IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.475/Coch/2016 : Asst.Year 2012-2013
IT(TP)A No.134/Coch/2016 : Asst.Year 2011-2012
&
SA No.08/Coch/2018
(Arising out of ITA No.475/Coch/2016)
SA No.25/Coch/2016
(Arising out of ITA No.134/Coch/2016)

M/s.US Technology Resources Private Limited 721/722, NILA, Techno Park Campus Trivandrum-695 581. **PAN : AAACU6085C.**	Vs.	The Dy.Commissioner of Income-tax, Circle – 2(1) Trivandrum.
(Appellant)		(Respondent)

Appellant by : Sri.Raghunathan S., Advocate
Respondent by : Sri. Santham Bose, CIT-DR

Date of Hearing : 17.05.2018		**Date of Pronouncement : 23.05.2018**

ORDER

Per Chandra Poojari, AM

These two appeals by the assessee, one for the assessment year 2012-2013 is directed against the order of the Dy.Commissioner of Income-tax, Circle 2(1), Trivandrum, dated 19.08.2016, which was passed in consequent to the direction of the Draft Resolution Panel-2, Bangalore, (DRP) u/s 144C(5) of the Income-tax Act, 1961, dated 05.08.2016, and the other appeal of the assessee for assessment year 2011-2012 is directed against the order of the Asst.Commissioner of Income-tax, Circle 1(1), Trivandrum, dated 28.01.2016, which was passed in consequent to the

direction of the DRP-2, Bangalore u/s 144C(5) of the I.T.Act, dated 28.12.2015. Since common issues are involved in both the appeals, they are being heard together and disposed off by this consolidated order, for the sake of convenience.

2. Grounds of appeal raised in ITA No.475/Coch/2016 are reproduced below:-

> *"The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:*
>
> *Ground No.1 – Erroneous levy of income tax and interests thereon*
>
> *1.1 The learned DCIT and DRP erred in law and on facts in:*
>
> *(i) Determining the total income of USTRPL for the year at Rs.50,05,47,9820;*
>
> *(ii) Levying income tax of Rs.21,84,59,250 (including interest under section 234B of the Income-tax Act, 1961 (`the Act') amounting to Rs.5,60,56,510); and*
>
> *(iii) Raising a net demand payable of Rs.20,55,69,980 upon the Appellant.*
>
> *Ground No.2 – Assessment and reference to Transfer Pricing Officer are bad in law.*
>
> *2.1 The draft order issued by the Assistant Commissioner of Income Tax Circle 1(1) Trivandrum (`Assessing Officer' or `AO') having concurrent jurisdiction over the case, is bad on facts, and is in violation of the principles ;of natural justice and is*

otherwise arbitrary and thus bad in law as well as void ab-initio;

2.2 The AO has erred in making a reference to the Assistant Commissioner of Income-tax, (Transfer Pricing) (,TPO'), inter alia, since the TPO has not recorded an opinion that any of the conditions in section 92C(3) of the Act, were satisfied in the instant case. Accordingly, the order passed by the TPO is without jurisdiction.;

2.3. On the facts and in the circumstances of the case and in law, the learned TPO and accordingly, the
learned AO erred in not demonstrating that the motive of the Appellant was to shift profits outside of India by manipulating the prices charged in its international transactions, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act

2.4 The draft order passed by the AO is without jurisdiction, inter alia, insofar as it purports to give effect to an invalid order of the TPO.

Ground No.3 – Non-issuance of show cause notice prior to the issue of TP order by the TPO.

3.1 The TPO has not issued any show cause notice nor provided any opportunity of being heard- to the assessee before passing the TP order. This act of the TPO is a gross violation of principles of natural justice.

Ground No.4 - Erroneous disallowance of reimbursement of expenses under section 40(a)(ia)

4.1 On the facts and in the circumstances of the case, the DCIT and DRP have erred in disallowing an amount of Rs.34,94,59,683 under section 40(a)(ia), being reimbursement of salary costs and related rentals borne by US Technology International Pvt.

Ltd. ("USTIPL") on behalf of the Appellant, in respect of employees deputed by USTIPL to the Appellant, pursuant to Deputation and Support Service Agreement.

4.2 The DCIT and DRP have erred in not considering the settled position of law that the provisions of Chapter XVII-B of the Act does not apply to a payment on a cost-to-cost basis, without any element of profit therein.

4.3 The DCIT and DRP have thus, erred in contenting that tax is deductible under section 194J and 194I for such reimbursement of salary costs and rentals, respectively.

4.4 The DC IT and DRP have erred in not considering the notwithstanding provisions laid out under section 190 of the Act wherein it is clarified that the tax is deductible at source under Chapter XVII-B, only in respect of payments of "income" or "any sum" comprising an element of Income.

4.5 The DCIT and DRP have failed to consider the fact that tax had already been deducted by USTIPL at the time of payment of such salaries and rentals as instructed in section 192 and 194-1 of the Chapter XVII-B of the Act.

Ground No. 5-Erroneous disallowance of reimbursements without considering that the law prescribed under second proviso to section 40(a)(ia) of the Act is curative in nature

5.1 The DCIT and DRP have erred in law by disregarding the substantive compliance undertaken by the USTIPL and USTRPL, as required under second proviso to section 40(a)(ia) of the Act with respect to such reimbursement of expenses.

5.2 The DCIT and DRP are not justified in law in disregarding the fact that deduction of tax is only one mode of recovery of tax, and once the tax is recovered by a particular mode, then additional recovery of tax is not permissible. Such additional recovery will

amount to taxing the same income twice i.e. once in the hands of the deputed employees or vendors and then again in the hands of the USTRPL

5.3 The DCIT and DRP have erred in not considering the fact that the payee (USTIPL) had already offered such receipts while filing its return of income for the relevant A Y as evidenced by the Form 26A furnished in this regard during the assessment proceedings. Hence, no disallowance is warranted in law, in the case of the Company, as mandated under second proviso to section 40(a)(ia) of the Act.

5.4 The DCIT and DRP have erred in principle by disregarding the contention of the Assessee that the amendment to section 40(a)(ia) of the Act, by way of introduction of second proviso thereto, vide Finance Act 2012 is curative in nature intending to avoid undue hardships to assesses. It is settled legal position that when an amendment in law, inserts a remedy to make the section workable, then such amendment ought to be in operation from the inception of the section itself, so that reasonable interpretation can be given to the section as a whole.

5.5 The DCIT and DRP have erred in holding that the second proviso to section 40(a)(ia) of the Act is prospective in nature without considering the jurisdictional Cochin ITAT ruling in the case of G.K.Granites v. ACIT (ITA No.24/Coch/2015), wherein it is held that the second proviso to section 40(a)(ia) being declaratory and curative in nature, has retrospective effect from 01 April 2005.

Ground No.6 – Determination of arm's length price in relation to Management support services

6.1 TPO/ AO erred in rejecting the TP documentation maintained by the appellant and erred in non- acceptance of the benchmarking followed in relation to the management service fees (aggregated with software development activity) paid by the appellant to its associated enterprise for

the service rendered. The TPO has erred in not considering the fact that even after paying the management service fee the Assessee still earns an overall NCP margin which is higher than the margin earned by the comparable. The Ld AO erred in upholding the contentions of TPO.

6.2 TPO/ AO failed to understand that the payment of the management fee was in connection with the software development activity of the Company. Instead the TPO has considered the payment of management fee and the software development activity of the company as two different functions performed.

6.3 The TPO in her order concluded that comparable uncontrolled price ('CUP') was the most appropriate method for benchmarking without providing any details of the CUP used.

6.4 The TPO failed to understand the business requirement of making the management fee payment and went beyond her jurisdiction in denying the payment out-rightly, whereas, the role of the TPO is limited to determining the ALP using one of the prescribed method.

6.5 The TPO/ AO erroneously concluded that no services were received by the assessee, without appreciating the business realities of the Company and the evidences provided during the course of the TP assessment.

6.6 TPO / AO has ignored the fact that 92.31 % of the revenue was earned on account of the client services by USTRPL who has customer relationship with UST Global Inc. The revenue earned by the company has increased by 33% and this was on account of the assistance from the marketing team of UST Global Inc. and acquisition of new clients.

Ground No. 7- Without prejudice, Management Services cannot be categorized as "Fees for included Services" and hence not taxable in India as per the Double Taxation Avoidance Agreement ('DTAA') between India and United States of America

7.1 Without prejudice to Ground 5, on facts and

circumstances of the case, the learned DCIT and DRP have erred in law by alleging that the payment made by the Appellant to US Technology Global Inc ("USTG") the erstwhile US Technology Resources LLC ("USTR"), as payment made for technical service and hence "Fees for included Services" for the purpose of India US DT AA.

7.2 The DCIT and DRP have failed to consider the fact that the services provided by USTG to USTRPL are primarily in the nature of management services i.e. assistance in decision making involving areas such as sales and marketing, legal matters, public relation activities, treasury services and risk management services

7.3 The DCIT and DRP have failed to consider that the management services rendered are neither technical services nor consultancy service and have wrongly adopted a position that the said payment has been made for technical knowledge, experience and processes rendered by USTG.

7.4 The learned DCIT and DRP have arbitrarily concluded that the services are technical in nature and have failed to take cognizance of the relevant facts in this regard.

7.5 The learned DCIT and DRP have failed to consider the fact that the management services are not covered in the ambit of "Fee for included Services" ("FIS") prescribed in Article 12 of the India-USA Double Tax Avoidance Agreement. The sequence chart encapsulating the ambit of FIS is attached as Exhibit 1. On consequence, such management fees would assume the character of business profits of USTG under Article 7 of the India-USA DTAA which would be taxable in India only if the same is attributable to a Permanent Establishment (PE) of USTG in India. In the absence of a PE of USTG in India, the said amount would not be taxable in India as business profits. In view of the same, the said amount of management service charges would not be

chargeable to tax in India in the hands of USTG, in light of the provisions of section 90(2) of the Act.

7.6 On the facts and in the circumstances of the case, the learned ACIT and DRP have erred in law by confirming the disallowance of management fees paid by the Appellant to USTR, under section 40(a)(i) of the Act, on the grounds of perceived non-withholding of tax at source under section 195 of the Act, without considering the fact that the said amount is not chargeable to tax in India under the provisions of the India-USA DTAA.

7.7 Without prejudice, the DCIT and DRP have erred in facts by proposing disallowance of entire Rs 8,12,12,725 under section 40(a)(i), when the actual expense incurred by the Appellant is only Rs 4,06,06,362. The DCIT and DRP has failed to consider the fact that 50% of such management fees payable for the captioned A Y, had been reversed by the Appellant. The AO in this respect, has disregarded the directions mentioned in Circular No. 7/2007 dated 23 October 2007.

Ground No. 8- Consequential levy of interest under section 234B of the Act.

8.1 On the facts and circumstances of the case, the learned DC IT and DRP have erred confirming the consequential levy of interest under section 2348 of the Act at Rs.5,60,56,5l0.

Ground No.9 - Consequential levy of interest under section 2340 and 244A of the Act.

9.1 On the facts and circumstances of the case, the learned DCIT has erred in levying interest under section 234D of the Act at Rs 57,06,057 and recovering interest of Rs.40,75,752 under section 244A of the Act.

Ground No.10 - Relief

10.1 The Appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto; and

10.2 The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise,

the above grounds of appeal, either before or during the hearing of the appeal."

3. Ground Nos.1 to 3 and its sub-grounds were not pressed by the learned Counsel for the assessee. According the same are dismissed as not pressed.

4. Ground No.4 and its sub-grounds are in respect of erroneous disallowance of reimbursement of expenses u/s 40(a)(ia) of the Income-tax Act, 1961.

5. The brief facts of the case are that the assessee, a domestic company with its operations at Technopark Campus Thiruvananthapuram had entered into an agreement with US technology International Private Limited (USTIPL) another domestic company functioning from the same premises. Both the companies are majority owned subsidiaries of UST Global Corporation BVI, the holding company incorporated in British Virgin Islands. USTRPL is engaged in the domestic sales of software developed by them whereas USTIPL is an Export Oriented Unit. The agreement dated 151 day of April 2007 entered into between USTRPL and USTIPL which continues to remain in force for the A Y 2012-13 is that "USTRPL shall engage USTIPL to depute resources and provide other administrative support to manage its project requirements with its clients and in consideration for the services rendered, USTRPL shall reimburse all expenses incurred by USTIPL on the resources deputed to USTRPL and the apportioned cost of specific support services received from USTIPL as mutually

agreed.

5.1 The Assessing Officer observed that during the previous year relevant to A Y 12-13 also, USTRPL has debited an amount of Rs. 34,94,59,683/- under the head 'Subcontracting charges 'on payments made to USTIPL. The expense of Rs. 34,94,59,683/- debited represents the reimbursement of salary and related costs of employees deputed to the company by US Technology International (P) Ltd., a UST Group company. In the course of assessment proceedings, the assessee was required to furnish the details of expenses under the head "sub-contracting charges" and whether such payments were subjected to TDS. In reply to this query, it was informed vide letter dated 04/02/2016 that the payments are in the nature of pure reimbursement and that there is no profit element in those payments. Further, they had stated that the portion pertaining to salary and other allowance claimed to be reimbursement were directly made to the employees by USTIPL instead of USTRPL and that tax has been deducted from these payments included in the sub-contracting charges, by USTIPL. When the assessee was asked to explain why tax was not deducted by USTRPL from the sub-contracting charges as a whole paid to USTIPL, the assessee relying on various judicial precedents contended that payment by way of reimbursement of expenses incurred on behalf of a group concern, on a cost to cost basis, without any element of profit therein, should not be subject to TDS. However the findings of this office in this regard are discussed below.

5.2 From the clauses of agreement entered by assessee with USTIPL, following points are to be noted:

(a) USTIPL provides customer specified software product development and services to its customer. Thus in present case such services have been provided to the assessee by USTIPL.

(b) USTIPL has deputed its resources with the assessee and in addition providing administrative support to manage its project requirements with its (assessee's) clients.

(c) For the above purpose consultants have been made available by USTTPL to the assessee.

(d) The assessee is required to compensate USTIPL by way of all expenses incurred by USTIPL on the resources deployed and in addition apportioned cost of specific support services received from STIPL as mutually agreed. Thus the agreement does not specify in clear terms the additional amount to be paid by assessee as the same has not been spelt out in the agreement.

e) TIPL shall bear all taxes relating to income arising to it under the agreement on a net income basis. Thus agreement acknowledges the fact that income will arise to USTIPL on account of this agreement.

5.3 The A.O. further noted that in commercial terms, one

would enter into such an agreement only with the motive of making profit as no additional advantage is being conferred on USTIPL by the assessee vide this agreement. This agreement also has a non-compete clause which prohibits USTIPL from offering any services directly or indirectly to clients of assessee or in the markets in which assessee is actively offering services.

5.4 Thus from above, it becomes evident that STIPL is rendering managerial, technical and consultancy services to the assessee by providing services of technical or other personnel. Thus the services come within purview of section 9(1)(vii) explanation 2 and provisions of section 194J are attracted in this case. Here it is important to note that for assessee, recipient of payment is USTIPL and not its employees as they are paid salary by USTIPL. Since for USTIPL payment received by it is not chargeable under the head salary but business income, so such payment will not be covered under exclusion clause of explanation 2. As regards rent for premises being charged separately, the same would be covered by provisions of section 1941. Thus the payments so made are covered by provisions of section 194J/194I. However no tax at source was deducted by the assessee by claiming that the amount paid are mere reimbursement and so no element of income was there in such payments. So provisions of section 40(a)(ia) are clearly attracted.

5.5 Another important factor to be noted is that the section

194J uses word "any sum" in comparison to section 195 which uses term 'any other sum chargeable under the provisions of this Act'. Thus section 194J presumes that some income is there in every sum paid and so it further says "deduct an amount equal to ten percent of such sum as income tax on income comprised therein". Thus, based on the facts of the present case, where there is a specific agreement between assessee and USTIPL and the payment is being made for specified services by assessee, the tax at source was required to be deducted. The CBDT Vide circular No: 715, dated 8.8.1995 has also clarified that Sections 194C and 194J refer to any sum paid. Thus as TDS is to be deducted on 'any sum paid'; hence it does not make any difference as to whether the slim is paid as a reimbursement or as a pay merit for rendering services for establishing TDS liability. Hence the payments to USTIPL is disallowed by invoking provisions of section 40(a)(ia) of the Act. In this context, it is also relevant that the addition made on this ground was upheld by Hon'ble DRP for A Y 2011-12 in this case.

5.6 In this regard, the assessee has submitted that "USTIPL, the payee has filed its return of income in which it has offered to tax, the sub-contracting charges paid by USTRPL ". The assessee has also submitted a certificate in Form 26A as mandated by section 201 (1) of the Act. However the same cannot be considered as the 2nd proviso to section 40(a)(ia) is applicable w.e. f. 1-4-2013, i.e. from A Y

2013-14.This is also clarified in the explanatory memorandum to Finance bill, 2012.

5.7 The A.O. further observed that since no TDS has been made by USTRPL from the 'subcontracting charges', they will be hit by the disallowance under section 40(a)(ia). Therefore expenses of Rs.34,94,59,683/- under the head "subcontracting charges" was disallowed by the Assessing Officer u/s 40(a)(ia) of the IT Act.

6. Against the above order of the Assessing Officer, the Draft Resolution Panel (DRP) has given a direction that USTIPL is rendering managerial, technical and consultancy services to the assessee by providing services of technical or other personnel. Thus the services come within purview of section 9(1)(vii) explanation 2 and provisions of section 194J are attracted in this case. Here it is important to note that for assessee, recipient of payment is USTIPL and not its employees as they are paid salary by USTIPL. Since for USTIPL payment received by it is not chargeable under the head salary but business income, so such payment will not be covered under exclusion clause of explanation 2. As regards rent for premises being charged separately, the same would be covered by provisions of section 194-I. Thus the payments so made are covered by provisions of section 194J/194I. However no tax at source was deducted by the assessee by claiming that the amount paid are mere reimbursement and so no element of income was there in such payments. So provisions of section

40(a)(ia) are clearly attracted. Another important factor to be noted is that the section 194J uses words `any sum' in comparison to section 195 which uses term `any other sum chargeable under the provisions of this Act'. Thus section 194J presumes that some income is there in every sum paid and so it further stays "deduct an amount equal to ten per cent of such sum as income tax on income comprised therein". Thus, in the facts of the present case, where there is a specific agreement between assessee and USTIPL and the payment is being made for specified services by assessee, the tax at source was required to be deducted. So, the AO has rightly disallowed all these payments by invoking provisions of section 40(a)(ia) of the Act. The CBDT vide circular No.715 dated 8.8.1995 has also clarified that sections 194C and 194J refer to any sum paid. Thus as TDS is to be deducted on `any sum paid'; hence it does not make any difference as to whether the sum is paid as a reimbursement or as a payment for rendering services for establishing TDS liability. Thus reimbursements cannot be deducted out of the bill amount for the purpose of tax deducted at source. In the case of Arthur Andersen & Co. [94 TTJ 736 (Mum.)] the Mumbai Tribunal held that where the cost of services is charged and recovered by way of reimbursement, even without any profit element, TDS will be applicable. In case of Cochin Refineries (1996) 222 ITR 354 (Ker.), HNS VSAT Inc 95 ITD 157 (Del ITAT) and Hindalco 94 ITD 242 (Mum) also this was held that TDS is applicable on mere reimbursement of expenses also. So objection of the assessee cannot be accepted.

7. In conformity with the direction of the lower authorities, the Assessing Officer passed the final order.

8. Against the above order, the assessee is in appeal before us. Before us, the learned Counsel for the assessee submitted that this is only a reimbursement of expenses, which does not include any element of profit so as to deduct TDS on the said payment. For that purpose, he relied on the order of the Hyderabad Bench of the Tribunal in the case of Bhagyanagar Gas Ltd. v. ACIT [(2013) 29 taxmann.com 220 (Hyd.Trib.)], wherein the Tribunal held as under:-

> *"11. GAIL and HPCL deputed their personnel who worked under the control and management of JVC. The employees were carrying out the work of the Assessee as its employees not carrying out the work on behalf of GAIL or HPCL. Salary, cost of these employees are a charge on the profits of the Assessee. Payment by way of salary would not constitute Fees for technical services. Nor can the transaction be viewed as a works contract performed by GAIL and HPCL. Merely because the companies had in an agreement agreed to depute their employees would not mean that it is a works contract. Further the Assessee paid only the salaries of the persons who worked under the control and supervision of the Assessee. Instead of paying the amount to the employees directly, the Assessee reimbursed the amount to GAIL and HPCL who had paid the amount to the employees. This can be viewed as a financial arrangement under which GAIL and HPCL pay to the deputed employees on behalf of the Assessee and the Assessee reimburses the same. It is a reimbursement of amount spent by GAIL and HPCL in payment of persons in the employ of the*

Assessee and payment for any services rendered by GAIL and HPCL.

12. In our opinion such payment cannot be considered as payment towards work executed by GAIL and HPCL in the course of work contract. In the Case of United Hotels Ltd. v ITO [2005] 2 SOT 267 (Delhi) under similar circumstances, the IT A T, Delhi has held that reimbursement of salary to the deputed personnel would not attract deduction of tax at source. We find that these decisions are squarely cover the issue on appeal. In the following cases it has been held that reimbursement of expenses are not subject to tax deduction at source. The following decisions also support the case of the assessee:

(1) CIT v. Industrial Engineering Projects (P.) Ltd. [1993] 202 ITR 1014 (Delhi).

(2) CIT v. Siemens Aktiongesellschaft [2009] 310 ITR 320 / 177 Taxman 81 (Bom.).

(3) CIT v. Dunlop Rubber Co. Ltd. [1982] 10 Taxman 179 (Cal.)

13. Respectfully following the decision of the co-ordinate bench, we delete the addition made by the AO under Section 40(a)(ia)."

9. Without prejudice to the above, the learned Counsel submitted that the amended first proviso to section 40(a)(ia) to be applied retrospectively, though it was introduced by the Finance (No.2) Act, 2010 with effect from 01.04.2010. For this purpose, he relied on the judgment of the Hon'ble Supreme Court in the case of *CIT v. Calcutta Export Company [(2018) 93 taxmann.com 51 (SC)]* in Civil Appeal Nos.4339-4340 of 2018 and Others, order dated 24th April, 2018.

10. The learned Departmental Representative, on the other hand, relied upon the orders of authorities below.

11. We have heard the rival submissions and perused the material on record. In our opinion, the judgment relied on by the assessee's Counsel in the case of Bhagyanagar Gas Ltd. (supra) cannot be applied to the facts of the present case. In that case, the payment was directly made to its employees of the contracting company. However, in the present case, the payment has been made to USTIPL and not to its employees as they are paid salary by USTIPL itself. Since for USTIPL, payment received by it is not chargeable under the head salary but it has been charged under the head business income. Being so, such payment will not be covered under exclusion clause of explanation 2 to section 9(1)(vii) of the I.T.Act. Further, there was a payment of rent for which the provisions of section 194-I is applicable. Hence it cannot be considered as reimbursement of expenditure. Thus, the payments so made are covered by the provisions of section 194J/194I, as may be applicable in the present case.

12. Coming to the alternative contention of the learned Counsel that the second proviso to section 40(a)(ia) should be applied, in principle, we are agreeing with the contention of the assessee's Counsel that if the recipient has paid tax on the income received by them by filing the return of income within the due date specified in sub-section (1) of section 139, such payment shall be allowed as a deduction while computing the

income in which tax has been paid. This view is fortified by the judgment relied by the assessee's Counsel in the case of *Calcutta Export Company (supra)*, wherein the Hon'ble Supreme Court held as under:-

> *"17. However, it has caused some genuine and apparent hardship to the assesses especially in respect of tax deducted at source in the last month of the previous year, the due date for payment of which as per the time specified in Section 200 (1) of IT Act was only on 7th of April in the next year. The assessee in such case, thus, had a period of only seven days to pay the tax deducted at source from the expenditure incurred in the month of March so as to avoid disallowance of the said expenditure under Section 40(a)(ia) of IT Act.*
>
> *18. With a view to mitigate this hardship, Section 40(a)(ia) was amended by the Finance Act, 2008 and the provision so amended read as under:-*
>
> *"40. Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "profit and gains of business or profession*
>
> *(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contactor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction has not been paid-*
>
> *(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or*

(B) in any other case, on or before the last day of the previous year;

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted

(A) during the last month of the previous year but paid after the said due date; or

(B) during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

19. The above amendments made by the Finance Act, 2008 thus provided that no disallowance under Section 40 (a) (ia) of the IT Act shall be made in respect of the expenditure incurred in the month of March if the tax deducted at source on such expenditure has been paid before the due date of filing of the return. It is important to mention here that the amendment was given retrospective operation from the date of 01.04.2005 i.e., from the very date of substitution of the provision.

20. Therefore, the assesses were, after the said amendment in 2008, classified in two categories namely; one; those who have deducted that tax during the last month of the previous year and two; those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in case of assessees falling under the first category, no disallowance under Section 40(a) (ia) of the IT Act shall be made if the tax deducted by them during the last month of the previous year has been paid on or before the last day of filing of return in accordance with the provisions of Section 13 9(1) of the IT Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under Section 40(a)(ia) of IT Act where the tax was deducted before the last month of the previous year

and the same was credited to the government before the expiry of the previous year. The net effect is that the assessee could not claim deduction for the TDS amount in the previous year in which the tax was deducted and the benefit of such deductions can be claimed in the next year only.

21. The amendment though has addressed the concerns of the assesses falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the tax at source and by paying the same to the credit of the Government before the due date of filing of their returns under Section 139(1) of the IT Act. The disability to claim deductions on account of such lately credited sum of TDS in assessment of the previous year in which it was deducted, was detrimental to the small traders who may not be in a position to bear the burden of such disallowance in the present Assessment Year.

22. In order to remedy this position and to remove hardships which were being caused to the assessees belonging to such second category, amendments have been made in the provisions of Section 40(a) (ia) by the Finance Act, 2010.

23. Section 40(a)(ia), as amended by Finance Act, 2010, with effect from 01.04.2010 and now reads as under:

"4(a)(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or; after deduction, has not paid on or before the due date specified in

sub-section (1) of Section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deducted in computing the income of the previous year in which such tax has been paid."

24. Thus, the Finance Act, 2010 further relaxed the rigors of Section 40(a)(ia) of the IT Act to provide that all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made. However, the memorandum explaining the provisions of the Finance Bill, 2010 expressly mentioned as follows: "This amendment is proposed to take effect retrospectively from 1st April, 2010 and will, accordingly, apply in relation to the Assessment Year 2010-11 and subsequent years."

25. The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied retrospectively i.e., from the date of insertion of the provisions of Section 40(a)(ia) or to be applicable from the date of enforcement.

26. TDS results in collection of tax and the deductor discharges dual responsibility of collection of tax and its deposition to the government. Strict compliance of Section 40(a)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature, the purpose of which is to ensure tax compliance and not to punish the tax payer, should not be allowed to be converted into an iron rod provision which metes out stem punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislature

can and do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subject or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. As discussed above, the amendments made in 2008 and 2010 were steps in the said direction only. Legislative purpose and the object of the said amendments were to ensure payment and deposit of TDS with the Government.

27. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the Section, is required to be read into the Section to give the Section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the Section as a whole.

28. The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bona fide tax payer. The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective

operation i.e., from the date of substitution of the provision. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Such could not be the intention of the legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature required to be given retrospective operation i.e., from the date of insertion of the said provision.

29. Further, in Allied Motors (P) Limited (supra) , this Court while dealing with a similar question with regard to the retrospective effect of the amendment made in section 43-B of the Income Tax Act,1961 has held that the new proviso to Section 43B should be given retrospective effect from the inception on the ground that the proviso was added to remedy unintended consequences and supply an obvious omission. The proviso ensured reasonable interpretation and retrospective effect would serve the object behind the enactment. The aforesaid view has consistently been followed by this Court in the following cases, viz., Whirlpool of India Ltd., v. CIT, New Delhi [2000] 245 ITR 3, CIT v. Amrit Banaspati [2002] 255 ITR 117 and CIT v. Alom Enterprises Ltd. [2009] 319 ITR 306.

30. Hence, in light of the forgoing discussion and the binding effect of the judgment given in Allied Moters (supra), we are of the view that the amended provision of See 40(a)(ia) of the IT Act should be interpreted liberally and equitable and applies retrospectively from the date when Section 40(a)(ia) was inserted i.e., with effect from the Assessment Year 2005-2006 so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates. As the developments with regard to the Section recorded above shows that the amendment was curative in nature, it should be given retrospective operation as if the amended provision existed even at the time of its insertion.

> *Since the assessee has filed its returns on 01.08.2005 i.e., in accordance with the due date under the provisions of Section 139 IT Act, hence, is allowed to claim the benefit of the amendment made by Finance Act, 2010 to the provisions of Section 40(a)(ia) of the IT Act.*
>
> *31. In light of the forgoing discussion, we are of the view that judgment of the High Court does not call for any interference and, hence, the appeals are accordingly dismissed. In view of the above, all the connecting appeals, interlocutory applications, if any, transferred cases as well as diary numbers are disposed off accordingly. Parties to bear cost on their own."*

13. However, in the present, the payment of tax by the recipient company before the due date of filing of the return of income has not been verified by the lower authorities, hence, it is appropriate to remit the issue to the file of the Assessing Officer for the purpose of verification of applicability of first proviso to section 40(a)(ia) of the I.T.Act, as it was considered retrospective effect by the Hon'ble Supreme Court in the case of *Calcutta Export Company (supra)*. Accordingly, this issue is remitted to the file of A.O. for fresh consideration.

14. As regards ground No.6 and its sub-grounds, the grievance of the assessee is that the Transfer Pricing Officer has no jurisdiction to question the reasonability of payment of management service fees. For this purpose, he relied on the order of the Chennai Bench of the Tribunal in the case of *Siemens Gamesa Renewable Power (P.) Ltd. v. DCIT [(2018) 92*

taxmann.com 330 (Chennai – Trib.)], wherein it was held by the Tribunal as under:-

> *"20.5 We have heard both the parties and perused the material on record. In our considered opinion, transaction to transaction approach is not required if the Profit Level Indicator (PLI) of assessee at entity segment level is at arm's length where the assessee company has adopted TNMM for the purposes of benchmarking, its adoption of CUP solely for the purposes of evaluating technical assistance fee would lead to chaos and be detrimental to the interests of both revenue and the assessee. In other words, once the arm's length criterion is tested at entity level, the learned TPO has no jurisdiction to examine the need, benefit etc. in relation to each transaction. This view was supported by the judgment of Delhi High Court in the case of Magnetic Marelli Powertrain India (P.) Ltd. (supra) wherein held that:-*
>
> *"17. As far as the second question is concerned, the TPO accepted TNMM applied by the assessee as the most appropriate method in respect of all the international transactions including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee of Rs. 38,58,80,000 only for which Comparable Uncontrolled Price ("CUP") method was sought to be applied. Here, this court concurs with the assessee that having accepted the TNMM as the most appropriate, it was not open to the TPO to subject only one element i.e payment of technical assistance fee, to an entirely different (CUP) method. The adoption of a method as the most appropriate one assures the applicability of one standard or criteria to judge an international transaction by each method is a package in itself, as it were, containing the necessary elements that are to be used as filters to*

judge the soundness of the international transaction in an ALP fixing exercise. If this were to be disturbed, the end-result would be distorted and within one ALP determination for a year, two or even five methods can be adopted. This would spell chaos and be detrimental to the interests of both the assessee and the revenue. The second question is, therefore, answered in favour of the assessee, the TNMM had to be applied by the TPO/ AO in respect of the technical fee payment too."

20.5.1 In the case of Air Liquide Engg. India (P.) Ltd. (supra) held that:-

"33. The TPO has made the disallowance in question mainly on the basis of the benefit test. In this regard, it is seen that the payment of royalty cannot be examined divorced from the production and sales. Royalty is inextricably linked with these activities. In the absence of production and sale of products, there would be no question arising regarding payment of any royalty. Rule 10A(d) of the ITAT Rules defines 'transaction' as a number of closely linked transactions. Royalty, then, is a transaction closely linked with production and sales. It cannot be segregated from these activities of an enterprise, being embedded therein. That being so, royalty cannot be considered and examined in isolation on a stand-alone basis. Royalty is to be calculated on a specified agreed basis, on determining the net sales which, in the present case, are required to be determined after excluding the amounts of standard bought out components, etc., since such net sales do not stand recorded by the assessee in its books of account. Therefore, it is our considered opinion that the assessee was correct in employing an overall TNMM for examining the royalty. The TPO worked out the difference in the PU of the outside party (the assessee) at 4.09% and the comparables at 7.05%. This has not been shown to fall outside the permissible range.

34. The decision of the Tribunal in 'Ekla Appliances', 2012- TH-OI-HC Del-TP, has been sought to be distinguished by the TPO, observing that the facts in that case are not in pari materia with those of the assessee's case. However, therein also, the benefit test had been applied by the TPO, as in the present case. The matter was carried in appeal before the Hon'ble High Court. The Hon'ble Delhi High Court has held that the so-called benefit test cannot be applied to determine the ALP of royalty payment at nil and that the TPO could apply only one of the methods prescribed under the law. A similar view has been taken in 'Sona Okegawa Precision Forgings Ltd.' (supra) and in 'KHS Machinery Pvt. Ltd. v. ITO 53 SOT 100 (Ahm) (URO).

35. It is, thus, seen that the royalty payment @ 3% by the assessee is at arm's length. The Technical Collaboration Agreement stands approved by the Government of India. The royalty payment has been accepted by the department as having been made by the assessee wholly and exclusively for its business purposes. For Assessment Years 2004-05 and 2005-06, such payment of royalty has been allowed by the CIT (A). As per the FEMA Regulations, royalty can be paid on net sales @ 5% on domestic sales and @ 8% on export sales. The royalty payment by the assessee falls within these limits. It also falls within the limits of payment of royalty in the auto mobile sector, as per the market trend. This payment of royalty is at the same percentage as that paid by other auto ancillaries in the automotive industry. Then in 'Ekla Appliances' (supra) and in 'Ericsson India Pvt. Ltd. v. DeIT 2012-TII-48-ITAT-Qel-TP, it has been held that royalty payment cannot be disallowed on the basis of the so-called benefit test and the domain of the TPO is only to examine as to whether the payment based on the agreement adheres to the arm's length principle or not. That being so, the action of the TPO in the present case, to

make the disallowance mainly on the ground of the benefit test, is unsustainable in law.

36. Keeping in view all the above factors, the disallowance made on account of royalty is found to be totally uncalled for and it is deleted as such.

21. Hence, following the ratio of the Hon'ble Delhi High Court in CIT v. EKL Appliances (supra) and various other decisions as noted above and given the facts and circumstances of the instant case, we hold that the addition made by the TPO and upheld by the DRP is unsustainable and is to be deleted. Hence Ground No.2 is held in favour of the assessee. Hence, the appeal of the Revenue ITA. No. 1040/Hyd/2011 is dismissed and Assessee's appeal in ITA. No. 1159/Hyd/2011 is allowed."

20.5.2 In the case of Sakata Inx (India) Ltd. (supra) wherein held that:-

"2.9 We have heard the rival contentions and perused the material available on record. In our considered view, there is no infirmity in the order of ld. CIT(A) inasmuch as:

(i) ld. DR could not justify the application of CUP method to Arm's Length working.

(ii) The products manufactured by the appellant were developed from technology support provided by the AE it would not have been possible so without the continuous AE support. The rights of access to the ongoing technical support and development of new products received by the appellant were clearly provided in the agreements entered into with the AE.

(iii) The cost benefit test as worked out by the TPO was not based on proper appreciation of the facts and thus CUP method applied by the AO/TPO was not justifiable.

(iv) The judicial citations relied on by ld. CIT(A) as

well as further judgments relied on by the assessee including Hon'ble High Court in the case of Delhi EKL appliance Ltd. (supra) support the view taken by ld. CIT(A).

In view of the foregoing we uphold the order of the CIT(Appeals) and dismiss the revenue's appeal."

20.6 In our considered opinion, ALP of management service cannot be said to be Nil in the absence of a valid comparable. Since no effort had been made by TPO to determine market value of services received by assessee, adjustment made by TPO as a disallowance of expense could not be upheld. In other words, the TPO cannot simply arrive at a conclusion that quality and volume of services received by the Appellant were not commensurate with payment made by the Appellant. This view is fortified by the order of Tribunal in the case of Merck Ltd. (supra) - upheld by Bombay High Court [ITA 272 of 2014].

24.7 Such argument in our view is not convincing. The argument would have been valid if fees was fixed in respect of each service, which was compulsorily required to be provided to the assessee, but it is not so in the present case. The agreement listed certain services on which the assessee requires guidance/assistance from time to time. The assessee was thus entitled to any of the services as and when required. Therefore, applying CUP method to the service not availed by the assessee during the year is not justified. It would have been appropriate if the AO had applied CUP method to the payment made during the year by the assessee for the three services and compared with similar payment for such services by an independent party. No efforts have been made by TPO/ AO to determine the market value of services received by the assessee during the year relating to SAP implementation and quality control to show that the assessee had paid more compared to any independent party for the same services. The assessee had submitted that in case the assessee

had paid to the AE at man hour rate for the technical services provided during the year in relation to SAP implementation, the fees payable would have been significantly higher. There is nothing produced before us to controvert the said claim. The assessee has applied TNMM which shows that the margin shown by the assessee was higher than the comparable companies. The case of the assessee is also supported by the decision of Tribunal in case of Me Can Erricson India Pvt. Ltd. (supra) in which the decision of TPO to take the value of certain services at nil has not been upheld. Considering the entirety of facts and circumstances, the adjustment made by TPO which is nothing but disallowance of expenses cannot be upheld. We, therefore, set aside the order of CIT (A) on this point and delete the addition made.

20.7 Further, this view was supported by the decision of Co-ordinate Bench, Chennai in the case of Flakt India Ltd. (supra) vide order dated 9th June, 2016 for assessment year 2009-10 and in the case of Da Business Process Services (P.) Ltd. v. Dy. CITITAT in ITA No. 2166 of2011.

20.8 In our considered opinion, Jurisdiction of the TPO is to determine the commercial expediency and necessity in the hands of the assessee. The learned TPO has remarked that the Assessee has not substantiated the necessity to incur such expenditure. In this regard, it is pertinent to note that the business transactions of the Assessees taken place in the ordinary course, which cannot be questioned by the TPO. Further, the learned TPO cannot conclude based on mere assumptions without examining the commercial expediency of the assessee. This view is fortified by the judgments/order of the various courts as below:-

(i) Hive Communication (P.) Ltd. (supra)
(ii) EKL Appliances Ltd. (supra)
(iii) Computer Graphics Ltd. (supra)

20.9 In our considered opinion, benefit test is not a precondition for justifying arm's length price. Under Rule 10B of the Income-tax Rules, 1962 which deals with 'Determination of the arm's length price'. there is no mention of the 'benefit test' being adopted for the purpose of determining such arm's length price. It is not a precondition to conclude that the payment is within arm's length. In other words, the TPO cannot apply the benefit test for determining ALP as he cannot assess the benefit derived by assessee in a particular transaction. This view is fortified by the following judgments:-

(i) R.A.K Ceramics India (P.) Ltd. (supra) which was upheld by Andhra Pradesh High Court [IT Appeal No. 595 of 2016]-

'10. We are really surprised to see the reasoning of TPO in fixing the ALP of royalty payment at 2%. It is manifest from TPO's order he has rejected assessee's TP analysis under TNMM. Further, in para 6.4 of his order TPO has mentioned of undertaking an independent analysis under TNMM for selecting comparables and determining ALP. However, even after repeatedly scanning through his order, we failed to find any such analysis being done by him. Similarly, though in para 5.1.1, Id. DRP has observed that TPO has benchmarked intangible transactions by using CUP, but, the order passed by TPO does not support such conclusion. It is an accepted principle of law that TPO has to determine the ALP by adopting anyone of the methods prescribed u/s 92C of the Act. Mode and manner of computation of ALP under different methods have been laid down in rule 10B. Even, assuming that TPO has followed CUP -method for determining ALP of royalty payment, as held by Id. DRP, it needs to be examined if it is strictly in compliance with statutory provisions. Rule 1OB(1)(a) lays down the procedure for determining ALP under CUP method. As per the said provision. TPO at first has to find out the price charged or paid for property transferred

or services provided in a comparable uncontrolled transaction, or a number of such transactions. Thereafter, making necessary adjustments to such price, on account of differences between the international transaction and comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market, TPO will determine the ALP. It is patent and obvious from TPO's order, the determination of ALP at 2% is not at all in conformity with Rule 1OB(1)(a). The TPO has not brought even a single comparable to justify arm's length percentage of royalty at 2% either under CUP or TNMM method. On the contrary, observations made by TPO gives ample scope to conclude that adoption of royalty at 2% is neither on the basis of any approved method nor any reasonable basis. Rather it is on ad hoc or estimate basis, hence, not in accordance with statutory provisions. The approach of TPO in estimating royalty at 2% by applying the benefit test, in our view, is not only in complete violation of TP provisions but against the settled principles of law. ITAT, Mumbai Bench in case of Castrol India Ltd. v. Additional CIT, ITA No. 1292/Mum/2007 dated 20/12/2013 while examining identical issue of determination of ALP at 'Nil' by applying the benefit test held as under:

"11. We have considered the rival submissions and perused the relevant material on record. It is observed that the impugned royalty was paid by the assessee company to its AE namely Castro I Ltd. UK at 3.5% of the net ex-factory sale price of products manufactured and sold in India as per the technical collaboration agreement. This international transaction involving payment of royalty to its AE was benchmarked by the assessee R.A.K Ceramics India P. Ltd. by following CUP method in its TP study report and since average rate of royalty of three comparables selected by it was higher at 4.67% than the rate at which royalty was paid by

the assessee to its AE, the transaction involving payment of royalty was claimed to be at arm's length. A perusal of the order passed by the TPO u/s 92CA(3) of the Act shows that neither these com parables selected by the assessee in its TP study report were rejected by her nor any new com parables were selected by her by making a fresh search in order to show that the payment of royalty by the assessee to its AE was not at arm's length. She simply relied on the approval of SIA to hold that any royalty paid by the assessee on exports and other income was not allowable and disallowed the royalty payment to the extent of Rs. 40,51,486/- treating the same as the royalty paid by the assessee in respect of exports sale and other income. We are unable to agree with this strange method followed by the TPO to make a TP adjustment in respect of royalty payment which is not sustainable either in law or on the facts of the case. She has neither rejected the method followed by the assessee to benchmark the transaction in respect of payment of royalty nor has been adopted any recognized method to determine the ALP of the said transactions. The approval of SIA adopted by the TPO as basis to make TP adjustment in respect of royalty payment was untenable and even going by the said basis wrongly adopted by the TPO, no TP adjustment in respect of royalty payment was liable to be made. As per the said basis, the net sales of the assessee after excluding export sale and other income were to the extent of Rs. 1118.70 crores and the royalty paid thereon at Rs. 24.38 crores being less than the rate of 3.5% approved by SIA, there was no case of any excess payment made of royalty by assessee than approved by SIA to justify its disallowance by way of TP adjustment. In our opinion, the ld. CIT (A) could not appreciate these infirmities in the order of the TPO despite the same were specifically brought to his notice on behalf of the assessee and confirmed the TP adjustment made by the TPO in respect of royalty payment which was totally

unjustified. We therefore, delete the addition made by the AOITPO and confirmed by the ld. CIT on account of TP adjustment in respect of royalty payment and allow ground NO.3 of the assessee's appeal.'"

(ii) TNS India (P.) Ltd. (supra)

'16. We have considered the issue. We are unable to accept the contention of the Assessing Officer/TPO with reference to the services provided by AEs. Assessee has provided the agreements which were entered not during the year but in earlier year and has been paying the service fee termed as management fee accordingly. This claim is not arising for the first time in this year but, is also there in earlier years and later years. Assessee is part of a worldwide group and they have placed some corporate centres for guidance of various units run by them across the globe. It was submitted that the costs being incurred by the centres are being shared by various units and assessee's share in this year has come to 5% of the receipts payable to NFO Worldwide Inc USA and at 4% to NFO Asia Pacific Ltd. Hongkong on the net revenues. These amounts are within the norms prescribed for payment of fees to various group companies of similar nature. There is no dispute with reference to services being provided by the group companies to assessee and assessee also paid various other amounts including royalty. As submitted by assessee, even though some correspondence was placed on record with reference to the advise given to assessee, providing a concrete evidence with reference to the services in the nature of specific activities is difficult, like proving the role of an anesthesian in an operation conducted by a surgeon. There may be an evidence of operation being performed by the Doctor in the form of sutures or scars etc., which can be proved later but the role of an anesthesian before operation and after gaining consciousness is difficult to prove as that is not tangible in nature.

Likewise, for the advise given by various group centres to the group companies in day-to-day manner is difficult to place on record by way of concrete evidence but the way business is conducted, one can perceive the same. Assessee has given a detailed write-up as well as the services provided and benefit obtained which were not contradicted. The Assessing Officer did not believe the same in the absence of concrete evidence. Unless the Assessing Officer steps into assessee's business premises and observes the role of these companies/assessee's business transactions, it will be difficult to place on record the sort of advice given in day-to-day operations. What sort of evidence satisfies the AO also not specified. Assessee has already placed lot of evidence in support of claims. Therefore, on that court, we are not in agreement with the Assessing Officer and TPO that services were not rendered by the group companies to assessee.

16.1. Even otherwise, the role of transfer pricing Officer is to determine the arm's length price of a transaction. He cannot reject the entire payment under the provisions of sec. 92CA as held by the Hon'ble Delhi High Court in the case of EKL Appliances Ltd. (supra) wherein the Hon'ble Delhi High Court, on I similar facts where the TPC also determined the ALP at Nil, has held as under:

"21. The position emerging from the above decisions is that it is not necessary for assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for assessee to show that any ITA Nos. 944/H/07, 194 & 74/H/OB, 793/H/09, 654, 655/H/10 & 7/H/2012 TNS India Pvt. Ltd. expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have

been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia Finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(l)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for 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 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 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 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 assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorized.

23. Apart from the legal position stated above, even on merits the disallowance of the entire brand fee/royalty payment was not warranted. Assessee has furnished copious material and valid reasons as to why it was suffering losses continuously and these have been referred to by us earlier. Full justification supported by facts and figures have been given to demonstrate that the increase in the employees cost, finance charges, administrative expenses, depreciation cost and capacity increase have contributed to the continuous losses. The comparative position over a period of 5 years from 1998 to 2003 with relevant figures have been given before the CIT (Appeals) and they are referred to in a tabular form in his order in paragraph 5.5.1. In fact there are four tabular statements furnished by assessee before the CIT (Appeals) in support of the reasons for the continuous losses. There is no material brought by the revenue either before the CIT (Appeals) or before the Tribunal or even before us to show that these are incorrect figures or that even on merits the reasons for the losses are not genuine.

24. We are, therefore, unable to hold that the Tribunal committed any error in confirming the order of the CIT (Appeals) for both the years deleting the disallowance of the brand fee royalty payment while determining the ALP. Accordingly, the substantial questions of law are answered in the affirmative and in favour of assessee and against the Revenue. The appeals are accordingly dismissed with no order as to costs"'.

15. On the other hand, the learned Departmental Representative relied on the order of the lower authorities.

16. We have heard the rival submissions and perused the material on record. It was categorically held by the Tribunal in

the case of *Siemens Aktiongesellschaft (supra)* that benefit test is not a precondition for justifying arm's length price. Under Rule 10B of the Income-tax Rules, 1962 which deals with 'Determination of the arm's length price'. there is no mention of the 'benefit test' being adopted for the purpose of determining such arm's length price. It is not a precondition to conclude that the payment is within arm's length. In other words, the TPO cannot apply the benefit test for determining ALP as he cannot assess the benefit derived by assessee in a particular transaction. Accordingly, ground No.6 raised by the assessee is allowed.

17. By way of ground No.7 and its sub-grounds, the grievance of the assessee is that the Management Service cannot be categorized as "Fees for included Services" and hence not taxable in India as per the Double Taxation Avoidance Agreement between India and United States of America.

18. After hearing both the parties, we are of the opinion that similar issue has been considered by the Tribunal in assessee's own case for assessment year 2007-2008 in ITA No.222/Coch/2013 dated 27.09.2013, wherein it was held as under:-

> *"16. We have considered the rival submissions on either side and also perused the material available on record. Admittedly, the assessee, a resident company, entered into management service agreement with a company, viz. US Technology Resources LLC, a company incorporated in USA and a tax resident in USA. As per this management service agreement, the USA company agreed to provide assistance, advice and support to assessee company in management decision making, sales*

and business development, financial decision making, legal matters and public relation activities, treasury service, risk management service and any other management support as may be mutually agreed between the parties. In pursuance of this agreement, the USA company provided its assistance, advice and support and the assessee company paid a sum of Rs.85,22,743 in consideration of the services rendered by the USA company. Thus, the question arises for consideration is whether the payment made by the assessee company to USA company for the services rendered would be taxed in India or not? If it is taxable in India the assessee has to necessarily deduct tax at source at the time of making payment as provided in section 195 of the Indian Income-tax Act. The contention of the assessee before this Tribunal is that the managerial consultancy service has been specifically omitted in clause 4 of Article 12 of DTAA. Therefore, the managerial service provided by the USA company to the assessee company is not taxable in India. It is also the contention of the assessee before this Tribunal that at the best, the payment made by the assessee company to USA company may be considered as a business profit under Article 7 of the DTAA between India and USA and in the absence of a permanent establishment in India for the USA company it cannot be taxable in India. Therefore, the assessee company is not liable to deduct tax at the time of payment as required under section 195 of the Act.

17. We have carefully gone through the provisions of section 9(1)(vii) of the Income-tax Act which defines " fees for technical services". For the purpose of convenience, the provisions of section 9(1)(vii) are reproduced alongwith Explanation 1:

9.(1) The following incomes shall be deemed to accrue or arise in India:-
(i) to (vi) xxxxxxxxxxxxxxxx
(vii) income by way of fees for technical services payable by-
(a)The Government; or
(b)A person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c)A person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government) [Explanation 1.- For the purposes of the

foregoing proviso, an agreement made on or after the 1s: day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]"

Explanation 2 to section 9(1)(vii) which was introduced by Finance Act, 1977 with effect from 01-04-1977 clearly says that fees for technical service means any consideration for rendering any managerial, technical or consultancy services.

18. We have also carefully gone through the provisions of DTAA between India and USA as notified by the Government of India in Notification No.GSR 990(E), dated 20-12-1990. Article 12 of DTAA between India and USA deals with royalties and fees for included service. Fee for included service is defined in clause 4 of Article 12 of DTAA. For the purpose of convenience, we are reproducing below clause 4 of Article 12 of the DTAA between India and USA:

"4. For the purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:
(a)Are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
(b)Make available technical knowledge, experience, skill, know-how, or processes, or consist of development and transfer of a technical plan or technical design."
19. As per the above definition in DTAA, fees for included services means payment of any kind to any person in consideration for rendering of any technical or consultancy services. As rightly submitted by the Ld.counsel for the assessee, the term "managerial service" as found in Explanation 2 to section 9(1)(vii) of the Indian Income-tax Act, 1961 is not found in clause 4 of Article 12 of the DTAA between India and USA. Taking advantage of the absence of these words "managerial services" in clause 4 of Article 12 of the DTAA between India and USA, the Id.counsel argued that clause 4 of Article 12 of the DTAA between India and USA is more beneficial to the assessee when compared to section 9(1)(vii) of the Indian Income-tax Act, 1961. Therefore, in view of section 90(2) of the Income-tax Act, 1961, the assessee is entitled to take the benefit out of the DTAA between India and USA. Therefore, the question now arises for consideration is - Which are the services included in clause 4 of Article 12 of the DTAA between India and USA?

20. The contention of the assessee is that fees for included services as provided in clause 4 of Article 12 includes only fees paid for technical

services which are made available to the assessee to avail technical knowledge, expertise, skill, know how or process, etc. We have carefully gone through the Memorandum of Understanding concerning the fees for included service in Article 12 of the DTAA between India and USA. For the purpose of convenience, we are reproducing the relevant portion of the Memorandum of Understanding said to be executed between India and USA on 15th May, 1989:

"Under paragraph 4, technical and consultancy services are considered included services only to the following extent: (1) as described in paragraph 4(a), if they are ancillary and subsidiary to the application or enjoyment of a right, property or information for which are royalty payment is made; or (2) as described in paragraph 4(b), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, under paragraph 4(b), consultancy services which are not of a technical nature cannot be included services."

21. From this Memorandum of Understanding, it is obvious that as provided in clause 4(b) of Article 12 of the DTAA between India and USA, if the technical or consultancy services made available are technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design are considered to be technical or consultancy services. It is also clarified that consultancy services not of technical nature cannot fall under "included services". In view of this Memorandrum of Understanding between two sovereign countries, the consultancy services which are technical in nature alone are to be included as technical and consultancy services for the purpose of fees for included services as per sub clause 4(b) of Article 12 of DTAA between India and USA.

22. With this background, let us now examine whether the service provided by USA company to the assessee company would be of service of technical nature as provided in clause 4(b) of Article 12 of DTAA between India and USA. Copy of the so-called management service agreement between the assessee and the USA company is not filed by the assessee before this Tribunal. Therefore, this Tribunal has to examine the services from the order of the CIT(A) where the relevant part of the management service agreement is extracted at paragraph 14 on page 22 of his order:

"WHEREAS, USTRPL (i.e. appellant) is in the business of developing world class information technology turnkey software solutions and innovative application development services.

WHEREAS USTR (i.e. service provider) provides customer specified software development services and IT consulting services .

WHEREAS, USTRPL and USTR now desire to enter into an agreement whereby USTR would provide following management services to USTRPL:.

- Assistance, advice and support in the field of management decision making. These services will be rendered by USTRs CEO and his support personnel.

- Assistance, advice and support in the field of financial decision making. These services will be rendered by USTR's CFO and USTR's Group controller including their support personnel.

- Assistance, advice and support in legal matters and public relation activities. These services will be rendered by USTR's legal advisor and his support personnel. - Assistance, advice and support in the field of treasury services. These services will be rendered by different treasury managers of USTR.

- Assistance, advice and support in the field of risk management services. These services will be rendered by different risk managers of USTR.

- And any other management support as may be mutually agreed between the parties.

NOW THEREFORE in consideration of the mutual promises and covenants hereinafter contained, the parties hereto agree as follows:

I. GENERAL DESCRIPTION OF OBJECTIVES AND SCOPE OF DELIVERY

1. During the term of this agreement the role of each company in this partnership is as follows:

a) USTRPL employs USTR to provide management services. The knowledge and experience of USTR will be used to support USTRPL in managing its business and in training its employees.

b) USTR is responsible for recruiting, training and deploying adequate resources to provide the services.

II. ROLE OF USTRPL

1. The USTRPL designated Person will operate as the main interface between USTR and USTRPL. He will ensure that USTRPL's personnel

co- ordinates and interfaces with USTR's personnel in a manner satisfactory to USTR.

2. Depending upon the requirements, USTRPL will send its personnel from time to time to USTR office in US or 23 ITA No.222/Coch/2013 Overseas to study and analyse the requirements. USTRPL will bear all the expenses including travel, lodging, training expenses associated either directly or indirectly with the said assignments."

23. It is not in dispute that the assessee has received the above services from the USA company in terms of management service agreement between the assessee and the USA company. Therefore, it is obvious that the USA company provides highly technical services which are used by the assessee for taking managerial decision, financial decision, risk management decision, etc.

24. The next question arises for consideration is whether the above services could be considered as "technical and consultancy services" as provided in clause 4 of Article 12 of DTAA? As already discussed, only the services which are technical in nature, alone could be considered for included services. Therefore, This Tribunal has to examine whether the services rendered by the USA company are in the nature of technical services. Admittedly, the services rendered by the USA company are made use by the assessee company in management decision making, sales and business development, financial decision making, legal matters and public relations activity, treasury service, risk management service, etc.

25. Let us also examine whether the services provided by the USA company are technical in nature or not? Around 2500 years ago, the Tamil poet Thiruvalluvar in 'Thirukkural' under chapter XLVII under the heading "Action after Deliberations" has elaborated the points which are required for human relations, management, science and communication. It may be relevant to consider one of the verses # 461 the translated version of which reads as follows:

"Analyse the cost involved, yield and profits achievable before acting on a proposition."

Therefore, it could be seen that the technology that is involved in analyzing a business proposition was well developed even before 2500 years ago. The term "management" has been explained by various authors at various point of time. In fact, Mr. James A.F. Stoner explains "management" as follows:

"Management is the process of planning, organizing, leading and controlling the effects of organization members and of using all other organizational resources to achieve the stated organizational goals."

Some of the other authors described management as - latest of the arts and youngest of sciences. The systematic body of knowledge is the phenomenon of present century in management. So the recent trend in management is to adopt systematic body of knowledge in the management process. As per the management service agreement, the managerial advice rendered by the USA company was used in the decision making process of management, financial and risk management etc. Science is fact based, critically tested, systematized body of knowledge pertaining to specific field. The knowledge is accumulated through study, experience and experimentation. The scientific knowledge produces impersonal results and it can be empirically tested and universally applied. Therefore, the knowledge which was accumulated through study, experience and experimentation with regard to management, finance, risk, etc. of a particular business is nothing but a technical knowledge. In the era of technology transformation, the information / experience gathered by US resident company relating to financial risk management of business is technical knowledge.

26. We now move on to see what is meant by 'decision making'. The term 'decision making' is not defined either in the Income-tax Act *or in the DTAA. Therefore, one has to go by the meaning understood in the management. Shri Harold Koontez and Keinz Weihrach, experts in the management define 'decision making' as follows:*

"Decision making is a selection of a course of action from amongst the alternatives, it is the core planning."

Another expert by name, R Terry defines 'decision making' as follows:

"Decision making is a selection of an alternative form from two or more alternative to determine a course of action."

Yet another expert, Kenneth R Andrews defines decision making as follows:

"Decision making is a process involving information, choice of alternative options, implementation and evolution that is directed towards achievement of certain selected goals."

27. From the above definitions given by various experts, we may come to a simple and comprehensive meaning as follows:

- Decision making is an act of selecting the suitable solution to the problems from various available alternative solutions to guide actions towards achievement of desired objectives.

28. Now the assessee here is admittedly making use of the advice, input, experience, experimentation and assistance rendered by the USA company in the decision making process of management, financial and risk management, etc. It is nobody's case that the USA company is taking any decision on behalf of the assessee. On the basis of the input, advice, assistance and service provided by the USA company, the management decision is taken by the assessee company in India by selecting suitable solution after considering all the alternatives available. It is also to be remembered that the USA company is giving training to the assessee's employees in making use of the inputs, experience, experimentation, assistance and advice rendered by them for taking a better and possible decision in order to achieve the desired objectives / goal. Therefore, in the context of professional management and decision making process, the advice and service rendered by the USA company which was made use by the assessee in managerial decision making process is in the nature of technical services which facilitate the assessee to take correct and suitable decision towards achievement of the desired objects and business goal. Therefore, it may not be correct to say that what was received by the assessee is only a managerial advice and not technical advice. The technological input acquired by the US company through experience and experiment was tested at various stages and process and further it was made available to the assessee so as to enable the assessee to apply / use the same in its decision making process.

29. Apart from that financial and risk decision making process is a highly complicated and technical one. Unless the assessee gets a technical input and advice from financial and risk management experts it may be difficult to select a right process for the growth of the company. It is not the case of the assessee that in a given set of facts / problem, the USA company gave its solution or advice. The solution or decision is admittedly taken by the assessee company on the basis of the advice, service rendered by the USA company. Therefore, it is obvious that the technical knowledge, experience, skill possessed by the USA company with regard to financial and risk management was made available in the form of advice or service which was made use by the assessee company in the decision making process not only in management but also in financial matters. Another aspect is risk management service. Risk management service is a highly complicated one in the financial sector. Unless, the technical expertise and knowledge gained by the USA company is made available to the assessee company, they may not be able to analyse the situation to avoid risk in the business. It is also necessary to note that apart from providing the input, service and advice, the USA company is also providing training to the employees of the assessee company. Therefore, this Tribunal is of the considered opinion that the service of technical input, advice, expertise, etc. rendered by the USA company

are technical in nature as provided in clause 4(b) of Article 12 of the DTAA.

30. We have carefully gone through the judgment of the Andhra Pradesh High Court in the case of GVK Industries Ltd (supra). In the case before the Andhra Pradesh High Court, the assessee company constructed and erected power generating station designed to operate using industrial gas as fuel near Rajamundri. The assessee company intended to utilize the expert service of qualified and experienced professional who would prepare a scheme for raising the finances and tie up the required loan. A non resident company offered its services as a financial advisor to the petitioner company's project.. The services offered by the non resident company includes financial structure and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making an assessment of export credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the petitioner-company in loan negotiations and documentation with lenders and structuring, negotiating and closing the financing for the project in a co-ordinated and expeditious manner. For its services the assessee company paid 0.75% of the total debt financing as "success fee". On the advice of the non-resident company at Zurich, the assessee approached the Indian finance institution for loan. The assessee also approached the International Finance Corporation, USA for a part of its foreign currency loan requirement. After successful rendering of service, the non resident Zurich company sent an invoice for payment of "success fee" to the extent of US$ 17,15,476.16 (Rs.5.4 crores). The assessee company approached the income-tax authorities in India for issuing a no objection certificate to remit the said amount claiming that the non resident company had no permanent establishment in India and all services were rendered from outside India. The Income- tax Officer refused to issue the certificate. On a writ petition before the High Court it was found that the scope of service / work undertaken by the non resident company was merely to draw up a scheme, advise on the terms and methods of negotiation and for documentation with the lender, evaluate the pros and cons of various lending alternatives, both for local and the foreign borrowings, prepare a preliminary information memorandum to be used as the basis for placing the foreign and local debt, and that the responsibility of entering into correspondence as per the advice of the non resident company and pursuing the matter was that of the assessee company itself, and not that of the non resident company. Therefore, the office of the assessee company could not be treated as the place of business of the non-resident company. In those facts and circumstances, the Andhra Pradesh High Court found that the business connection between the assessee company and non resident company had not been established. However, it was found that the "success fee" would fall within the definition of 9(1)(vii)(b) of the

Act. The Andhra Pradesh High Court found that advice given to procure loan to strengthen finances would be as much a technical or consultancy service, as it would be with regard to management, generation of power or plant and machinery. The "success fee" was chargeable under the provisions of the Income-tax Act, and therefore, the assessee was not entitled to no objection certificate.

31. During the course of hearing, the ld.counsel for the assessee was called upon to comment on the applicability of this judgment of the Andhra Pradesh High Court. The ld.counsel submitted that the Andhra Pradesh High Court had no occasion to consider the DTAA between India and USA. Therefore, the judgment of the Andhra Pradesh High Court is not applicable. No doubt, DTAA agreement between India and USA was not considered by the Andhra Pradesh High Court, but the ratio laid down by the Andhra Pradesh High Court clearly shows that advice given to procure loan to strengthen the finance would be managerial or technical or consultancy services for generation of power or plant and machinery. This finding of the Andhra Pradesh High Court is squarely applicable in respect of the service received by the assessee from USA company. Therefore, this Tribunal is of the considered opinion that advice / service said to be received by the assessee company from USA company is in the nature of technical or consultancy services within the meaning of clause

(iv)(b) of Article 12 of DTAA.

32. We have also carefully gone through the judgment of the Karnataka High Court in the case of De Beers India Minerals Pvt Ltd (supra). In the case before the Karnataka High Court, the assessee engaged in the business of prospecting and mining for diamonds and other minerals. The assessee entered into an agreement with Netherland company to engage their services for conducting airborne survey for high quality, high resolution, geophysical data suitable for selecting kimberlite targets. For the technical services rendered by them the assessee had paid consideration as per the agreement. The assessing officer found that the payment made to Netherlands company was for technical services provided by them. Therefore, the assessee has to deduct tax on payments made to Netherlands company. However, the Commissioner (Appeals) found that the payment made by the assessee to the Netherlands company was not covered by Article 12(5) of the DTAA between India and 33 ITA No.222/Coch/2013 Netherlands. He also found that the Netherlands company has not imported any technology to the assessee and they have just used the technology and have gone back with the same. The CIT(A) further found that no technology has been made available to the assessee by the Netherlands company, therefore, the consideration paid does not fall within the definition of Article 12(5) between India and Netherlands. On further appeal by

the revenue before the Tribunal it was held that the payment in question for services rendered would not fall within the definition of "fee for technical services" under Article 12(5)of the DTAA between India and Netherlands. The Tribunal found that Netherlands company has surveyed, collected and processed the data on behalf of the assessee. There is no doubt that Netherlands company performed the service using the technical knowledge and expertise, but such technical expertise, skill and knowledge has not been made available to the assessee. On those facts, the Karnataka High Court found that the assessee was not being possessed with technical know how to conduct the prospecting operation. The maps and photographs which were made available to the assessee cannot be considered as technology made available. Therefore, the question of Netherlands company transferring any technical plan or technical design does not arise in the facts of the case.

33. As observed by the Karnataka High Court, the Netherlands company surveyed the area, prepared plan and photographs which are made available to the assessee company locating the exact area for mining. In fact, the Netherlands company located the exact area where diamonds were available after analyzing the photograph and the assessee company has nothing to do except mining the earmarked area for excavating diamonds. In fact, the technology of locating the diamond by aerial survey was not given to the assessee company. Only, the result of the survey was furnished by the Netherland company. Therefore, it is not a case of making available any technical expertise. In fact, the decision was taken by the Netherlands company fixing the location for mining. In the case on our hand, the facts are entirely on different set of facts. The decision was not taken by the USA company. The USA company facilitated the assessee company for making decision in the managerial, financial and risk management system by providing their knowledge, expertise, experimentation to the assessee company. The entire experiment, knowledge, expertise was made available to the assessee and the assessee was facilitated to take a decision on the knowledge, expertise, experimentation which were made available by the USA company. Therefore, this Tribunal is of the considered opinion that the judgment of the Karnataka High Court in the case of De Beers India Minerals Ltd (supra) may not be applicable to the facts of this case.

34. We have also carefully gone through the decision of the Mumbai Bench of this Tribunal in the case of Raymond Ltd (supra). In the case before the Mumbai Bench of this Tribunal the assessee engaged in manufacturing suiting, engineers' steel files and rasps and cement in India. With a view to muster funds it proposed to issue two types of Global Depository Receipts (GDRs) in the international market. The assessee company engaged a UK company as lead managers to the

issue. The assessee paid necessary charges for the services rendered by the lead managers and the managers. However, no tax was deducted by the assessee company form the payment made to them. The assessing officer found that there was violation of the provisions of section 195(1) of the Act holding that the amounts paid to lead managers and managers were chargeable to tax in India as fees for technical services within the meaning of section 9(1)(vii) of the Act. The Appellate Commissioner also upheld the order of the assessing officer. On further appeal before the Mumbai Bench of this Tribunal, the Tribunal found that the services rendered by the lead managers and managers are managerial or consultancy services within the meaning of section 9(1)(vii) r.w.s. Explanation 2 of the Act and therefore the payment made to managers are income by way of fees for technical services deemed to accrue or arise in India. Referring to the DTAA between India and UK, the Tribunal found that no technical knowledge, experience, skill, know how or process, etc. was made available to the assessee company by the non resident managers to the Global Depository Receipts. However, considering the services rendered by the UK company, the Mumbai bench of this Tribunal found that the arrangement between the assessee and the managers of the Global Depository Receipt issued was for the purpose of engaging the service of the managers under the subscription agreement. The subscription agreement contained detailed clauses as to rights and liabilities of the assessee company and the managers. The Tribunal found that as per the agreement, the managers had undertaken to render service in connection with the issue of Global Depository Receipts for which they are entitled for remuneration. The Tribunal found that the services of the managers for issue of Global Depository Receipt were utilized outside India for the purpose of carrying on its business in India. Since the arrangement is only for marketing the Global Depository Receipt outside India, the Tribunal found that the commission paid to UK company cannot be considered to be fee for technical service, therefore, there is no obligation on the part of the assessee to deduct tax u/s 195(1) of the Act. Therefore, it is obvious that only for marketing the GDR outside India, the service of managers are enjoyed. The decision to issue GDR was taken by Indian company without any assistance from managers. In the case before us, it is a clear case of using the technology, expertise of the foreign company in India for taking managerial, financial decision and risk management analysis. The expertise, analysis, technical knowledge supplied by the foreign company remains with the assessee for ever and it could be even used in future for the business of the assessee in the process of management decision, financial decision making and risk management analysis. Therefore, the decision of the Mumbai Bench of this Tribunal in the case of Raymond Ltd (supra) is also not applicable to the facts of the case.

35. We have also carefully gone through the decision of the Pune Bench of this Tribunal in the case of Sandvik Australia Pty Ltd (supra). The assessee, an Australian company provided I.T. support service to Indian group companies in Asia Pacific Region in order to achieve the consolidated and standardized I.T. environment in Sandvik group. The Tribunal, after considering the agreement between the parties found that the agreement provided only for back up services, I.T. support services for solving I.T. related problems in Indian subsidiary. The agreement with Sandvik Asia Ltd nowhere suggested that the assessee has to make available required technical know how for solving the problem in the I.T. related problems. In the case before us, the USA company has to provide all expertise to the assesee company which would be utilized in the decision making process related to management, financial and risk management. Therefore, this decision of the Pune Bench of this Tribunal may also not be applicable to the facts of the present case. 36. We have also carefully gone through the decision of the Mumbai Bench of this Tribunal in the case of Wokhardt Ltd (supra). In the case before the Mumbai Bench of this Tribunal, the assessee company was incorporated in USA and as per the agreement, the said company sent one of its professionals to India for a period of two days to address conference on future strategy of the company. The assessee company paid US$ 80,000 for the services rendered by the USA company and no tax was deducted. The Tribunal found that the presentation made by the professional was essential in the nature of sharing management, experience and business strategy. Therefore, the Tribunal found that the services rendered by US company could not be termed as technical services in nature. In the case before us, it is not a case of sharing of experience and business strategy. It is a case of providing technical information for taking managerial and financial decision. The assessee also used that technology, information and expertise of USA company in management risk analysis. The information and expertise made available to the assessee company was very much available with them and it can be used in future whenever the occasion arises. Apart from the employees of the assessee company was also trained by USA company. Therefore, this Tribunal is of the considered opinion that the decision of the Mumbai Bench of this Tribunal in the case of Wokhardt Ltd (supra) also may not be of any help to the assessee.

37. We have also carefully gone through the decision of the Authority for Advance Ruling in Intertek Testing Services India (P) Ltd (supra). The Authority for Advance Ruling considered the DTAA between India and UK and found that rendering of service and making use of service go together. It was found that rendering of service and making use of the service are two sides of the same coin. After considering the word "which" the Authority for Advance Ruling found that rendering technical or consultancy service is followed by relative pronoun

"which" and it has the effect of qualifying the services. The service offered may be the product of intense technological effort and lot of technical knowledge and the experience of the service provider would have gone into it. The Authority for Advance Ruling found that the technical knowledge and the experience of the service provider should be imparted to and absorbed by the receiver, so that the receiver can deploy similar technology or techniques in future without depending on the provider. In this case also, the information, expertise and training provided by the USA company was absorbed by the assessee company in their decision making process and it was utilized for the purpose of business. The USA company made available all the technical data, information, expertise to the assessee company which was absorbed and made use of by the assessee company in their managerial and financial decision making process and other decision in the development of the business. Therefore, the expertise and technology which was made available by the USA company is technical service within the meaning of Article 12(4)(b) of the DTAA between India and USA. Hence, this ruling of the Authority for Advance Ruling may not of any assistance to the assessee.

37. In view of the above, we do not find any infirmity in the order of the lower authority. Accordingly the same is confirmed.

38. In the result, the appeal of the assessee is dismissed."

19. The same view was followed by the Tribunal for A.Y.s 2008-2009 to 2013-2014 in ITA Nos.99-104/Coch/2017 vide order dated 29.01.2018. Further, it was held in that order that even if the assessee has credited the amount to the recipient's account, the provisions of section 195(1) is applicable. In view of the above, we are inclined to uphold the orders of the lower authorities and sustain the addition on this count for non-deduction of TDS, in this year as well. This ground raised in the assessee is rejected.

20. Ground No.8 is in respect of levy of interest u/s 234B and Ground No.9 is in respect of levy of interest u/s 234D and 244A. These grounds are consequential in nature, to be

computed accordingly by the Assessing Officer. It is ordered accordingly.

21. In the result, the appeal for assessment year 2012-2013 is partly allowed for statistical purposes.

22. Grounds of appeal raised in ITA No.134/Coch/2016 are reproduced below:-

> *"The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:*
>
> *Ground No.1 - Erroneous Demand*
>
> *1.1 The learned ACIT and DRP erred in law and on facts in:*
>
> *(i) Determining the total income of USTRPL for the year at Rs. 40,56,92,844;*
>
> *(ii)Levying income tax of Rs. 15,77,16,247 (including interest under section 234B of the Income-tax Act, 1961 ("the Act") amounting to Rs. 4,66,02,188); and*
>
> *(iii) Raising a demand of Rs. 16,72,35,830 upon the Appellant.*
>
> *Ground No.2 - Assessment and Reference to Transfer Pricing Officer are bad in law*
>
> *2.1. The draft order issued by the ACIT is bad on facts and in law, and is in violation of the principles of natural justice that the AO did not issue to the Appellant, a show cause notice, as per proviso to section 92C(3) of the Act;*
>
> *2.2. The AO has erred in making a reference to the Deputy Commissioner of Income-tax, (Transfer Pricing 2(3)(2))('TPO'), inter alia, since the TPO has not recorded an opinion that any of the conditions in*

section 92C(3) of the Act, were satisfied in the instant case. Accordingly, the order passed by the TPO is without jurisdiction;

2.3. On the facts and in the circumstances of the case and in law, the learned TPO and accordingly, the learned AO erred in not demonstrating that the motive of the Annel1ant was to shift profits outside of India by manipulating the prices charged in its international transactions, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act;

2.4 The draft order passed by the AO is without jurisdiction, inter alia, insofar as it purports to give effect to an invalid order of the TPO.

Ground No.3 - Erroneous disallowance of reimbursement of salary expenses under section 40(a)(ia)
of the Act

3.1. On the facts and in the circumstances of the case, the ACIT and DRP have erred in disallowing under section 40(a)(ia), an amount of Rs. 26,41,76,508, being reimbursement, on a cost-to-cost basis, of salary and other allowances borne by US Technology International Pvt. Ltd. ("USTIPL") on behalf of the Appellant, in respect of employees deputed by USTIPL to the Appellant, pursuant to Deputation and Support Service Agreement.

3.2. The ACIT and DRP erred in not considering the settled position of law that the provisions of Chapter XVII-B of the Act does not apply to a payment on a cost-to-cost basis, without any element of profit therein. In other words, ACIT and DRP have erred in not considering the settled principle that tax is deductible at source only in respect of payment of income or any sum comprising an element of Income.

3.3. The ACIT and DRP have erred in law by alleging non- deduction of tax on reimbursement of

salaries paid to USTIPL by USTRPL, even after acknowledging the fact that tax has been deducted on such reimbursement of salaries by USTIPL. The ACIT and DRP have thus effectively proposed a double deduction of tax on the same amount.

Ground No. 4 Erroneous disallowance of reimbursement of rent paid under section 40(a)(ia) of the Act

4.1. On the facts and in the circumstances of the case, the ACIT and DRP have erred in disallowing under section 40(a)(ia), an amount of Rs. 90,50,903, being reimbursement, on a cost-to-cost basis, of rent borne by USTIPL on behalf of the Appellant, in respect of office premises shared by the Appellant with USTIPL;

4.2. The ACIT and DRP erred in not considering the settled position of law that the provisions of Chapter XVII-B of the Act does not apply to a payment on a cost-to-cost basis, without any element of profit therein. In other words, ACIT and DRP have erred in not considering the settled principle that tax is deductible at source only in respect of payment of income or any sum comprising of an element of income.

4.3. The ACIT and DRP have erred in invoking TDS provisions under the Act on such reimbursement of rent which has already been subject to TDS under section 1941 of the Act, resulting in double deduction of TDS on same amount of income.

Ground No. 5- Erroneous disallowance of reimbursements without considering that the law prescribed under second proviso to section 40(a)(ia) of the Act is curative in nature

5.1. The ACIT and DRP have erred in law on proposing disallowance of reimbursements of expenses paid to USTIPL under section 40(a)(ia) disregarding the substantive compliance of second proviso to section 40(a)(ia) of the Act by the payee

and USTRPL.

5.2. The ACIT and DRP have erred in law on proposing disallowance of reimbursements of expenses to USTIPL under section 40(a)(ia) by alleging procedural defect of non-filing of Form 26A under rule 31ACB. The ACIT and DRP have erred in construing such directory compliances as mandatory compliances.

5.3. The ACIT and DRP have erred in principle by disregarding the contention of the Assessee that the amendment to section 40(a)(ia) of the Act, by way of introduction of second proviso thereto, vide Finance Act 2012 is curative in nature intending to avoid undue hardships to assesses.

5.4 The ACIT and DRP failed to appreciate that the amendment to section 40(a)(ia) of the Act was made with a view to remove the unnecessary hardship caused to assessee by the earlier provision. It is settled legal position that when an amendment in law, inserts a remedy to make the section workable, then such amendment ought to be in operation from the inception of the section itself, so that reasonable interpretation can be given to the section as a whole.

Ground No.6 - Determination of arm's length price in relation to Management support services

6.1. The TPO/AO erred in rejecting the TP documentation maintained by the petitioner and erred in non-acceptance of the benchmarking followed by the Assessee in relation to the management service fees (aggregated with software development activity) paid by the appellant to its associated enterprise for the service rendered. The TPO/AO has erred in not considering the fact that even after paying the management service fee the Assessee still earns an overall NCP Margin of23.45%

which is higher than the margin earned by the comparable i.e. 13.60%.

6.2. The TPO/AO failed to understand that the payment of the management fee was in connection with the software development activity of the Company. Instead the TPO/AO has considered the payment of management fee and the software development activity of the company as two different functions performed by the company.

6.3. The TPO/AO concluded that comparable uncontrolled price ('CUP') was the most appropriate method for benchmarking without providing any details of the CUP used. The Hon'ble DRP has not passed a speaking order on the adoption of CUP as the most appropriate method by the TPO/AO and assessing the ALP at Nil.

6.4. The TPO/AO erred in understanding the legitimacy of the management fee paid and concluded that no services were received by the assessee, without appreciating the business realities of the Company and the evidences such as growth in the revenue, acquisition of new clients retention of existing clients provided during the course of the assessment.

Ground No.7 - Without prejudice, Management Services cannot be categorized as "Fees for included Services" and hence not taxable in India as per the Double Taxation Avoidance Agreement ('DTAA') between India and United States of America

7.1. Without prejudice to Ground 6, on facts and circumstances of the case, the learned ACIT and DRP have erred in law by alleging that the payment made by the Appellant to US Technology Global Inc ("USTG") the erstwhile US Technology Resources LLC

("USTR"), as payment made for technical service and hence "Fees for included Services" for the purpose of India US DT AA.

7.2. The ACIT and DRP have failed to consider the fact that the services provided by USTG to USTRPL are primarily in the nature of management services i.e. assistance in decision making involving areas such as sales and marketing, legal matters, public relation activities, treasury services and risk management services

7.3. The ACIT and DRP have failed to consider that the management services rendered are neither technical services nor consultancy service and have wrongly adopted a position that the said payment has been made for technical knowledge, experience and processes rendered by USTG.

7.4. The learned ACIT and DRP have arbitrarily concluded that the services are technical in nature and have failed to take cognizance of the relevant facts in this regard.

7.5. The learned ACIT and DRP have failed to consider the fact that the management services are not covered in the ambit of "Fee for included Services" ("FIS") prescribed in Article 12 of the India-USA Double Tax Avoidance Agreement. The sequence chart encapsulating the ambit of FIS is attached as Exhibit 1. In consequence, such management fees would assume the character of business profits of USTG under Article 7 of the India-USA DTAA, which would be taxable in India. In the absence of a PE of USTG in India, the said amount would not be taxable in India as business profits. In view of the same, the said amount of management service charges would not be chargeable to tax in India in the hands of

USTG, in light of the provisions of section 90(2) of the Act.

7.6. On the facts and in the circumstances of the case, the learned ACIT and DRP have erred in law by confirming the disallowance of management fees paid by the Appellant to USTR, under section 40(a)(i) of the Act, on the grounds of perceived non-withholding of tax at source under section 195 of the Act, without considering the fact that the said amount is not chargeable to tax in India under the provisions of the India-USA DTAA.

Ground No. 8- Consequential levy of interest under section 234B of the Act.

8.1. On the facts and circumstances of the case, the learned ACIT and DRP have erred confirming the consequential levy of interest under section 234B of the Act at Rs.4,66,02,188.

Ground No.9 - Consequential levy of interest under section 234D and 244A of the Act.

9.1. On the facts and circumstances of the case, the learned ACIT has erred in levying interest under section 234D of the Act at Rs 62,89,220 and recovering interest ofRs.32,30,367 under section 244A of the Act.

Ground No. 10 - Relief

10.1. The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, the above grounds of appeal, at any time before or during the hearing of the appeal."

23. Ground No.1, 2 and its sub-grounds are general in nature, does not require any specific adjudication.

24. As regards Ground No.3 and 4, similar ground was taken up for adjudication in ITA No.475/Coch/2016, wherein we have held that the expenditure in question cannot be considered as reimbursement of expenditure and it is to be liable for deduction of tax at source u/s 194J or 194-I, as the case may be. Therefore, respectfully following the same, we dismiss ground No.3 and 4, in this year as well.

25. As regards ground No.5 also, similar issue was taken up for adjudication in ITA No.475/Coch/2016, wherein we have held the payment of tax by the recipient company before the due date of filing of the return of income has not been verified by the lower authorities, hence, it is appropriate to remit the issue to the file of the Assessing Officer for the purpose of verification of applicability of first proviso to section 40(a)(ia) of the I.T.Act, as it was considered retrospective effect by the Hon'ble Supreme Court in the case of *Calcutta Export Company (supra)*. Accordingly, this issue is also remitted to the file of A.O. for fresh consideration.

26. As regards ground No.6 and its sub-grounds, similar issue has been adjudicated earlier in this order in ITA No.475/Coch/2016, wherein by relying upon the decision of the Tribunal in the case of *Siemens Aktiongesellschaft (supra)* we have held that benefit test is not a precondition for justifying arm's length price. Under Rule 10B of the Income-tax Rules, 1962 which deals with 'Determination of the arm's length price'. there is no mention of the 'benefit test' being

adopted for the purpose of determining such arm's length price. It is not a precondition to conclude that the payment is within arm's length. In other words, the TPO cannot apply the benefit test for determining ALP as he cannot assess the benefit derived by assessee in a particular transaction. Accordingly, ground No.6 raised by the assessee is allowed.

27. As regards Ground No.7 and its sub-grounds, similar issue raised in these grounds were came up for adjudication before us in assessment year 2012-2013, which we have discussed in para 18 and 19 above, and decided against the assessee. Accordingly, for this assessment year as well, by applying the same ratio, we dismiss the ground raised by the assessee.

28. Ground No.8 is in respect of levy of interest u/s 234B and Ground No.9 is in respect of levy of interest u/s 234D and 244A. These grounds are consequential in nature, to be computed accordingly by the Assessing Officer. It is ordered accordingly.

29. In the result, the appeal for assessment year 2011-2012 is partly allowed for statistical purposes.

30. The assessee has filed Stay Application No.25/Coch/ 2016 for assessment year 2011-2012. At the time of hearing before us, the learned Counsel for the assessee requested for withdrawal of the same. Accordingly, the same is dismissed as withdrawn.

31. The assessee has also filed an SA No.08/Coch/2018. Since the appeal in ITA No.475/Coch/2016 is disposed off by us, the stay application filed by the assessee, arising out of the said appeal, has become infructuous. Accordingly, the same is dismissed as infructuous.

Order pronounced on this 23rd day of May, 2018.

Sd/-	Sd/-
(George George K.)	**(Chandra Poojari)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Cochin ; Dated : 23rd May, 2018.
Devdas*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The Pr.CIT (Central) Kochi.
4. The CIT(A) – IV, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin