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

BEFORE SHRI. JASON P. BOAZ, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T(TP).A No.1039 & 1078/Bang/2015
(Assessment Years : 2009-10 & 2010-11)

Deputy Commissioner of Income-tax,
Circle -11(1), Bengaluru .. Appellant

vs.

M/s. Adcock Ingram Ltd,
49C & D, Bommasandra Industrial Area,
Anekal Taluk, Bengaluru 560 009 .. Respondent
PAN : AAGCA4343M

Assessee by : Shri. Vishnu Bagri, CA
Revenue by : Shri. Harinder Kumar, CIT - DR

Heard on : 12.12.2017
Pronounced on : 31.01.2018

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

These are two appeals filed by the Revenue against the orders of the CIT (A)-1, Bengaluru, dt.27.04.2015 & 22.05.2015, for the assessment years 2009-10 and 2010-11 respectively.

02. The grounds of appeal raised by the Revenue for AY. 2009-10 are as under :

1. The order of the CIT (A) is opposed to law and the facts and circumstances of the case.

2. The CIT(A) erred in not upholding the adjustment made by the TPO w.r.t. license fee and management fees.

3. The CIT(A) erred in not appreciating the fact that the purpose of payment of license fee and management fee by the assessee to the AE is to suppress the profit margin and shifting of the same to the AE, whereas these expenditures are not part of any transactions involving third parties.

4. The CIT(A) erred in making the deletions without appreciating the observations made by the TPO that the impugned expenditures are not recovered from the AE by way of sales price of finished products, charged to the AE.

5. The CIT(A) erred in mis-interpreting the action of TPO in determining of ALP w.r.t. international transactions at NIL as against the observation of TPO in the order, that it resulted in suppression of profit.

6. The CIT(A) ought to have appreciated that the facts in all the relied upon cases and the assessee's case are distinguishable and distinct in sofaras determination of ALP of the license fees and management fee by the TPO is on account of non-recovery of amounts by way of sales price and not due to reasons given in the cited cases.

7. The CIT(A) was not correct in deleting the adjustment made without appreciating the fact that even otherwise, these expenses would have been disallowed us.37(1) of the Income tax Act, as the conditions of said section 37(1) of the Income tax Act were not met.

8. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.

9. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.

03. The grounds of appeal raised by the Revenue for the AY 2010-11 are as under :

1. The order of the CIT (A) is opposed to law and the facts and circumstances of the case.

2. The CIT(A) erred in not upholding the adjustment made by the TPO w.r.t. license fee and management fees.

3. The CIT(A) erred in deleting the impugned adjustment made by the TPO w.r.t. license fee and management fees, by placing reliance on his own decision in assessee's own case in ITA No.154/CIT(A)-1/CO/14-15 dated 27.04.2015 for A.Y.2009-10, without appreciating the fact that the revenue has not accepted the same and has preferred further appeal against it.

4. The CIT(A) erred in not appreciating the fact that the purpose of payment of license fee and management fee by the assessee to the AE is to suppress the profit margin and shifting of the same to the AE, whereas these expenditures are not part of any transactions involving third parties.

5. The CIT(A) erred in making the deletions without appreciating the observations made by the TPO that the impugned expenditures are not recovered from the AE by way of sales price of finished products, charged to the AE.

6. The CIT(A) erred in mis-interpreting the action of TPO in determining of ALP w.r.t. international transactions at NIL as against the observation of TPO in the order, that it resulted in suppression of profit.

7. The CIT(A) ought to have appreciated that determination of ALP of the license fees and management fee by the TPO is on account of non-recovery of amounts by way of sales price and not due to reasons given in the cited cases in the relied upon order.

8. The CIT(A) was not correct in deleting the adjustment made without appreciating the fact that even otherwise, these expenses would have been disallowed us.37(1) of the Income tax Act, as the conditions of said section 37(1) of the Income tax Act were not met.

9. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.

10. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.

IT(TP)A No.1039/Bang/2015 :

04. Ground nos.1, 2, 8 and 9 are general in nature.

Ground nos.3, 4, 5 & 6 deal with the issue of licence fee and management fees. Brief facts relevant to decide the present appeal are as follows. The assessee is a company incorporated in India and is engaged in manufacture of pharmaceutical formulations for Adcock Ingram Health Care (Pty)Ltd, South Africa (AIHPL) and providing outsourced formulation manufacturing services to domestic pharmaceutical companies. The assessee was established as a joint venture company on 05.02.2007 between Medreich SA (Indian company) and AIHPL (AE) for the purposes mentioned in the joint venture agreement with shareholding of 50.1% and 49.9% of Medreich and AIHPL respectively.

05. The assessee company (resident) entered into various arrangements with AIHPL in the form of business agreement dt.31.08.2007 for technical knowhow manufacture of pharmaceutical formulations. As per the terms of the agreement, the assessee was required to pay a licence fee at the rate of 8% of net sales. (page 244 of the paper book).

06. The assessee had also entered into a management agreement with Medreich SA dt.31.07.2008 for the purposes of liaisoning and coordinating the services and also to manage its supply arrangement to AIHPL more efficiently. As per the management agreement the assessee was to compensate Medreich SA at the rate of 3% of the net sales (page 240 of the paper book).

07. The assessee has filed the return of income and the case was selected for scrutiny. As there was international transaction, the AO referred the matter to the TPO u/s.92B of the Act for determining the ALP. The assessee in the financials for AY 2008-09 has given the segmental allocation of cost and revenue between the AE and non-AE, as under :

Segemental allocation of cost and revenue between AE and non-AE:

Particulars	Segmental Operating Results				Total (A+B+C+D)
	AE	Non-AE	AE		
	Manufacture and export of drug formulations	Income from contract manufacturing services	Regulatory affairs services	Corporate /Unallocated (D)	
Income					
Sales / Service income	603,003,808	138,888,089	3,320,309	--	884,100,295
Less: Excise	--		---	--	113,943,7

Duty		59,971,891			82
Sales / Service Income (Net)	603,003,808	81,916,198	3,320,309	--	688,240,315
Other Operating income	10,594,516	6,452,537	---	18,012,297	35,059,350
Non-operating income				1,803,177	1,803,177
Total Operating Income	613,598,324	88,368,735,	3,320,309	19,815,474	725,102,842
Expenditure					
Cost of goods sold	354,419,620				354,419,620
Personnel expenses	39,861,207	25,185,089	1,802,280		66,848,576
Operating and Other expenses	72,179,291	58,765,209	1,011,541		131,956,041
Bank Charges	3,335,798				3,335,798
Depreciation	19,170,374				19,170,374
Fringe Benefit Tax				235,493	235,493
Non-operating expenses				38,587,137	38,587,137
Total operating cost	488,966,290	83,950,298	2,813,821	38,822,630	614,553,039

On the basis of the above, it was submitted by the assessee that operating profit / operating cost at the entity level was 25.49% as against the non-AE it was 5.26 %. Thus it was submitted that the international transactions at the entity level for the 'Manufacture and export of drug formulations', was as under :

	International Transactions	Received	Paid
1	Sales of Manufactured Products	603003808	
2	Licence Fee		16100000
3	Service Fee	3320309	
4	Purchase of Raw Material		15760215
5	Purchase of Fixed assets		2793316
6	Reimbursment of Expenses		3284877
			1134874
7	Management Fees		16592899
	Total	606324117	55666181
	Total Intl. Transactions:		***661990298***

08. The TPO was not satisfied with the MAM adopted by the assessee as TNMM and has proposed the bench mark two transactions, namely, licence fee and management fees by adopting the CUP method as the MAM hence rejected TP study of the assessee and issued show-cause notice dt.09.08.2012, by which the assessee was called upon to prove as to why the management fees and licence fees should not be treated as NIL. The assessee filed its reply to the

show-cause notice vide its communication dt.26.12.2013. it was mentioned as under :

" *Payment of license fee is at arm's length:*

- *The Company is an independent entity and not a captive manufacturer.*

- *Payment of license fee by a captive manufacturer is warranted since a license of the technical know-how is required to manufacture the requisite products. Since a license is so provided, a consequential remuneration would also be mandated so that the arrangement conforms with the arm's length standard.*

- *The financial position of the Company would be indifferent to the payment or non-of the license fee.*

- *Whether or not the Company is a captive manufacturer undertaking contract manufacturing activities is not a relevant factor in determining whether or not a licence fee payment is justified.*

- *Despite paying the impugned license fee to the AE, the operating profit margin of the Company on the principal transaction is at arm's length.*

- *Payment of license fee by the Company meets market conditions since inter alia, the same is determined as a percentage of the Net Sales Price (as defined in.the inter-company agreement).*

- *Arm's length price of the transaction should not be considered as 'nil' since as per the Act, the ALP is required to be determined in light of the any of the five prescribed methods (as then existing) in the manner prescribed in Rule 103. Your goodself has not mentioned as to which method is proposed to be applied to determine as 'nil' the ALP of the license fee paid by the Company.*

1.6 Payment of management fee is at arm's length:

- *Arm's length price of the transaction should not be considered as 'nil' since as per the Act, the ALP is required to be determined in light of the any of the five prescribed methods (as then existing) in the manner prescribed in Rule 10B. Your goodself has not mentioned as to which method is proposed to be applied to determine as 'nil' the ALP of the license fee paid by the Company.*

- *There is commercial need for the payment of the management fee since the payments directly benefit the Company by enabling it to carry out its business operations more efficiently.*

- *Your approach of enquiring on commercial expediency of the impugned payment is incorrect in law.*

- *In the pharmaceutical industry it is common to procure the services for which the management fee payout is made.*

1.7 Transactions relating to license fee and management fee are closely linked to the principal transaction of manufacture and export of drug_ formulations. In this regard, your goodself should note that the license fee and management fee payments are on account of the principal transaction.

License fee transaction is at arm's length since the principal transaction to which the payment relates to is at arm's length

2.11 In addition to the above, it is submitted that since the principal transaction to which the license fee is closely linked is at arm's length (with an operating profit margin on operating cost of 19.24% vis-à-vis 8.57% being the operating profit margin of the comparable companies), the license fee transaction would also be at arm's length. We request you to take cognizance of this aspect. The submissions of the Company that the license fee payment should be regarded as closely linked to the principal transaction of manufacture and export of drug formulations is contained in Para 4.

2.12 The Company also submits that the above margin of 19.24% has been earned by it despite the charge of license fee by AIHPL. In other words, despite paying the impugned license fee to the AE, the operating profit margin of the Company on the principal transaction is at arm's length.

2.13 Without prejudice to the above, the Company submits that had the payment of license fee not been made, the Company would have realized a lower sale price. Such principle was upheld in the ruling of the Delhi ITAT in ACIT v. Sona Okegawa Precision Forgings Limited (2010-TH-41-ITAT-DEL-TP), where the Delhi ITAT held that:

"There was no material brought on record by the TPO to demonstrate that the price on sales made to the AE was not at arm's length. That being so, it was at market determined prices that the sales were made by the Assessee. Moreover, it goes unchallenged that the fees paid under the technology agreement comprise an integral part of the cost of production, which was recovered from the sales price. It was thus that so far as regards the sales made to the AE, the amount of fees paid under the technology agreement was recovered by the Assessee from the AE as part of sales price. This being so, such fee paid becomes revenue neutral, that is to say, in case the assessee did not pay the fees on the sales made to the AE, a corresponding reduction in the price charged to the AE would have to be given by the assessee, lest the cost for the sale comes down. Such latter methodology was not advisable for it would create problems in the accounting. Also, the impact on the taxable profits would be nil."

Payment of license fee by the Company meets market conditions

2.14 Your goodself has mentioned that the license fee payment does not meet the market conditions since the scope of procurement of an alternative cost effective know-how is restricted which could be available to the assessee. Your goodself has also mentioned that even if it is a situation that no alternative know-how is available, the conditions cannot be prohibitory in nature.

2.15 The Company submits that the above Contentions are incorrect. We request you to note that the license fee paid by the Company is determined as a percentage of the Net Sales Price as defined in the agreement (and thus, variable) and is not a fixed lump sum. Such an approach for determining license fee payments is typically adopted in independent market conditions. This would have been the scenario even where the know-how had been obtained by the Company from an alternative source (subject to such alternative source being available for the nature of products that are manufactured by the Company).

2.16 It is also submitted that had an alternative know-how source been available from a comparable unrelated party, similar restrictive conditions on the exploitation of the know-how would typically be imposed by the unrelated party on the Company to protect the nature and quality of its rights in such know-how. Such restrictions could relate to the geography in which the finished products are sold, the nature of customers to whom the products are sold, the price at which it is to be sold etc. In light of the above, the Company submits that your contention that the license fee payment does not meet the market conditions is incorrect.

Transactions relating to license fee and management fee are closely linked to the principal transaction of manufacture and export of drug formulations

4.1 The Company had considered the payment towards license fee and management fee as being closely linked with the principal transaction of manufacture and export of drug formulations to AIHPL. Based on the approach adopted by your goodself in the notice, it appears that you have rejected such an approach of the Company. In this regard, the Company wishes to place before you the factual matrix underlying the license fee and management fee payout.

4.2 The international transaction of AIL_ being manufacture and export of drug formulations to AIHPL involves the following:

- *AIHPL identifies the type and composition of the drug formulations required by it;*

- *The Company plans and schedules the manufacturing activities based on AIHPL requirements and with the assistance of MSPL. The Company also determines the nature and quality of the raw materials required for production, identifies the vendors based on inputs from AIHPL and purchases the raw materials;*

- *The Company is required to manufacture the product based on specifications under the South African pharma regulations. for this purpose, it receives inputs from MSPL;*

- *The Company uses the intellectual property licensed by AIHPL to manufacture the drug formulations;*

- *The manufactured drug formulations are then exported to AIHPL; all the documents that are required to be executed to export the finished goods are prepared by AIL.*

- *With the assistance of MSPL, the Company tracks the shipments and ensures that the same is received by AIHPL;*

- *The Company, with the assistance of MSPL, ensures collection of receivables from AIHPL.*

4.3 From the above, it can be seen that the international transaction with AIHPL comprises of two key elements: (a) obtaining and using know-how and technology required to manufacture the drug formulations; and (b) awareness of the dynamics of the South African pharma market, the South African pharma regulatory environment and liaisoning with AIHPL, its customer, for production scheduling, budgeting, delivery and timely collection of dues from AIHPL.

4.4 The Company pays a license fee to its AIHPL for a non-exclusive use of the know-how required to manufacture the products requisitioned by AIHPL. The license fee is paid at the rate of 8% of the Net Sales Price (as defined in the inter-company agreement). It can be seen that the royalty is computed having regard to the sale price that relates to

the principal transaction relating to manufacture and export of drug formulations to AIHPL. It can also be seen that the royalty is paid to a common source, that is, AIHPL.

4.5 The Company pays management fees to MSPL to liaise with AIHPL and keeping the Company informed of developments within the South African pharma industry. The management fee payable is determined at 3% of the net sales. It can be seen that the remuneration is computed having regard to the principal transaction.

4.6 In light of the above, the Company had submitted that the license fee and management fee transaction are closely linked to the principal transaction of manufacture and export of drug formulations. Two transactions are said to be closely linked when, inter alia, one transaction arises on account of the main transaction and such transaction has its source in the main transaction. This principle was applied by the Pune Income-tax Appellate Tribunal ('ITAT') in Demag Cranes & Components (India) Pvt. Ltd. v. DCIT (30 taxmann.com 364)."

09. The sum and substance of the submissions made by the assessee before the TPO was that the licence fee and management fees paid by the assessee are intrinsic, interdependent and interlinked with the main transaction and therefore they are inseparable from the main transaction and hence they cannot be bench-marked separately , beside this the assessee also made various submissions mentioned herein above .

10. However the TPO was not convinced with the submission made by the assessee and accordingly passed an order u/s.92CA(3) on 02.01.2013 by rejecting the economic analysis undertaken by the assessee and proposed to make TP adjustment to the tune of Rs.326,92,899/-, with the following break up :

International transactions	Value as per books of account	ALP as determined by TPO	TP adjustment
License fees paid	1,61,00,000	Nil	1,61,00,000
Management fee paid	1,65,92,899	Nil	3,26,92,899
Total TP adjustment			3,26,92,899

The AO agreed with the view expressed by the TPO and passed a final assessment order on 30.04.2013 and approved the disallowances suggested by the TPO. Feeling aggrieved, the assessee filed an appeal before the CIT (A).

11. The CIT (A) after going through the record had deleted the addition proposed by the AO / TPO and for that purposes has come to the conclusion in para 15 and 16 as under :

".....I find that the Appellant's approach of aggregating the transactions of royalty and management fee for the purpose of TP study are in line with transfer pricing principles as enunciated in commentary and guidance. The Appellant has submitted that when these transactions are considered as closely linked, the operating profit margin derived by it on account of the export of pharmaceutical products is 25.49% which are higher than the margins of the comparable companies identified by the Appellant at 9.05%. The comparable companies identified by the Appellant have not been challenged by the TPO and the transaction of export of pharmaceutical products has been found to be at arm's length."

16. In view of the above discussion, I hold that the License fee and management fee paid are closely interlinked

> *to the appellant's activity of manufacture and export of drug formulations to the AE. The same being closely linked to the export activity, the impugned transactions cannot be considered as separate class of transactions for the purpose of transfer pricing analysis. As such, the ground no.2 raised by the Appellant is allowed. Similarly, having regard to the above discussion which covers the ground Nos.4.1,4.2,5.1 and5.2,the said grounds are also allowed.*

Thereafter the appeals of the assessee were allowed by the CIT (A). Feeling aggrieved by the order passed by the CIT (A), the Revenue is in appeal before us on the grounds mentioned herein above.

12. The Ld. DR pointed out that in the show-cause notice (page 5), the TPO has mentioned giving the show-cause notice to the assessee, as to why the ALP of the licence fee should be treated as nil. Similarly at page 14 of the show-cause notice, it was mentioned that the management fee is a class of its own and is therefore required to be separately analysed and therefore mentioned that the management fees is analysed separately under the CUP method.

13. The argument of the learned DR was that the assessee being a contractual manufacture of its AE and therefore it is inconceivable for third party who is contractual manufacturer to pay the licence fee to the Principal for which it is manufacturing the pharmaceutical products. For that purpose, the TPO relies upon the definition of 'licence fees' and it was also the conclusion that there is a huge difference in the profit margins of the related party sales and contract manufacturing and it was the case of the Revenue that the licence fees was only chargeable in the case of the AE and not with respect of the

other non AE parties It was also the case of the Revenue that the assessee company is required to be compensated for the licence fees paid by it under the agreement, to AIHPL. It was also the case that in the case of AEs management fees has been paid to MSPL of Rs.16592899 and to Medreich Ltd of Rs.04335467. (para 3.2.2 of TP order). Thus the TPO has after analysing the reply has concluded that there was duplication of management services lies and further it was mentioned that there is no evidence of rendering of services.

14. The Ld. DR relied upon the following case laws :

i) Volvo India P Ltd v. CIT [(2017) 77 taxmann.207;

ii) Herbal Life [ITA No.1406/Bang/2010, dt.17.04.2017]

On the basis of the above, it was submitted that the CIT (A) erred in deleting the addition made for the purpose of bench marking the ALP of licence fees and management fees as NIL. Further it was the case of the Revenue that no benefit has been accrued to the assessee on the basis of the so-called licence fee and management fees paid to the assessee.

15. On the other hand, the Ld. AR for the assessee has submitted that the transactions were inter-linked with the primary activity of the assessee and therefore they cannot be separately bench marked. The Ld. AR relied upon the order passed by the CIT (A) and also Ld. AR relies upon the following judgments :

1. Demag Cranes & Components (India) Pvt. Ltd. v. DCIT (30 taxmann.com 364) – Pune ITAT;
2. Cummins India Ltd. v. Addl. CIT (53 taxmann.com 53) – Pune ITAT;
3. Toyota Kirloskar Motor (P) Ltd. v. Asst. CIT (TS-217-ITAT-2014-Bang) – Bangalore ITAT;
4. SC Enviro Agro India Ltd. v. DCIT (34 taxmann.com 127) – Mumbai ITAT;
5. CIT v. EKL Appliances (20 taxmann.com 509) – Delhi High Court;
6. Safran Aerospace India Pvt. Ltd. v. DCIT (ITA 1261 / B / 2010) – Bangalore ITAT.
7. Hive Communication (P.) Ltd. v. Commissioner of Income-tax (12 taxmann.com 287) – Delhi High Court
8. CIT v. EKL Appliances (20 taxmann.com 509) – Delhi High Court
9. Siemens VDO Automotive Ltd. v. DCIT (923/B/2012) – Bangalore ITAT
10. Luwa India Pvt. Ltd. v. ACIT (568 / Bang / 2012) – Bangalore ITAT

16. We have heard the rival contentions, perused the records as also the case laws cited by both the parties. From a reading of the effective grounds raised by the Revenue, it is clear that the finding of fact recorded by the CIT (A) in paras 15 and 16 (reproduced above) have not been refuted by the Revenue by way of challenging that the management fees and licence fees paid by the assessee were not inter linked, interrelated or inter connected with the primary activity of the assessee i.e the approach of assessee as well as CIT(A) in aggregating the transactions were wrong . In our view, aggregation of transaction is permissible under income tax Act and rules framed there under . In this regard, we may conveniently rely upon the recent judgment of Hon'ble Delhi High Court in *Sony Ericsson Mobile Communication India (P.) Ltd.* v. *CIT* [2015] 374 ITR 118/231 Taxman 113/55 taxmann.com 240 wherein it was held that aggregation of such transaction is permissible and relied upon the OECD Commentary in this regard.

> **80**. The use of expression 'class of transaction', 'functions performed by the parties' in Section 92C(1) illustrates to the contrary, that the word 'transaction'

can never include and would exclude bundle or group of connected transactions. More important would be reference to meaning of the term 'transaction' in Section 92F, clause (v), which as per the said definition includes an arrangement or understanding or action in concert whether or not the same is formal or in writing, whether or not it is intended to be enforceable by legal proceedings. Rule 10A in clause (d) states that "for the purpose of this Rule and Rules 10AB and 10E", the term 'transaction' would "include a number of closely linked transactions". This Rule in positive terms declares that the legislative intent is not to deviate from the generic rule that singular includes plural. The meaning or definition of the expression 'transaction' in clause (d) to Rule 10A read with sub-section (1) to Section 92C, therefore, does not bar or prohibit clubbing of closely connected or intertwined or continuous transactions. This is discernible also from sub-rule (2) to Rule 10B quoted above. The sub-rule refers to 'services provided', 'functions performed', 'contractual terms (whether or not such terms are formal or in writing) of the transactions' which lay down explicitly or impliedly the responsibilities, risks and benefits to be divided between the respective parties to the transactions. Use of plurality by way of necessity and legislative mandate is evident in the said Rule.

81. Similarly, sub-rule (3) to Rule 10B refers to transactions being compared or comparison of the enterprises entering into such transactions likely to affect the price or cost charged etc. A reading of Rule 10C reassures and affirms that the general principle of plurality is not abandoned or discarded.

And coordinate bench decision in the matter of Gulbrandsen Chemicals (P.) Ltd. *v.* Deputy Commissioner of Income-tax* [2017] 79 taxmann.com 105 (Ahmedabad - Trib.) had held as under

8 ……..We find that, in the case of *Knorr-Bremse India (P.) Ltd.* v. *Asstt. CIT* [2016] 380 ITR 307/236 Taxman 318/[2015] 63 taxmann.com 186 (Punj. & Har.), Hon'ble Punjab & Haryana High Court has observed that "The doubt, if any, in this regard is set at rest by rule 10A(*d*), which provides that for the purpose of rule 10A and rules 10 B to 10E, 'transaction' includes a number of closely related transactions" and that "Thus, the closely linked transactions can, in a given situation, be components of single composite transaction". Their Lordships have then added that "The assessee would, however, have to prove that although each sale and each provision of service is priced separately, they were all provided under one composite agreement which constitutes one international transaction". Similarly, in the case of *Sony Ericsson Mobile Communications India (P.) Ltd.* v. *CIT* [2015] 374 ITR 118/231 Taxman 113/55 taxmann.com 240 (Delhi), Hon'ble Delhi High Court has observed that, "There is considerable tax literature and text that CUP method, i.e. comparable uncontrolled price method, RP method, i.e. resale price method, and CP method (i.e. cost plus method) can be applied to a transaction or a closely linked or continuous transactions". Their Lordships have, in this backdrop, put in a word of caution that "thus, it would be inappropriate to

proceed with the arm's length price computation methods with a preconceived notion of singularity as a statutory mandate" and that "clubbing of closely linked, which could include continuous transactions, may be permissible and not ostracised". Clearly, therefore, in certain situations, such aggregation of transactions is permissible for benchmarking even when the prices at which transactions are entered into are different. In principle thus aggregation of transactions can be done and is permissible ……..

And coordinate nech decision in the matter of Cummins India Ltd. [2015] 53 taxmann.com 53 (Pune - Trib.) wherein it was held as under

" **24**. The first issue arising in the present appeal is whether in view of the OECD guidelines and the Indian Transfer Pricing provisions, aggregation of transactions could be made or not. We find that Pune Bench of the Tribunal in *Demag Cranes & Components (India) (P.) Ltd.* (*supra*) had elaborately considered the OECD guidelines under Chapter – III and also the guidance Notes issued by the Institute of Chartered Accountants of India on transfer pricing in para 13.7 and had held as under:—

'30. We have carefully considered the rival submissions. Section 92B of the Act provides the meaning of expression "international transaction" as a transaction between two or more associated enterprises. Rule 10A(d) of the Rules explains the meaning of the expression "transaction" for the purposes of computation of ALP as to include a number of closely linked transactions. Rule 10B of the Rules prescribes the manner in which the ALP in relation to an international transaction is to be determined by following any of the methods prescribed. Shorn of other details, it would suffice to observe that on a combined reading of Rule 10A(d) and 10B of the Rules, a number of transactions can be aggregated and construed as a single 'transaction' for the purposes of determining the ALP, provided of course that such transactions are 'closely linked'. Ostensibly the rationale of aggregating 'closely linked' transactions to facilitate determination of ALP envisaged a situation where it would be inappropriate to analyse the transactions individually. The proposition that a number of individual transactions can be aggregated and construed as a composite transaction in order to compute ALP also finds an echo in the OECD guidelines under Chapter III wherein the following extract is relevant:-

"Ideally, in order to arrive at the most precise approximation of arm's length conditions, the arm's length principle should be applied on a transaction-by-transaction basis. However, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis. Examples may include 1. Some long term contracts for the supply of

commodities or services; 2. Rights to use intangible property; and 3. Pricing a range of closely linked products (e.g. in a product line) when it is impractical to determine pricing for each individual product or transaction. Another example would be the licensing of manufacturing know-how and the supply of vital components to an associated manufacturer; it may be more reasonable to access the arm's length terms for the two items together rather than individually. Such transactions should be evaluated together using the most appropriate arm's length method. A further example would be the routing of a transaction through another associated enterprise; it may be more appropriate to consider the transaction of which the routing is a part in its entirety, rather than consider the individual transactions on a separate basis."

31. In this background, considering the legislative intent manifested by way of Rule 10A(d) read with Rule 10B of the Rules, it clearly emerges that in appropriate circumstances where closely linked transactions exist, the same should be treated as one composite transaction and a common transfer pricing analysis be performed for such transactions by adopting the most appropriate method. In other words, in a given case where a number of closely linked transactions are sought to be aggregated for the purposes of bench marking with comparable uncontrolled transactions, such an approach can be said to be well established in the transfer pricing regulation having regard to Rule 10A(d) of the Rules. Though it is not feasible to define the parameters in a water tight compartment as to what transactions can be considered as 'closely linked', since the same would depend on facts and circumstances of each case. So however, as per an example noted by the Institute of Chartered Accountants of India (in short the 'ICAI') in its Guidance Notes on transfer pricing in para 13.7, it is stated that two or more transactions can be said to be 'closely linked', if they emanate from a common source, being an order or contract or an agreement or an arrangement, and the nature, characteristic and terms of such transactions substantially flow from the said common source. The following extract from the said Guidance Notes is worthy of notice:-

"13.7 The factors referred to above are to be applied cumulatively in selecting the most appropriate method. The reference therein to the terms 'best suited' and 'most reliable measure' indicates that the most appropriate method will have to be selected after a meticulous appraisal of the facts and circumstances of the international transaction. Further, the selection of the most appropriate method shall be for each particular international transaction. The term 'transaction' itself is defined in rule 10A(d) to include a number of closely linked transactions. Therefore, though the reference is to apply the most appropriate method to each particular transaction, *keeping in view, the definition of the term 'transaction', the most appropriate method may be chosen for a group of closely linked transactions Two or more transactions can be said to be linked when these transactions*

emanate from a common source being an order or a contract or an agreement or an arrangement and the nature, characteristics and terms of these transactions are substantially flowing from the said common source. For example, a master purchase order is issued stating the various terms and conditions and subsequently individuals orders are released for specific quantities. The various purchase transactions are closely linked transactions.

13.8 *It may be noted that in order to be closely linked transactions, it is not necessary that the transactions need be identical or even similar.* For example, a collaboration agreement may provide for import of raw materials, sale of finished goods, provision of technical services and payment of royalty. Different methods may be chosen as the most appropriate methods for each of the above transactions when considered on a standalone basis. However, under particular circumstances, one single method maybe chosen as the most appropriate method covering all the above transactions as the same are closely linked." (Underlined for emphasis by us)."

17. In view of the above we hold that the aggregation of transaction's as done by the assessee and as upheld by the CIT(A) were in accordance with law further there is no specific challenge by the Revenue before us challenging this finding of Fact that bundle approach of assessee and CIT(A) were incorrect .

18. Having held so now we are duty bound to decide the grounds raised before us in the light of the admitted position that aggregations of transactions as done by the assessee and upheld by the CIT(A) were in accordance with law .

Licence fee

19. We may mention that Indian TP provisions do not contain any specific guidelines on Intra-group service payments (management fees and licence fee etc). In many cases the TPO has arrived at an ALP as Nil, by arriving at a conclusion that no benefit has been obtained by the assessee from such intra-group service payments. While OECD guidelines seem to indicate the "Benefit test" to be actual rendition of services which provides economic or commercial value, the Indian TPOs insist on positive demonstration of actual benefit accruing to the service recipient from the services rendered. In our considered opinion the Revenue could not decide what was necessary for a taxpayer and what was not. The requirement of services should have been judged from the view point of the taxpayer as a businessman;

As per section 92(2) of the Act, the ALP of transactions are in the nature of cost or expenses allocation, or apportioned to an enterprise or contributed by an enterprise, shall be determined having regard to the arm's length price of such benefits, service and facility. This section also covers intra-group service transactions, as often the charge for the services were based on cost allocation/ apportionment. Therefore, the benefit test was a necessary part of determining the

arm's length price of any intra group services; The 'benefit' needed to be identified from the taxpayer's viewpoint, which could be potential, reasonable, foreseeable, may not be quantifiable in money alone, and may be strategic, but could not be incidental. The benefit also could not have qualifications such as "substantial", "direct" and "tangible" because these qualifications were not given in section 92(2) of the Act. There are several non-monetary terms other than profitability, like usefulness, enhancement in value, sustainability and enhancement of business interest, which were required to be seen while judging the benefit test. Like in the present case , the licence is required for long term manufacturing of drugs and formulation within know how of the AE further the assessee is Joint venture company therefore TPO cannot lose sight of various benefit which may flow to Indian partner in the absence of provision for making the payment for the use of license

In the case in hand TPO has concluded that no licence fee should have been charged by AIHPL as all the manufactured drugs formulations are exported to AIHPL which is an associate entity of the assessee company and on manufactured drug formulation was

sought to any other entity therefore AE, to not have charged any amount from assessee in the nature of licence fee as the entire manufactured drug formulation have been exported to it and thereafter TPO had recorded that there is a huge difference in profit margin of a related party sales and the contract manufacture . in our vie the approach of TPO was not correct as it is contrary to law laid in the case of EKL Appliances, Delhi High Court, 345 ITR 241 and Dresser Rand , Mumbai Tribunal, 13 taxmann.com 82 (Mumbai) where Hon'ble court and tribunal had held

i) Not necessary for the assessee to show that any legitimate expenditure was also incurred out of necessity
ii) Not necessary to show that any expenditure incurred for the purpose of business has actually resulted in profit or income, either in that year or subsequent years
iii) The only condition is that the expenditure should have been incurred wholly and exclusively for the purpose of business

I) TPO is expected to examine the international transaction as he actually finds the same and then make suitable adjustment. Wholesale disallowance is not authorised

And further in Dresser Rand, Mumbai Tribunal, 13 taxmann.com 82 (Mumbai) it was held as

(1) TPO/AO cannot question the commercial wisdom of the taxpayer
(2) How an assessee conducts his business is his prerogative and it is not for revenue authorities to decide what is necessary for an assessee and what is not

(3) Whether a particular expense on services received actually benefits an assessee in monetary terms or not, even a consideration for its being allowed as a deduction in computation of income, and by no stretch of logic, it can have a role in determining the ALP of that service.

(4) When evaluating the ALP of a service, it is wholly irrelevant as to whether the assessee benefits from it or not. The real question is whether the price of this service is what an independent enterprise would have paid for the same

20. In view of the above and as well as in view of finding recorded herein above that all these international transactions are linked to the main business being carried on by the assessee and such closely linked transactions are to be analysed in aggregate to determine the arm's length price. Moreover it is difficult to comprehend the manufacturing of drugs in India without there being any operation in licence to manufacture the drugs from the statutory authorities and for that to have the access on the formulation which is the technical knowledge and domain of AE. The prices charged by the assessee and the amount of licence fees paid to AE cannot be examined on stand-alone basis, because it will have effect of determination the net prizes received by the assessee. Further the charges paid by the assessee (JV) to AE for acquiring the technical know-how and is a valuable assets. In the present case, TPO has not brought on record any comparable uncontrolled party(JV or otherwise) which is manufacturing the drugs with the same prices or less prices as that of the assessee without separately charging the license fee, therefore the approach of the Transfer Pricing Officer to compute NIL charges for the license

fee cannot be uphold as transfer prices adjustment can be made in accordance with the one of the method provided under the rules framed under the income tax act. In view thereof, we find no merit in the analysis carried out by the TPO by benchmarking the licence fee. In fact assessee by aggregation of transactions in the TP study had benchmarked the arm's length price of all the transactions by comparing operating profit / operating cost at the entity level was 25.49% as against the non-AE it was 5.26 % .However, we observe that the comparability analysis in the TP study carried out by the assessee by aggregation of transactions adopting TNMM as the most appropriate method has not been examined by either of the authorities below who have merely concentrated merely on the issue of aggregation / segregation of transactions. The CIT (A) has mechanically accepted the results of the assessee to be at arm's length by accepting the operating profit / operating cost of the assessee as 25.49% as against non-AE at 5.26%. In that view of the matter, we deem it appropriate to remand the issue to the file of the CIT (A) for examining the correctness of the ALP at the entity level by applying the TNMM as the most appropriate method by aggregating the transactions. The CIT (A) is directed to take the remand report from the TPO in this regard and afford the assessee adequate opportunity of being heard in the matter.

MANAGEMENT FEES

21. Similarly the assessing officer / TPO had made the addition for Rs 165592899/- on the protest that there is no requirement for the assessee to

pay for the Management fees and further it was mentioned that no evidence / proof for a) commercially need/ expediency of the requirement of service such services b) whether it is a normal market business practice to involve parties as in the present case . The assessee has furnished the details of the services available by the assessee from Medreich to the assessing officer as mentioned at page 22-23 of the transfer pricing order . The TPO had mentioned the reply pursuant to the show cause notice in his order and the assessee has concluded " **it is further submitted that after factoring in cost of all related party transaction the company has earned and operating margin of 22.53% which is significantly higher than 9.05% earned by the comparable companies thus establishing all the underlying transaction including the transaction for payment of licence fee and Management fee are at arm's length .....**" (page 40 of TPO order). TPO had the recorded the contradiction findings inasmuch as it was mentioned that that there was duplication of services as alleged there was no evidence of rendering the services for the Management . In our view **taxpayer could only be asked to maintain and produce the evidence of receipt of service which a businessman keeps and maintains regarding services received from a third party. The burden of maintenance of documents/ evidences could not be higher on the taxpayer merely due to the reason that it was receiving services from its AEs further** TPO has not held that the similar kind of services was already available with the taxpayer with any concrete evidence. In the absence of any instances of services provided by the AE and from the fact that

services availed by the taxpayer from the third parties were similar in nature, the TPO's viewpoint on duplication test was not acceptable. In all**.** We find that in a materially identical situation in the case of *Merck Ltd.* v. *Dy. CIT* [2016] 69 taxmann.com 45 (Mum.), a coordinate bench, has observed, inter alia, as follows:

> '9. We find that there is a clear contradiction in the findings of the authorities below. On one hand, the stand of the authorities below is that no services are rendered, and, on the other hand, there are categorical findings that the services rendered are so general in nature that even an employee of the assessee could have rendered the same. In the event of no services actually having been rendered, there cannot be any occasion for the same services being rendered by a person without specialized knowledge. On the one hand, it is held that arm's length price of these services is zero value, and, in the same breath, it is held that "there would hardly be any substantial payment" for these services. Clearly, services are rendered on the facts of the present case. There is sufficient material on record to show that the assessee was, under the agreement, entitled to receive a package of services on as and when required basis. The emails and other documentary evidences show that the assessee was in receipt of these services. Just because these services were too general, in the perception of the authorities below, or just because the assessee did not need these services from the outside agencies, cannot be reason enough to hold that the services were not rendered at all. We have perused the material before us, and, in our considered view, the assessee has reasonably established rendition of services. The assessee may not have received all the services under the agreement but essentially the assessee had right to receive all these services, as and when required, under the agreement. The payment is made for the rights accruing to the assessee for the bundled services under the contract and not for each service on ala carte basis. The reason that the assessee did not use a particular service cannot justify holding that no payment was warranted for such services. To give an example from day to day life, if an assessee is paying for having right to view a bouquet of television channels, which come as a package, he does not decline to pay the consideration for the bouquet of television channels because he did not view a particular television channel. The example may seem to be a bit too simplistic but it does hammer the massage, as we would like to, that not availing a particular service under a contract does not mean that no payments are required to be made for all the services bundled under the contract. The other thing is the benefit test. We do not think benefit test has too much relevance in the arm's length price ascertainment. When evaluating the ALP of a service, it is wholly irrelevant

as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. In case TPO can demonstrate that the consideration for similar services, under the CUP method, is NIL, he can very well do so. That's not, however, his case. He only states that these services are not worth the amount paid by the assessee. Such band statements and sweeping generalizations cannot help the case of the revenue authorities. The assessee has benchmarked the transaction on TNMM basis, and unless the revenue authorities can demonstrate that some other method of ascertaining the arm's length price on the facts of this case will be more appropriate a method of ascertaining the arm's length price, the TNMM cannot be discarded. Dealing with almost a similar situation, as we are in seisin of, a coordinate bench of this Tribunal, in the case of *AWB India (P.) Ltd.* v. *Dy. CIT* [2015] 152 ITD 770, has observed as follows:

"11. In ground nos. 5 to 9, which we will take up together, the assessee has raised the following grievances:

5. That, on the facts and circumstances of the case, the DRP and TPO/AO have failed to appreciate the business model and business realities of the appellant and role of its AE, while conducting the economic analysis, and concluding that no service is received or no benefit, and/or services received are duplicative in nature.

6. That, on the facts and circumstances of the case, the DRP and TPO/AO erred in presumptively holding that the revenue authorities are empowered to question the commercial decision of the appellant and in not appreciating the jurisprudence that the DRP and the AO/TPO cannot go beyond their powers to question the business decision of the company.

7. That, on the facts and circumstances of the case, the DRP has erred in confirming that the TPO has discharged his statutory onus by establishing the conditions specified in (a) to (d) of Section 92C(3) of the Act have been satisfied before disregarding the arm's length price determined by the appellant and proceeding to decide the arm's length price himself.

8. That, on the facts and circumstances of the case, the DRP and TPO/AO have erred in conducting economic analysis of the international transactions without relying on any comparable transaction/companies using inappropriate method.

9. That, on the facts and circumstances of the case, the DRP and TPO/AO have erred in determining the arm's length price of international transactions consisting of cost and profit margin at 'nil'.

12. So far as these grievances of the assessee are concerned, the relevant material facts are as follows. The assessee is engaged in the business of trading in food

grains. It is a part of AWB group Australia and its 99.999% equity is held by AWB Australia Limited and the balance. 001% equity is held by another group company, namely AWB Investments Limited. One of the international transactions that the assessee entered into with its AEs was payment of Rs. 58,20,571 towards 'management services'. On an analysis of the details of the payments made under this head, the TPO was of the view that the benefit of some of the services availed under the head 'management services' was not commensurate with the payments made for the same. He was also of the view that as against the use of TNMM by the assessee in benchmarking, the right course of action will be to follow CUP method because the value under CUP method will be best indicator of the value of these services. It was in this background that the TPO made certain adverse inferences against the assessee. The TPO was of the view that while the assessee has made a payment of Rs. 20,35,907 towards financial management and reporting services, "but the services rendered are negligible compared to the cost incurred". The TPO was also of the view that "a minor clarification or seeking of certain guidance on verify basic issue does not call for a payment of Rs. 20 lakhs. Therefore, the ALP of these services was taken as 'NIL'. He further noted that while the assessee has made a payment of Rs. 1,23,476 towards human resources services, the assessee has "not furnished any specific input on training and development of human resources and it is also noticed that these services are of routine nature and duplicate at best". Accordingly, the TPO also treated ALP of these services as 'NIL'. As regards the payment of Rs. 96,355 towards 'legal services', the TPO did take note of the services that the assessee was entitled to under these arrangements but as there is no evidence of any services having been actually rendered by the AE, the TPO concluded that it does not have any value in an arm's length situation. The value of this service was also taken as NIL. The same was the case with respect to the payments for other services. Accordingly, no arm's length value was assigned to these services also. In respect of these cases TNMM was rejected and CUP was applied though, even under CUP method, value assigned was nil as, in the opinion of the TPO, these services were worthless.

13. When Assessing Officer proposed to make disallowance in respect of payments for the above services, arm's length value of which was taken at 'zero', aggregating to Rs. 31,23,325, as against total management fees of Rs. 58,20,571 paid by the assessee, assessee carried the matter before the DRP but without any success. The DRP confirmed the stand so taken by the TPO, Accordingly, an ALP adjustment of Rs. 31,23,325 was made by the Assessing Officer. The assessee is aggrieved and is in appeal before us.

14. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

15. One of the very basic pre-condition for use of CUP method is availability of the price of the same product and service in uncontrolled conditions. It is on this basis

that ALP of the product or service can be ascertained. It cannot be a hypothetical or imaginary value but a real value on which similar transactions have taken place. Coming to the facts of this case, the application of CUP is dependent on the market value of the arrangements under which the present payments have been made. Unless the TPO can identify a comparable uncontrolled case in which such services, howsoever token or irrelevant services as he may consider these services to be, are rendered and find out consideration for the same, the CUP method cannot have any application. His perception that these services are worthless is of no relevance. It is not his job to decide whether a business enterprise should have incurred a particular expense or not. A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient. As held by Hon'ble jurisdictional High Court in the case of *CIT* v. *EKL Appliances Limited* (345 ITR 241), "Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same".

16. The very foundation of the action of the TPO is thus devoid of legally sustainable merits. There is no dispute that the impugned payments are made under an arrangement with the AE to provide certain services. It is not even the TPO's case that the payments for these services were not made for specific services under the contract but he is of the view that either the services were useless or there was no evidence of actual services having been rendered. As for the services being useless, as we have noted above, it is a call taken by the assessee whether the services are commercially expedient or not and all that the TPO can see is at what price similar services, whatever be the worth of such services, are actually rendered in the uncontrolled conditions.

17. As for the evidence for each of the service stated in the agreement, it is not even necessary that each of the service, which is specifically stated in the agreement, is rendered in every financial period. The actual use of services depends on whether or not use of such services was warranted by the business situations whereas payments under contracts are made for all such services as the user may require during the period covered. As long as agreement is not found to be a sham agreement, the value of the services covered under the agreement cannot be taken as 'nil' just because these services were not actually required by the assessee. In any case, having perused the material on record, we are satisfied that the services were actually rendered under the agreement and these services did justify the impugned payments.

18. We are also of the considered view that in the absence of prerequisites for application of CUP methods being absent in the present case, it was not open to the TPO to disregard the TNMM employed by the assessee. No defects have been

pointed out in application or relevance of TNMM in this case. Under these circumstances, the TPO's impugned action cannot meet our judicial approval.

19. For the detailed reasons set out above, we uphold the grievance of the assessee and direct the AO to delete the impugned ALP adjustment of Rs. 31,23,325. The assessee gets the relief accordingly."

25. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench.

26. In the present case, though a finding is given to the effect that no services are rendered, in the light of the contradictions in this finding and the observations above, it is clear that in effect commercial expediency of this payment is questioned. That exercise, in our considered view- particularly in the light of Hon'ble Delhi High Court's judgment in the case of *CIT* v. *EKL Appliances Ltd.* [2012] 345 ITR 241, cannot be conducted in the course of ascertaining the arm's length price.

27. In view of the above discussions, as also bearing in mind entirety of the circumstance, it is clear that the impugned ALP adjustment is contrary to the scheme of the Act. The authorities below have been swayed by the considerations which were not germane to the issue. We, therefore, uphold the grievances of the assessee and direct the Assessing Officer to delete the ALP adjustments in respect of the payment of fees for technical services. The assessee gets the relief accord.'

22 . We are in considered agreement with the views so expressed by the coordinate bench and the impugned addition must stand deleted for this short reason alone. In our considered view, the facts of the case before us are materially similar inasmuch as the services are indeed rendered by the AE, as evident from the documentary evidences on record and yet its arm's length value is held to be NIL only because, according to the authorities below, these services were worthless, these services were not required by the assessee, the assessee could have performed these services on its own and the services were not rendered by the group entity. The TPO has rejected

the determination of arm's length price on the basis of TNMM, at entity level, but then he has not adopted any other permissible method for determination of arm's length price. Such a course of action, as noted above, is not permissible in law. Just because these services are worthless in the eyes of the revenue authorities, the arm's length price of these services cannot be held to be NIL. Similarly, the findings that no services were rendered and that the assessee could have performed these services on its own are contradictory. If no services were rendered, which services the authorities below hold that the assessee could have performed on its own. Even the agreement for Management services provided for cost allocation based on turnover at the rate of 3 percent. For the sake of repetition approach of the assessee as well as the Commissioner has not been challenged by the revenue before us whereby by the aggregation of transactions has been done. The computation of nil for Management services by the TPO was done on the basis of method not permissible under the laws by bringing in the comparable uncontrolled transaction by the TPO. These are at has to be done on the basis of a permissible method of ascertaining the arm's length price. It cannot be open to the TPO to reject a method of ascertaining the arm's length price without applying a legally permissible method to substitute for the method of ascertaining ALP as adopted by the assessee. To hold that the arm's length price of these services was NIL under the CUP method, the TPO had to necessarily demonstrate that the same services, whatever be its intrinsic worth, were available for NIL consideration in an

uncontrolled situation; that is not, and that cannot be, the case. It is also not the case of the authorities below that the arm's length price of these services, under any other legally permissible method is, NIL There is thus no legally sustainable foundation for the impugned ALP adjustment. However, we observe that the comparability analysis in the TP study carried out by the assessee by aggregation of transactions adopting TNMM as the most appropriate method has not been examined by either of the authorities below who have merely concentrated merely on the issue of aggregation / segregation of transactions. The CIT (A) has mechanically accepted the results of the assessee to be at arm's length by accepting the operating profit / operating cost of the assessee as 25.49% as against non-AE at 5.26%. In that view of the matter, we deem it appropriate to remand the issue to the file of the CIT (A) for examining the correctness of the ALP at the entity level by applying the TNMM as the most appropriate method by aggregating the transactions. The CIT (A) is directed to take the remand report from the TPO in this regard and afford the assessee adequate opportunity of being heard in the matter. .Thus Ground nos.3, 4, 5 & 6 of revenue appeal are allowed for statistical purposes.

23 With respect to the alternative ground i.e no 7 we may record , that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is

left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India Pvt. Ltd. v. Additional Commissioner of Income Tax, 2012 (13) ITR (Trib) 422:

> "When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'.
>
> Thus, it becomes important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO.
>
> Whilst the report of the TPO in this case ultimately noted that the ALP was 'nil', since a comparable entity would pay 'nil' amount for these services, this Court noted that remarks concerning, and the final decision relating to, benefit arising from these services are properly reserved for the AO.

> The AO can, therefore, determine under Section 37 that the expenditure claimed (in this case, the referral fees) was not for the benefit of the business, and thus, disallow that amount. This does not restrict or in any way bypass the functions of the TPO. Quite to the contrary, it represents the correct division of jurisdiction between the two entities."

24 In view of the above the appeal filed by the revenue is allowed for statistical purposes.

25 As all the facts and circumstances of the appeal number 1078/2015 are similar to the facts and circumstance of the appeal bearing no 1039/2015, therefore respectfully following the finding recorded in the said appeal no 1039/2015 we hereby also allow the appeal bearing no 1078/2015 for statistical purposes.

In the result, both the appeals of the revenue are allowed for statistical purposes.

Order pronounced in the open court on 31st day of January , 2018.

Sd/-	Sd/-
(JASON P. BOAZ)	(LALIET KUMAR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Bengaluru
Dated : 31.01.2018.

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

SENIOR PRIVATE SECRETARY