IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.414/Del/2011
Assessment Year: 2006-07

Michelin India Tyres Pvt. Ltd., Unit 401-404, 4th Floor, Copia Corporate Suites, Jasola District Centre, New Delhi.	Vs.	DCIT, Circle-6(1), New Delhi.

PAN: AADCM8454G

(Appellant)		(Respondent)
Assessee by	:	Shri Nageshwar Rao, Advocate
Revenue by	:	Shri Sarabjeet Singh, Sr.DR
Date of Hearing	:	05.12.2018
Date of Pronouncement	:	08.01.2019

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 26th October, 2010 passed by the Assessing Officer u/s 143(3) read with section 144C of the IT Act relating to Assessment Year 2006-07.

2. Grounds of appeal Nos.1,2,3 and 16 being general in nature are dismissed.

3. Grounds of appeal No.4,5,6 and 12 which relate to disallowance of technical fee paid read as under:-

> "4. The Hon'ble DRP/AO erroneously assumed that the payment for technical services fails to satisfy the 'commensurate with income' test. The Hon'ble DRP/AO has erred in law and in facts of the case by assuming that since there is no income arising to the Appellant from the payment made for technical services, it is not commensurate with the income.
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> 5. Without prejudice to the above grounds, the Hon'ble DRP/AO has erred in law and facts of the case in holding the arm's length price of the transaction involving technical assistance provided to the Appellant by its AE as 'NIL'. The TPO can only disallow the profit margin charged by the AE, but the costs involved have to be allowed.
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> 6. Without prejudice to the above grounds, the Hon'ble DRP/AO has erred in the use of Comparable Uncontrolled Price ('CUP') method for the benchmarking of the transaction involving technical assistance provided to the Appellant by its AE, and the use of such CUP was without any comparable transactions whatsoever.
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> 12. The Hon'ble DRP/AO has erred on facts and circumstances in failing to appreciate that the availing of technical assistance services from AE's should not fall under the purview of transfer pricing since the price at which the impugned transaction took place was commercially negotiated with the consent of the joint-venture partner."

4. Facts of the case, in brief, are that the assessee filed its return of income on 30.11.2006 declaring loss of Rs.24,18,39,870/-. A reference was made by the Assessing Officer to the TPO for determination of the ALP of the international transaction u/s 92C(3) of the IT Act. In response to the notice issued by the TPO, the assessee filed various details from time to time as required by the TPO. During the course of TP proceedings, the TPO observed that the assessee has undertaken the following international transactions:-

S.No.	Type of International Transaction	Value
1	Import of finished goods for resale in India	245,291,403
2.	Availing of technical assistance from AEs	78,291,144
3.	Reimbursement of expenses by AE	2,893,345
4.	Advance paid against machinery	164,062,049

4.1 He observed that the assessee has paid fee for technical services on a whole for the manufacturing operations of the assessee. However, there is no manufacturing activity undertaken during this year. On being questioned by the TPO, it was argued that since the JV between Apollo Tyres and the assessee constituted 49% stake in favour of Apollo Tyres, it was a key participant in deciding the price for the technical services availed from Michelin Group entities worldwide. Hence the price negotiated with the overseas AEs was a commercially negotiated price and can be considered at Arm's Length. The TPO observed that the majority shares in this case was with the assessee and it was also open for it to negotiate the terms and payments thereof. He further observed that the shelving of the manufacturing functions has been mostly attributed to the termination of the JV Agreement with Apollo Tyres. He observed that the JV Agreement with Apollo Tyres was entered into on 17th September, 2003 and it was terminated under an agreement dated 30th September, 2005. He further observed that even in the previous year ended 31st March, 2005, the manufacturing operations of the assessee were hived off following disagreements between Apollo Tyres and Michelin group. Therefore, it is amply clear that the assessee did not have any manufacturing operations in the preceding assessment year also. He further noted that even in the previous assessment year, the assessee has made payments for

technical assistance and had no manufacturing operations. According to him, under uncontrolled circumstances and by application of CUP method, there is no arm's length price for any payment which does not have the corresponding benefit. In the instant case, the assessee is perpetually paying technical assistance fee for which no corresponding benefit arises to it. Since the payment of technical service fee was argued to be paid in accordance with an agreement entered into with the AE, the Assessing Officer proceeded to identify whether transfer of the intangible has actually taken place and then only to ascertain whether the income with respect to a transfer is commensurate with the income attributable to the intangible. According to him, the formal agreement between the assessee and the AE cannot be a basis for determining the ALP of the transactions. According to him, in the TP parlance, the agreements between the associates may be a tool to determine the quantum and methodology of payment, but, the same does not hold sacrosanct on grounds of economic reality. Relying on various decisions, he held that the payment of technical services cannot be justified solely on the basis of agreement between the assessee and the AE and the real test lies in 'commensurate economic benefits.' He observed that the payment of technical know-how service must satisfy 'commensurate with income test.' According to the TPO as per various judicial precedents in the 'commensurate with income' the profit earned by the enterprise over and above the industry average can be considered as income attributable to the payment of technical service fees. However, in the instant case, there is no income since the assessee has itself admitted that this payment was made for manufacturing function of the assessee which did not take

place. Since there was no manufacturing activity even in the previous assessment year, therefore, he held that the ALP of such payment is nil by application of CUP method.

5. Based on the order of the TPO, the Assessing Officer confronted the assessee to explain as to why the technical fees paid by the assessee should not be amortized. Rejecting the various explanation given by the assessee, the Assessing Officer held that when the assessee was procuring tyres from its parent/associated companies and was selling in India, it wanted to set up manufacturing facility which was altogether a different venture which the assessee was seeking to establish as a JV with Apollo group. The JV would have taken the shape of a distinct enterprises different from the assessee. Since the venture was admittedly aborted and since there was no sign of its revival and no effort for the revival of the joint venture or for setting up of the facility of its own is apparent, therefore, this business can safely be treated as aborted. Further, the assessee itself is disallowing a part of the expenses on the same project. Therefore, claiming the other part is without any cogent reasons. He, therefore, held that the claim of Rs.7,82,91,144/- is not an allowable expenditure.

6. The assessee approached the DRP. However, the DRP also rejected the contention of the assessee. The Assessing Officer accordingly made the disallowance of Rs.7,82,91,144/- in the final order. Aggrieved with such order of the Assessing Officer/TPO, the assessee is in appeal before the Tribunal.

7. The ld. counsel for the assessee strongly challenged the order of the A.O./TPO/DRP. He submitted that the TPO grossly erred in rejecting the benchmarking of the technical fees paid to overseas AEs by considering the overseas AE as tested party and applying TNMM. The DRP also routinely upheld the TPO's determination of ALP for technical fees as nil on the pretext of applying CUP as the most appropriate method by purported application of fanciful and illegal 'commensurate with income test' and completely failed to appreciate the invalidity of such approach. He submitted that absence of direct income attributable to such expenditure would hardly be test for determining its ALP under Chapter-X. He submitted that it is the settled law that provisions of Chapter-X can only be used to substitute ALP by applying one of the prescribed methods in law. The TPO, in the instant case, proceeded by completely ignoring the nature of service contemplated under the technical services agreement. The lower authorities have discarded the various case laws cited by the assessee in support of the assessee's case. Their approach is not only arbitrary and inconsistent with provisions under Chapter-X, but is also contrary to settled principles of taxation as every expenditure need not necessarily result in separate stream of income. He accordingly, submitted that without considering the submissions made by the assessee, the lower authorities could not have disallowed the expenditure claimed by the assessee.

8. The ld. DR, on the other hand, strongly supported the order of the TPO/A.O. He submitted that the expenditure was incurred for an aborted manufacturing process

and since no benefit or future benefit was accrued to the assessee, therefore, such expenditure is in the nature of pre-operative expenditure. He accordingly, submitted that the order of the A.O./TPO/DRP should be upheld.

9. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the assessee in the instant case had incurred an amount of Rs.11,60,89,064/- in respect of an aborted project of setting up of a manufacturing facility in India. The above amount consisted of an amount of Rs.7,82,91,144/- towards technical fees paid which the assessee claimed as revenue expenditure against its income from trading of tyres. We find the Assessing Officer, applying the CUP method, determined the arm's length price at nil and disallowed the same on the ground that the payment of technical know-how service does not satisfy 'commensurate with income' test. There is no income since the assessee has itself commented that this payment was made for manufacturing function of the assessee which did not take place. The Assessing Officer further held that it is in the nature of capital expenditure and accordingly, disallowed the same.

10. We find identical issue had come up in assessee's own case in the immediately preceding assessment year and the Tribunal in ITA No. 3355/Del/2011, order dated 30.10.2015, has discussed the issue by observing as under:-

> "11. A.O. observed that the technical fee paid by the assessee towards receipt of certain rights to use technology by the assessee for the manufacture of Tyres was expenditure which was clearly in the nature of capital expenditure and relied upon the judgements cited as KCP Ltd. Vs CIT 242 ITR 659 (S.C.) and CITS Vs Reinz Talbros Pvt. Ltd. 252 ITR 637 (Del.).

12. Ld. CIT(A) while confirming the order passed by A.O., observed in para 5.2 of the impugned order to the effect that "the appellant itself has submitted that these expenses were incurred with a view to establish a manufacturing facility as a part of its on- going business strategy and achieve backward integration. However, the plan for which the funds amounting to Rs.1,42,04,926/- were expended by the appellant i.e. availing the technical services to assess the feasibility, was eventually hived-off / Discontinued". Thus, such expenditure can be aptly summed up as 'infructuous expenditure' incurred for a project which was ultimately scrapped. Judicial precedents on this issue have held such expenses as not allowable being in the nature of capital expenditure and relied upon the judgement cited as Triveni Engineering Works Ltd. Vs CIT 232 ITR 639 (Del.), 100 Taxman 90 (Del. H.C.).

13. Ld. A.R. by relying on the judgement of Hon'ble Jurisdictional High Court cited as Indo Rama Synthetics (I) Ltd. Vs CIT 185 Taxman 277 (Del.) contended that in the identical circumstances, Hon'ble Jurisdictional High Court has discussed the case of Triveni Engineering Works Ltd. (supra) and CIT vs Modi Industries Ltd. (1993) 200 ITR 341 and came to the following conclusion:

> "In the case at hand the amount spent on the project reports was not for the purpose of facilitating the assessee's existing trading operations or enabling management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched. If only the project reports had been successfully accepted and put into implementation, the assessee would have gone into manufacturing of a new product which would have certainly required investment of fresh capital and coming into existence of additional fixed assets."

14. Now. Coming to the case at hand, the assessee claimed to have spent an amount of Rs.1,42,04,926/- towards legal fee under the head 'professional New Delhi legal expenses', which have been treated as capital expenditure and added to the income of the assessee by the A.O. as well as Ld. CIT(A).

15. Ld. CIT(A) by relying upon the decision of Hon'ble High Court in the case of Triveni Engineering Works Pvt. Ltd. (supra) confirmed the order passed y A.O. making addition of Rs.1,42,04,926/- being in the nature of capital expenditure on the sole ground that when the said amount was expended by the appellant for availing the technical services to assess the feasibility of the project was eventually hived off / discounted such expenditure are to be treated as infructuous expenditure and as such are in the nature of capital expenditure.

16. However, the Hon'ble Jurisdictional High Court in the case of Indo Rama Synthetics (I) Ltd. (supra) has made fine distinction in the capital and revenue expenditure in para 10 of the judgement reproduced in the preceding para of this order by observing that if the expenditure is incurred for starting of a new business not carried out by the assessee earlier, then such expenditure is held to be of capital

in nature. However, if the expenditure incurred is in respect of the same business which is already carried out by the assessee even if for the expansion of business, to start a new unit which is the same as earlier business and there is unity of control of creating funds then such expenditure is to be treated as business expenditure. No doubt, Hon'ble Jurisdictional High Court in the case of Triveni Engineering Works Ltd. (supra) observed that :-

> "After taking note of various judgments of the Supreme Court observed that test to determine an expenditure to be capital or revenue is not straight. However, the test of "enduring benefit is largely accepted and applied by the courts. Further, if the expenditure is incurred with a view to bringing an asset or advantage into existence, it is to be treated as capital expenditure and while doing so, it is not necessary that such expenditure should have that result."

17. But in the instants case, the expenditure of Rs.1,42,02,926/- expended on legal fees by the assessee, cannot be treated as capital expenditure for two reasons one: that's the expenses were incurred with a view to establish manufacturing facilities as a part of ongoing business strategy and to achieve backward integration, even though, the plant for which the funds amounting to Rs.1,432,02,926/- were expended by the appellant i.e. for availing technical services to assess the feasibility was eventually hyped off / discontinued and the same are to be treated as revenue expenditure in view of the law laid down by Hon'ble Jurisdictional High Court in the case cited as Indo Rama Synthetics (I) Ltd (supra) and as such, the said expenditure on account of technical fee cannot be treated as capital expenditure."

11. In view of the decision of the Tribunal in assessee's own case in the immediately preceding assessment year, we are of the considered opinion that the A.O./TPO are not justified in denying the same as revenue expenditure in nature. Further, we find merit in the argument of the ld. counsel for the assessee that absence of direct income attributable to such expenditure would hardly be a test for determining its ALP under Chapter-X. In view of the above, the grounds raised by the assessee are allowed.

12. The grounds of appeal Nos.7 to 11 by the assessee read as under:-

"7. The Hon'ble DRP/AO has erred in rejecting the most appropriate method adopted by the Appellant to determine the arm's length price for the transaction pertaining to import of goods for resale ('trading' activities).

8. The Hon'ble DRP/AO has adopted a flawed approach by using single year data as against the multiple year data used by the Appellant, to compute the ALP of the international transaction of the Appellant using TNMM method.

9. The Hon'ble DRP/AO erred in law by not directing TPO to apply the Proviso to section 92C of the Act and to allow the Appellant the benefit of upward variation of 5 percent in determining the Arm's Length Price.

10. Without prejudice to Ground 7, the DRP/AO has erred in the computation of margins using the Transactional Net Margin Method and confirming the erred calculation made by TPO. The TPO has calculated the margins using the Capitaline and Prowess databases to arrive at a mean margin of 8.02%. However, the Appellant's calculation based on the annual reports of the comparables gives a mean margin of 7.12%.

11. Without prejudice that TNMM is not the most appropriate method to benchmark the trading transaction the DRP/AO/TPO have erred in not undertaking adjustments for differences in the cost base of the Assessee vis-a-vis the comparable companies."

13. Facts of the case, in brief, are that the assessee in the instant case has applied Resale Price Method (RPM) on purchase of goods. The TPO observed that most of the comparable companies taken by the assessee are not into trading. He observed from the Prowess database that the percentage of trading sales of all companies was below 10% except India Tyre & Rubber whose trading sales are 100%. Since the assessee has selected companies from the same industry, therefore, in order to bring in closer comparability, the TPO applied TNMM. The DRP upheld the action of the

A.O./TPO in considering the TNMM as the most appropriate method as against RPM selected by the assessee.

13.1 The ld. counsel for the assessee, referring to the order of the Tribunal for A.Y. 2003-04, submitted that identical issue was decided by the Tribunal in assessee's own case and it was held that the CIT(A) was fully justified in directing the A.O/TPO to adopt the Resale Price Method as the most appropriate method instead of TNMM applied by them. He submitted that there is no change in the business. Therefore, in absence of any contrary material brought by the A.O./TPO/DRP, the RPM should be accepted.

14. The ld. DR, on the other hand, heavily relied on the order of the TPO. He submitted that the assessee in the instant case has debited substantial expenses in the P&L Account and not in the trading account, therefore, the ALP of the international transaction cannot be determined and, therefore, it is not proper to use RPM.

14.1 The ld. counsel for the assessee, in his rejoinder, submitted that the DRP, while deciding the issue at para 4 of the order, has not given any clear-cut finding. Further, the TPO in the subsequent assessment year has followed RPM. He accordingly, submitted that the order of the A.O./TPO adopting TNMM as the most appropriate method should be set aside and the RPM followed by the assessee should be allowed.

15. We have considered the rival arguments made by both the sides. We find the only issue to be decided in the impugned grounds is regarding the most appropriate method i.e., RPM followed by the assessee or TNMM adopted by the A.O/TPO/DRP.

We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2003-04. We find the Tribunal in ITA No.1874/Del/2011, order dated 10th January, 2018 has decided the issue in favour of the assessee by observing as under:-

> "8. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the TPO has accepted the RPM as the most appropriate method for the assessments 2005-06, 2008-09 and 2009-10, which is evident from the observation of the ld. CIT(A) in para 4.8 of the order dated 13.03.2013 for the assessment year 2007- 08 which read as under:
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> > "4.8 It was also brought to the notice that the TPO has accepted RPM as the most appropriate method in the case of the appellant for the AY 2005-06 and subsequently in the AY 2008-09 and 2009-10. The appellant continues to be a reseller of tyres and tubes in all these years."
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> 9. It is also noticed that for the assessment year 2007-08, the ld. CIT(A) directed the TPO to adopt the RPM as the most appropriate method and deleted the additions made by the AO under TNMM. In the present case, nothing is brought on record to substantiate that the facts for the year under consideration were different from the assessment years 2005-06, 2007-08, 2008-09 and 2009-10. Therefore, on the principles of consistency also, the RPM was rightly directed by the ld. CIT(A) to be adopted as the most appropriate method for the year under consideration.
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> 10. On a similar issue, the Hon'ble Bombay High Court in the case of CIT Vs L'Oreal India (P.) Ltd. (supra) held as under:
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> > "7. After having perused the relevant part of the order passed by the Commissioner and the Tribunal on this question, we are in agreement with Mr. Pardiwalla that the Tribunal did not commit any error of law apparent on the face of the record nor can the findings can be said to be perverse. The Tribunal has found that the TPO has passed an order earlier accepting this method. The Tribunal has noted in para 19 of the order under challenge that this method is one of the standard method and the OECD (Organization of Economic Commercial Development) guidelines also state in case of distribution or marketing activities when the goods are purchased from associated entities and there are sales effected to unrelated parties without any further processing, then, this method can be adopted. The findings of fact are based on the materials which have been produced before the Commissioner as also the Tribunal. Further, it was highlighted before the Commissioner as also the Tribunal that the RPM has been accepted by the TPO in the preceding as well as succeeding assessment years. That is in respect of distribution

segment activity of the Assessee. In such circumstances, and when no distinguishing features were noted by the Tribunal, it did not commit any error in allowing the Assessee's Appeal. Such findings do not raise any substantial question of law. The Appeal is devoid of merits and is, therefore, dismissed. There would be no orders as to costs."

11. Similarly, the ITAT Delhi Bench 'F', New Delhi in the case of DCIT Vs Delta Power Solution India P. Ltd. in ITA No.3004/Del/2013 (supra) held as under:

"6.1. It is observed that the primary objective of the assessee is of manufacturing /trading/ assembling of Telecom Power Equipment, visual display products, industrial automation and magnetic components, etc. The only issue in dispute is in regards to the MAM for determining ALP in respect of the trading section. The assessee had used TNMM as MAM for arriving at the ALP in respect of purchase of raw materials, export of finished goods and in respect of Transaction relating to import of industrial automation products and sales commission it had used RPM as MAM. The ld. AR submitted that as there is no value addition in respect of goods sold by the assessee and therefore RPM is the MAM for determining ALP in respect of these two heads being import of industrial automation products and sales commission.

6.2. It is observed that the ld.CIT(A) has dealt with the issues relating to the timing difference and sufficient data not being available to reconcile the change in the market, change in rate of exchange, change in cost etc. at length in paragraph 3.1.at pages 3 to 9. The ld.CIT(A) has reproduced in paragraph G, the relevant extract of the accepted position for A.Y: 2009-10, wherein the TPO has accepted the RPM as the most appropriate method for calculating the ALP in respect of trading segment."

12. We, therefore, by keeping in view the aforesaid narrated facts, the ratio laid down by the Hon'ble Bombay High Court and respectfully following the aforesaid decision dated 14.03.2016 of the ITAT Delhi Bench 'F', New Delhi in ITA No. 3004/Del/2013 for the assessment year 2008-09 in the case of DCIT Vs Delta Power Solution India P. Ltd., are of the view that the ld. CIT(A) was fully justified in directing the AO/TPO to adopt RPM as the most appropriate method instead of TNMM applied by them. Accordingly, we do not see any infirmity in the impugned order and do not see any merit in this appeal of the department.

13. In the result, the appeal of the department is dismissed."

16. Since there is no change in the business pattern of the assessee and the same business is continuing and considering the fact that the TPO has accepted RPM as the most appropriate method for assessment year 2005-06, 2008-09 and 2009-10, and the

finding given by the Tribunal at para 8 of the order was not controverted by the Revenue, we direct the A.O./TPO to adopt RPM as the most appropriate method as considered by the assessee. The grounds raised by the assessee are accordingly, allowed.

17. The grounds of appeal No.13 of the assessee reads as under:-

> "13. The Hon'ble DRP/A.O. has erred on facts and circumstances of the case by not allowing 50 percent of the travelling and 25 percent of the personnel expenses amounting to Rs. 37,094,022, incurred by the Appellant and deeming the same to be related to the manufacturing activity."

18. Facts of the case, in brief, are that the assessee had incurred an amount of Rs.11,60,89,064/- in respect of an aborted project of setting up of manufacturing facility in India which never took off. The above amount consists of Rs.7,82,91,144/- towards technical fees paid and Rs.3,77,97,920/- towards other expenses which was added back by the assessee itself without assigning any reason. The Assessing Officer observed from the details of project expenses written off by the assessee that only payments made to sub-contractors relatable to project were included in it. The assessee did not include expenses relatable to project incurred on account of personal travel expenses and other incidental charges. These expenses also formed part of the expense relatable to the aborted project part of which has been disallowed by the assessee itself under 'project expenditure written off.' Since no exact bifurcation was available, the TPO held that 50% of the travelling expenses and 25% of the salary, wages, bonus, etc. on estimate basis as relatable to the aborted project and, therefore, be disallowed. Since this disallowance has not been captured by the TP adjustment,

the TPO worked out such disallowance at Rs.1,35,24,365/- being 25% of Rs.5,40,97,458/- on account of salaries, etc. and Rs.2,35,69,657/- (being 50% of Rs.4,71,39,314/-) both totaling to Rs.3,70,94,022/-. The assessee approached the DRP. However, the DRP also decided the issue against the assessee. The Assessing Officer accordingly, made the disallowance. Aggrieved with such order of the A.O./TPO, the assessee is in appeal before the Tribunal.

18.1 The ld. counsel for the assessee submitted that the Assessing Officer proceeded on a factually incorrect premise that manufacturing of tyres cannot be taken as extension of existing trading business of tyres and that it amounted to setting up of altogether different venture for manufacturing. He submitted that one of the objectives of the assessee company right from very inception was manufacturing of tyres. Therefore, the disallowance of expenditure arbitrarily made without any valid reasons should be set aside and the consequential disallowance made on unsupported allegation of expenditure relating to aborted project should be deleted.

19. The ld. DR, on the other hand, heavily relied on the order of the A.O./DRP. Referring to para 6.1 of the order of the DRP, he submitted that the DRP has given a categorical finding that complete details of these expenses were neither filed before the Assessing Officer nor before the DRP to justify the claim that no such expenses were incurred in connection with the setting up of the project. Therefore, the order of the DRP/A.O. should be upheld. In his alternate contention, he submitted that the

matter may be restored to the file of A.O./TPO with a direction to furnish all the details and substantiate its claim.

20. We have heard the rival arguments made by both the sides and perused the material available on record. We find the Assessing Officer on ad hoc basis made the addition of Rs.3,70,94,022/- being 50% of the travelling expenses and 25% of the salary, wages, bonus, etc., relating to the aborted project. We find the DRP rejected the ground raised by the assessee holding that complete details of these expenses were neither filed before the Assessing Officer nor during the DRP proceedings to justify its claim that no such expenses were incurred in connection with the setting up of the project. It is the submission of the ld. counsel for the assessee that the finding of the TPO is contrary to the facts available on record since the assessee has furnished all the details. Considering the totality of the facts of the case and in the interest of justice, we deem it appropriate to restore the issue to the file of the Assessing Officer with a direction to verify the details filed by the assessee and, in case complete details were filed, then to adjudicate the issue afresh in accordance with law, after giving due opportunity of being heard. We hold and direct accordingly. This ground of appeal is allowed for statistical purposes.

21. Ground No.14 by the assessee read as under:-

> "14. The Hon'ble DRP/AO has erred on facts and in law by not allowing provision for impairment of stock value."

22. The facts of the case, in brief, are that during the course of assessment

proceedings, the Assessing Officer asked the assessee to justify its claim for debiting 'Provision on account of impairment' amounting to Rs.34,09,016/-. The assessee in its reply submitted that the amount of impairment is provided for where the net realizable value of the inventory/stock is more than the cost of that particular stock or item of product. It was submitted that the net realizable value of the 1153 quantity of stock bearing No.CAI033269 has been recorded as Rs.1,06,20,641/- which is lower than the cost price of the stock recorded at Rs.1,40,30,257/-. The difference between the above amounting to Rs.34,09,016/- has been accrued as 'Provision for impairment of stock value.' It was accordingly submitted that the above is not in the nature of an unascertained liability and should not be treated as such and should be allowed as a deduction.

23. However, the Assessing Officer was not satisfied with the explanation given by the assessee. According to him, the law does not allow any provision other than specified ones like provision for bad debts. Nothing was brought on record in the instant case to prove that the provision was made on scientific basis. Rejecting the various explanation given by the assessee and observing that how and why a value lower than the cost value was assigned and in absence of any debit notes issued to the supplier on account of supply of inferior manufactured tyres, the Assessing Officer in the draft assessment order proposed to disallow the same. The assessee approached the DRP. However, the DRP also upheld the action of the Assessing Officer. The Assessing Officer in the final order thereof, made the disallowance. Aggrieved with such order of the A.O./DRP, the assessee is in appeal before the Tribunal.

24. The ld. counsel for the assessee submitted that valuation of closing stock on the basis of cost or realizable value whichever is lower is an accepted accounting principle by decisions of various courts. Such is also the approach prescribed under Accounting Standard-2 which deals with valuation of inventory which has been prescribed u/s 145A of the IT Act. He submitted that the Assessing Officer has disallowed the same by presuming it to be a 'provision for impairment of stock' as an unascertained liability and on the premises that the law does not allow any provision other than specified ones like provision for bad debts. The order of the DRP is also very cryptic. He accordingly submitted that the addition made by the Assessing Officer should be deleted.

25. The ld. DR, on the other hand, heavily relied on the orders of the A.O./DRP.

26. We have considered the rival arguments made by both the sides and perused the material available on record. We find the Assessing Officer disallowed an amount of Rs.34,09,016/- which was debited by the assessee under the head 'Provision on account of impairment' on the ground that the law does not allow any provision other than specified ones like 'Provision for bad debts.' Further, according to him, nothing was brought on record to prove that the provision was made on scientific basis and the assessee has not raised any debit note against the suppliers for supply of inferior quality of material. It is the submission of the ld. counsel for the assessee that the valuation of closing stock on the basis of cost or realizable value whichever is lower is an accepted accounting principle and the valuation of the inventory made by the

assessee is as per Accounting Standard-2. We find merit in the arguments advanced by the ld. counsel for the assessee. It has been held by various decisions that valuation of closing stock should be made on the basis of cost or realizable value whichever is lower if the same system of accounting is being followed by the assessee consistently. Such type of approach has also been prescribed in Accounting Standard-2 issued by ICAI which deals with valuation of inventory. We find the Assessing Officer in the instant case disallowed the provision presuming that it is an unascertained liability. Since the assessee, instead of showing the lower value on the right hand side has shown the gross value and debited the provision, therefore, the net effect would be nil. We, therefore, set aside the order of the Assessing Officer and direct him to allow the claim of the assessee. The ground raised by the assessee is accordingly allowed.

27. Ground of appeal No.15 reads as under:-

> "15. The Hon'ble DRP/AO has erred on facts and in law by not allowing 50 percent of the total advertisement expenses amounting Rs.7,124,007/-."

28. The facts of the case, in brief, are that the Assessing Officer, during the course of assessment proceedings, noticed that the assessee had incurred huge advertisement expenses amounting to Rs.1,42,48,015/-. With a view to examine whether the above expenses were wholly and exclusively related to the business of the assessee, especially in view of the fact that these expenses would essentially lead to establishment and promotion of 'Michelin brand' in India, he asked the assessee to provide the requisite details. From the submissions filed by the assessee, he observed

that whole of such expenses claimed cannot be accepted as incurred wholly and exclusively for the business of the assessee. Relying on the OECD Guidelines, the Assessing Officer held that the assessee is incurring such a huge amount on advertisement and generating benefits to its AEs who owned the brand without being able to cogently show as to how it benefitted wholly from such brand building. Therefore, it is a concocted arrangement to lower its profit and save on the expenditure of the AE. Relying on the decision of the Hon'ble Supreme Court in the case of *McDowell and Co. Ltd. vs. CTO reported in 154 ITR 148 (SC),* the Assessing Officer disallowed 50% of such expenses amounting to Rs.79,24,007/- towards brand building for the entity shown in the brand. The assessee approached the DRP but without any success. The Assessing Officer, thereafter, made this disallowance.

29. Aggrieved, the assessee is in appeal before the Tribunal.

30. The ld. counsel for the assessee challenged the order of the Assessing Officer in disallowing 50% of such advertisement expenses. He submitted that the action of the Assessing Officer is unjustified and merely based on presumptions and surmises. He submitted that although detailed submission was made before the Assessing Officer and DRP in support of such expenditure being wholly and exclusively for the purpose of the assessee's business in India including the decision of the Tribunal in the case of *Nestle India Ltd. (2009) 27 SOT 09* which has been upheld by the Hon'ble Delhi High Court, the lower authorities have disregarded the same and proceeded to disallow the expenditure. He accordingly submitted that the action of the Assessing Officer which

has been upheld by the DRP should be set aside and the disallowance be deleted.

31. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer and the DRP.

32. We have considered the rival arguments made by both the sides and perused the material available on record. We find the Assessing Officer disallowed an amount of Rs.71,24,007/- being 50% of the advertisement expenses of Rs.1,42,48,015/- debited by the assessee on the ground that these expenses would lead to establishment and promotion of 'Michelin brand' in India. In other words, it is his allegation that such expenses are towards brand building for the entities owning the brand and the assessee has not benefitted wholly and exclusively from such advertisement expenses. We do not find any logic behind the action of the Assessing Officer. There is no dispute regarding the incurring of the expenditure. It is not the case of the Assessing Officer that by incurring such expenses the revenue of the assessee has not gone up. If while incurring such expenses in the normal course of business activities either the parent company or some other party is benefitted, the same cannot be a ground to disallow a part of the expenditure on *ad hoc* basis. We find the Delhi Bench of the Tribunal in the case of *Nestle India Ltd. vs. DCIT 111 TTJ 498* has held that the expenditure incurred by the assessee company on advertisement/sales promotion of some Nestle products in India may give rise to certain benefit to Nestle SA, but it cannot be a ground to disallow the claim of the assessee once it is established that the expenditure in question has been incurred by the assessee for the purpose of business of the

assessee inasmuch as the expenditure by the assessee on advertisement/sales promotion has direct nexus between the earning of the income by the assessee. The decision of the Tribunal has been upheld by the jurisdictional High Court. The various other decisions relied on by the ld. counsel for the assessee which are placed on paper book also support his case. Since there is no dispute regarding the incurring of the expenditure and it is also not the case of the Revenue that by incurring such huge expenditure there is no increase in the turnover of the assessee, therefore, merely because the parent company will be benefitted because the brand is owned by it, the same cannot be a ground to disallow 50% of the expenditure on *ad hoc* basis. We, therefore, set aside the order of the CIT(A) and direct him to delete the disallowance.

33. In the result, the appeal filed by the assessee is allowed, in the terms indicated.

The decision was pronounced in the open court on 08.01.2019.

Sd/-	Sd/-
(BHAVNESH SAINI)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMFBER

Dated: 08th January, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi