

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

[Before Hon'ble Shri N.V.Vasudevan, JM & Hon'ble Shri M.Balaganesh, AM]

I.T.A No. 612/Kol/2017

Assessment Year : 2012-13

M/s Philips India Ltd.
(formerly Philips Electronics
India Ltd.)
[PAN: AABCP 9487 A]
(Appellant)

-vs-

ACIT, Circle-12(2), Kolkata

(Respondent)

For the Appellant : Shri Arvind Sonde, Advocate
Shri Ketan Kr. Ved, Advocate
Shri H.P. Srivastava, AR

For the Revenue : Shri G. Mallikarjuna, CIT DR

Date of Hearing : 29.01.2018

Date of Pronouncement : 07.02.2018

ORDER

Per M.Balaganesh, AM

1. This appeal filed by the assessee against the assessment order of the ACIT Circle-12(2), Kolkata, dt. 29.04.2016 for the A.Y. 2012-13 passed u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter the 'Act') in pursuance to the order of the DRP-2, New Delhi, dt. 5.12.2016.
2. The Ground No. 1 raised by the assessee is general in nature and does not require any adjudication.

3. Determination of Arm's Length Price (ALP) for Management Support Services

The brief facts of this issue is that the assessee is a part of the Royal Philips Organisation, Headquartered in Netherlands. The ultimate parent company of the group is Koninklijke Philips Electronics NV (KPENV). Royal Philips Electronics of the Netherlands is a diversified health and well being company. Royal Philips is organized into the following product divisions:-

- (i) Philips Consumer Electronics: This division develops, manufactures and markets a wide range of television, audio, video, communications and interactive media systems.
- (ii) Philips Domestic Appliance and Personal Care : This division makes a wide range of electrical products for personal care and household convenience.
- (iii) Philips Lighting: This division is the global leader in lamps, luminaries, lighting electronics, automotive lighting, special lighting, UHP & LCD backlighting and lumileds.
- (iv) Philips Medical Systems : This division is one of the world leaders in diagnostic imaging systems and related services.
- (v) Philips Semiconductors : This division supplies silicon system solutions for mobile communications, consumer electronics, digital displays, contactless payments and connectivity and in-car entertainment and networking.
- (vi) Other Activities : relates to Corporate Technology, Corporate Investments etc.

The assessee had made international transaction with its associated enterprises (AEs) during the year and the same was referred to the Transfer Pricing Officer (TPO) u/s 92CA of the Act for determination of ALP. The assessee submitted sector wise transfer pricing study report along with functional analysis and information required u/s 92D(1) of the Act before the ld TPO. The assessee has undertaken international transactions during the year under considerations as under:-

Software development services	- Rs 382,80,00,000/-
Payment of Management Support Services	- Rs 339,17,83,606/-
Payment of Intra Group services (Service Level agreement) - Reimbursements	- Rs 4,33,77,146/-
Payment towards AMP	- Rs 1,04,08,155/-
Health Care Contract Manufacturing	- Rs 34,20,000/-

3.1. The assessee submitted before the Id TPO that some of the transactions pertain to services which are commonly described in international tax and transfer pricing context as 'intra-group services' (in short IGS). The assessee benchmarked the Intra Group Services transactions by using the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM).

3.2. The intra-group services (IGS) received by the assessee are covered under what has been described as a General Services Agreement (GSA). Under the overall umbrella package of this GSA, the assessee has entered into a 'Management Support Services Agreement (MSSA)' and a 'Research and Development Cooperation Agreement (RDCA)' with KPENV. Among these two agreements under the GSA, only the IGS provided under the MSSA are discussed herein. The preamble to this MSSA are as under :-

An AGREEMENT made this day 22nd October, 2004 by and between

Koninklijke Philips Electronics NV (KPENV) and Philips India Ltd (assessee herein).

WHEREAS, Philips has substantial resources in commercial , financial, accounting and other matters which would be beneficial to successfully conducting a business;

WHEREAS, these resources would be employed for the benefit of the individual member companies of the Philips concern ;

WHEREAS, the Company wishes to ensure continuity in its business operations and for that reason is interested to take advantage of and secure access to the aforementioned resources and acknowledges the necessity of paying an appropriate consideration for that purpose ;

WHEREAS, it is recognized between the parties that a system requiring separate payments for resources on each separate occasion poses great problems in view of the fact that for certain Concern services (as hereinafter defined) no market price can reasonably be established with reference to comparable situations in the market place ;

WHEREAS, it is further recognized that in view of the continuous flow of information such a system of separate payments would in any event be very difficult, if not impossible, to administer and would involve very costly and burdensome accounting procedures ; and

WHEREAS, it is finally recognized that such a system of separate payments does no justice to the continuous efforts of Philips to generate and obtain new resources for the benefit of the Company and other member companies of the Philips concern and , accordingly, the parties have agreed on a remuneration system which is based on the relation existing from year between the activities of the Company and the activities of Philips and its Associated Companies.

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS

ARTICLE 1 – DEFINITIONS

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.....

“Concern Services” : Any and all activities performed by Philips in respect of the matters specified in Article 2 hereto.

.....
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ARTICLE 2 – Services in commercial, accounting, auditing, financial, fiscal, social and legal matters and in all other fields in which Philips has resources

These services for which resources are available with KPENV were sought to be rendered to PEIL (assessee herein). The assessee explained Article 2 before the Id TPO elaborately as under:-

- i. In case of **commercial matters**, the services are described in general as pertaining to distribution and trading of products, and particularly with respect to
 - a) advertising,
 - b) sales promotion,
 - c) public relations,
 - d) market research (including information and trends on the world market),
 - e) labelling, packaging, shipping and forwarding,
 - f) long-term export business and
 - g) international tendering and purchasing from third parties.
- ii. In case of **accounting, auditing and financial matters**, the services are described as
 - a) Accounting and auditing principles and methods
 - b) Budgeting methods
 - c) 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
 - d) Developments of data processing
- iii. In case of **fiscal and legal matters**, special mention is made of patents, trademarks and customs duties, particularly in international transactions
- iv. In case of personnel matters, special mention is made of

- a) *Selection and training of personnel*
- b) *An adequate personnel policy*
- v. *Insurances*
- vi. *Admittance at PEIL's specific request at mutually agreed times of reasonable number of employees of PEIL to KPENV's premises to acquaint elves with commercial and other knowledge as specified above, familiarise themselves with the organisation of the whole Group and with working methods used by it or receive advice on specific matters in the fields described above.*
- vii. *Any other similar matters which PEIL may reasonably refer to KPENV or which KPENV may itself deem appropriate.*

ARTICLE 4 – REMUNERATION

In consideration of the Concern Services rendered by Philips under this Agreement the Company agrees to pay to Philips aremuneration 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 exclude any costs in respect of Concern Services rendered inside the Country.

3.3. The assessee stated that the reason of entering into the MSSA has been described in the preamble to the Agreement. It mentions that KPENV (acting at the same time for its Associate Companies, and referred to as 'Philips' jointly and severally in the MSSA) has substantial resources in commercial, financial, accounting and other matters which would be beneficial to successfully conducting a business. These resources 'would be employed for the benefit of individual member companies of the Philips concern' (i.e KPENV and its Associated Companies). Thus, it would appear that KPENV, on the basis of the resources available at its disposal, has decided to employ those resources for

the benefit of its Associated Companies. The assessee also stated that it is mentioned in the Preamble that it is PEIL (assessee) which, wishing to ensure the continuity in its business operations, is interested to take advantage of and secure access to the aforementioned resources. Further, it is PEIL which has acknowledged the necessity of 'paying an appropriate consideration for that purpose'. It was further stated that the Preamble also asserts that it is recognized by each party to the Agreement that a system requiring payments for resources on each separate occasion poses great problems in view of the fact that for certain Concern Services (activities described in Article 2 of the MSSA) 'no market price can reasonably be established with reference to comparable situations in the market place'. This statement is of great importance with regard to arm's length pricing of the transactions covered under the MSSA. The Preamble also mentions that it is further recognized by the Parties to the Agreement that in view of the continuous flow of information, such a system of separate payments would in any event be very difficult, if not impossible, to administer and would involve very costly and burdensome accounting procedures. In the end, the Preamble goes on to mention that such a system of separate payments does no justice to the continuous efforts of Philips to generate and obtain new resources for the benefit of the Company and other member companies of the Philips concern and, accordingly, the parties have agreed on a remuneration system **which is based on the relation existing from year to year between the activities of the Company and the activities of Philips and its Associated Companies.**

3.4. The assessee submitted a separate Transfer Pricing Study Report with regard to the 'Philips General Service Agreement'. This Report of September 2006 is subtitled 'For certain Internal General Services between various Philips Group Companies in Asia Pacific Region with Koninklijke Electronics NV (KPENV)'. The assessee stated that the group had placed reliance on OECD guidelines and had accordingly used indirect method of charging the costs, wherein, when an indirect method of charging is used,

the relationship between the costs and the services provided is obscured and it may become difficult to assess the value of the benefit provided. Indeed, it may mean that the contributing enterprise is less aware than in the case of the direct-charge method that it is incurring costs for certain facilities and, in consequence, is less aware of whether or not it is benefitting from them. The most appropriate indirect method is generally recognized to be one which is based on sharing among the beneficiaries, in proportion to the benefits received or expected, the actual costs incurred in providing the services. It was stated that KPENV has applied the indirect method for allocating the costs to the assessee under the MSSA and then added a margin of 10% on the costs while making the charge. So far as the margins are concerned, they have been benchmarked through a separate benchmarking study which has relied on data from Pan-Asia comparables. It needs to be mentioned that this selection of the comparables is not appropriate as the recipient of services, with its specific functional profile of a low-risk distributor for consumer life style sector and speciality lighting sector and a near zero-risk distributor in case of health care sector and a general manufacturer for domestic consumption in case of lighting sector, is based in India with its specific economic and market conditions. If the margins are at all to be compared, then the comparables need to be selected from India.

3.5. The Id TPO applied the Comparable Uncontrolled Price (CUP) Method as the MAM for determination of Arm's Length Price (ALP) in respect of this transaction. In this regard, the Id TPO observed as under:-

(a) The application of the arm's length principle would be to see whether the charges paid by the taxpayer for intra group services reflect the same charges for the services that would have been, or would reasonably be expected to be, levied between independent parties dealing at arm's length for comparable services under comparable circumstances. It is crucial to determine how much a comparable independent service recipient, under comparable circumstances, would be willing to pay for that service.

(b) An arm's length entity would be willing to pay for an activity only to the extent that the activity confers on it a benefit of economic or commercial value. Thus, whether as a result of payment of management service fees and head quarter to its AE the taxpayer, got any economic or commercial value to enhance its commercial position is also to be seen. The expected benefit must be sufficiently direct and substantial so that an independent recipient, in similar circumstances, would be prepared to pay for it. If no benefit has been provided (or was expected to be provided), the service cannot be charged for.

(c) It is for the taxpayer to prove that the services are rendered. The other aspect of intra group services is the quantification of such services in terms of actual expenditure incurred and commensurate benefits derived therefrom. To confirm to the arm's length principle, the costs of intra-group services can only be charged for, where the recipient of the services derived a benefit from those services and that the benefit has been sufficiently direct and substantial so that; an independent recipient, in similar circumstances, would be prepared to pay for it.

(d) Another aspect to be seen is, would the entity for whom the activity is being performed either have been willing to pay for the activity if performed by an arm's length entity or would have performed the activity itself?

(e) Whether expenses incurred by one entity should be apportioned and allocated to other members of the group or whether a charge should be levied by the service provider that reflects the value of the services supplied. Because, the arm's length charge is not only a function of the price at which a supplier is prepared to perform the service (or the cost of providing the service), but also a function of the value to the recipient of the service (or the willingness of the recipient to pay for such services). Therefore, the determination of an arm's length charge must take into consideration the

amount that an arm's length entity is prepared to pay for such a service in comparable circumstances.

(f) Mere description of the various services will not suffice to justify the price charged in intra group services. The taxpayer has to prove with proper documentation and evidence that the services are actually rendered and payment is commensurate with the benefit derived therefrom.

(g) Understandably, when expenditure is incurred for the benefit of the group as a whole, no charging of such expenditure is required as such expenditure is not incurred in connection with any individual member of the group and the benefit of such expenditure would be available to all the members of the group. Similarly, if no benefit is received or the benefit is remote or for the benefit of entire group, the same should not be charged.

Therefore, unless it is shown that tangible and direct benefit has been derived by such payment and that the payment made is commensurate to the benefit derived or expected to be derived when parties deal with each other at arm's length, the arm's length price of such payment for intra group services is to be treated either as Rs. Nil or to the extent of the benefit actually derived from such payment. Thus, payment for intra group services to be treated at arm's length only when it is proved substantially by the taxpayer that such services were actually received and further proving that the taxpayer has benefitted from the receipt of such services.

3.6. During the course of proceedings before the 1d TPO, the assessee submitted that the services to be rendered as per the MSSA by the AE are essential to the assessee to operate in consistent and cost effective manner. In present business environment, operational synergies between the peer companies are imperative for any company to

thrive in the current market scenario. The services under MSSA were in the nature of technical, commercial, financial, administrative and general areas. The Philips group globally has access to extensive knowledge and expertise in such areas. These arrangements helped Philips group in effective application of these services which resulted in substantial savings in total costs compared to the cost, the group would have incurred, if these were borne by the respective companies in different countries in an inconsistent manner without adhering to the global best practices within the group. The MSSA lays down that KPENV has expertise and resources in commercial, accounting, auditing, financial, fiscal, social and legal matters. The General Service Agreement framework leads to global arrangement made by Philips whereby the group service centers are relentlessly carrying out research studies in technical, commercial, accounting, financial, human resource, legal and administrative matters. The outcome of the activities carried out by the group service centers are shared across the Philips group. The arrangement under MSSA is an exclusive arrangement to be used within the Philips group and is not made available to any third parties. It is important to mention that the objective of the Group is to centralize certain activities so that an overall standardization is achieved by the service delivery and quality. However, in few cases, technical assistance and licenses are granted to third parties in return of royalty. The royalty proceeds are deducted from concern costs before allocating the cost to respective companies. As the services provided by AE under MSSA are vast and on continuous basis, the relative share (in %) of services provided to third parties as compared to Philips is negligible and hence not comparable. The assessee submitted that the intra group services from AE have been accounted under different segments as follows:-

	<u>MSSA</u>	<u>R&D Services</u>	<u>Total</u>
Lighting	204,56,74,673	16,86,34,000	221,43,08,673
CL	53,52,94,985	14,01,63,749	67,54,58,734
Healthcare	43,83,20,392	28,67,403	44,11,87,795
Healthcare (CM)	6,57,99,588	20,65,84,406	27,23,83,995

Corporate	30,66,93,969	3,85,04,214	34,51,98,183
Total	339,17,83,606	55,67,53,773	394,85,37,379

The assessee provided the details about the receipt of services and the benefits from them by way of mails received from KPENV and Group entities and on the basis of these mails and their description, it was of the belief that the benefit test was substantiated. The assessee submitted the entire series of emails for each division under MSSA and voluminous documents submitted vide their letters dated 15.10.2015 , 27.10.2015 15.1.2016 and 20.1.2016 and demonstrated the benefits received on account of such services received. The Id TPO analysed the entire emails and other correspondences filed before him supra and rejected the same. The Id TPO by placing reliance on the decision of the Hon'ble Supreme Court in the case of Morgan Stanley & Co dated 13.2.2006 and concluded that the services rendered by KPENV to assessee is only in the nature of stewardship services (control, supervisory and monitoring functions) and thus there cannot be any charge for them. Accordingly he held that the management support services charges are only in the nature of stewardship activities and hence there cannot be any charge for them and also on the aspect that the assessee had not proved the benefits derived by it pursuant to this MSSA. Based on the above observations, the ALP of the services provided to the assessee by KPENV under the MSSA was held to be NIL and accordingly the Id TPO made an upward adjustment to ALP by Rs 339,17,83,606/-.

3.7. The Id Dispute Resolution Panel (DRP) on verification of the working sheets detailing the payment allocation keys giving out the basis of payments made to the AE. It observed that the AE renders set of services to the assessee which are categorized broadly in the following modules :-

Module 1 : The costs of the Concern Group services, Company Research and Patent & License activities are allocated based upon relevant turnover.

Module 2 : The costs of the Sector / Business Group services are allocated based upon the Sector / Business relevant turnover.

Module 3 : The costs of the Business Unit (BU) services are allocated based upon

3a : the BU relevant turnover ; or

3b : the BU production value

Module 4 : The costs of the Regional Services are allocated based upon :

4a: Sector / Business relevant turnover in the region ; or

4b: Sales to third parties by selling organizations in the region

Module 5 : The costs of the concern development activities are allocated based upon :

5a: Production value ; or

5b: Production quantities (mostly at AG level).

5c: Purchase value in case of outsourced production or contract manufacturing (internal or external Philips)

The services as per Module 3 are Nil for Indian entity. The assessee has allocated costs in proportion of the turnover for Modules 1, 2, & 4 whereas the allocation for Module 5 is basis production value ratios. It held that it has to be seen in the context of these services as to whether these result in some tangible benefit to the assessee or not. The services as they appear are routine services and it may be just to standardize the output of the assessee. The unique factors of the Indian market cannot be governed and strategized through guidance from the parent set up which may not have enough expertise. Further, the production by the Indian entity may be as per specification from

the parent, but this cannot extend to the office and market operations of the sourcing etc. of the assessee. The Id DRP observed that the Id Counsel for the assessee contended that assessee is a risk bearing manufacturer – in this context it is quite illogical that the entity is magnifying its costs by availing of services which at best can be duplicate in nature and content. It observed that the examination of the financials leads to this conclusion. It finally held that the service content does not appear to be of the nature of stewardship nature and the Id TPO is well within his statutory domain to determine the ALP for the intra group services rendered apparently per force to the assessee. The Id DRP placed reliance on the decision of the *Hon'ble Delhi High Court in the case of EKL Appliances reported in (2012) 345 ITR 241 (Del)* wherein it was held that :-

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

3.7.1. It further held that assessee has to meet the rigors of the benefit test as laid down in the recent judgement of *Delhi Tribunal in the case of Bombardier Transportation India Pvt Ltd reported in 2015-TIOL-473-ITAT-DEL-TP* wherein it was held as under:-

“Intra Group Services vis-à-vis Benefit test

“it is seen that in the present A.Y. there is clear finding by the TPO and the DRP that the assessee has not given the details of the total costs incurred by the AE on particular services. In fact, the assessee could not establish how the said cost was incurred and on what basis the said cost was placed upon the assessee. Thus, the assessee’s contentions of the benefit given in A.Y. 2008-09 and 2010-11 be taken into consideration, does not

survive. The payment for Intra Group Services to AEs is separate international transaction independent of financial results and capable of verifiable separately. Therefore, the TPO was right in his action to determine the ALP separately, rather than aggregating it with other transactions under TNMM. The documents filed before the Panel shows that the assessee company have received hardware/software from third parties directly and the billing was also raised by those third parties on the assessee. Only the said transaction was routed through the AE, those invoices were to the tune of Rs.13,87,84,117/- and invoices amounting to Rs.97,99,091/- which was raised by the third parties on the AE for the services rendered by them to the assessee. Thus, the DRP rightly directed the TPO to examine these invoices and allowability of the same as expense to be decided. From the review of the services and benefit report and the supporting documents submitted by the assessee, it can be seen that the assessee company is benefited from the supervision and guidance of the group's functional experts. Though, the annexures show that the assessee was benefitted significantly from the intra-group services received from its AEs, it failed to give the supporting evidence such as invoice, confirmation from parties to prove the same. The assessee has also undertaken a detailed cost benefit analysis in order to demonstrate the cost savings achieved by it by availing the said services from the AEs. Therefore, when AEs transact with each other, for the purpose of transfer pricing, they must replicate the dynamics of market forces, as there is no concept of free lunch in business dealings. Thus, the DRP rightly held that the benefit test which is well recognized by OECD and other developed countries Tax regime have to be seen for allowing the payment in case of Intra-Group Services. The expected benefit must be sufficiently direct and substantial so that an independent entity in similar circumstances, would be prepared to pay for it. If no benefits have been provided then the services cannot be charged for. Since the assessee just explained in generic nature about the benefits vis-à-vis the intra-group services payment to its AEs, therefore, we uphold the orders of the DRP as well as the TPO."

3.7.2. The Id DRP also placed reliance on the decision of *Delhi Tribunal in the case of Knorr Bremse India P Ltd vs ACIT in ITA No. 5097/Del/2011 for AY 2007-08* wherein it was held that :-

"9.2. After hearing the parties with reference to material on record, we find that the authorities below have not conclusively held that the assessee could not enter into such a transaction nor had they disallowed the same by holding that such an expenditure is not assessee's business expenditure. The DRP as well as the authorities below have merely elucidated that the payments are reimbursement in respect of Ms. Rita Ricken and other personnel's case to serve the interest of share holders. By saying so they have only described (the circumstance under which the international transaction has been entered by the appellant. so as to test the benefit that can be said to have reached the assessee. It, therefore, cannot be said to have questioned the commercial expediency of such transactions entered by the appellant. The I.T rules contain exhaustive detail regarding nature of information and documents which are required to be maintained by the assessee. Rule 10D(1) of the 1. T Rules. 1962 also mandates the maintainability

of record of uncontrolled transactions to be taken into account in analysing the comparability of the international functions entered into by the assessee. It, therefore, is obligatory on part of the appellant to maintain such record and produce the same before the TPO to show that it has benchmarked the international transaction at ALP. This obligation, however, has not been discharged by the assessee.

9.3. The appellant in the present case is also not shown to be willing to pay any amount for such services, if it were, so provided by an independent enterprise or if the same would have been performed in house. The DRP is found to have considered these services as non-beneficial for the recipient and did not take it as chargeable services. The perusal of e-mails and other contemporaneous record only goes to reveal that incidental and passive association benefit has been provided by the associate enterprise. In this view of the matter there could neither be any cost contribution or cost reimbursement nor payment for such services to the AE. The TPO, therefore, has rightly adopted Nil value for benchmarking the arm's length price in respect of both these services. We, therefore, do not find any reason to interfere with the well reasoned conclusion reached by the AO on this count. The grounds raised in appeal in this respect, therefore, stand rejected. "

3.7.3. Based on the aforesaid observations and judicial precedents relied upon, the Id DRP held that the services are not of the nature of stewardship in nature but also not meeting the benefit test so as to merit allowance of the same and accordingly upheld the ALP determined by the Id TPO though not as stewardship service. Aggrieved, the assessee is in appeal before us on the following grounds:-

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. 339,17,83,606/- to the Arm's length Price (herein referred to 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 the Appellant in spite of holding and thereby negating the TPO's

viewpoint that services are not in the nature of stewardship services and thus negating the findings of the TPO;

- 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 *Completely disregarding the benefits received by the Appellant on receipt of such management services and not appreciating that such services are not duplicative and have significantly assisted the Appellant in achieving its daily operational efficacy;*
- 2.4 *Ignoring the fact that the voluminous tangible evidences furnished unambiguously demonstrate regular flow of valuable services received by the Appellant from the Associated enterprises and not discussing the same appropriately in the respective orders;*
- 2.5. *Concluding that no specific benefit was received by the Appellant*
and thus holding that benefit test have not been satisfied by the Appellant so as to merit allowance of such expenses;
- 2.6. *Rejecting/ Not taking cognizance of the transactional level economic analysis undertaken by the Appellant in the TP study to substantiate the arm's length price of such transaction;*
- 2.7 *Not appreciating the fact that percentage of sales increased in the future years after the Appellant started receiving management support services ;*
- 2.8 *Erred in concluding that no specific benefit was received by the Appellant from the services received ;*
- 2.9 *Not appreciating that the Appellant being a part of multinational enterprise wherein many processes are centralized to facilitate the group entities to attain operational efficiency and a competitive edge in their respective countries. These arrangements are meant for the beneficiary of such pooled services;*
- 2.10. *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;

2.11. Without prejudice to the above arguments, not taking cognizance of the fact that the AO in the case of KPENV (i.e the associate enterprise of Philips India from which it avails MSSA services) , for the same AY, has held that the services provided by KPENV to the Appellant are for the survival and success of the Appellant, which view has also been upheld by the DRP Panel in the case of KPENV and thereby resulting in a contradictory approach.

4. Rule of consistency

4.1 The Learned AO, DRP and TPO erred in disallowing the payments made for management support 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 all preceding years (i.e. for all the assessment years preceding to AY 2009-10) by the AO and the TPO.

4.3. 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.

4. The Id AR vehemently relied on the orders of this tribunal passed in assessee's own case for the Asst Year 2009-10 in ITA No. 1141/Kol/2016 dated 5.4.2017 ; for the Asst Year 2010-11 in ITA Nos . 2408 /Kol/2016 and 505/Kol/2015 dated 27.6.2017 and for the Asst Year 2011-12 in ITA Nos. 863 & 539/Kol/2016 dated 15.12.2017 wherein it was held that the assessee had duly demonstrated the benefits derived pursuant to MSSA services rendered by the AE and deleted the adjustment made to ALP thereon. The Id AR argued that even in this year, the MSSA is governed by the very same agreement entered into on 22.10.2004 as was considered by this tribunal in the earlier years supra and hence there is no need to take a divergent view during this year.

5. In response to this, the Id DR relied on the written submissions filed by him during the course of appellate proceedings for the Asst Year 2011-12 and the same are 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 reiterates 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 requirements 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 transactions. Basis this, it can be surmised that incidental benefits 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 needs 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 be 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 to 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.

	<p>implications in respect of foreign operations;</p> <ul style="list-style-type: none"> - Insights into potential tax exposures for specific projects such as investments, acquisition or reorganisations.
Information technology	<ul style="list-style-type: none"> - 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-duplication 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	<ul style="list-style-type: none"> - 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.”

The Id DR further argued that the email correspondences did not clearly quantify the benefits derived by the assessee and that they are general in nature. Accordingly he pleaded that the assessee had not proved the benefits received by it pursuant to this MSSA with AE and prayed for non-interference in the order of the lower authorities.

6. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee. We find that similar issue had cropped up before this tribunal in assessee's own case for the Asst Years 2009-10 , 2010-11 and 2011-12 and similar arguments were advanced by both the sides. We find that in the order passed for the Asst Year 2011-12, this tribunal had held as under:-

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 Volume 1 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 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	34867	128%	

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 judgement 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 Ground Nos 2 & 3 raised by the assessee are allowed.

We find that there is no change in the facts and circumstances during the year under appeal with regard to MSSA when compared to that in the earlier years and hence respectfully following the judicial precedents 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 339,17,83,606/- is deleted. Accordingly, the Ground Nos. 2, 4.1. and 4.3. raised by the assessee are allowed.

7. DETERMINATION OF ALP FOR AMP EXPENSES

Ground No. 3.1. to 3.11 and 4.2 & 4.3 of assessee appeal

The brief facts of this issue is that the assessee during the year incurred expenses towards advertisement and marketing (AMP) 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 Id TPO accepted the same. The assessee, in order to promote its sales in the Indian region, has undertaken marketing and sales promotion activities which is a pre-requisite of any independent company competing to thrive in such competitive market. The marketing activities undertaken by the assessee were aimed at capturing the market to enable it to enhance its market shares and hence increase the revenue and profitability of the company. This is immensely critical to the assessee's own domestic business due to the intense competition in the market place. It is difficult for companies to penetrate the market, sustain and subsequently increase the customer's base. All the marketing activities of the assessee are products specific i.e the lights, consumer lifestyle and healthcare products. Therefore it clearly demonstrates that the purpose of such promotional activities is to position our products in target customers' mind rather than rendering such marketing services to the AEs for promoting the brand exclusively. The sales and marketing team of the assessee were responsible for promoting the sales and undertaking the marketing functions. Most of these activities were undertaken to build a better distribution channel and market sustainability in India. The assessee before the Id TPO made detailed submissions in respect of AMP expenses as detailed under:-

- a) The AMP costs were incurred for advertisement in the designated territory of the assessee only, which is India. The advertisements primarily contained local content suited / created for the Indian customers ;
- b) The AMP costs are payments made to third parties in India that are not in any way related to either the assessee or any of its AEs. The assessee had the discretion of deciding the form, manner, content and timing of the advertising ;

c) The assessee decides the extent of expenditure it needs to incur on advertisement to promote its sales and in the best interest of its business in its designated territories.

7.1. The assessee submitted that the AMP expenses incurred by it cannot be treated as marketing & distribution services rendered to the AEs and thereby as an international transaction as 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) of the Act which governs the definition of transaction is reproduced below:-

“transaction includes 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, understanding or action is intended to be enforceable by legal proceedings”.

Mere presumption just because of the assessee being a subsidiary which is owned by AE, an arrangement between AE and the assessee exists is erroneous. The assessee is a separate legal entity with its own management and functions independently. There is no substantial evidence to justify that there exists an arrangement. Therefore, it was pleaded that 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 criterion laid down u/s 92F(v) of the Act, which defines the term ‘transaction’. Further section 92B(1) of the Act defines the term ‘international transaction’ to mean transactions 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 transactions 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. From the above, it is evident that the purview of section 92 of the Act is limited to only such transactions that are either between two

AEs or governed by a prior arrangement between the AEs and any unrelated party. Here, it may be noted that the AMP expenses do not form part of the 'international transaction' of the assessee since the expenditure has been entirely incurred in India and with unrelated domestic parties by the assessee. Assessing domestic transactions entered into by the company with independent third parties is beyond the scope of powers vested with the Id TPO under the said section. It was pleaded that relying on the judgement of *Hon'ble Delhi High Court in the case of Sony Ericsson reported in 55 taxmann.com 240 (Delhi)*, the Id TPO had assumed that the assessee is engaged in rendering marketing services to its AEs and thus treated AMP as an international transaction. It would be worthwhile to mention here that AMP expenses as an international transaction has not been analysed in the case of Sony Ericsson by the Hon'ble Delhi High Court and the said Court did touch upon the issue but did not conclude AMP to be an international transaction. The assessee placed reliance on the decision of *Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd reported in 381 ITR 117 (Del)*, wherein it was held that AMP cannot be treated as an international transaction. This decision was rendered after considering Sony Ericsson judgement. Accordingly, it was pleaded that the decision of Sony Ericsson cannot be applied as proposed by the Id TPO to determine the existence of an international transaction relating to marketing & distribution services to the AEs on account of the AMP expenses incurred by the assessee. The assessee also placed reliance on two more decisions of *Hon'ble Delhi High Court in the case of CIT vs Whirlpool of India Ltd reported in (2015) 64 taxmann.com 324 (Delhi)* and *Honda Siel Power Products Ltd vs DCIT reported in (2015) 64 taxmann.com 328 (Delhi)*. The assessee stated before the Id TPO that since it does not believe AMP to be an international transaction, the assessee is not mandated to maintain TP documents in terms of section 92D read with Rule 10D of the Act.

7.2. The assessee submitted the details of AMP expenditure for the financial year 2011-12 as under:-

	<u>Media Spend</u>	<u>Agency Fees</u>
Lighting	16,11,58,309	13,32,70,087
Consumer lifestyle	26,45,19,614	5,97,95,416
Health care	4,20,92,304	1,16,65,041
Corporate	0	(23,12,896)
Total	46,77,70,228	20,24,17,649

Without prejudice to the claim of the assessee that AMP is not an international transaction, the assessee however furnished the sample copy of invoices on account of media and agency fees for Consumer Lifestyle and Healthcare Sector and soft copy of audio / video advertisements for lighting / consumer lifestyle sector in DVD along with the written submissions thereon.

7.3. The assessee stated that AMP expenses are already factored in TNMM in the distribution segments and hence the same are not required to be evaluated separately. It was pleaded that 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. It was argued that without prejudice to the above, even if BLT is applied, a proper comparable set is important to establish the BLT.

7.4. With regard to the comparables chosen by the Id TPO, the assessee mentioned that if the comparables taken by the Id DRP in Asst Year 2011-12 are considered, assessee's AMP expenses were less than that of comparables in % terms.

7.5. However, the Id TPO rejected the assessee's claim and held that excess of AMP expenses incurred by the assessee is service rendered by the assessee for promoting the brand on behalf of AE and hence categorized the same as an international transaction u/s 92B of the Act by observing that the assessee has incurred significant AMP expenses which resulting in promoting brand of its AE. The Id TPO rejected the assessee's contention that the TNMM analysis was sufficient to show that the transactions of the assessee are at ALP and determined the price of the alleged AMP expenses by applying BLT. Based on the above, the Id TPO proposed an upward adjustment to the tune of Rs 1,04,03,155/- towards excess AMP expenses holding that the assessee should have received reimbursement of such alleged excess of AMP expenses from the AE.

7.6. Before the Id DRP, the assessee submitted that the international transaction on account of AMP spend could not be viewed as such in the absence of agreement / arrangement / understanding to incur AMP expenses or excessively incur AMP expenses and accordingly AMP expenditure incurred by the assessee does not result in an international transaction. The Id DRP held that mere absence of a formal agreement does not help the case of the assessee, whereas the conduct has the transaction written all across. In such a scenario, it does not help the case of the assessee as the assessee indeed undertakes the Amp action resulting in promotion of the brand. Accordingly the Id DRP held that the AMP expenditure to be an international transaction. The Id DRP on perusal of the tabulation of AMP expenses division wise done by the Id TPO observed that the profile of those expenses indicated direct and conspicuous role in buildup of the intangibles. Those expense heads have therefore been correctly

categorized as AMP expenses. The Id TPO computed the ALP on such AMP expenses by imputing a mark up of 5% on such eligible expenses. The same is in line with Example 10 of BEPS guidelines. The said Example concluded that an entity, performing functions and incurring marketing expenditure substantially in excess of the level of function and expenditure of independent marketer / distributor / manufacturer in comparable transactions, is required to be compensated and the appropriate tax administration must propose a transfer pricing adjustment based on such compensation for such AMP activity performed. Such adjustment may be consistent with what independent enterprises would have earned in similar transactions.

7.6.1. The Id DRP held that the assessee is into manufacturing as well as distribution activities. The Id TPO had rightly invoked TNMM in view of the facts of this case. The choice of comparables has been accepted by the assessee. The mark up for services is required and it has been upheld by BEPS guidance also. The Id TPO without invoking the BLT is therefore directed to re-compute the mark up basis the above example by BEPS. The Id DRP directed the Id TPO to exclude two Government owned entities (Webel Technologies Ltd and Shretron India Ltd) from the list of comparables as the FAR of Government owned companies is not comparable with privately owned business groups. Subject to the above directions, action of the Id TPO was upheld in line with BEPS example. The Id DRP placed reliance on the decision of Sony Ericsson and held AMP to be an international transaction.

8. Aggrieved, the assessee is in appeal before us on the following grounds:-

3. Determination of arm's length price for AMP expenses

3.1. The AO, DRP and TPO erred on facts and in law, in making an adjustments of Rs. 10,359,000/- towards alleged excess AMP expenses incurred by Appellant and construed such expense as brand promotion for the parent AE';

3.2 The AO, DRP and TPO erred on facts and in law in not appreciating that expenditure on AMP unilaterally incurred by the Appellant in India could not be regarded as an international transaction as per section 92B of the Act, so as to invoke the provisions of section 92 of the Act;

3.3 The TPO erred in using the formula of AMP/Sales while determining the excess AMP spend, which tantamount to bright line test and which has been rejected by the Hon'ble High Courts in various judgments;

3.4 Misinterpreting and placing incorrect reliance on the international guidance in relation to the 'marketing intangibles' and the Bright Line Test (Which is not in consonance with India Transfer Pricing Regulations) and arrived at erroneous conclusions while making unwarranted TP adjustment;

3.5 The AO and TPO erred in not giving appropriate effect to the directions of Hon'ble DRP.

3.6 The AO, DRP and TPO erred in ignoring the fact that the AMP expenses are already factored in TNMM analysis and hence the same are not required to be evaluated separately;

3.7 The AO, DRP and TPO erred on facts and in law in holding that the Appellant has rendered services to its AE by incurring the alleged excess AMP expenses;

3.8 The AO, DRP and TPO erred on facts and in law in ignoring the fact that the AMP expense incurred by the Appellant were in respect of its own business purpose and requirements and that all the benefits resulting from such expenditure are to its own account;

3.9 The AO, DRP and TPO erred in completely disregarding the business and pricing model of the Appellant which compensates the Appellant for the AMP expenses incurred by it;

3.10 Without prejudice to the above arguments, the AO, DRP and TPO erred and failed to appreciate that comparables considered by the TPO for the purpose of determining the excess AMP spend are not valid comparables;

3.11 Without prejudice to the above arguments, the AO, DRP and TPO erred in not appreciating/acknowledging that DRP in Assessee's own case for A.Y. 2010-11 and A.Y. 2011-12 has accepted certain companies as comparables for AMP analysis and there is no occasion to deviate from such comparables.

4.2 The Learned AO, DRP and TPO erred in making transfer pricing adjustment on the alleged excess cost incurred for AMP expenses as brand promotion for AE. The payment for AMP expenses have been accepted as not excessive in the Appellant's own case in preceding years by the AO, TPO and the DRP.

4.3 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.

9. The Id AR vehemently relied on the order of this tribunal passed in assessee's own case for the Asst Year 2011-12 in ITA Nos. 863 & 539/Kol/2016 dated 15.12.2017 wherein it was held that AMP expenditure incurred by the assessee in the facts and circumstances of the case cannot be construed as an international transaction by placing reliance on the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd referred to supra.

10. In response to this, the Id DR stated that the assessee is only importing goods from its AE and selling it locally in India and as such , it is only a distributor of products. The decision rendered in Sony Ericsson Case was clearly given in the case of Distributor whereas, decision in Maruti Suzuki case was given in the case of Manufacturer & Marketer. Hence the reliance placed by this tribunal in earlier year is incorrect and cannot be used for the year under appeal. He further argued that the department had filed Special Leave Petition (SLP) before the Hon'ble Apex Court against the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd and pleaded that only the decision of Sony Ericsson would rule the field as on date.

11. We have heard the rival submissions. At the outset, we find that the Id TPO, Id AO and the Id DRP had categorically accepted the basic fact that the assessee is a manufacturer and also engaged in distribution of products. While this is so, we are not able to comprehend the argument advanced by the Id DR that assessee is only a distributor and thereby the decision of Sony Ericsson would apply to the case. We find

that since the assessee is a manufacturer cum distributor as accepted by the lower authorities, the decision rendered in Maruti Suzuki supra would be applicable to the assessee's case, since the contention of the Id DR that assessee is only distributor, is not emanating from the records of the lower authorities. We find that the issue under dispute before us is squarely addressed by this tribunal in assessee's own case for the Asst Year 2011-12 supra wherein it was held :-

“43. We have heard the rival submissions and perused the materials available on record. The preliminary 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, 1961. 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 Id. AR in the given facts and 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 Assessee's 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 cases 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.

Respectfully following the same, the upward adjustment made by the Id TPO and upheld by the Id DRP in the sum of Rs 1,03,59,000/- is hereby directed to be deleted. Accordingly, the Grounds 3 , 4.2 & 4.3. raised by the assessee are allowed.

12. The Ground No. 5 raised by the assessee is with regard to claim of benefit arising out of the proviso to section 92C(2) of the Act i.e variation of 5% from the arithmetic

mean. In view of our decisions rendered hereinabove for Grounds 2 to 4, we do not deem it necessary to adjudicate this Ground.

13. The Ground No. 13 raised by the assessee is without prejudice to the grounds raised by it in Grounds 2 to 5 , wherein the Id TPO concluded that an adjustment may be required to be made to the international transactions of the assessee in relation to its other segments, if it is held later in judicial proceedings that intra-group service charges is actually required to be paid. In this regard, the observations of the Id TPO in para 61.5 page 164 of his order would be relevant and the same are reproduced hereunder for the sake of convenience:-

61.5. Without prejudice to the above discussion, it is proposed that the Operating Profit of the tested party i.e Assessee is taken as 12.41% and 14.17% respectively for the distribution segment and contract manufacturing division. Consequently, even if it is held in later judicial proceedings that the intragroup services is actually required to be paid then the Operating Profit Margin of the company is to be taken as given in the table above at 4.66% and 4.88% for distribution segment and contract manufacturing division respectively.

This observation of the Id TPO had triggered the raising of ground no. 6 before us by the assessee. But we find that this passive observation of the Id TPO was not at all considered in the following orders passed by the lower authorities :-

- a) Order of the Id DRP dated 19.12.2016 u/s 144C(5) of the Act
- b) Order passed by the Id TPO u/s 92CA(3) r.w.s. 92CA(5) & 144C(5) of the Act dated 25.1.2017
- c) Final Assessment Order passed by the Id AO u/s 143(3) r.w.s. 144C of the Act dated 27.2.2017.

Hence we hold that the passive observations made by the Id TPO had been completely ignored by the Id DRP and in the giving effect order to DRP directions and in the final assessment order. Accordingly, the said observations would have no relevance in the proceedings for the assessee and there is no grievance that could be caused to the assessee in that regard. There is no impact for the assessee pursuant to the aforesaid passive observations of the Id TPO. The various contentions raised by the assessee are left open in view of giving effect order to DRP passed by the Id TPO and final assessment order passed by the Id AO. Hence we are of considered opinion that adjudication of Ground No. 6 raised by the assessee would be superfluous.

14. DISALLOWANCE OF LEASE RENTALS – Rs 6,86,60,107/-

Ground Nos. 7.1 to 7.3

The brief facts of this issue is that the assessee claimed lease rental paid for motor car taken on finance lease from Citi Corp amounting to Rs. 6,86,60,107/-. The same was treated as capital expenditure by the Id AO based on the reliance placed in assessee's own case for the Asst Year 2003-04 which got confirmed by this tribunal. The Id DRP observed as under:-

The lease rentals paid by the assessee for the year 2003-04 were disallowed and the action was upheld by the ITAT. Subsequent matters have been pending / though this adjustment has been allowed in 2011-12 , the panel upon consideration of the facts is not inclined to allow relief to the assessee.

Aggrieved, the assessee is in appeal before us on the following grounds :-

7. Lease Rental

7.1. The Learned AO and DRP erred in law and on facts in disallowing Rs. 6,86,60,107 being the lease rent paid in respect of cars treating the same as capital expenditure.

7.2. The Learned AO and DRP erred in law and on facts in disallowing the lease rent paid without taking cognizance of the decision of the Supreme Court in the case of ICDS Ltd. vs. CIT (2013) 350 ITR 527 (SC).

7.3. Strictly without prejudice to the above, the Learned AO and DRP erred in law and on facts in not allowing depreciation on total payment towards lease transactions including interest.

14.1. The Id AR argued that this issue is covered by the decision of the *Hon'ble Supreme Court in the case of ICDS Ltd vs CIT reported in (2013) 350 ITR 527 (SC)* wherein it was held that :-

‘the lessor i.e the assessee is the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of section 32 of the Act and hence, is entitled to claim depreciation in respect of additions made to the trucks, which were leased out.’

The Id AR stated that the assessee herein is a lessee and is entitled for deduction towards lease rentals paid towards cars taken on finance lease. He also stated that the lessor had confirmed that it had claimed depreciation in the relevant Asst year on the said cars which were leased out to the assessee. He further placed reliance on the decision of the *Hon'ble Rajasthan High Court in the case of Rajshree Roadways vs UOI reported in 263 ITR 206 (Raj)* wherein it was held that the lessee would be entitled to the deduction of rent paid by him and the benefit of the depreciation shall be available to owner of the asset. Further the Special Leave Petition (SLP) filed by the department against the said decision before the Hon'ble Supreme Court has been dismissed . He further placed reliance on the co-ordinate bench decision of this tribunal in the case of *The Royal Bank of Scotland N.V. vs DDIT in ITA No. 1738/Kol/2009, 1926/Kol/2010 , 519/Kol/2011 and 1805/Kol/2012)* dated 13.4.2016 wherein on identical matter, the issue was decided in favour of the assessee. In response to this, the Id DR fairly conceded that the issue is covered by the decision of the Hon'ble Supreme Court in the case of ICDS Ltd supra.

14.2. We have heard the rival submissions. We find that the issue 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. 7 raised by the assessee.

15. DEPRECIATION ON MOULDS

Ground Nos. 8.1 to 8.4

The brief facts of this issue is that the Id AO during the course of assessment proceedings observed that assessee has claimed depreciation @ 30% on moulds instead of 15%. The Id 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. The depreciation on moulds @ 30% is available to the assessee if these are used exclusively in rubber and plastic industries. As such, the assessee had no plastic factory. Therefore, the assessee is not entitled for depreciation @ 30% on moulds. Accordingly, the Id AO disallowed the excess depreciation claimed by assessee for Rs 3,14,04,052/- and added to the total income of the assessee. Aggrieved, the assessee filed objections before the Id DRP. The Id DRP rejected the claim by observing as under:-

According to the New appendix 1 to Rule 5 of the IT Rules effective from AY 2006-07 onwards, (vii) of Part A of the Table Of Rates 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 development and not production of plastic or rubber goods.

In the above view of the matter the Panel does not feel inclined to interfere with the finding of the AO. The depreciation @ 15% is upheld. Accordingly the objection is dismissed.

15.1. Aggrieved, the assessee is in appeal before us on the following grounds:-

8.1. The Learned AO and DRP erred in law and on facts in disallowing Rs. 3,14,04,052/- being excess depreciation to the tune of 15% claimed by the Company on moulds.

8.2. 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 Rule, 1962.

8.3. 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.

8.4. Strictly without prejudice to the above, the Learned AO and DRP erred in law and on facts in not allowing depreciation on moulds for this year after adding the amount of Rs. 2,67,54,530/- disallowed last year to the opening written down value of moulds.

15.2. We have heard the rival submissions. The Id AR stated that the 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-makers to whom moulds were given by the assessee to be used in the plastic factory, under its control and supervision and prayed that depreciation @ 30% would be eligible on the said moulds. We find that this issue has been considered by this tribunal in assessee's own case for the Asst Year 2011-12 in ITA Nos. 863 & 539/Kol/2016 dated 15.12.2017 wherein it was held as under:-

"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 A.Y. 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 appears to be true. But as such no documentary evidence was filed in support of the assessee's claim. However in the interest of justice and 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."

Respectfully following the aforesaid judicial precedent, we restore this matter to the file of the ld AO for fresh adjudication in accordance with law. The assessee is at liberty to adduce fresh evidences before the ld AO in support of its contentions. Accordingly, the Ground Nos. 8.1 to 8.4 raised by the assessee are allowed for statistical purposes.

16. NON-GRANT OF DEDUCTION U/S 80G OF THE ACT

Ground No. 9

The assessee claimed deduction u/s 80G of the Act in the sum of Rs 26,22,813/- in the return of income. This was not granted by the ld AO and this action was upheld by the ld CITA. Aggrieved, the assessee is in appeal before us on the following ground:-

9. Non grant of deduction u/s 80G

9.1. The Learned AO and DRP erred in law and on facts in not granting deduction under section 80G of the Act amounting to Rs. 26,22,813/-.

16.1. We have heard the rival submissions. We find that there is no discussion in the assessment order regarding this and hence we deem it fit and appropriate to restore this issue to the file of the ld AO to verify the claim of deduction u/s 80G of the Act with the receipts and other relevant documents to be produced by the assessee before the ld AO. Accordingly, the Ground No. 9 raised by the assessee is allowed for statistical purposes.

17. SHORT CREDIT OF TAX DEDUCTED AT SOURCE**Ground No. 10**

The Id AO granted credit for tax deducted at source of Rs. 5,17,37,622/- as against the claim by the assessee to the tune of Rs.5,19,20,101/- . Since the issue involves only verification of certificates / Form 26AS, as the case may be, we hereby direct the Id AO to kindly verify the necessary evidences in this regard and grant TDS credit, if eligible, to the assessee. Accordingly, the Ground No. 10 raised by the assessee is allowed for statistical purposes.

18. LEVY OF INTEREST U/S 234 B OF THE ACT

The Ground No. 11 raised by the assessee is with regard to chargeability of interest u/s 234B of the Act which is consequential in nature and does not require any specific adjudication.

19. LEVY OF INTEREST U/S 234 D OF THE ACT

The Ground No. 12 raised by the assessee is with regard to chargeability of interest u/s 234D of the Act which is consequential in nature and does not require any specific adjudication.

20. LEVY OF INTEREST U/S 244A OF THE ACT

The Ground No. 13 raised by the assessee is with regard to chargeability of interest u/s 244A of the Act which is consequential in nature and does not require any specific adjudication.

21. INITIATION OF PENALTY U/S 271(1)(C) OF THE ACT

The Ground No. 14 raised by the assessee is with regard to initiation of penalty u/s 271(1)(c) of the Act which would be decided afresh by the ld AO in accordance with law while giving effect to this order.

22. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Court on 07.02.2018

Sd/-
 [N.V. Vasudevan]
 Judicial Member

Sd/-
 [M.Balaganesh]
 Accountant Member

Dated : 07.02.2018

SB, Sr. PS

Copy of the order forwarded to:

1. M/s Philips India Limited (formerly Philips Electronics India Ltd., DLF IT Park, Tower-A, 3rd Floor, 08, Major Arterial Road, Block-AF, New Town (Rajarhat), Kolkata-700156.
2. ACIT, Circle-12(2), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, 6th Floor, Kolkata-700069.
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
 Head of Office/D.D.O., ITAT, Kolkata Benches

