

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: '1-2', NEW DELHI**

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.7183/Del/2017
Assessment Year: 2013-14

M/s. Avery Dennison (I) Pvt. Ltd., P-24, Green Park Extension, New Delhi, Delhi	Vs.	ACIT, Circle -3(2), New Delhi
PAN :AAACA6163D		
(Appellant)		(Respondent)

Appellant by	Sh. Vishal Kalra, Adv. & Sh. S.S. Tomar, Adv.
Respondent by	Sh. H.K. Choudhary, CIT(DR)

Date of hearing	20.06.2018
Date of pronouncement	27.06.2018

ORDER

PER O.P. KANT, A.M.:

This appeal has been filed by the assessee against the order dated 31/10/2017 passed by the Deputy Commissioner of Income-tax, Circle 3(2), New Delhi [in short 'the Assessing Officer'] for assessment year 2013-14, in pursuant to the directions of the Ld. Dispute Resolution Panel (DRP) issued vide order dated 25.08.2017. The grounds raised by the assessee in the appeal are reproduced as under:

- 1. That on the facts and in the circumstances of the case and in law, the order passed by the learned Assessing Officer ("Ld. AO") is bad in law and void ab-initio.*

2. *That on facts and circumstances of the case and in law, the AO erred in assessing the income of the Appellant under the normal provisions of the Act at INR 1,06,05,38,594/- as against an income of INR 16,10,50,670/- returned in pursuance to the directions of the Hon'ble Dispute Resolution Panel ("Hon'ble DRP")*

3. *That the erred in fact and law by upholding the adjustment made by the Ld. AO/ Ld. Transfer Pricing Officer ("Ld. TPO") wherein the Ld. AO/ Ld. TPO has held that the Appellant's international transaction of receipt of intra-group services with its Associated Enterprises ("AEs") does not satisfy the arm's length principle envisaged under the Act and thereby made an adjustment of INR 25,19,80,074 and in doing so have grossly erred by:*
 - 3.1. *Not appreciating that the intra-group services received by the Appellant are intrinsically linked to the business operations by the Appellant in its two business segments i.e. Pressure Sensitive Materials ("PSM") and Retail Information & Branding Solutions ("RBIS");*

 - 3.2. *Not appreciating the business model of the Appellant and rejecting the Appellant's economic analysis of benchmarking closely interlinked transactions using Transactional Net Margin Method ("TNMM") in favour of Comparable Uncontrolled Price ("CUP") method;*

 - 3.3. *Failing to appreciate that the services received from the AEs are part of a package of composite agreements which cannot be unbundled;*

 - 3.4. *Ignoring documents, cost allocation methodology and analysis provided by the Appellant and placing reliance on previous year's conclusion that the services availed by the Appellant from its AE were in nature of 'duplicate' and "shareholder" services which have not conferred any commercial benefit upon the Appellant.*

 - 3.5. *Not appreciating that the Hon'ble DRP/ Ld. TPO should not question the commercial wisdom of the Appellant and the*

benefit received by the Appellant from the receipt of intra-group services and can only ascertain the arm's length price payable for such services;

3.5. Not appreciating that the Hon'ble DRP, while applying CUP method failed to produce any comparable uncontrolled transaction price/ data relied upon for computing the arm's length price for the intra-group services received by the Appellant as Nil; and

3.7. Not appreciating that even at a transactional level, the margin earned by AEs from provision of intra-group services are at arm's length.

- 4. The Hon'ble DRP has erred in law by upholding the reference made by the Ld. AO to the Ld. TPO by not appreciating that such a reference suffers from jurisdictional error as the Ld. AO has not recorded any reasons in the assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Ld. TPO for computation of the arm's length price ("ALP"), as is required under Section 92CA(1) of the Income Tax Act, 1961 ("the Act").*
- 5. Hon'ble DRP has erred in law by upholding the adjustment made by the Ld. TPO/ Ld. AO thereby by not appreciating that while making the said adjustment the Ld. TPO/Ld. AO have not satisfied the conditions set out in section 92C(3) of the Act.*
- 6. That on the facts and circumstances of the case, the Ld. AO has erred both on facts and in law, in making a best judgment assessment under section 144 of the Act without appreciating that the conditions prescribed under section 144 of the Act for making a best judgment assessment are not fulfilled in the instant case.*
 - 6.1. That on the facts and circumstances of the case, the Ld. AO erred both on facts and in law, in not appreciating that Appellant duly furnished the details sought by the Ld. AO and complied with the terms of notices issued during the*

course of assessment proceedings and the directions contained therein.

6.2. That on the facts and circumstances of the case, the Ld. AO violated principles of natural justice in not providing the Appellant an opportunity of being heard before making a best judgment assessment under section 144 of the Act.

7. That on the facts and circumstances of the case, the Ld. AO completely erred in finalizing the assessment in complete disregard to the specific direction issued by the Hon'ble DRP and made the addition on account of fall in Gross Profit ("GP") ratio without providing any cogent reasons.

8. That on the facts and circumstances of the case, the Ld. AO has erred both on facts and in law, in making ad-hoc addition of IIMR 39,55,27,776 on account of fall in GP ratio in the subject assessment year.

8.1. That on the facts and in law, the Ld. AO erred in making ad-hoc and arbitrary addition solely on account of fall in the GP ratio without appreciating the business and commercial considerations and that the fall is in the ordinary course of business Activities.

8.2. That on the facts and circumstances of the case, the Ld. AO erred in making additions of INR 39,55,27,776 merely by reason of a decrease in the GP ratio vis-a-vis preceding years ignoring the detailed submissions furnished by the Appellant in the course of assessment proceedings along with supporting evidence, outlining business reasons and justifications for the decrease in GP ratio during AY 2013-14.

8.3. That on the facts and circumstances of the case, the Ld. AO erred in making additions of INR 39,55,27,776 by rejecting books of accounts of Appellant without appreciating the fact that the books of account including bills and invoices were produced by the Appellant for verification before the Ld. AO pursuant to the directions of Hon'ble DRP and were found to be in order after thorough examination by the Ld. AO.

9. *That on the facts and circumstances of the case, the Ld. AO has erred both on facts and in law, in making a disallowance of INR 25,19,80,074 under section 37(1).*

9.1. That on the facts and circumstances of the case, the Ld. AO has erred both on facts and in law, in considering the payment of INR 25,19,80,074 for intra group services as not been incurred wholly and exclusively for the purpose of business in terms of section 37(1) of the Act.

9.2. That on the facts and circumstances of the case, the Ld. AO erred in making a double disallowance of INR 25,19,80,074 under section 37(1) despite having already disallowed said expenses under the transfer pricing provisions.

9.3. Without prejudice to the above grounds, that on the facts and circumstances of the case, the Ld. AO erred in interpreting the specific directions issued by Hon'ble DRP requiring the Ld, AO to disallow expenses of INR 25,19,80,074 under section 37(1) on protective basis.

That the above grounds are independent and without prejudice to each other.

The Appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of objection either before or during the course of proceedings in the interest of the justice.

2. Briefly stated facts of the case are that in the relevant year, the assessee company was engaged in the business of manufacturing and trading of pressure sensitive adhesive material, self-adhesive paper (PSM), self-adhesive film, tape, sheets, handbags, barcodes and dealing in barcode scanners, printers and there is spare parts and other garment accessories. The assessee filed return of income for the year under

consideration on 28/11/2013, declaring total income of Rs.16,10,50,670/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. In assessment proceedings, the Assessing Officer observed International transactions entered into by the assessee with its Associated Enterprises (AEs) and therefore, for determination of arm's length price of those International transactions, he referred the matter to the learned Transfer Pricing Officer (TPO). The Ld. TPO in his order dated 05/09/2016 proposed an adjustment of Rs.25,19,80,074 to the value of international transaction reported by the assessee. The Assessing Officer after incorporating the said adjustment issued a draft assessment order on 10/11/2016. In the said order, he proposed other additions/disallowances also. Aggrieved with the draft assessment order, the assessee filed objections before the Ld. DRP, who issued direction to the Assessing Officer on 25/08/2017 disposing the objections of the assessee and upheld the adjustment proposed by the Ld. TPO. Pursuant to the said directions, the Assessing Officer issued the impugned final assessment order. Aggrieved with the said final assessment order, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. The ground Nos. 1 and 2 of the appeal are general in nature and covered by the other grounds, and, hence we are not required to adjudicate upon specifically. The Ld. counsel also did not press these grounds and accordingly same are dismissed.

4. The ground Nos. 3 to 3.7 of the appeal relate to the transfer pricing adjustment of Rs.25,19,80,074/- to the international transaction of intragroup services.

4.1 The facts qua the issue in dispute are that the assessee is a subsidiary of Avery Dennison Corporation, USA. The assessee in its transfer pricing study reported thirty one (31) International transactions, which are listed in the transfer pricing order of the Ld. TPO. The Ld. TPO accepted all the transactions at arm's-length except the international transaction relating to receipt of intragroup services in the two business segments of Pressure Sensitive Materials (PSM) and Retail Branding Information Solutions (RBIS). The Activities of these two segments have been summarized by the assessee as under:

- **PSM-** *In PSM segment, the appellant manufactures and sells pressure sensitive materials, graphics and graphic films, reflective products and performance polymers.*
- **RBIS-** *In RBIS segment, the Appellant manufactures and markets a wide range of price marking and brand identification products, such as printed labels, graphic and barcode tags, price tickets, carton labels and printing applications for retailers, apparel manufacturers, distributors and industrial customers.*

4.2 The assessee furnished details of those intragroup services availed from Associated Enterprises (AEs) as under:

S. No.	Nature of Services	Amount of INR
	Self Adhesive Material	

1.	<i>Marketing Support Services</i>	98,118,983
2.	<i>Operations and Logistics</i>	21,678,611
3.	<i>Technical assistance services</i>	7,361,532
4.	<i>Accounting and Administration Services</i>	5,324,736
5.	<i>Management Information Systems</i>	16,729,568
6.	<i>Labour Law and Employee Relations</i>	15,776,791
7.	<i>Financial Services</i>	10,795,993
8.	<i>Corporate Support Centre (CSC) Services</i>	21,593,767
9.	<i>Information Technology Services (ITSSC)</i>	1,092,721
<i>Retail Branding the Information Solutions</i>		
1.	<i>Ticket HUB</i>	26,345,175
2.	<i>GVP Services</i>	35,256,075
3.	<i>VIPFS Services</i>	32,685,030
4.	<i>CSC Services</i>	18,251,297

4.3 The assessee benchmarked its international transaction of receipt of the services by applying Transactional Net Margin Method (TNMM) as the most appropriate method and using Profit Level Indicator (PLI) of operating profit/sales (OP/Sales). The assessee was selected as the tested party and comparable companies were used. Based on the said analysis, the assessee claimed that margins earned by it in both the segments, being higher than the comparable companies, the international transactions of the assessee were considered at arm's-length. The assessee also furnished few samples of email correspondence, brochure, product catalogue etc to support that services were rendered. The assessee also furnished details of benefit received from the services availed.

4.4 The Ld. TPO, however, held that the assessee failed to prove the benefit it had derived from the services purportedly provided by the expats. He submitted that no independent entity would pay for such services without cost benefit analysis. He further noted that no documentation had been produced by the taxpayer to support the claim of receipt of services. According to him, no

real evidences of services rendered were produced and payment of service fee was only an arrangement to change the tax base without an economic substance in the transaction. He submitted that the assessee has merely submitted few mails exchanged between the personal of the group and none of those emails establish the requirement/specific needs of the taxpayer for those services and the benefit which had accrued to the taxpayer.

4.5 The Ld. TPO rejected the aggregate approach of benchmarking of the international transaction and separately benchmarked the transactions. After perusal of the submission of the assessee and following direction of the learned DRP, in earlier years, the Ld. TPO accepted the arm's-length price of Ticketing HUB and VIPFS, however, with regard to the balance intragroup services of management support received by the assessee amounting to Rs.25,19,80,074/-the arm's-length price has been taken to NIL by application of comparable uncontrolled price (CUP) method.

4.6 The Ld. DRP also found the said management support services in the nature of shareholder services, duplicate services, services that provided incidental benefits or passive benefits. The relevant finding of the learned DRP is extracted as under:

“4.2.5 Assessee's failure to substantiate claim.

1. In view of tire above discussion and the OECD guidelines on this subject, the assessee was required to show that the services received from the A.E. were for its need and benefit, and that these are not services of the type discussed above i.e. shareholder services, duplicative services, services that provide incidental benefits, or passive benefit. The assessee was also required to show

that the charges paid for these services are, what would have been paid by an independent entity, in similar circumstances.

2. *The submissions of the assessee and the facts have been carefully considered. True copy of documents filed by the assessee in his paper book have also been considered. The assessee has failed to show how they substantiate the services claimed, and are not in relation to other transactions with AEs. The assessee filed a voluminous paperbook but was unable to pinpoint evidence supporting the services claimed which meets the tests laid down in the OECD Guidelines discussed above. Filing of a voluminous paperbook containing copies of general correspondence does not meet the test of allowability discussed above. This view is supported by the decision of the Hon'ble ITAT in Fosroc Chemicals India Pvt. Ltd v DCIT, 2015-TII-144-TAT-BANG-TP. In this case, the Hon'ble ITAT observed as follows:*

35. *The Assessee has in the present case filed material before the IPO to demonstrate the nature of services rendered. In the paper book filed before us the index of the paper book gives a description of the service. We are of the view that the above description alone would not suffice. As we have already seen the TPO had specifically called upon the Assessee to give details of the services rendered and how the same were utilized by the Assessee and its relevance for the Assessee's business. The evidence filed by the Assessee in this regard is in the form of e-mails between parties, reports etc. As to how the evidence filed by the Assessee was Actually useful in its business has also to be highlighted as the Assessee will be the best person to know these facts which are within its knowledge. It is only if such a stand is taken by the Assessee can the IPO take the issue forward to arrive at a proper conclusion. In our opinion filing of voluminous correspondence, reports etc., would not be a proper way of discharge of Assessee's burden to establish the ALP of expenditure in question.*

3. *Further, even if the assessee's claim of services received were to be accepted, the copy of documents filed, at best, shows that the services claimed by the assessee are Actually in the nature of shareholder services, duplicative services, services that provide incidental*

benefits, or passive benefits. The assessee has also failed to show that the charges paid for these services are, what would have been paid by an independent entity, in similar circumstances. The assessee has failed to furnish necessary evidence to substantiate the services rendered and to show that such services are not in the nature of shareholder services, duplicative services, services that provide incidental benefits, or passive benefits. The assessee has not been able to discharge his burden of proving that these services meet the test laid down in the OECD guidelines discussed above, and payment for these services was commensurate with, what would have been paid by an independent entity in similar circumstances.

4. When companies around the world are outsourcing such services to India, the assessee claims that it is receiving such services from its AEs abroad. The assessee has failed to substantiate its claim. In view of the above discussion, the assessee's claim is not acceptable.”

4.7 The learned DRP further mentioned status on the issue-in-dispute in earlier years and held that transfer pricing adjustment towards intragroup services is primarily question of fact and has to be decided on the facts of the particular year. Accordingly, upheld the adjustment observing as under:

“2. A similar issue arose in earlier years. In AY 2010-11, 2011-12 and 2012-13 the DRP deleted the adjustment in respect of ticketing hub and VIPFS(TPO allowed in AY2012-13 on the basis of earlier year directions of DRP) anti upheld the remaining adjustment. This year, the TPO has made the adjustment in accordance with the directions of the DRP in the preceding year. In his order, the TPO has discussed the issues in detail and has given valid reasons for the adjustment made. The assessee has not been able to controvert the findings of the TPO. A transfer pricing adjustment towards intra-group services is primarily a question of fact which has to be decided on the

facts in a particular year. This year, the 'IPO has determined its ALP at Rs.5,90,30,205/-using CUP and consequently, made an adjustment of Rs.25,19,80,074/-. In his order, the TPO has discussed the facts in detail and has given valid reasons for his decision. The decision of the TPO is supported by the OECD guidelines and judicial decisions discussed above. The contentions raised by the assessee have been discussed in detail in these judicial decisions and the issue has been decided in favour of the Department. In CJT v. Cushman & Wakefield (India) Pvt Ltd. (2014-TU-07- r iC-DEL-TP), the Hon'ble Delhi High Court have explained the role of the AO and the TPO. This decision permits the determination of the arm's length price of a transaction as has been done by the TPO. Considering the facts, the TP adjustment made towards the intra-group services, made by the AO/TPO, is justified and is upheld.”

4.8 The learned DRP on an alternative and protective basis also held the intragroup services as disallowable u/s 37(1) of the Act. Before us, the learned counsel submitted paper books in three volumes, containing pages 1 to 492; pages 1 to 908; and pages 1 to 1397 respectively, and submitted that similar adjustment on account of intragroup services have been deleted by the Tribunal in preceding years. The learned counsel referred to order of the Tribunal for assessment year 2007-08, 2008-09, 2010-11 and 2011-12. The Ld. counsel further submitted that these orders of the Tribunal have been affirmed by the Hon'ble Delhi High Court in ITA Nos. 386/2016; 392/2016; 401/2016; 402/2017; 516/2017 and 517/2017.

4.9 The Ld. counsel submitted that in the year under consideration the assessee has received services similar to the services received in assessment years 2007-08, 2008-09, 2010-

11 and 2010-12 and wherein the Tribunal has accepted all such services at arm's length, accordingly, the adjustment in the year under consideration also deserve to be deleted.

4.10 The Ld. counsel however further submitted that in the immediately preceding assessment year 2012-13, the Tribunal accepted the aggregated benchmarking approach, need and benefit of the services so received, but referred the issue back to the AO/TPO for verification of rendition of the services. The Ld. counsel fairly accepted that assessee has not filed any appeal before the Hon'ble High Court against the said decision of the Tribunal for assessment year 2012-13.

4.11 The Ld. DR, on the other hand, submitted that when in immediately preceding assessment year, i.e., AY: 2012-13, the Tribunal has restored the issue of benchmarking of the intragroup services for verification of the evidences of rendering the services by the AEs and the assessee has not filed any appeal against the said decision, the assessee is bound by the said decision. He submitted that following the said decision in the year under consideration also the matter need be restored to the file of the Ld. AO/TPO for verification of the rendering of the services and for deciding the issue afresh in the light of the direction of the Tribunal.

4.12 We have heard the rival submissions and perused the relevant material on record. This is undisputed that in the immediately preceding assessment year i.e. 2012-13, the issue of arm's-length price of intragroup services has been restored back to the file of the Ld. AO/TPO by the Tribunal in ITA No.

5578/Del/2016. The finding of the Tribunal on the issue in dispute is reproduced as under:

“13. We have perused the orders of the coordinate bench as well as of Hon'ble High Court. To determine ALP of intra group services according to us it is necessary for TPO to assess (a) need test, (b) benefit test, (c) rendition test, (d) duplication test and (e) share holder Activity Page 10 of 13 test. It is also accepted that need test and benefit test are required to be examined from the perspective of a businessman and not from the perceptiveness of the revenue. Services may be required by a person for its business need and at the time of availing it, the benefit accruing to that person is perceived, such benefit may or may not accrue but if services are rendered the payment is required to be made for those services subject to the other conditions. Of course no independent person pays for the Activities / services which are duplicate in nature. Person may also not pay for the services which he is not required to carry out but by other such as shareholders to protect their investments and control interest. It may not be possible always that direct and tangible benefit can be demonstrated by concrete evidence by the assessee. Therefore, if it is found that the normal business justifies the need of those services and it has some perceivable benefit then revenue cannot question payment for those services provided those services are rendered and are neither duplicative or in the nature of share holder services. This is for the simple reason that unless the services are rendered which are neither duplicate and are not share holder Activity then only any independent person would be willing to pay for those services. This is a necessary ingredient for determination of ALP of intra group services. As the earlier orders passed by the coordinate bench for Assessment Year 2007-08 to AY 2011-12 also concerning the same agreement which is also before ld TPO for determination of ALP of intra group services, we respectfully following the order of the coordinate bench hold that need test and benefit test are already satisfied for determination of ALP of those intra group services and therefore for this year also we hold that such test questioned by the ld TPO is incorrect as the

services concerned are pertaining to the same agreement which has been examined by the coordinate benches in case of assessee for earlier years. However, the rendering of such services is subject to determination for each Assessment Year independently based on the evidences for rendering of the services. Therefore the assessee is required to demonstrate with credible evidence to satisfy that such services have Actually been rendered by the foreign AE to the assessee for the year. Evidences of services which have been submitted before the ld TPO for the following services are as under:-

S. No.	Relevant IGS	Evidences Submitted before TPO
1.	Marketing Support Services	Marketing - Product Brochures
		Email: Tracking Commercialized End use Projects via S5.com Email: SF. corn-May figures
		Email. Beer in India
		Product Size of ADIPL and ADC
		Email-Coca cola India RFS Solutions for Modern Trade & Juices

		Email- HFS India need your help
		-Email- Improved draft business plant Multitrip Email-2011 OGSM
		Email: Bisleri- Vedica Mineral Water
		Email: Samples of MZ2001 to each countries Email: Samsung IMDI label _MZ1081 sample Email. Need forecast for MZ 2000 and MZ 2001 for 2012
		'Email: Mew projects from LPM-AP Durables Strategy Deployment Meeting Email- Re: New projects from LPM-AP Durables Strategy Deployment Meeting
		Email - Dust Repellant Coat
		Email: Converting College Email-Group teleconference Email-Regional Beer and Team Meeting Email: Global Beverage
2.	Operations and Logistics Support	Email- Re : IN4 Updates, July 15 2011 Email: IN4 Startup Raw material estimates Email- Re: IN4 Installation Plans
		Email- Safety Checklist/ Ale-
		Email- Re: Fw: INI Trial Mate-a Ae-#!

		<i>Sample Purchase Agreement YFY Glassine Paper and price list</i>
		<i>Email - Re: Drum Meter suppliers</i>
		<i>Email. Samples of MZ20C1 to each countries Email Samsung IMDI label MZ1081 samples Email: Need forecast for MZ23I n± WJOOI to-2D12</i>
3.	<i>Technical assistance services</i>	<i>Email- Re: Fw: issue with IN3 HM BUR current</i>
4.	<i>Labour law and employee relations</i>	<i>RE. FLDP Program Document</i>
		<i>Salary benchmarking report ' Email: Deck for today session managing your own development plans Email: Pre read for India Talent Council Meeting Trading Calendar</i>
5.	<i>Financial Services</i>	<i>Email RE S&P 500 Sector Revenue forecast Update EMial Global Finance Quarterly Call Reminder Email: Q3 Forecast Revenue</i>
6.	<i>Accounting and Administration services</i>	<i>NA</i>
7.	<i>Management information systems</i>	<i>NA</i>
8.	<i>Corporate Support centre (CSC) Services</i>	<i>RE Cynthia Case ADIM 000000554296 Resolves for oracle mapping Email: Oracle User Access Rights Remote Support for Oracle Accounting Software Oracle Lotus Notes email support</i>
9.	<i>Ticketing HUB</i>	<i>Exhibit II TRIM Background and overview Internal Document-Satellites training manual (TRIM) Internal Document- Sample screenshots of TRIM Orders</i>
10.	<i>GVP Service and strategic support</i>	<i>Email : Upcoming APAC Q3 2012 Attestation-Policy Exception Intercompany database Email: RBIS Controllership Training series HFM Training Presentation Product Training HTT Product Training</i>
11	<i>VIPFS Services</i>	<i>List of RBO's</i>

14. We have carefully analysed whether the evidences submitted by the assessee are sufficient to conclude that services have Actually been rendered by the foreign AE or not. Coming to the Paper Book at Page 235-253 we found that it is a marketing broacher for labeling

solutions. We failed to understand that how this marketing broacher can show that the marketing support services have been rendered by AE. Page Nos. 254 to 259 is with respect to some conference call and webinar. Further the mails at Page No. 262 to 262 are with respect to 'Beer in India' which is just the information asked with respect to some connectivity as well as communication from Executive Vice President . Page No. 263 to 280 is a product finder and similarly some of the mails are very general and pertaining to team meetings and teleconference between the two parties. Similarly we have also perused such evidence with respect to other services also as per chart produced before us. Startlingly, assessee himself has not submitted any proof with respect to accounting administrative services and management information system listed at Sl No. 6 and 7 of the chart. With respect to financial services only sector revenue forecast and Q3 forecast revenue were mentioned. Therefore, on analysis of the above documents we found that there are no proper evidences led before the ld TPO that services have infAct been Actually rendered by the AE. It is expected from the assessee for proper benchmarking to lead evidence with respect to each of the nature of services with respect to each class of services mentioned in the above chart with corresponding manner of rendering of the services, the time lag of initiation of services and closure of the services. The evidences produced are apparently very general and do not show the rendering of the services. In view of this we set aside the appeal of the assessee to the file of ld TPO/AO for verifying the evidence of rendering of the services by the AE with respect to nature of each of the services listed in the agreement. The assessee is also further directed to lead proper and credible evidence with respect to nature of services and how and when those services have been rendered by the AE. It is also made clear that AO shall not question the need and benefit arising out of these services as the same have been conclusively decided by the order of the coordinate bench for earlier years in the case of the assessee itself. In the result the appeal of the assessee with respect to ground No. 1, 2, and 3 are allowed with above direction accordingly."

4.13 The facts and circumstances and the intragroup services involved in the year under consideration are identical to the facts and circumstances and the intragroup services availed in assessment year 2012-13, thus respectfully following the finding

of the Tribunal (supra), we restore the matter of determining arm's-length price of the intragroup services to the file of the Ld. AO/TPO for deciding in view of the direction of the Tribunal in assessment year 2012-13 as reproduced above. It is needless to mention that assesses shall be afforded adequate opportunity of being heard. Thus, ground No. 3 to 3.7 of the appeal are allowed for statistical purposes.

5. The ground No. 4 and 5 of the appeal were not pressed by the Ld. counsel of the assessee, being general in nature and accordingly, we dismiss the same as infructuous.

6. In ground Nos. 6 to 8, the assessee has challenged the addition made on account of fall in gross profit of the assessee, sustained by the Ld. DRP, amounting to Rs.39,55,27,776/-.

6.1 The Ld. Assessing Officer has mentioned in the draft assessment order that the assessee was asked to furnish explanation for fall in gross profit rate during the year under consideration, however, neither any reply was filed in this respect, nor and books of accounts of vouchers were produced before him therefore, in absence of any books of accounts to verify the trading results, he estimated the gross profit rate taking average gross profit rate of last three assessment years. Accordingly, he proposed average gross profit rate of 38.09% as against the gross rate of 33.44% declared by the assessee, which resulted into addition of Rs.39,55,27,776/-. Consequent to the direction of the Ld. DRP, the assessee produced books of accounts and other vouchers, which were verified by the Assessing Officer on test check basis. According to the Assessing Officer, the assessee failed to provide justification for decrease in

gross profit rate during the year under consideration, and thus, he sustained the addition of Rs.39,55,27,776/-.

6.2 Before us, the Ld. counsel submitted that the Assessing Officer himself has recorded that bills and invoice had been examined and found in order. According to him, the books of accounts have not been rejected by the Assessing Officer and section under section 145(3) has not been invoked in the case of the assessee and, thus, gross profit addition without rejecting books of accounts of the assessee, is not justified. The Ld. counsel filed written submission on the ground Nos. 6 to 8 which are reproduced as under:

"B. SUBMISSIONS OF THE APPELLANT:

B.1 Ground No. 6 - The Ld. AO grossly erred in law and the facts of the case by framing assessment to the best of his judgment under section 144 of the Act:

- 1. Pursuant to directions of the Hon'ble DRP, the Appellant produced its books of account (i.e., ledger accounts and invoices) relevant to corporate tax additions proposed in the draft assessment order for verification before the Ld. AO.*
- 2. Along with such books of account, the Appellant also submitted detailed reasons / justification of decrease in GP Ratio and increase in other specific expenses during the subject year. A copy of submissions filed before the Ld. AO on September 15, 2017 containing reasons / justification are placed at Pages 1023 to 1045 of the Paper Book (Volume III).*
- 3. After verifying and examining the books of accounts and finding them in order and explicitly mentioning the same in the assessment order itself, the Ld. AO still sustained the addition on account of fall in GP Ratio and that too invoking the provisions of section 144 of the Act.*
- 4. As per **Para 4.7 of the assessment order**, a clear finding of fact has been given by the Ld. AO that:*

*"The counsel of the assessee company produced bill/ invoices of expenditure of above heads on 23.10.2017. **These bills/ invoices have been verified with the help of books of accounts. The bills/ invoices have been examined thoroughly and found in order.**"*

(emphasis supplied)

5. Despite such a clear finding of fact recorded by the Ld. AO in the assessment order, the ad-hoc addition on account of fall in GP Ratio was sustained alleging that the Appellant failed to provide justification for decrease in GP Ratio during the assessment proceedings. Relevant extract from Para 4.7 of the assessment order is reproduced as below for your Honours' easy reference.

"However, addition on account of GP Ratio has been made on **estimate basis** with respect to GP Ratio of previous 3 years **after rejecting books of accounts of assessee. Hence, assessee failed to provide justification with respect to decrease in GP Ratio during assessment proceeding.** Considering the above, addition of Rs. 39,55,27,776 /- made in draft order on account of applying estimated GP Ratio is hereby added to the total income of assessee company."

(emphasis supplied)

6. It is further submitted that detailed justification and reasons for fall in GP Ratio were also furnished in the additional submissions filed with the Hon'ble DRP during hearing dated May 9, 2017. A copy of such additional submissions are placed at **Pages 983 to 1020 of the Paper Book (Volume III).**
7. It is a well settled law that an assessment to the best of judgement of the Assessing Officer under section 144 of the Act can be made only when the assessee fails to furnish the details/ information called for by the Assessing Officer in the course of assessment proceedings.
8. In the facts of the present appeal as highlighted above, it has been established beyond doubt by the Ld. AO himself that books of account of the Appellant concerning the impugned addition were examined and found in order. Further, the submissions made by the Appellant containing detailed justification/ reasons for fall in GP Ratio submitted with the Ld. AO in the course of assessment proceedings have been placed on record.
9. Further, the Ld. AO did not show cause to the Appellant before passing the assessment order under section 144 of the Act, which makes the assessment bad in law and void ab initio. The law is no longer res integra that assessment framed under section 144 of the Act, without show causing the assessee as to why such an Action is warranted in the case makes the assessment bad and liable to be quashed:
- Malik Packaging v. CIT: 202 CTR 417 (All.);
 - CIT v. Amarchand Sharma And Udani [2014] 364 ITR 203 (Andhra Pradesh)
10. Therefore, it is respectfully submitted that the assessment framed ignoring the mandatory requirement under law deserves to be quashed.
11. It is also submitted that the draft assessment order and the final assessment order are bad in law because section 144 could not

have been applied in case of an eligible assessee as per section 144C(1) of the Act.

B.2 Estimated addition made merely on the basis of fall in GP Ratio is ad-hoc and arbitrary and is therefore ought to be deleted being bad in law:

1. *It is submitted that that arbitrary / ad hoc addition on account of fall in GP Ratio cannot be made without pointing out any specific defect in the books of accounts or pointing out any cogent reasons, why the books of accounts do not reflect true and correct picture of profits.*
2. *The case of the Appellant on all fours is covered by the decision of the Jurisdictional High Court in the case of CIT vs. Smt. Poonam Rani [2010] 326 ITR 223 (Delhi) wherein it was held as under:*

"8. The fall in gross profit Ratio, in the absence of any cogent reasons could not, by itself, have been a ground to hold that proper income of the assessee cannot be deduced from the accounts maintained by her and consequently, could not have been a ground to reject the accounts invoking section 145(3) of the Act.

9.....

*10.... if the rate of gross profit declared by the assessee in a particular period is tower as compared to the gross profit declared by him in the preceding year, that may alert the Assessing Officer and serve as a warning to him to look into the accounts more carefully and to look for some material which could lead to the conclusion that the accounts maintained by the assessee were not correct, **but a low rate of gross profit, in the absence of any material pointing towards falsehood of the account books, cannot, by itself, be a ground to reject the account books under section 145(3)"***

(emphasis supplied)

3. *It has been similarly held in the following judgements that merely because there is a fall in GP Ratio, the same does not provide a basis for the AO to reject an assessee's books of account and go on to make the addition on an estimated basis without pointing out any defects in such books of account:*
 - *Aluminium Industries (P.) Ltd. v. CIT [1995] 80 Taxman 184 (Gau.);*
 - *ACIT v. Budhalal & Co. [2011] 47 SOT 27 (Ahmedabad)(URO);*
 - *Babu Jewellers v. Income-tax Officer [2011] 141 TTJ 73 (Chandigarh - Trib.)(UO);*
 - *Narendra Mafatlal Mehta vs. Income-Tax Officer [1997] 59 TTJ 165 (Mum.);*
 - *DCIT v. Subhash Chand Agrawal [2013] 58 SOT 122 (Allahabad - Trib.)(URO);*
 - *Pushpanjali Dyeing & Printing Mills (P.) Ltd. v. JCIT [2001] 72 TTJ 886 (Ahmedabad)*

4. *The Ld. AO rejected the books of accounts which were audited by an independent Chartered Accountant containing no qualification or adverse remarks. It is respectfully submitted that audited books of accounts cannot be rejected in a summarily manner without pointing out any cogent defects / reasons to support such rejection (reference is invited to the judgment of Delhi High Court in the case of CIT v. Jay Engineering Works Ltd: 113 ITR 389 @ page 392 (Del)). Reliance in this regard is also placed on Bharat Heavy Electricals Ltd. vs DCIT (2005 98 TTJ 565 Delhi ITAT) wherein the Hon'ble ITAT acknowledged that the auditor had duly verified the genuineness claim while undertaking an audit for this year without raising any qualifications and hence the addition made by Ld. AO is bad and void ab-initio.*
5. *However, the Ld. AO without providing any cogent reasons for such Action, rejected the books o account. There was no evidence or material on which the Ld. AO relied on to reach to the conclusion that the audited books of account did not show correct position of gross profits of the Appellant for the subject year.*

In view of above arbitrary addition alleging fall in GP Ratio cannot be made by rejecting the books of accounts in the absence of any defects being pointed in such books. It is humbly prayed to that the impugned addition amounting to Rs. 39,55,27,776 made by the Ld. AO purely on the basis of an estimate deserves to be deleted.

B.3 Ground No. 8 - The impugned addition was made by the Ld. AO by completely disregarding the business reasons and justification provided by the Appellant for fall in GP Ratio:

1. *It is humbly submitted that in making the impugned addition, the Ld. AO completely failed to appreciate the business and commercial considerations faced by the Appellant and that the fall in GP Ratio was in the ordinary course of Appellant's business Activities.*
2. *In this regard, the Appellant has reproduced in brief for your Honours as below, the reasons and justification for fall in GP Ratio in the subject year vis-a-vis the preceding AY which were also submitted earlier before the Hon'ble DRP and Ld. AO:*
 - *There was only a 2.79% decline in the GP Ratio in AY 2013-14 as compared to the preceding AY 2012-13 which was a nominal decline in the ordinary course of the business.*
 - *The comparison with the average GP Ratio of the last three preceding AYs as done by the Ld. AO is not a good comparison considering the ever changing dynamics of the business environment and the new lines of businesses commenced by the Appellant during AY 2012-13 and AY 2013-14.*
3. *The reasons for year-on-year decline separately for both the PSM and RBIS Divisions are summarized as below.*

3.1 RBIS Division:

There was decline of 3.11% in the GP Ratio of RBIS Division in the subject year over preceding AY mainly because of the following reasons:

- i. Introduction of new technology, i.e., Radio Frequency Identification ('RFID') technology - The ratio of cost to sales value of RFID enabled tags comes to around 83% as compared with around 24% for non-RFID tags, thereby reducing the GP margins on sales of RFID ones.
- ii. The RBIS Division caters to the apparel industry, which is seasonal in nature and gets impacted significantly by ever changing fashion trends. During the subject year, the Appellant increased the inventory levels for better customer service and improving lead times in line with the general trend of industry, thus leading to significantly higher cost of purchases.
- iii. There was a sharp depreciation in the rate of Indian Rupee against the US Dollar ('USD') in AY 2013-14 as compared with AY 2012-13. From the average rate of Rs. 47.94 for 1 USD in AY 2012-13, it climbed to an average of Rs. 54.45 during AY 2013-14, therein resulting into a net depreciation of around 13.50% in the value of Indian Rupee over a period of just one year. This accordingly, led to a surge in the purchase cost of materials imported by the RBIS Division.

3.2 PSM Division:

There was decline of 1.30% in the GP Ratio of PSM Division in the subject year over preceding AY mainly because of the following reasons:

- i. The PSM division imports around 87% of its materials from outside India, payments for which are required to be made in USD. The depreciation of the Indian Rupee (as mentioned above) resulted in higher purchase costs; thereby leading to a decline in the overall GP Ratio of the PSM division.
- ii. Though the costs of PSM division increased during the subject year; however, the average selling price of the products did not increase in the same proportion on account of various external factors (v.i.z. tough competition in market, attempt to maintain market share, efforts to retain customers) leading to a decline in the GP Ratio in AY 2013-14 vis-a-vis AY 2012-13.
- iii. During AY 2012-13, the PSM division commenced trading in a new business segment - 'Graphics and Reflectives' which became fully operational in AY 2013-14. On account of this, the division made huge purchases of raw material required for the manufacturing of these products.

The aforesaid reasons have been explained in detail along with supporting data and evidences in its submissions made before the Hon'ble DRP and the Ld. AO (refer pages 1024 to 1036 @ Paras 1-1 to 1-24 of the Paper Book-Volume III).

B.4 Addition on account of GP Ratio not made in preceding or subsequent assessment years:

1. *It may also be pertinent to mention here that the trading results of the Appellant have been accepted all along by the AO.*

Sl.	AY	GP Ratio (%)	Whether any GP Ratio addition made by the Ld. AO
1	2010-11	38.82	No adjustment and assessment completed under section 143(3) r.w.s. 144C(13) vide order dated February 24, 2015.
2	2011-12	39.24	No adjustment and assessment completed under section 143(3) r.w.s. 144C(13) vide order dated February 26, 2016.
3	2012-13	36.23	No adjustment and assessment completed under section 143(3) r.w.s. 144C(13) vide order dated September 30, 2016.
4	2013-14	33.44	Impugned year under appeal before the Hon'ble Tribunal

In view of the above submissions, it is prayed to your Honours that the ad hoc GP Ratio addition deserves to be deleted.”

6.3 The Ld. DR, on the other hand, relied on the finding of the lower authorities.

6.4 We have heard the rival submissions and perused the relevant material on record. We note that in para 4.7 of the impugned order, the Ld. Assessing Officer has sustained the addition with following observations:

“4.7 Due opportunity has been provided to assessee by letter issued dated 08.09.2017 with respect to claims of expenses as made by assessee. The counsel of the assessee company produced bills/ invoices of expenditure of above heads on 23.10.2017. These bills/invoices have been verified with the help of books of accounts. The bills / invoices have been examined thoroughly and found in order. After verification of books, same have been returned back to the counsel on the same day. Some samples pertaining to 2nd week of month of September, 2012, have been placed on the record. However, addition on account

of GP rate has been made on estimate basis with respect to GP rate of previous 3 years after rejecting books of accounts of assessee. Hence, assessee failed to provide justification with respect to decrease in GP rate during assessment proceeding. Considering the above, addition of Rs. 39,55,27,776/- made in draft order on account of applying estimated G.P rate is hereby added to the total income of assessee company.”

6.5 Thus, it is evident that bills/invoices of expenditure have been verified by the Assessing Officer with the help of books of accounts in proceedings consequent to the direction of the Ld. DRP. The Assessing Officer himself has recorded that bills/invoices have been examined thoroughly and found in order. After verification, he returned the books of accounts and kept sample bills/vouchers on record. In view of the above finding, it is evident that the Assessing Officer has neither invoked section 145 (3) of the Act nor rejected books of accounts of the assessee. In such circumstances, we do not understand as how the Assessing Officer has made addition for decrease in gross profit rate during the year under consideration. In the normal business, it is not necessary that always the gross profit rate will be steady and it may increase or decrease depending on the prevailing business atmosphere. Without rejecting books of accounts of the assessee, the Assessing Officer cannot tweak with the gross profit rate declared by the assessee. Accordingly, we direct the Assessing Officer to delete the said addition. The ground No. 6 to 8 of the appeal are accordingly allowed.

7. The ground No. 9 is in respect of protective addition for disallowance of expenditure Rs.25,19,80,074/- in respect of intragroup services made under section 37(1) of the Act.

According to the Assessing Officer intragroup services have not been incurred wholly exclusively for the purpose of the business and thus respective expenditure is disallowed under section 37(1) of the Act on protective basis, as the addition has been made substantially under transfer pricing additions. According to the assessee, this amounts to double disallowance and the Assessing Officer has committed error in interpreting the specific direction issued by the Ld. DRP requiring the Assessing Officer to disallow expenses under section 37(1) of the Act on protective basis. Before us, the learned counsel submitted that in earlier and subsequent assessment years no such addition has been made under section 37(1) of the Act and, thus, in view of the rule of consistency, the Revenue should not pursue the additions and it should be deleted. In support of the contention, the Ld. counsel produced before us a copy of the assessment order for assessment year 2014-15.

7.1 The learned DR, on the other hand, relied on the finding of the lower authorities.

7.2 We have heard the rival submissions and perused the relevant material on record. The Ld. counsel has contested the above addition on the ground of rule of consistency. On verification of the assessment orders of the earlier years and subsequent years, we find that though the transfer pricing addition for intragroup services has been made, but no disallowance under section 37(1) has been made on protective or otherwise basis in those years. Thus, the Revenue has in earlier and subsequent year accepted this position that no such disallowance is required. The facts and circumstances in the year

under consideration on the issue in dispute are identical to the earlier and subsequent assessment years and the Revenue has accepted that no disallowance under section 37(1) of the Act is required, in such circumstances, the Revenue cannot insist for sustaining the addition in view of the rule of consistency. Accordingly, we direct the Assessing Officer to delete the said addition and the ground of the appeal is accordingly allowed.

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

Decision is pronounced in the open court on 27th June, 2018.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 27th June, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi