आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1650/PUN/2013
निर्धारण वर्ष / Assessment Year :2008-09

Eaton Technologies Pvt. Ltd.,
Cluster C, Wing 1, EON Free Zone,
Plot No.1, Survey No.77, MIDC,
Kharadi Knowledge Park,
Kharadi, Pune – 411014 .... अपीलार्थी/Appellant

PAN: AABCE4323Q

Vs.

The Asst. Commissioner of Income Tax,
Circle 1(2), Pune .... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : S/Shri Vishal Kalra, Saumyendra S. Tomar
प्रत्यर्थी की ओर से / Respondent by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख / Date of Hearing : 23.08.2018		घोषणा की तारीख / Date of Pronouncement: 31.10.2018

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against the order of CIT(A)-IT/TP, Pune, dated 27.06.2013 relating to assessment year 2008-09 against the order passed under section 143(3) r.w.s. 144C(4) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

1. *That on the facts and circumstances of the case and in law, CIT(A) erred in upholding the transfer pricing adjustment amounting to INR 1,88,88,400 carried out by the transfer pricing officer ("TPO")/ Assessing officer ("AO").*

Transfer pricing adjustment in respect of reimbursement relating to payment of 'Oracle implementation charges' to its Associated Enterprise ("AE")

2. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the Nil arm's length price determined by the TPO/ AO, in respect of reimbursements of payments amounting to INR 1,66,22,982 by the Appellant to its AE, for Oracle implementation charges.*

2.1 *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding that the Appellant was not able to establish the receipt of services from its AE disregarding the documentary evidences.*

Transfer pricing adjustment for business support services and marketing support services rendered to the AE

3. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the transfer pricing adjustment carried out by the TPO/ AO amounting to INR 13,76,666 and INR 8,88,752 in respect of 'business support services' and 'marketing support services' respectively.*

3.1 *That on the facts and circumstances of the case and in law, the CIT(A) erred in erroneously rejecting the company 'Times Innovate Media Limited' as a comparable, as used by the Appellant in its transfer pricing analysis holding that the same is functionally not comparable.*

3.2 *That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the use of multiple year data for the purposes of transfer pricing analysis, ignoring the provisions of Rule 10B(4) of the Income Tax Rules, 1962 ("Rules") which allow use of multiple year data of comparable companies for the purpose of determination of the arm's length price.*

3.3 *That on the facts and circumstances of the case and in law, CIT(A) erred in not appreciating the Functional, Asset and Risk ('FAR') profile of the appellant and consequently denying appropriate risk adjustments.*

Tax credit of advance tax paid

4. *That on the facts and circumstances of the case and in law, CIT(A) erred in not granting the due credit of advance tax paid of INR 9,00,000.*

3. The assessee has also raised additional ground of appeal which reads as under:-

(i) *That on the facts and circumstances of the case and in law, the CIT(A) ought to have excluded Agrima Consultants International Ltd from the comparable set for the purposes of benchmarking the international transaction pertaining to MSS and BSS segments, for it was functionally not comparable.*

4. The issue raised in the present appeal is against transfer pricing adjustment made in the hands of assessee in two of the segments carried on by assessee.

5. Briefly, in the facts of the case, the assessee company was engaged in providing engineering design development services, software development services, back office support services and business development services to its associated enterprises. The assessee for the year under consideration had furnished return of income declaring total income of ₹ 1,35,64,616/-. The case of assessee was picked up for scrutiny. The assessee had entered into various international transactions with its associated enterprises. Therefore, reference under section 92CA(1) of the Act was made by Assessing Officer to Transfer Pricing Officer (TPO) for computing arm's length price in relation to international transactions. The TPO noted that the assessee was subsidiary of Eaton Asia International Ltd., which in turn, was subsidiary of Eaton Corporation. The assessee was primarily engaged in providing customer support services and business support services to Eaton Corporation, USA. The said concern Eaton Corporation, USA was globally diversified industrial manufacturer of various items. The assessee was providing business support services, which included market research and analysis on the group's high-end markets, analysis of financial reports, analysis of competitive intelligence documents, financial analysis for decisions on mergers and acquisitions, creating acquisition proposals, etc. The assessee was remunerated on cost and markup of 8% for the above said services provided to Eaton Corporation. The TPO had enlisted various international transactions undertaken by assessee with its associated enterprises under para 4 at page 2 of the order of TPO and the amount of transactions totaled to ₹ 87,38,22,500/-. In respect of provision of design engineering services, the assessee had applied CUP method as the most appropriate method and no

addition has been made by the TPO in this regard. However, in respect of other services i.e. software services, back office accounting services, business support services, marketing support services, the assessee had applied TNNM method, which is the issue raised before us. Further, in respect of balance services, complete results have been accepted and no addition has been made. The TPO was of the view that benchmarking done and arm's length price in the case of transactions relating to business support services and marketing support services were liable for TP adjustment and hence, show cause notice was issued to the assessee. The assessee for analysis of its international transactions, had taken segmental operating profit / total cost as its PLI and had selected five external comparables. The PLI in the case of assessee company was 8% and for computing PLI of comparables data of three years was taken and weighted average was arrived at 11.06%. The assessee was asked to provide single year profitability ratio of selected companies, in response to which details were furnished and mean margins worked out to 16.15%. The TPO thus, show caused the assessee and also pointed out that the concern Times Innovative Media Ltd. was functionally different company, hence the same needs to be excluded and the mean margins of comparables worked out to 20.68% and bringing adjustment to the tune of ₹ 8.8 crores. Show cause notice was also issued for benchmarking international transactions of business support services, wherein PLI of the company was 7.66% (OP/TC). The assessee had provided single year profitability ratio of selected concerns and mean margins worked out to 18.86%. The assessee was thus, show caused as to why adjustment should not be made to that segment also. Reply of assessee is reproduced by TPO. In reply, the assessee stressed that use of multiple year data versus single year data of comparables for determining arm's length value of business support services. It was further pointed out that Times Innovative Media Ltd. was functionally comparable and hence, the same needs to

be included. The assessee asked for risk adjustment in both the segments and also provided working of risk adjustment. The TPO rejected the plea of assessee of using data of multiple years as against data for contemporaneous period. The TPO also held that the assessee was not entitled to 5% standard deduction and adjustment on account of risk. This is in respect of marketing support services and an upward adjustment of ₹ 8,88,752/- was proposed and then in respect of business support services, applying data for contemporaneous period, the TP adjustment of ₹ 13,76,666/- was proposed.

6. Another adjudication was made as regards reimbursements to Eaton Ltd., UK. The first contention of assessee was that it was not an international transaction. However, the TPO rejected claim of assessee since the assessee and M/s. Eaton Ltd., UK were associated enterprises within meaning of section 92A of the Act. The assessee had made payment of ₹ 2.70 crores to M/s. Eaton Ltd., UK on account of certain pre-operative expenditure in connection with setting up of a new business unit. The entity to which the payment was made was an associated enterprise and hence the said transaction was held to be valid international transaction under section 92B of the Act and it was also reported by assessee in Form No.3CEB for the assessment year. The assessee further pointed out that it had disallowed the said payments while computing taxable profit for the year and even if it is assumed that it was international transaction, it did not impact the taxable income of assessee. The TPO noted that the assessee in fact had claimed deduction under section 10A of the Act on enhanced income and hence, it had not resulted any adverse impact on the assessee but on the other hand, the assessee had taken undue advantage. Consequently, the TPO then considered the nature of expenses and observed that the assessee could not demonstrate by any evidence / document that it had received any corresponding services from its associated

enterprises during the year, hence the said transaction was valued at Nil. Accordingly, the value of transaction amounting to ₹ 2.70 crores entered into with its associated enterprise was taken at Nil and the income of assessee was increased by ₹ 2.70 crores (approx.). Thereafter, the Assessing Officer passed final assessment order after including the adjustment on account of international transaction amounting to ₹ 2,93,60,140/-.

7. The CIT(A) first dealt with the issue of payment made to associated enterprise on account of pre-operative expenses. The CIT(A) was of the view that the assessee has not established its case of receiving services. However, since the assessee had disallowed ₹ 1,04,71,740/-, adjustment was restricted to balance amount of ₹ 1,66,22,982/-.

8. Coming to the next adjustment to business support services, the CIT(A) held that only single year's data is to be applied, in view of provisions of Rule 10B(4) of the Income Tax Rules, 1962 (in short 'the Rules'). The CIT(A) also upheld the order of TPO in excluding Times Innovative Media Ltd. as the said concern was engaged in organizing activities relating to management of events and activities relating to advertising on bus queue shelters, Metro Stations and Flyovers, etc. The CIT(A) held that 'event segment' is totally different than the 'marketing support service segment', wherein marketing support service was about marketing the products whereas 'events segment' provides services related to organizing and executing events. The CIT(A) held both to be functionally different and he confirmed adjustment of ₹ 13,76,666/- made to business support services and ₹ 8,88,752/- made to marketing support services. The CIT(A) further held the assessee not to be a risk free entity and did not allow functional risk adjustment. The CIT(A) also held that the assessee was not entitled to the benefit of +/-5%

standard deduction. Another issue raised by assessee was against non-granting of credit on advance tax paid of ₹ 9 lakhs. The CIT(A) observed that the Assessing Officer has not discussed the said issue and hence, the assessee could approach Assessing Officer under section 154 of the Act.

9. The assessee is in appeal against the order of CIT(A).

10. The learned Authorized Representative for the assessee pointed out that ground of appeal No.1 raised by assessee was general in nature. With regard to issue in ground of appeal No.2, the learned Authorized Representative for the assessee pointed out that it was against TP adjustment made on account of reimbursement of payments, in the absence of assessee establishing the receipt of services from its associated enterprises. The issue vide grounds of appeal No.3 and 3.1 was against transfer pricing adjustment for business support services and marketing support services rendered to associated enterprises. The grounds of appeal No.3.2 and 3.3 were not pressed. The issue in ground of appeal No.4 is against non allowance of credit of advance tax paid of ₹ 9 lakhs. The learned Authorized Representative for the assessee pointed out that the assessee was providing accounting support services to different entities and sum of ₹ 1.66 crores was incurred by assessee on Oracle Software implementation. He pointed out that TPO was not sure what were the services and benchmarking was done. The learned Authorized Representative for the assessee pointed out that margins of assessee at 29.05% were accepted but the TPO says that no rendition of services, hence has taken at Nil and adjustment was made on account of arm's length price at ₹ 2.70 crores, out of which, since the assessee had already added back sum of ₹ 1.04 crores, balance sum of ₹ 1.66 crores was added by CIT(A). The learned Authorized Representative for the assessee stressed that main segment of services

had been accepted to be at arm's length price i.e. on account of engineering design services, no addition has been made in the hands of assessee. He further pointed out that the assessee was using Oracle provided by associated enterprise and giving services to its group concerns and was remunerated at cost plus. The second transaction was held to be at arm's length price but first transaction was taken at Nil. The learned Authorized Representative for the assessee placed reliance on the decision of Pune Bench of Tribunal in Eaton Industries Manufacturing GmbH Vs. DCIT (2017) 79 taxmann.com 173 (Pune – Trib.). He then pointed out that there was services agreement between assessee and associated enterprise, copy of which is placed on record and there was list of services to be provided on the basis of which, the remuneration was calculated. He further placed reliance on the ratio laid down by Pune Bench of Tribunal in Eaton Fluid Power Ltd. Vs. ACIT (2018) 92 taxmann.com 158 (Pune – Trib.), wherein TP adjustment has been deleted and financial results of segment were accepted.

11. In respect of next issue i.e. grounds of appeal No.3, 3.1 and additional ground of appeal, the learned Authorized Representative for the assessee stressed that in the marketing support services, the concern Times Innovative Media Ltd. was to be included. He pointed out that since that concern was event management concern, so it was excluded by TPO and CIT(A) but in case FAR of assessee was same and the functions performed, which are placed at page 223 of Paper Book, then it was apparent that the assessee also undertakes promotional activities. The learned Authorized Representative for the assessee further pointed out that under both the segments of business support services and marketing support services, concern Agrima Consultants International Ltd. was excluded. He pointed out that the assessee can raise inclusion of another concern during TP proceedings as held by Pune Bench of Tribunal in Dover India (P) Ltd. Vs. DCIT (2015) 59 taxmann.com

53 (Pune – Trib.) and in Haworth (India) (P.) Ltd. Vs. DCIT (2017) 88 taxmann.com 316 (Pune – Trib.) and hence, there is no merit in the orders of authorities below. In respect of ground of appeal No.4, the learned Authorized Representative for the assessee stressed that credit for advance tax had not been allowed to assessee till date.

12. The learned Departmental Representative for the Revenue in respect of first issue pointed out that functions of concern has to be seen wherein the assessee paid to Eaton Ltd., UK sum of ₹ 2.70 crores, out of which, sum of ₹ 1.04 crores related to the period prior to formation of assessee. Further, the assessee charged cost plus mark up for providing services, which had not been disturbed. Our attention was drawn to para 20 of Tribunal's order in Eaton Industries Manufacturing GmbH Vs. DCIT (supra) and it was pointed out that while allowing the claim, the Tribunal had considered evidences furnished but in assessee's case, no such evidences of giving any services has been furnished. In respect of exclusion of Times Innovative Media Ltd., the learned Departmental Representative for the Revenue placed reliance on the observations of CIT(A) in para 2.3.7. In respect of Agrima Consultants International Ltd., the learned Departmental Representative for the Revenue pointed out that it was a new ground raised by way of additional ground of appeal.

13. The learned Authorized Representative for the assessee in rejoinder pointed out that information of Oracle are placed at pages 70 to 79 of Paper Book and thereafter, at pages 98 to 117 of Paper Book and also the copy of Share / Services Agreement was filed on record.

14. We have heard the rival contentions and perused the record. The ground of appeal No.1 raised by assessee being general, is dismissed. The second issue raised vide ground of appeal No.2 is against TP adjustment made on account of reimbursement of payments. The case of Revenue is that the assessee had failed to establish receipt of services from its associated enterprises, for which the aforesaid payment was made, hence there was no merit in the claim of assessee that no adjustment was warranted in respect of aforesaid payment made to M/s. Eaton Ltd., UK. In the facts relating to the issue, the assessee pointed out that the said sum of ₹ 2.71 crores (approx.) was paid to M/s. Eaton Ltd., UK towards Oracle Implementation charges. The said amount included sum of ₹ 1,04,71,740/- which was incurred towards formation of APSSC Unit prior to 19.04.2007, hence the said sum of ₹ 1.04 crores was added back to its return of income by the assessee on account of pre-operative / pre-commencement expenses. The assessee claimed that since this expense was added back and was not claimed as expenditure, it had no impact on taxable income and no benchmarking analysis was warranted for the said payment. The CIT(A) has accepted the plea of assessee and deleted TP adjustment to the said extent. The Revenue is not in appeal against aforesaid finding of CIT(A).

15. Now, coming to the sum of ₹ 1.66 crores (approx.), which as per the assessee included the cost paid for rendering back office accounting services from APSSC unit. The assessee was charging on cost plus basis to its associated enterprises for provision of back office accounting services from the said APSSC unit. The assessee claims that for providing the said services, it was using Oracle base provided by Eaton Ltd., UK and had remunerated it of ₹ 1.66 crores. The assessee had included the said expenditure of ₹ 1.66 crores in the cost base of APSSC and determined profit margins of APSSC segment and after considering

the aforesaid cost, the transaction was determined to be at arm's length price since the assessee had earned operating margins of 28.69% on operative cost after including the payment for Oracle Implementation charges. The TPO had not disturbed international transactions pertaining to APSSC segment and no TP adjustment was proposed. However, both the Assessing Officer and CIT(A) have made TP adjustment in respect of payment made to associated enterprises for Oracle Implementation charges on account of assessee not establishing its case of receiving services from its associated enterprises. The assessee before us has filed copy of agreement between assessee and Eaton Ltd., UK, copy of which is placed at pages 98 to 117 of the Paper Book. Under the agreement, Eaton Ltd., UK was the provider and assessee was participant. It was acknowledged that Eaton Ltd., UK provided certain shared services to certain members of Eaton group and it had agreed with the 'participant' with respect to certain shared services provided by it to the assessee, hence, agreement was entered into. The term 'services' was to include services set forth in Appendix-A to the agreement. It was agreed that the assessee shall pay Eaton Ltd., UK for estimated fees together with markup rate relating to all services rendered by Eaton Ltd., UK. Other terms were agreed upon between the parties for providing services. Appendix-A enlisted the services, which include range of shared services under three departments i.e. International Systems, Finance, International Systems Applications and the Office of Program Leadership. It was specifically provided that applications team, designs and develops reports and customized applications using Oracle and other IT tools. The outcome of said works was used by the financial processing sub-departments in Eaton SSC and Eaton's plants. The services included problem solving, designing, development and application support. The assessee in support has also placed on record the copies of invoices raised by Eaton Ltd., UK on the assessee at pages 70 to 79 of Paper Book. The agreement is placed at pages 98 to 117 of

Paper Book. The assessee claims that the said amount was paid for implementation of Oracle System, which was very basis / foundation of rendering accounting services to associated enterprises. The said Oracle System was essential for the assessee to render accounting services to its associated enterprises. The assessee had benchmarked the said transaction with APSSC segment. The assessee was an eligible entity entitled to 100% deduction and it was the case of assessee before the authorities below and even before us that there was no requirement to make excess claims or false claims of expenses. The assessee had availed the said services from its associated enterprises for setting up APSSC unit, pursuant to which payment was made to Eaton Ltd., UK.

16. The issue which arises before us is whether in such scenario, it could be said that the value of services availed by assessee was Nil. The TPO had considered the same at Nil and concluded that arm's length price of transaction was Nil. During the course of hearing, the assessee has also filed Services Agreement entered into by the assessee with Eaton Truck Components in APSSC unit, to establish its case of providing services to different Eaton entities using Oracle Implementation system. The perusal of said agreement between assessee and Eaton Truck Components reflects that the assessee was the provider and the said concern was participant. The Preamble of said agreement provides that provider i.e. assessee had personnel capability of providing transaction processing services to support the participant's business activities. Under the said agreement, the assessee was to provide accounting and transactions services to participant for which, it was remunerated at cost plus markup of 12%. In other words, the payments which have been made by assessee to Eaton Ltd., UK for Oracle Implementation charges have been utilized for providing services to other Eaton group entities from whom the assessee has been remunerated. It may be

reiterated that the assessee had earned margins of 28.69% in its APSSC segment i.e. after incurring aforesaid cost of ₹ 1.66 crores. In such scenario, it cannot be held that the assessee had not availed any services from Eaton Ltd., UK. The Oracle system was used by assessee for providing its services and the expenditure incurred by assessee is to be considered as part of cost based operations. The assessee had aggregated the international transactions relating to operating of APSSC business, wherein this transaction of availing Oracle services was also aggregated and benchmarked by testing net margins vis-à-vis third party comparables at entity level. The TPO has not disturbed the benchmarking of international transactions using entity level of APSSC segment. Once the margins have been accepted, then cost incurred could not be disturbed. In any case, the TPO has to benchmark the transaction and has to examine whether or not the method adopted by assessee to determine its arm's length price was most appropriate method. The second stage was to compare the margins of assessee with mean margins of comparables selected and it was not the jurisdiction of TPO to consider whether the payments made by assessee or cost incurred by the assessee for the shared services was justified or not. In case, such exercise has to be done, then the same has to be carried on by Assessing Officer.

17. We find that similar issue arose in Eaton Fluid Power Ltd. Vs. ACIT (supra) and the Tribunal held as under:-

> *"29. Now, coming to the issue of transfer pricing adjustment made by TPO on account of services availed by the assessee from its associated enterprises and taking the value of said international transactions at Nil. In the first instance, we hold that TPO cannot sit in the judgment of business module of assessee and its intention to avail or not to avail any services from its associated enterprises. The role of TPO is to determine the arm's length price of international transactions undertaken by the assessee and whether the same is at arm's length price when compared with similar transactions undertaken by external entities or internal comparables. We have already addressed similar issue in Emerson Climate Technologies (India) Limited Vs. DCIT in ITA No.2182/PUN/2013, relating to assessment year 2009-10 and in ITA No.211/PUN/2015, relating to assessment year 2010-11, order dated 29.12.2017 and observed as under:-*

"17. We have heard the rival contentions and perused the record. The assessee was 100% subsidiary of Copeland Corporation, USA. The assessee was earlier a company incorporated under the Companies Act and was joint venture of 51:49 between Kirloskar Brother Ltd. (KBL) and Copeland Corporation. M/s. KBL exited the joint venture in June, 2006 and the assessee became wholly owned subsidiary of Copeland Corporation. Post-exit of KBL, there was need to provide operational, strategic and advisory support to the assessee company to ensure that assessee benefit from the manufacturing and operational processes followed by Emerson Group of Companies worldwide. The said support services were provided by Emerson HK and Emerson TH, for which the assessee entered into agreement/s with both the parties separately. The aim of providing support services to the assessee was to achieve the following objectives:-

- *Development of new products for the Indian market;*
- *Implementation of cost effective and advanced manufacturing processes;*
- *Improvement of the financial performance and accounting processes;*
- *Establishing robust control and governance processes;*
- *Establish best in class HR practices followed throughout the Globe;*
- *Develop strong global customer business; and*
- *Differentiate itself in the Indian market.*

18. In order to achieve the said objectives, the assessee availed services from its associated enterprises. In this regard, the assessee had furnished various documentary evidences before the TPO, which were in the form of e-mails/presentation, details of visit of personnel of associated enterprises to India, purposes of visit, etc. The assessee has placed on record the said evidences at pages 323 to 898 of the Paper Book i.e. copies of e-mails / presentations and summary containing detailed explanation of the same at pages 911 to 938 of the Paper Book. The assessee had summarized about 100 e-mails justifying the receipt and benefit of services from associated enterprises and filed the same separately with reference to the page nos. of paper book, where these were enclosed. In addition to the same, the assessee had enlisted certain key benefits, which were derived by it on account of payment of fees for advisory and other services in support of which documentary evidence was filed, which are as under:-

Key benefits derived	***Page No.***
Development of New Products – Aluminium Motor, Product Sr. No.CR 72	*333 – 336*
Access to web portals enabling significant cost reduction such as e-sourcing etc.	*551 – 564*
Assistance in negotiating a beneficial purchasing rate with suppliers – viz. Bao Steel	*487 – 490*
Cost reduction targets achieved due to e-bidding platforms implemented	*533 – 534*
Identifying lead for new business opportunities for ECT India – Examples of support/inputs received for Whirlpool for Indian markets	*587 – 588*
Identifying lead for new business opportunities for ECT India – Examples of support/inputs received for Blue Star for its Middle East markets	*597 – 598*
Sharing of key data related to competitors such as Mitsubishi	*565 – 566*
Sharing of key data related to competitors such as Sanyo	*583 – 584*
Assistance in implementation of performance management system for employees of ECT India, identifying the training needs, etc	*621 – 622*

Access to regional / global information in respect of suppliers, commodities updates etc	*539 – 546*
Solutions obtained for critical issues such as unionizations issues with labour, legal cases pending in court, union wages proposals, high attrition rates, e-hiring deployment, etc.	*613 – 628*

19.The assessee thus, filed documentary evidence to demonstrate that it had availed services in the field of Human Resources, Marking and Product, Finance, Business Development and Management and other services i.e. support for new product, marketing material, training material and technical support. The assessee has also explained the need for services being in field of operational, strategic and advisory support services. The first aspect which arises in the present appeal is whether the TPO while ascertaining whether price paid for the services is at arm's length price or not, can enter the field of businessman, who is the best judge as to whether it needs to avail the said services. The answer to the same is 'No'. Each businessman is the best judge to come to decision as to whether it needs the said support services or not. Secondly, once such a decision has been taken by the businessman and it provides the evidence of services received by it from its associated enterprises, then the TPO cannot question the same by commenting upon the nature of services provided, where in any case, information is hyper technical. First of all, where the TPO has referred to the services provided and pointed out defects in the services provided, the first step that services have been provided stands established. Once the same is established by way of assessee producing several evidences before the TPO, which were in the form of contemporaneous data, then the TPO is precluded from commenting upon the same and holding that the assessee had not received any services and also there was no need for making any payments for such services, as the services provided were not upto the mark. In any case, the perusal of various evidences filed by the assessee i.e. contemporaneous data available on record shows that it is highly technical and the same has been used by the assessee for carrying on its business activities, such evidence cannot be brushed aside being not upto the mark. The TPO had referred to part of the data and drew conclusion, which is not warranted in any case.

20.Another aspect of the issue which needs to be kept in mind is the developing scenario of carrying on the business in the country. The said business is carried on by the entities which have presence outside India and have certain standards, which are attached to its brand name. In order to maintain its brand value, arrangements are made with different entities across the globe by holding companies, so that different entities operating in different parts of the world adhere to specific rules and regulations while carrying on business under the said brand. The assessee is 100% subsidiary of Copeland Corporation, which admittedly, has presence in various Countries. The assessee has placed on record that besides the assessee entering into agreement with Emerson HK, Emerson TH, various entities of other countries had entered into such agreements. The terms of the agreement are similar for providing services, wherein a particular formula is designed by the person providing the services i.e. the basis for remuneration is the cost incurred by way of man hours charged to the entity with mark up of 5.8%. Such method of charging and remunerating was identical in the case of all the entities which were availing the services from Copeland Corporation through Emerson HK and Emerson TH. The assessee had also furnished on record the basis for charging cost by the two entities from the assessee. No doubt, the complete details of operations of the said concerns worldwide had not been filed, but that had no relevance to the activities or services availed by the assessee. There is no merit in the order of TPO in rejecting the segmental details of AEs filed by the assessee vis-à-vis services availed by it. What is to be considered in the

hands of assessee is the services it had availed from Emerson HK and Emerson TH and not the whole activities undertaken by the said two concerns worldwide. The assessee had put on record that not only the assessee but many other concerns were availing same services from the two entities and even the basis for remuneration to the said concerns was the same in respect of all the countries. In such circumstances, there is no merit in the order of TPO in holding that as to whether the said concerns have given services or whether they are qualified to give the services and the cost incurred by AEs. First of all, this is outside the domain of TPO. Under the Transfer Pricing Regulations what the TPO has to determine is whether the services which have been provided by associated enterprises are at arm's length price. Accordingly, we find no merit in this part of the order of TPO.

21.In this regard, we find support from the ratio laid down by the Hon'ble High Court of Delhi in Hive Communication Pvt. Ltd. in Income Tax Appeal No.306/2011, wherein it has been held that the legitimate business needs of the company must be judged from the view point of the company itself and must be viewed from the point of view of a prudent businessman. It was further held by the Hon'ble High Court that it was not for the Assessing Officer to dictate what the business needs of the company should be; it is businessman who can only judge the legitimacy of the business needs of the company from the point of view of prudent businessman. Hence, the benefit derived and accruing to the company must also be considered from the angle of prudent businessman. The Hon'ble High Court clearly held that the term "benefit" to a company in relation to its business has a very wide connotation and it was difficult to accurately measure these benefits in terms of money separately. The said principle laid down by the Hon'ble High Court has been applied by the Delhi Bench of Tribunal in McCann Erickson India P. Ltd. Vs. Addl.CIT (supra) to hold whether the benefits derived by the assessee, in view of the evidences in respect of management service charges and client coordination fees, cannot be found fault with.

22.Similar proposition has been laid down by the Hyderabad Bench of Tribunal in TNS India Pvt. Ltd. Vs. ACIT (supra), wherein the Assessing Officer had not believed the write-up for the services provided and the benefit obtained. The Tribunal held that unless the Assessing Officer steps into assessee's business premises and observes the role of the said company or the assessee's business transactions, it would be difficult to place on record the sort of advice given in day-to-day operations. Therefore, the order of Assessing Officer/TPO that services were not rendered by the group companies to assessee was negated by the Tribunal.

23.The next stand of the TPO is two-fold; as to what benefits have been received by the assessee against the said support services and intricacy value of services given by the associated enterprises. The said aspect is linked to the issue of whether there is any need for services and in the absence of its establishing the same, whether the TPO / Assessing Officer is correct in determining the arm's length price of transactions at Nil. The assessee had entered into an agreement with its associated enterprises for availing the services because of business benefits arising from such an understanding. Law does not require the assessee to demonstrate the need for availing the services. The assessee is best person to arrange its affairs to conduct the business in the manner it wants and Revenue cannot step into the shoes of businessman to decide what is necessary for the businessman and what is not. The TPO is not empowered to question the decision of assessee to avail support services from the associated enterprises. The decision taken by the assessee in the course of carrying on its business is commercial decision and the TPO cannot question such commercial wisdom of assessee's decision. The second linked issue which has been raised is that the assessee did not

benefit from such support services where the assessee has shown losses during the year.

24.The Mumbai Bench of Tribunal in Dresser-Rand India (P) Ltd. Vs. Addl.CIT (supra) had held that We have further noticed that the TPO has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by so stretch of logic, it can have any role in determining ALP of that service. When evaluating the ALP of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same.

25.Accordingly, we hold that the TPO while benchmarking the transactions has to determine whether the price paid by the assessee for the services availed is what an independent enterprise would have paid for the same services. The analysis done by the TPO of the nature of services and benefits arising to the assessee on availing such services was beyond the scope of transfer pricing provisions and hence, we find no merit in the same."

30. The second aspect which needs to be considered in the present case is the services availed by assessee from its associated enterprises. The assessee is a group concern of worldwide Eaton group of companies and the intention to avail the said services is to carry out his business on worldwide platform. The total turnover of assessee for the year was ₹ 173 crores and the services availed from associated enterprises were intermingled to the extent that the Tribunal in earlier years has directed that for benchmarking international transactions undertaken by the assessee, import of raw materials for manufacturing purpose and export of finished goods should be aggregated. The information technology services availed by the assessee also relate to aforesaid business carried on by the assessee and hence, we find merit in the plea of assessee in aggregating the same with other international transactions undertaken by the assessee with its associated enterprises. Accordingly, we hold so. In any case, the assessee in the reasons for filing additional evidence has pointed out that information was filed before the TPO along with agreement and certificate of Eaton China, but thereafter, no other query was raised by TPO or any clarification was sought in respect of information technology services availed. The assessee thus, was under the bonafide belief that the documents and explanation furnished by it has been accepted. Further, the assessee before us has pointed out that though it is filing additional evidence but because of confidentiality clause, such information cannot be shared as it would affect the business transactions of assessee. We have gone through the additional evidence filed by the assessee and we are of the view that the assessee has established its case of availment of said services in the field of information technology. In addition, the assessee has also filed certificate from its associated enterprise dated 22.04.2011 i.e. during the course of TP proceedings, under which there is certification of factum of provision of services by Eaton China to the assessee and also basis for charging of such charge i.e. cost plus 5% markup. It was also confirmed by Eaton China that similar services were availed by other Eaton group companies and they were charged on the same basis as in the case of assessee. The assessee had also filed on record copies of debit notes and other JV vouchers raised during the year under consideration justifying its case of availing the said services and payment in lieu thereof.

31. In the above said facts and circumstances in the issue involved, we hold that there is no merit in observations of TPO in holding that the assessee had not availed any services, hence the arm's length price of international transactions is to be adopted at Nil.

32. The learned Departmental Representative for the Revenue had placed heavy reliance on the ratio laid down by Hon'ble High Court of Delhi in Cushman and Wakefield (India) (P.) Ltd. (supra), which in turn, has also taken into consideration the decision of Mumbai Bench of Tribunal in Delloite Consulting India (P.) Ltd. Vs. DCIT (2012) 137 ITD 21 (Mum). In the facts of the case before the Tribunal, the TPO had determined arm's length price of international transactions at Nil keeping in view the factual position as to whether in a comparable case, similar payments would have been made or not in the terms of agreement. The Hon'ble High Court taking note of the issue before it observed that neither Revenue nor the Court must question the commercial wisdom of assessee or replace its own assessment or commercial viability of the transaction. However, the details of specific activities for such cost was incurred and the attended benefit to the assessee had to be considered since the same was not considered, the matter was remanded back to the file of concerned Assessing Officer for arm's length price adjustment by the TPO, in accordance with law. The said judgment is dated 23.05.2014.

33. The Hon'ble High Court of Judicature at Hyderabad in the case of R.A.K. Ceramics India Pvt. Ltd. (supra) while deciding the issue of fulfillment of conditions of benefit test as raised by the TPO vis-à-vis royalty payments made by assessee @ 3% which was restricted to 2% of net ex-factory sale proceeds, held that it was incumbent upon the TPO after rejecting comparables selected by the assessee to come up with other comparables so as to justify the reduction of royalty payments. Further, no such exercise was undertaken by the TPO and by going into whys and wherefores of the improvement in the net sales and profits of assessee, the TPO held that there was no justification for payment of royalty @ 3% to associated enterprises by the assessee. The Hon'ble High Court held This reasoning is without legal basis of law as it is not for the TPO to decide the best business strategy for the assessee. The Hon'ble High Court also held that This whimsical fixation by the TPO amounts to an arbitrary and unbridled exercise of power. Thus, the order of Tribunal rejecting the case of TPO was upheld by the Hon'ble High Court.

34. The Hon'ble Bombay High Court in CIT Vs. M/s. Kodak India Pvt. Ltd. (supra) interpreted the provisions of section 92B(2) of the Act. The facts of the case as noted by the Hon'ble Bombay High Court were as under:-

> *"3. The respondent assessee is an Indian subsidiary of M/s. Eastman Kodak Co. USA (EKC). During the previous year relevant to the assessment year the respondent assessee sold its imaging business to one M/s. Carestream Health India Pvt. Ltd. The buyer company i.e. M/s. Carestream Health India Pvt. Ltd. was a Indian subsidiary of M/s. Carestream Inc. an USA company. The case of the respondent assessee was that the transaction of sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. was a transaction between the two domestic non Associated Enterprises. Hence, the provision of Chapter X of the Act would have no application. Thus, had not even declared this transaction in its 3 CEB report.*
>
> *4. However the Transfer Pricing Officer (TPO) while examining another Transfer Pricing issue came across the impugned transaction. It held on the basis of Section 92B(2) of the Act that even if the transaction between Kodak India Pvt. Ltd. and M/s. Carestream Health India Pvt. Ltd. was between two domestic non Associated Enterprises, yet it would still be considered to be an International transaction and Chapter X of the Act would be applicable. This on the basis that the holding companies of both the respondent assessee as well as M/s. Carestream Health India Pvt. Ltd. had entered into a global agreement for sale of its business. This global*

agreement was prior in point of time to the sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. The Assessing Officer passed a draft Assessment order under section 144C of the Act on the basis of the order of the TPO."

35. Two aspects were decided by the Tribunal of section 92B(2) of the Act, which came into effect from 01.04.2015 and prior to that the transaction could not be deemed to be an international transaction. It also held that no addition on account of arm's length price was warranted since the TPO failed to apply any of the methods prescribed under section 92C of the Act. The Hon'ble High Court vide para 10 held as under:-

"10. We must also record the fact that the ALP was arrived at by the Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under section 92C of the Act. The method to determine the ALP adopted was not one of the prescribed methods for computing the ALP. It was not even any method prescribed by the Board. At the relevant time, i.e. for A.Y. 2008-09 Section 92C of the Act did not provide for other method as provided in Section 92C(1)(f) of the Act. The impugned order of the Tribunal holds that the method adopted by the Revenue to determine the ALP was alien to the methods prescribed under section 92C of the Act. In the above circumstances, the Tribunal declined to restore the issue to the Assessing Officer for re-determining the ALP by adopting one of the methods as listed out in Section 92C of the Act. This finding of the Tribunal has also not been challenged by the Revenue."

36. In the facts of the case before the Hon'ble High Court of Bombay in CIT Vs. M/s. Lever India Exports Ltd. (supra), the TPO while evaluating the transactions between the parties held that the same were on principal to principal basis and no reimbursement of advertisement expenses by the respondent assessee to its associated enterprises could be allowed. Consequently, he determined the arm's length price at Nil by virtue of disallowing the expenditure. The Hon'ble High Court in such circumstances observed as under:-

"7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the <u>TPO's jurisdiction was to only determine the ALP of an International transaction.</u> In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. <u>It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and / or genuineness of the expenditure.</u> This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT(A) as well as the Tribunal that neither the

> *method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained."*
>
> *(underline provided by us for emphasis)*

37. In view of the ratio laid down by the jurisdictional High Court in CIT Vs. M/s. Kodak India Pvt. Ltd. (supra) and CIT Vs. M/s. Lever India Exports Ltd. (supra), the proposition laid down by the Hon'ble High Court of Delhi (supra) stands modified.

38. Applying the above said principle and in view of the facts and circumstances as referred to by us in the paras hereinabove, we hold the international transactions of information technology services availed has to be aggregated with other transactions being intrinsically linked to other international transactions undertaken by the assessee during the year and the same has to be benchmarked applying internal TNMM method as in the case of other international transactions. Further, we also reverse the order of TPO in holding that the assessee has not availed any services in view of various documents filed by the assessee and also certificate of Eaton China, which was filed during the course of TP proceedings evidencing not only the availment of services but also the basis of cost for such services. Similar services were availed by other Eaton group entities from Eaton China and its certificate that the same has also charged at the same rates as charged to the assessee. In the entirety of the above said facts and circumstances, we reverse the order of TPO / Assessing Officer in taking the value of international transactions of Information Technology Services availed at Nil and delete the adjustment made. Allowing the claim of assessee, the ground of appeal No.8 raised by the assessee is thus, allowed."

18. The assessee had availed services from its associated enterprises for which cost was incurred and on the other hand, the assessee had provided said services to various Eaton entities and was being remunerated on cost plus markup at 8%. The TPO had not disturbed the margins of assessee but on the other hand has disallowed cost incurred by assessee to be not at arm's length price. In order to make earnings, the corresponding costs have to be allowed; the assessee had incurred cost on Oracle Implementation provided by Eaton Ltd., UK and said Oracle platform was used by assessee to integrate its operations of APSSC unit in order to provide back office accounting services to Eaton entities. Once the transaction is closely and intrinsically linked to the business operations carried on by the assessee, then the same cannot be segregated and arm's length price of said transaction could not be taken at Nil. We find no merit in the approach adopted by TPO in this regard. We further find support from the ratio laid down by Pune Bench

of Tribunal in assessee's group concern in Eaton Industries Manufacturing GmbH Vs. DCIT (supra), wherein it was held as under:-

> *"16. In the present set of facts where the assessee is rendering procurement services to its principal and which in turn is being compensated on cost plus 18.8% mark-up; where the entire cost incurred by the assessee has been remunerated with a mark-up which is being offered to tax by the assessee in year to year, there is no merit in the orders of Assessing Officer/DRP in making the aforesaid disallowance under section 37(1) of the Act. Where the cost debited by the assessee has been recovered from its principal with mark-up and taxed in the hands of the assessee, there is no loss to the Revenue and in any case the disallowance of the expenditure would lead to a situation wherein on one hand there is disallowance in the hands of the assessee and on the other hand the mark-up on the recovery of the said expenditure is taxed in the hands of the assessee. Such an anomaly cannot be upheld in the hands of the assessee. In any case the assessee has placed on record the evidence of support services being received from the AEs which are in the nature of back office accounting services and IT support services which enable the assessee to run its business in India. The assessee has no establishment in India and has only a branch office wherein it is utilizing the place of its AEs and is also using services for carrying on its service or providing procurement services to its principal, i.e. EIMG, Switzerland, then it cannot be said that the said expenditure has not been wholly and exclusively incurred for the purpose of business. The cost of the services provided by the AEs has been allocated on a formula which has been followed form year to year and there is no merit in disallowance of the cost incurred on receipt of support services from its AE."*

19. Accordingly, we hold that there is no merit in disallowance made by TPO, which was upheld by CIT(A) at ₹ 1.66 crores. The same is allowed. Thus, the ground of appeal No.2 raised by assessee is allowed.

20. Now, coming to the next issue i.e. selection of comparables by assessee / TPO, which is raised vide grounds of appeal No.3, 3.1 and additional ground of appeal. The assessee had selected certain concerns as comparables. However, the TPO has rejected Times Innovative Media Ltd. as not to be comparable in the segment of marketing support services. Our attention was drawn to the functions performed by assessee which are enlisted in transfer pricing study report of assessee for the year under consideration and special reference was made to page 233 of Paper Book. The assessee was performing various functions in the field of marketing strategy, developing training and sales material price decision and transacting. Further, under the umbrella of marketing support services rendered,

the assessee pointed out that it undertook promotional activities in India and also liaisoned with the distributors and the sales representatives in India to facilitate the marketing and sale of Eaton Corporation products in India. It also identified customers in India and was responsible for managing the finance treasury, legal, pay roll and accounting performance. The assessee on the said basis claimed that since it was providing promotional activities in India, then its margins should be compared with Times Innovative Media Ltd., which was engaged in the business of organizing events for companies for advertising and marketing. The assessee had considered the events segment for the purpose of its analysis being comparable to marketing functions. We find no merit in the plea of assessee in this regard. The concern Times Innovative Media Ltd. was an event management concern and the functions performed by it were different from the functions performed by assessee of providing marketing support services. The nature of activities performed by assessee was marketing the products, whereas Times Innovative Media Ltd. was solely engaged in organizing and executing events. Accordingly, we find no merit in the plea of assessee in this regard and the said concern is to be excluded from final list of comparable. Accordingly, there is no merit in the plea of assessee and grounds of appeal No.3, 3.1 are dismissed.

21. The grounds of appeal No.3.2 and 3.3 are not pressed by way of written submissions, hence the same are dismissed.

22. The additional ground of appeal raised by assessee is against inclusion of Agrima Consultants International Ltd. The assessee is aggrieved by said inclusion and he has raised the issue by way of additional ground of appeal. The assessee had included the said concern as comparable in both the segments marketing support services and business support services and computed arm's length price.

The plea of assessee before us is that Agrima Consultants International Ltd. was functionally not comparable as it was providing technical and technology related consultancy and was consultant to leading financial institutions, hence it was engaged into financial consultancy. The learned Authorized Representative for the assessee pointed out that inclusion / exclusion of a concern can be raised at any stage as held by Special Bench of Chandigarh Tribunal in DCIT Vs. Quark Systems Pvt. Ltd. (2010) 38 SOT 307 (CHD) (SB), which has been approved by the Hon'ble High Court of Punjab and Haryana in CIT Vs. Quark Systems Pvt. Ltd. (2011) 244 CTR 542 (P&H). The learned Authorized Representative for the assessee further placed reliance on the decision of Pune Bench of Tribunal in Dover India (P) Ltd. Vs. DCIT (supra), wherein the said concern was excluded being not functionally comparable to a concern providing market support services.

23. The learned Departmental Representative for the Revenue has strongly objected to the said issue raised by assessee for the first time before the Tribunal.

24. We find no merit in the stand of learned Departmental Representative for the Revenue especially in view of the ratio laid down by Special Bench of Chandigarh Tribunal in DCIT Vs. Quark Systems Pvt. Ltd. (supra), which has been approved by the Hon'ble High Court of Punjab and Haryana. In view thereof, the assessee can raise the issue of inclusion / exclusion of any concern during any stage and hence, we admit the additional ground of appeal raised by assessee.

25. Now, coming to merits of the issue raised, wherein the assessee is engaged in marketing support services and is also providing business support services to its associated enterprises. The concern which has been picked up during TP study

report was Agrima Consultants International Ltd. on the premise that it was functionally comparable, but it was engaged in providing financial consultancy.

26. We find that the Tribunal in Dover India (P.) Ltd. Vs. DCIT (supra) has already held that Agrima Consultants International Ltd. was engaged in providing financial consultancy and the said company could not be said to be functionally comparable to a concern providing marketing support services. Where the comparables selected are not functionally comparable to the tested party, then the margins of such concern cannot be utilized for determining the arm's length price of international transactions undertaken by tested party. In view thereof, we direct the TPO to exclude margins of Agrima Consultants International Ltd. while benchmarking international transactions of assessee in both the segments pertaining to marketing and business support services and computer the arm's length price of international transactions after including Times Innovative Media Ltd. in market support services segment. The additional ground of appeal raised by assessee is thus, allowed.

27. Now, coming to the last ground of appeal No.4 raised by assessee, wherein the assessee is aggrieved by the orders of authorities below in not granting due credit of advance tax paid of ₹ 9 lakhs.

28. We find that the CIT(A) had directed the assessee to file necessary rectification application before the Assessing Officer under section 154 of the Act. The learned Authorized Representative for the assessee before us has pointed out that the said rectification application has not been disposed of till now. We direct the Assessing Officer to dispose of rectification application after due verification of

the claim of assessee. Hence, the ground of appeal No.4 is thus, allowed. The grounds of appeal raised by assessee are thus, partly allowed.

29. In the result, appeal of the assessee is partly allowed.

Order pronounced on this 31st day of October, 2018.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 31st October, 2018.

GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to</u> :

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune