INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "I-2": NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1827 & 1847/Del/2015

(Assessment Year: 2009-10 & 2010-11)

Noble Resources & Training India Pvt. Ltd, 1A-D, Vandana Building, 11, Tolstoy Marg, New Delhi PAN: AAACA0443N	Vs.	DCIT, Circle-18(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Aseem Chawla, Adv
Revenue by:	Shri H. K. Chaudhary, CIT DR
Date of Hearing	17/12/2018
Date of pronouncement	15/03/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the assessee for assessment year 2009 – 10 and 2010 – 11.

2. First, we take up the appeal for Assessment Year 2009-10. Assessee's appeal is against Order of The Asst Commissioner of Income Tax, circle – 13 (1), New Delhi (The Learned Assessing Officer) passed on 26/12/2013 u/s 143 (3) read with section 144C (13) of The Income Tax Act (The Act) in pursuance of direction of The Learned Dispute Resolution Panel –II, New

Delhi (the learned DRP) disposing of the objections filed by the assessee in the order passed by the learned Assessing Officer wherein the adjustment proposed by the learned Transfer Pricing Officer [the ld TPO] in order u/s 92CA (3) of The Income Tax Act in computation of the Arm's-Length Price (ALP) of the International Transactions [IA] was incorporated.

3. Assessee namely, Andagro services Private Limited, a company, was 100% subsidiary of M/s Noble Resources Trading (India) Private Limited which was merged with Noble Resources and Trading (India) Private Ltd w.e.f. 1/1/2006. Accordingly, return of Income of assessee for Assessment Year 2006-07 was revised to give effect to the scheme of amalgamation and therefore assessment order was passed in the name of Noble Resources and Trading India Private Limited.

4. Assessee filed its return of income on 30/09/2009 declaring loss of Rs. 224268822/–. Assessee was engaged in business of trading of bulk agro commodities, primarily involving export of agricultural products such as soybean meal, sesame seed and also export of iron ore etc. It was also importing crude soybean oil and pulses. Assessee entered into certain international transactions with respect to sale and purchase of traded goods, provision of services, transactions of reimbursement of expenses and charging of interest etc. Assessee stated that international transactions are made at Arm's-Length by adopting CUP as the most appropriate method as the comparable uncontrolled prices with respect to sale and purchase of traded goods and provision of services. For Business support services assessee adopted Cost plus Method [CPM] as the most appropriate method.

The assessee's profit level indicator [PLI] is Operating Profit/Operating Cost (OP/OC).

5. Therefore, LD AO referred to the Ld Transfer Pricing Officer to determine the Arm's-Length Price u/s 92CA (3) of the Income Tax Act. The LD Transfer Pricing Officer rejected the methodology adopted by assessee and proceeded to benchmark international transaction after making fresh search for comparables at the trading segment level using Transactional Net Margin Method (TNMM) as the most appropriate method. As assessee adopted quotes of some organization/ websites for some part of trading transaction, AO rejected them statsing that these are merely estimates and quotes and not actual transactions. In business support service segment, Ld. Transfer Pricing Officer was of the opinion that assessee in fact has used Transactional Net Margin Method instead of CPM method as it has taken the total cost base for comparability analysis. Hence, he adopted TNMM while determining Arm's-Length Price of the international transaction in business support service segment also.

6. The Learned Transfer Pricing Officer issued the show cause notice, which was replied by assessee. The learned Transfer Pricing Officer determined shortfall of Rs. 19530369/– with respect to the "business support services" rendered by the taxpayer and Rs 499296226/-With respect to benchmarking of the trading segment, where the assessee has adopted the CUP method, adopting Transactional Net Margin Method selecting four comparables, adopting profit level indicator of Operating Profit By Operating Revenue (OP/OR). Therefore, the Ld Transfer Pricing Officer, in nutshell, proposed an adjustment of Rs. 19530369/– in business support

service segment and Rs. 499296226/– in 'export and import' of chemicals. Based on this, the learned Assessing Officer passed an order determining the total income of the assessee at Rs. 432629270/– after granting of the set off of unabsorbed depreciation and carry forward business losses. Total income was computed at Rs. 67691440/–. Assessee preferred objections before the learned Dispute Resolution Panel, who passed direction on 26/12/2013. Based on those directions, order u/s 143 (3) was passed wherein 'business support service' segment adjustment was determined at Rs. 10731404/– and 'export and import of chemical segment' adjustment was made of Rs. 67428360/-. Total transfer pricing adjustment was Rs. 78159764/-. Consequently, total income of assessee was assessed at loss of Rs. 13095662/– against the returned loss of Rs. 215212462/–. One corporate tax adjustment of Rs. 123957036/- was also made on account of disallowance of provision of doubtful debts written off.

7. Therefore, assessee aggrieved with the order of the learned Assessing Officer has preferred this appeal raising following grounds of appeal:-

"1. That on the facts and circumstances of the case and in law, the Learned Assessing Officer ("Ld. AO")/Learned Transfer Pricing Officer ("Ld. TPO")/ Hon'ble Dispute Resolution Panel ("DRP") has erred in assessing business income amounting to Rs. 35,90,68,286/- (before adjustment of brought forward loss) as against a returned loss of Rs. 34,80,86,014/-, and thereby making an adjustment of Rs. 1,09,82,272/-.

1.1. That on the facts of the case and in law, the Ld. AO has erred in stating that

> *"The Transfer Pricing Officer, New Delhi after examination of company's transfer pricing documentation and economic analysis contained therein, passed an order dated 20.01.2014 u/s 92CA(3) of the Act directing therein an addition of Rs. 1,09,82,272/- to be made on account of difference of operating profit determined as per Arm's Length Price, i.e. by taking arm's length margin on international transactions relating to purchase of traded goods and sale of traded goods at 23.25%"*

2. That on the facts and circumstances of the case and in law, Hon'ble DRP/ Ld. AO/ Ld. TPO has grossly erred in sustaining the application of Transactional Net Margin Method ('TNMM') as against Cost Plus Method ('CPM') as applied by the appellant for the purposes of determination of the Arm's length Price ('ALP'), in respect of provision of business support services to its Associated Enterprises ('AE's').

2.1. That on the facts of the case and in law, Ld. TPO has erred in disregarding the search process conducted by the appellant for the purposes of computation of the ALP under CPM in respect of provision of business support services.

2.2. That on the facts of the case and in law, Hon'ble DRP/ Ld. AO has grossly erred in sustaining that companies chosen as comparables by the Ld. TPO while benchmarking net profit are suitable comparables, without taking into consideration the

economic activity, size of business, nature and class of international transactions.

2.3. That on the facts of the case and in law, Hon'ble DRP/ Ld. AO has erred in not rectifying the search filters selected erroneously by the Ld. TPO for application of TNMM.

2.3.1. That the Ld. TPO has not appropriately carried out the functional, asset and risk analysis ('FAR') in respect of the comparable companies selected while applying TNMM.

3. That on the facts and circumstances of the case and in law, Hon'ble DRP/Ld. AO has violated the principles of natural justice, equity and fair play as the appellant was not afforded reasonable opportunity of being heard.

4. That on the facts of the case and in law, Hon'ble DRP/ Ld. AO passed a laconic and a non speaking order, without disposing of the objections raised by the Appellant.

5. That on facts and circumstances of the case and in law, Hon'ble DRP/ Ld. AO while ^assessing the total liability of the appellant has erred in providing incorrect amount of setoff of brought forward losses & unabsorbed depreciation of earlier years.

5.1. That on facts of the case and in law, the Ld. AO instead of allowing setoff of Rs. 15,13,44,760/- being the aggregate amount of assessed brought forward losses and unabsorbed depreciation, allowed the same as Rs. 3,67,47,130/-.

6. That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act."

8. Ground Nos. 1 and 2 of the appeal are general in nature and in fact, support Ground Nos. 3 to 6 of the grounds of appeal, therefore they do not deserve any adjudication specifically, and hence they are dismissed.

9. Ground No. 3 is with respect to the rejection of the CUP method adopted by assessee as the most appropriate method for determination of the Arm's-Length Price of international transactions relating to export and import of chemicals entered with the associated enterprise wherein the learned Transfer Pricing Officer has made an adjustment of Rs. 67428360/–. The only dispute with respect to the above adjustment is that the learned Transfer Pricing Officer rejected the 'CUP' method and applied the 'Transactional Net Margin Method' for benchmarking of international transactions of import and export of chemicals.

10. Ld AR submitted that for benchmarking of export of methanol assessee has relied upon the price publication of ICIS Publications, Polymerupdate.com and internal comparables. He submitted that ICIS is the world's largest petrochemical market information provider and has in-depth knowledge across market in upstream and downstream sectors in Europe, Africa, Middle East, Asia-Pacific, and America. Price published is used, as a comparable as CFRW Norms whereas in case of the appellant, the price used is Free on Board (FOB) therefore, assessee adjusted those published quotes with freight charges. He further stated that Polymerupdate.com

provides real-time international news and prices for all polymers, petrochemicals and solvents on a daily bases, providing daily market intelligence across the countries. Learned Authorised Representative submitted that Learned Transfer Pricing Officer has rejected comparable suggesting that the data furnished by the assessee is merely based on 'estimates' and rumors and not on the basis of the 'actual transactions undertaken'. He stated that the learned Transfer Pricing Officer also failed to consider the internal CUP in the form of similar transactions undertaken with the unrelated parties. He submitted that learned Transfer Pricing Officer failed to consider the pricing methodology of Polymerupdate.Com and ICIS publication. He further referred to the pricing methodology placed at page Nos. 760 to 763 of the paper book. The learned Authorised Representative submitted that coordinate bench in assessee's own case for the Assessment Year 2007-08 and Assessment Year 2008-09 has dealt with the similar issue and held that CUP method is the most appropriate method in these trading transactions.

11. With respect to the acceptability quotation, market published information, he referred to the provisions of Rule 10AB, wherein for the purpose of benchmarking, in any 'other method' which takes into account the prices which has been charged or paid or would have been charged paid for the same are similar transactions under similar circumstances is accepted. He further stated that the 6th method prescribed also applies retrospectively with effect from when transfer-pricing provisions were introduced in India. He therefore held that the issue squarely covered in favour of the assessee

in assessee's own case for assessment year 2007-08 and 2008-09 where it has been sent back to the AO with directions.

12. The learned Departmental Representative vehemently supported the order of the learned Transfer Pricing Officer and the learned Dispute Resolution Panel and stated that in the CUP method, the actual transaction is required to be taken and not the price quotation or estimates. He further stated that such 'price quotations' or 'estimates' are not known with respect to the quantity and quality. Even otherwise, the authenticity of such price quotes is required to be established by the assessee. Merely because these are the quotations of some organization, they cannot be accepted. It was further stated that even the geographical location would also make a lot of difference in the prices. He further stated that quotations are for different price and not free on board price at which the assessee has entered into the international transactions; adjustments made for freight are also on estimates.

13. On other method, he submitted that it is not applicable for this year and when it is stated to be applicable in the law itself from a particular date, there is no reason that it applies retrospectively. In view of this, he submitted that there is no infirmity in the order of the learned Transfer Pricing Officer as well as the learned Dispute Resolution Panel.

14. We have carefully considered the rival contentions and perused the orders of the lower authorities. The above issue is squarely covered by the order of the coordinate bench in assessee's own case for assessment years 2007–08 and 2008–09[2016-TII-293-ITAT-DEL-TP], wherein it is held as under:-

"12. We have carefully considered the rival contentions and we are of the view that in the assessee's own case for AY 2006-07, the coordinate bench in ITA No. 5722/Del/2010 = ***2014-TII-62-ITAT-DEL-TP*** *has held relying on several Tribunal decisions that the CUP is the most appropriate method in case of trading transactions and internal CUP has been held to be more appropriate than external CUP data for comparability analysis. Before the coordinate bench the international transaction were sale of traded goods and purchases of traded goods as it is in the present year before us also. The Hon'ble Bench has held as under:-*

"4. We have heard the rival submissions and perused the relevant material on record. It is observed that the foremost point of difference between the assessee and the Revenue is the application of the most appropriate method and then the selection of comparables under TNMM. Whereas the assessee adopted CUP as the most appropriate method, the Revenue rejected it and insisted on the application of TNMM. The viewpoint canvassed by the Revenue in such rejection is that the necessary details required for the application of CUP method were not forthcoming from the assessee's side. Several Benches of the Tribunal has held that CUP is the most appropriate method in case of trading transactions provided the uncontrolled transactions relied by the assessee are really comparable and necessary data requiring adjustments, if any, is available. Internal CUP has been held as more appropriate than the external CUP. The net effect of this discussion is

that if the assessee's similar transactions with non Associated enterprises are available then it is always better to go by such internally comparable uncontrolled transactions for benchmarking the price charged/paid from/to its associated enterprises in comparable transactions. At the same time, it is relevant to observe that if complete data of such comparable uncontrolled transaction is not available, then the Revenue is at liberty to discard the CUP method and resort to any other suitable method.

5. Adverting to the facts of the instant case, it is seen that the details of its export transactions of Soyabean meal to its AEs is available on pages 64 & 65 of the paper book. Major transactions are of export to AE in Singapore and few transactions are of export to its AE in Indonesia. Page 135 of the paper book is a copy of Invoice dated 21.3.2006 pursuant to contract dated 2.3.2006 in which price of Rs. 193 per MT has been charged. The assessee also supplied similar products to its non-AE in Singapore, a copy of which is available on page 287 of the paper book. Similarly, the details regarding export of Sesame seed made to its AEs is available on page 66 of the paper book, for which the ld. AR contended that though no actual comparable uncontrolled transactions was available but the assessee could show the price actually charged by comparables. As regards the export of Iron ore of its AEs, the detail of which is available on page 67 of the paper book, the assessee tried to show that its invoices to its AE were comparable with that charged from non-AEs. In the like manner the assessee tried

to show that the comparable data of non-AEs was very much available, which the authorities below have refused to look into. From the order passed by the DRP, we find that there is no worthwhile discussion about the objections taken by the assessee in Form No. 35A. It can be seen from the DRP's order that it is summary of the view canvassed by the AO/TPO for making addition of Rs. 7.23 crores without properly noting or dealing with the objections raised by the assessee. The Tribunal in Evalueser Co. Pvt. Ltd. Vs Income-tax Officer (2014) 134 ITD 546 (Delhi) has restored the matter to the file of DRP for passing a detailed order when the objections of the assessee were not dealt with. The ld. AR contended that the assessee has full details to satisfy the authorities below as regards the application of CUP method and hence the matter should be restored to the file of TPO instead of DRP, who had also failed to appreciate the contentions made before him. We can observe from the order of the TPO as well that though detailed submissions were filed before him, but those have not been appropriately considered while proposing the addition of Rs. 7.23 crores. The ld. DR, though relied on the impugned order but suggested that if the matter was to be sent back then it should go to the TPO instead of DRP. Considering the entire conspectus of the case, we are of the considered opinion that the ends of justice would meet adequately if the impugned order is set aside and the matter is restored to the file of TPO. We order accordingly. However, we do not approve, in principle, the contention of the ld. AR that quotations etc. or the price as per some publications can be considered for benchmarking the assessee's

international transactions under the CUP method. The comparison is required to be done with the actual uncontrolled transactions and not quotations etc. If the assessee succeeds in providing appropriate data relevant for comparison under the CUP method, then the TPO should determine the ALP under the CUP method. If however, it turns out that necessary details furnished by the assessee are incomplete or not relevant, then the TPO may proceed with any other appropriate method. Needless to say the assessee will be allowed a reasonable opportunity of being heard in such de-novo proceedings and will also have full right to place any fresh material in its support."

[underlined by us]

13. The ld DR could not controvert the above decision as far as applicability of CUP method in the impugned transactions during the year as well as in AY 2006-07, in fact he agreed that CUP method is the most appropriate method in the trading transactions. Therefore respectfully following the decision of the coordinate bench, we hold that the CUP method shall be the most appropriate method for benchmarking the trading transactions with its AE in this year too.

14. Now the issue comes that whether the 'quotations' in the form of external CUP and custom data of third party shipping bills, brokers rates, SOPA Rates etc whether these can be considered as the reliable comparable data or not and whether they satisfy the requirement of Rule 10D (3)(c) of the Income Tax Rules, 1962. The coordinate bench in the assessee's own case has rejected that quotations etc. or the prices

as per some publications for benchmarking the assessee's international transactions under the CUP method. However, ld AR has relied on the decision of Hon'ble Gujarat High Court in case of CIT Vs. Adani Wilmar Ltd. wherein the Hon'ble High Court has held that the price publication as long as same are authentic and reliable would be relevant material for the purpose of Rule 10D(3)(c). The Hon'ble High Court considered the quotations of Malaysian Palm Oil Board prices and quotation by One Oil World for comparability analysis Before us the ld DR has stated that that these data are not authentic. However, we do not find a whisper in the order of ld. Transfer Pricing Officer that the internal and external comparable data have been examined at all with respect to their authenticity. They have been simply rejected relying on Rule 10D(3) of the Income Tax Rules. On the issue before the Hon'ble Gujarat High Court in case of CIT Vs. Adani Wilmar Ltd. was not on unacceptability of quotations but TPO only objected with respect to the geographical location of the transactions and the quotations. Therefore, even before the Hon'ble Gujarat High court the quotations were accepted as external CUPs. The Hon'ble Gujarat High Court has held as under:-

> *"3. Questions B to D pertain to computation of Arms Length Price. The Transfer Pricing Officer (hereinafter referred to as 'the TPO') adopted Comparable Uncontrolled Prices (CUP) method. In the process, the assessee had presented two sets of prices claiming them to be comparable. One set of transactions relied on by the assessee was supplied by*

Malaysian Palm Oil Board (hereinafter referred to as 'the MPOB'). Simultaneously, the assessee also relied on the quotations by one Oil World, an organisation based in Germany. The assessee adopted the average of two sets of prices and claimed that the price variance between the assessee's transaction and the average of two sets of prices did not exceed 5% and, therefore, no additions were necessary. The TPO, however, took into account only the rates mentioned by the MPOB and totally discarded the rates quoted by the German organisation. He, therefore, rejected the arithmetic mean of two sets of the prices in order to determine the Arms Length Price. This was on the basis of mainly two objections of his. One was that the MPOB was a Government Nodal Agency for Palm Oil Industry in Malaysia, whereas the quotations of Oil World did not have any statutory authority. The second objection was that Oil World was an independent organisation registered in Germany and had nothing to do with the oil prices prevailing in Malaysia. He relied on Rule 10D)(3)(a) of the Income tax Rules (hereinafter referred to as 'the Rules'), to place heavy reliance on the price list of the MPOB.

4. The assessee carried the matter in appeal. The Commissioner of Income tax (CIT) (Appeals) discarded both

the objections of the TPO. Referring to section 92C of the Income tax Act, 1961 (hereinafter referred to as 'the Act') and Rule 10(D)(3) of the Rules, he found that the quotations of the Oil World could not have been discarded. He observed as under :

"4.4 I have also gone through the few publications of Oil World which is independent organization established in 1958 in Germany. This provides the independent forecasting services for oil seeds, oils and beans and providing primary information and professional analysis. The oil world compiles information of various countries in the oil sector. This publishes daily, monthly and yearly journals in oil sector. This compiles information of various countries and, therefore, is broad based data base.

The quotation adopted by the appellant from Oil World is for Malaysia and not for Germany. Therefore, it is an authentic independent trade quotations and is duly covered under the various documents which has been listed in sub rule (3)(b) & (c) of Rule 10D of the IT, Rules. As this is an independent organization which is giving quotation of different countries, this cannot be ignored by the TPO without any valid reason. As the international transaction entered with AE is less than 5% of the arithmetical mean of these two quotations i.e. MPOB and

Oil World, as per proviso to Section 92(c) the appellant was justified in taking the international transaction at arm length. Therefore, no adjustment u/s.92(c) was required as all the prices at which the purchase have been made less than 5% of the arithmetical mean. Besides the above, I also find that the appellant has entered into contract with AE on long term basis for continuous supply of constant quality to ensure continuity in production into continuous plant which is also an important factor for considering the ALP and due weightage is required to be given while comparing the rates given by MPOB. Even the average price paid by the appellant is lower than average price on the basis of rates of MPOB. Therefore, in view of these facts, circumstances and the legal position the AO/TPO were not justified in making the adjustment to the purchase price and, accordingly, the addition on account of adjustment of the price is hereby deleted. Accordingly, this ground is decided in favour of the appellant."

5. The matter was carried in appeal before the Tribunal by the Revenue. The Tribunal confirmed the view of the CIT (Appeals) and, hence, this appeal.

6. Having heard the learned counsel for the parties we notice that the determination of Arms Length Price under section 92C of the Act is to be done as per the Rules

contained in Rule 10B Clause A to subsection 10. Rule 10B of the Rules pertains to CUP method. Rule 10D pertains to 'Information and documents to be kept and maintained under section 92D'. Sub rule (3) provides inter alia that the information specified in sub rule (1) shall be supported by authentic documents, which may include the following :

"Information and documents to be kept and maintained under section 92D.

10D. (1) Every person who has entered into an international transaction shall keep and maintain the following information and documents, namely :

(a) xxx xxx xxx

(b) a profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the assessee, and ownership linkages among them;

(c) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted;

7. In terms of clause (c) of subsection (3) of Rule 10D of the Rules, these price publications as long as the same were authentic and reliable, would be relevant materials. In this background, mere base of the organisation would be of no consequence. Further, though the price quotations of the MPOB would be entitled to its due and full weightage and respect, would not necessarily mean that the other quotations would lose their significance, unless, of course, it is pointed out that such quotations lack basis. In this context , we may recall that the only objections with the TPO to take into consideration the rate quotations of the Oil World were, that were not based in Malaysia and that it was an independent organisation, which had nothing to do with the old price prevailing in Malaysia. When the CIT (Appeals) as well as the Tribunal have accepted the reliability and authenticity of the organisation and its publication of ratelist, such objection of the TPO must be overruled. Learned advocate Mr.Bhatt for the Revenue, however, strenuously attempted to persuade us that the Oil World is a forecasting agency and further that such rates were not based on actual transactions. Quite apart from the observations of the CIT (Appeals) and Tribunal being to the contrary, these were not the objections of the TPO. We would, therefore, focus on the grounds on which the TPO desired to reject such price quotations."

15. We would also draw support for use of 'Quoted Prices' , if they are authentic for comparability analysis in CUP method from OECD BEPS Action Plan also. For this we refer to the release of new guidance on cross border commodity transactions by OECD on its Base Erosion and Profit Shifting (BEPS) plan actions 8 and 10, 2015 Final Reports, wherein there is an addition to Chapter II of the Transfer Pricing Guidelines relating to commodity transactions [Extracted from OECD publication Aligning Transfer pricing Outcomes with value creation OECD 2015] as under:-

The following paragraphs are added to Chapter II of the Transfer Pricing Guidelines, immediately following paragraph 2.16.

2.16A Subject to the guidance in paragraph 2.2 for selecting the most appropriate transfer pricing method in the circumstances of a particular case, the CUP method would generally be an appropriate transfer pricing method for establishing the arm's length price for the transfer of commodities between associated enterprises.The reference to "commodities" shall be understood to encompass physical products for which a quoted priceis used as a reference by independent parties in the industry to set prices in uncontrolled transactions. The term "quoted price" refers to the price of the commodity in the relevant period obtained in an international or domestic commodity exchange market. In this context, a quoted price also includes prices obtained from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies, where such indexes are used

as a reference by unrelated parties to determine prices in transactions between them.

2.16B Under the CUP method, the arm's length price for commodity transactions may be determined by reference to comparable uncontrolled transactions and by reference to comparable uncontrolled arrangements represented by the quoted price. Quoted commodity prices generally reflect the agreement between independent buyers and sellers in the market on the price for a specific type and amount of commodity, traded under specific conditions at a certain point in time. A relevant factor in determining the appropriateness of using the quoted price for a specific commodity is the extent to which the quoted price is widely and routinely used in the ordinary course of business in the industry to negotiate prices for uncontrolled transactions comparable to the controlled transaction. Accordingly, depending on the facts and circumstances of each case, quoted prices can be considered as a reference for pricing commodity transactions between associated enterprises. Taxpayers and tax administrations should be consistent in their application of the appropriately selected quoted price.

2.16C For the CUP method to be reliably applied to commodity transactions, the economically relevant characteristics of the controlled transaction and the uncontrolled transactions or the uncontrolled arrangements represented by the quoted price need to be comparable. For commodities, the economically relevant characteristics include, among others, the physical features and quality of the commodity; the

contractual terms of the controlled transaction, such as volumes traded, period of the arrangements, the timing and terms of delivery, transportation, insurance, and foreign currency terms. For some commodities, certain economically relevant characteristics (e.g. prompt delivery) may lead to a premium or a discount. If the quoted price is used as a reference for determining the arm's length price or price range, the standardised contracts which stipulate specifications on the basis of which commodities are traded on the exchange and which result in a quoted price for the commodity may be relevant. Where there are differences between the conditions of the controlled transaction and the conditions of the uncontrolled transactions or the conditions determining the quoted price for the commodity that materially affect the price of the commodity transactions being examined, reasonably accurate adjustments should be made to ensure that the economically relevant characteristics of the transactions are comparable. Contributions made in the form of functions performed, assets used and risks assumed by other entities in the supply chain should be compensated in accordance with the guidance provided in these Guidelines.

2.16D In order to assist tax administrations in conducting an informed examination of the taxpayer's transfer pricing practices, taxpayers should provide reliable evidence and document, as part of their transfer pricing documentation, the price-setting policy for commodity transactions, the information needed to justify price adjustments based

on the comparable uncontrolled transactions or comparable uncontrolled arrangements represented by the quoted price and any other relevant information, such as pricing formulas used, third party end-customer agreements, premia or discounts applied, pricing date, supply chain information, and information prepared for non-tax purposes.

2.16E A particularly relevant factor for commodity transactions determined by reference to the quoted price is the pricing date, which refers to the specific time, date or time period (e.g. a specified range of dates over which an average price is determined) selected by the parties to determine the price for commodity transactions. Where the taxpayer can provide reliable evidence of the pricing date agreed by the associated enterprises in the controlled commodity transaction at the time the transaction was entered into (e.g. proposals and acceptances, contracts or registered contracts, or other documents setting out the terms of the arrangements may constitute reliable evidence) and this is consistent with the actual conduct of the parties or with other facts of the case, in accordance with the guidance in Section D of Chapter I on accurately delineating the actual transaction, tax administrations should determine the price for the commodity transaction by reference to the pricing date agreed by the associated enterprises. If the pricing date specified in any written agreement between the associated enterprises is inconsistent with the actual conduct of the parties or with other facts of the case, tax administrations may determine a different

pricing date consistent with those other facts of the case and what independent enterprises would have agreed in comparable circumstances (taking into considerations industry practices). When the taxpayer does not provide reliable evidence of the pricing date agreed by the associated enterprises in the controlled transaction and the tax administration cannot otherwise determine a different pricing date under the guidance in Section D of Chapter I, tax administrations may deem the pricing date for the commodity transaction on the basis of the evidence available to the tax administration; this may be the date of shipment as evidenced by the bill of lading or equivalent document depending on the means of transport. This would mean that the price for the commodities being transacted would be determined by reference to the average quoted price on the shipment date, subject to any appropriate comparability adjustments based on the information available to the tax administration. It would be important to permit resolution of cases of double taxation arising from application of the deemed pricing date through access to the mutual agreement procedure under the applicable Treaty."

[underline supplied by us]

16. Therefore respectfully following the decision of Hon'ble Gujarat High Court and drawing support from OECD BEPS Action Plan , we are of the view that even the 'quoted prices' which is authentic may be acceptable as per Rule 10D(3) of the Income Tax Rules for comparability analysis.

17. The ld AR has also submitted that now the 'sixth method' has been prescribed by the board as per Rule 10D (1)(f) and which is held to be retrospective with effect from when transfer pricing provisions were introduced in India. For this ld DR relied on the decision of the coordinate bench in Toll Global Forwarding India Pvt. Ltd. Vs. DCIT (supra) which held as under:-

> *"22. Viewed thus, adopting a pedantic approach in determination of arm's length price, which serves letter of the law but leads to the conclusion diametrically opposed to the spirit of the law, has to be deprecated. We are in considered agreement with this school of thought. To that extent, the methods of determination of arm's length prices have to be essentially implemented in a reasonable and pragmatic manner so as to achieve its laudable objectives without any collateral damage.*
>
> *23. The lawmakers have also not been oblivious of this compelling need of a certain degree of flexibility in the methods of determining arm's length price. Central Board of Direct Taxes, vide notification dated 23rd May 2012, has introduced, in addition to Comparable Uncontrolled Price (CUP) method, Resale Price Method (RPM), Cost Plus Method (CPM), Profit Split Method (PSM) and Transactional Net Margin Method (TNMM), the following additional method:*

".....any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between nonassociated (i.e. independent) enterprises, under similar circumstances considering all the relevant facts".

24. Very significantly, the above method, which is only method prescribed under 'any other method' under section 92C(1)(f) read with rule 10B(1)(f) , is not a residual method in the sense that it is not a condition precedent for the application of this method that all other methods, i.e. methods set out in section 92C (1)(a)to 92C(1)(e) and as elaborated under rule 10B(1)(a) to (e), must fail and only then this method can be applied. This method is at par with all other methods of determining the arm's length price, as set out in sections 92C(1)(a) to (f), and, in terms of Section 92C(2), the most appropriate method, referred to in Section 92C(1), "shall be applied, for determination of arm's length price, in the manner prescribed". Therefore, as long as the method covered by rule 10AB, which is duly covered by Section 92C(1) satisfies the test of being the 'most appropriate method', it can be applied to a fact situation. There is clearly no bar on its applicability just because a method specified in rule 10B, even if indirect method like

TNMM, can also be applied to the same. Quite to the contrary, as noted by the coordinate benches in the cases of ACIT Vs. MSS India Pvt Ltd (supra), direct methods, such as CUP and the 'other method' under rule 10B which, as we will see in a short while, is only a variant of the CUP method, have an inherent edge over indirect methods, such as TNMM, and, therefore, as long as it is possible to do so, a direct method of ascertaining the arm's length method should be applied. In the case of Serdia Pharmaceuticals Pvt Ltd Vs ACIT (44 SOT 391) = ***2011-TII-02-ITAT-MUM-TP****, a coordinate bench of the Tribunal has observed that,"....even as the transfer pricing legislation does not provide for an order of preference of methods of determining ALP, such an order of preference being drawn up is an integral, though somewhat subliminal, part of the process of determining the ALP" and that whenever a direct method of ascertaining arm's length price can be used, it should be preferred over an indirect method. In view of these discussions, method under rule 10BA, which is a direct method of ascertaining arm's length price- as is the case with Comparable Uncontrolled Price (CUP) method, Resale Price Method (RPM) and Cost Plus Method (CPM), has an inherent edge over indirect methods such as Transactional Net Margin Method (TNMM) and Profit Split Method (PSM) .*

25. In effect, thus, it would appear that as long as one can come to the conclusion, under any method of determining the arm's length price, that price paid for the controlled transactions is the same as it would have been, under similar circumstances and considering all the relevant factors, for an uncontrolled transaction, the price so paid can be said to be arm's length price. As we have noted earlier in this order, the price need not be in terms of an amount but can also be in terms of a formulae, including interest rate, for computing the amount. In any case, when the expression 'price which....would have been charged on paid" is used in rule 10BA, dealing with this method, in this method the place of "price charged or paid", as is used in rule 10B(1)(a), dealing with CUP method, such an expression not only covers the actual price but also the price as would have been, hypothetically speaking, paid if the same transaction was entered into with an independent enterprise. This hypothetical price may not only cover bonafide quotations, but it also takes it beyond any doubt or controversy that where pricing mechanism for associated enterprise and independent enterprise is the same, the price charged to the associated enterprises will be treated as an arm's length price. In this view of the matter, the business model said to have been adopted by

the assessee, in principle, meets the test of arm's length price determination under rule 10BA as well.

26. No doubt, rule 10BA as also the corresponding enabling rule 10B(1)(f) are inserted by the Income Tax (Sixth Amendment) Rules 2012 and are specifically stated to be effective from 1st April 2012, i.e. assessment year 2012- 13 onwards. However, in Hon'ble Supreme Court's five judge constitutional bench's landmark judgment, in the case of CIT Vs Vatika Townships Pvt Ltd ***2014-TIOL-78-SC-IT-CB****, the legal position in this regard has been very succinctly summed up by observing that "(i)f a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect" Hon'ble Supreme Court has observed that "This (the foregoing analysis) exactly is the justification to treat procedural provisions as retrospective". Their Lordships then further observed that, "In Government of India & Ors. v. Indian Tobacco Association (2005) 7 SCC 396* **= *2005-TIOL-109-SC-CUS*** *the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in*

the context of it to be given a retrospective operation" and that "The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors. (2006) 6 SCC 286. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature." Their Lordships also noted that this retrospectively being attached to benefit the persons, is sharp contrast with the provision imposing some burden or inability where the presumption attaches towards prospectively.

27. It may appear to be some kind of a dichotomy in the tax legislation but the well settled legal position is that when a legislation confers a benefit on the taxpayer by relaxing the rigour of pre-amendment law, and when such a benefit appears to have been the objective pursued by the legislature, it would a purposive interpretation giving it a retrospective effect but when a tax legislation imposes a liability or a burden, the effect of such a legislative provision can only be prospective. What logically follows from the law so settled by a constitutional bench of Hon'ble Supreme Court, is that the operation of rule 10BA, which confers the benefit of an additional method of ascertaining arm's length price and, inter alia, relaxes the rigour of CUP

method, can only be retrospective in effect. In our considered view, therefore, rule 10BA is to be held as effective from 1st April 2002, i.e. the time when transfer pricing provisions were introduced in India."

18. In view of above, we hold that ;

i. The CUP is the most appropriate method to be applied for the international transactions of import and export of traded goods of the assessee.

ii. The assessee is required to support the international transaction by authentic documents which may also include quoted prices.

iii. the assessee may support its international transactions benchmarking analysis by the other method u/s 92C(1)(f) of the act which is held to be retrospective by the decision of the coordinate bench.

iv. In the event assessee fails to adduce and support its transactions under CUP method or under the sixth method then ld TPO and AO are entitled to resort to other method of benchmarking and comparability analysis after granting assessee a proper opportunity of hearing."

15. In view of the issue already adjudicated in case of assessee in earlier years, we set aside ground Nos. 3 & 4 of the appeal of the assessee holding that:-

a. Assessee is directed to produce before ld AO/ TPO quotations which it would like to rely upon, prove them to be authentic, genuine,

comparable with the terms and conditions of international transaction especially with respect to quantity and geographies and adjustment with respect to FOB value. Assessee shall also produce the benchmarking methodology before the ld AO/ TPO.

b. The ld AO/ TPO is directed to examine the same, and if found in accordance with law, then test the benchmarking made by assessee and compute ALP. In case AO is not satisfied with the same, before doing so ld AO/ TPO will give adequate opportunity of hearing to the assessee to prove its case, . Then he may decide issue on merits in accordance with law applying any other appropriate method including TNMM.

c. Ld AO shall pass draft order after incorporating any adjustment proposed by TPO to give opportunity to assessee for filing objections before DRP, if assessee wishes to do so. Then pass necessary orders in pursuance to this order after direction of ld DRP, if any.

16. Accordingly ground no 3 & 4 of the appeal is allowed with above directions.

17. Now, we come to ground No. 5 of the appeal of the assessee where the learned Transfer Pricing Officer has proposed adjustment to the international transaction of 'provision of business support services' of Rs. 10731404/– is under challenge. The assessee has entered into international transaction of provision of business support services amounting to Rs. 117787979/– and applied the 'Cost plus Method' taking 5% margin, selecting five comparable adopting multiple year data. The learned transfer pricing officer directed the assessee to take the single year

data i.e. current year, however, the assessee still conducted the fresh search and selected same comparable without making any adjustment on account of working capital risk adjustment. Therefore, the learned transfer pricing officer issued the show cause notice to the assessee stating that average margin of comparable is just 1.03% by using the multiple year data and it is also noted that assessee has mentioned method as 'Cost Plus Method' but basically used Transactional Net Margin Method, as assessee has taken entire cost of providing the services in the case of comparable companies as cost base. The ld TPO applied certain filters carried out fresh search and selected some of the comparables, Rejected all the comparables of the assessee. Assessee objected to the various filters proposed by the learned Transfer Pricing Officer as well as the selection of new comparables. The learned Transfer Pricing Officer rejected all the 5 comparable selected by the assessee and after recording the objection of the assessee, ultimately selected 9 comparables whose profit level indicator was 22.41% and therefore proposed an adjustment of Rs. 19530369/-. After the direction of the learned dispute resolution panel, above adjustment was reduced to Rs. 10731404/–. The assessee is aggrieved with the above adjustment and challenged the same vide ground number 5 of the appeal.

18. The learned authorised representative submitted that assessee is objecting to the inclusion of following comparables:-

i. Aptico Limited

ii. Cameo corporate Ltd

iii. Global procurement consultants Ltd

iv. HCCAB business services

v. Kllick agencies and marketing Ltd

vi. TSR Darashw Limited

vii. Cyber media research Ltd

19. He submitted a detailed chart, wherein assessee has challenged the inclusion of the above comparable submitting that they are not functionally comparable with the functions performed by the assessee. He also submitted huge number of judicial precedents, wherein those comparable companies have been excluded in comparability analysis of some other assessee. Therefore, the argument of the learned Authorised Representative is that they should be excluded from the comparability analysis in case of this assessee also.

20. The learned Departmental Representative vehemently objected to the argument of the learned Authorised Representative and submitted that the functions performed by the assessee are comparable with the functions performed by the comparable companies selected by the learned Transfer Pricing Officer. He referred to page number 1107 of the paper book wherein the functions performed by the assessee are mentioned as

a. identification of potential customers,

b. market research,

c. communication of the same to its Associated Enterprise and

d. Other support services.

He further stated that the assets employed for the above functions by the assessee are only personnel and the administrative cost. He further referred to the risk assumed by the assessee shown to be minimal. He

therefore submitted that on reading the above functions, it cannot be said that the comparable selected by the learned Transfer Pricing Officer are performing different functions then functions stated by the assessee. He further referred to page Nos. 539 to 554 of the paper book of the assessee to state that the learned Transfer Pricing Officer has given the detailed comments about selection of these comparables. He therefore submitted that there is no infirmity in the order of the learned Transfer Pricing Officer as well as the learned Dispute Resolution Panel in selecting above comparable for the comparability analysis.

With respect to judicial precedents, he submitted that comparability analysis is comparison of functions performed by the assessee with the functions of comparables. Therefore when a particular comparable is excluded in case of some other assessee, whose functions are neither before ITAT, DRP or TPO, comparable selected by the TPO cannot be excluded. Hence, these judicial precedents are not applicable for the reason that:-

i. Comparability analysis is only on the functions of the assessee with comparables selected
ii. are not on the functions of the assessee
iii. Functions of comparable are to be compared with functions of assessee, which is not dealt with in those precedents
iv. Comparability is a fact based analysis so rules on different facts cannot be applied in this case

21. We have carefully considered the rival contentions and perused the orders of the learned Transfer Pricing Officer as well as the Learned Dispute Resolution Panel. We have also perused the Transfer Pricing Study Report prepared by the assessee for the above segment. On careful reading of the transfer pricing study report prepared by the assessee, functions performed for the above segment, asset employed and risk assumed are stated in para number 5.5 as under.

"*5.5 Other transactions*

a) Provision of services

Functions Performed

a. Identification of Potential Customers;

b. Market Research;

c. Communication of the same to its AE's; and

d. Other Support Services.

Assets Employed

All these responsibilities do not require any separate capital investment and the cost incurred in these types of activities is only the personnel and administrative cost. For example, the salary of the employees of the project department, their telephone and internet expenses, traveling expenses and other miscellaneous expenses incurred during the period of time.

Risks Assumed

The various risks assumed by NRTIPL and its AEs in the course of undertaking the aforesaid transactions are enumerated in a tabular form below:

Risks	**NRTIPL**	**AEs**
Credit Risk -- This risk arises on account of bad debts taking place or delay in receipt of payments from customers.	NRTIPL provides support services to its AEs. Therefore, the credit risk associated with this transaction is minimal.	AEs are not exposed to credit risk with respect to this transaction.
- Foreign Exchange Risk This risk relates to the impact on profits arising due to differences in the currencies used by the contracting parties.	NRTIPL receives service fees in foreign currency. Therefore, the Company is exposed to foreign exchange risk.	AE's generally transact in US$, therefore, not exposed to foreign currency risk.
Manpower Risk Any company which employs technical personnel is faced with this risk.	NRTIPL primarily utilizes its man power in rendering support services to its AEs.	AEs are not exposed to manpower risk with respect to
	Therefore, NRTIPL is exposed to the risk of losing its key personnel to the competition	This transaction
Quality/ performance risk **This risk arises when the products/ services fails to meet the agreed upon specifications and standards.**	NRTIPL is required to perform its functions with due care and skill. But NRTIPL does not undertake any responsibility for any specific results of the services or any implied success connected with the services	Not applicable.

22. We have also carefully perused submissions made by the assessee before lower authorities. Vide submission dated 23/11/2011 the assessee has submitted the basic details at page Nos. 965 to 1184 of the paper book.

Another submission was also placed at page Nos. 919 to 964 of the paper book dated 19/04/2012. One more submission was also stated that page Nos. 846 to 918 of the paper book dated 9th May 2012 and second of the submissions in the month of June 29 and 11/10/2012, which are also placed at paper book number IV submitted before us. On careful reading of these submissions, we are of the opinion that the transfer pricing study report prepared by the assessee is sketchy and does not give the complete analysis of the functions performed by the assessee. It also does not show what kind of assets and personnel the assessee has employed. Further, none of the submissions made by the assessee before the learned Transfer Pricing Officer discussed the FAR analysis of this segment. No agreements, nature of services provided were shown before lower authorities or before us. In view of this, our opinion is that the assessee in the transfer pricing study report has not at all captured the functions performed by the assessee. Further, on reading the order of the learned Transfer Pricing Officer, We do not find that the functions performed for this segment has been captured and considered by the learned Transfer Pricing Officer also. On reading the order of the learned Dispute Resolution Panel, the arguments of the assessee have been dealt with in one-liners and confirmed the selection of comparable by ld TPO. Unless the functions performed by the assessee for this segment are properly captured, it is not possible to adjudicate on the comparable selected by the learned Transfer Pricing Officer and to persuade ourselves with the arguments advanced by the learned authorised representative. Merely based on some judicial precedents in case of some other assesses, comparables can neither be included nor

excluded. It will lead to strange situations, where one comparable excluded in one case, would always be excluded universally in all other cases. Approach of decided on inclusion or exclusion of comparables based on judicial precedents, on one day will leave assessee as well as revenue with zero comparables. One day this approach will make the comparability analysis redundant and unworkable. Therefore, paramount is Functions performed by assessee to be compared with that of comparables for comparability analysis. In view of above facts, it is apparent that without first analyzing the functions performed by the assessee for this business segment, the assessee has compared the margins/profit level indicator of those comparables with the assessee's own PLI. This is not acceptable as it amounts to putting the cart before the horse. In view of this, we set aside the whole issue back to the file of the learned Transfer Pricing Officer with the following direction to the assessee and ld TPO:-

a. to first capture the functions performed by the assessee for this business segment supported with the relevant evidences such as agreements, bills, invoices, correspondences etc of such functions performed, and
b. carry out fresh search of the comparable as per filters adopted by the learned Transfer Pricing Officer and
c. compare the Profit Level Indicator of such comparable with the assessee's profit level indicator and show that IA are at arm's length
d. On submission of these details, the learned Transfer Pricing Officer shall examine the same and decide the issue afresh after granting of proper opportunity of hearing to the assessee.

e. Thereafter, the learned TPO shall make any adjustment, if any, and then learned Assessing Officer, based on the above adjustment proposed shall pass the draft assessment order for option of giving an opportunity to the assessee to file any objection if it wishes to do so before the learned dispute resolution panel. On receipt of the direction of the learned Dispute Resolution Panel, or otherwise the learned Assessing Officer shall pass the final order.

23. In view of this ground number 5 of the appeal of the assessee is allowed with above directions.

24. The ground number 6 of the appeal of the assessee is with respect to the disallowance made by the learned assessing officer of INR 123957036/– on account of provision for doubtful debts. The brief fact shows that the learned assessing officer has noted that assessee has debited in the profit and loss account Rs. 123957036 under the head provision for bad and doubtful debts as on 31/3/2009. The learned AO was of the view that the above provision is not an ascertained liability and therefore the same was added to the total income of the assessee as disallowance. He further rejected the explanation given by the assessee stating that assessee is not able to establish that it has created any provision in the previous year for the said bad and doubtful debts, which has been written off in the impugned assessment year.

25. The assessee filed objection before the learned Dispute Resolution Panel, which is covered as per para No. 11 of the order of the learned DRP especially at para Number 11.3. The learned Dispute Resolution Panel has given a direction to the AO stating that the amount considered for the

proposed disallowance is an item on the credit side of the profit and loss account being provision written back and hence reduced from the computation of the total income. It was further held that the provision of doubtful debt debited in the profit and loss account is only INR 169106575/– which has been added back by the assessee already in the computation of the total income. Therefore, it was held that it is not a case of any provision for doubtful/bad debts debited in the profit and loss account and claimed as an allowable expenditure. The learned DRP also referred to the profit and loss account of the assessee and stated that assessee has only debited a sum of INR 9359406/– which is not provision but actual bad debts written off. As the issue has not been examined by the learned assessing officer in the draft assessment proceedings the dispute resolution panel directed the learned assessing officer to allow the above amount after verifying that they meet the requirement of the provisions of section 36 (2) of the act. It was further directed that learned AO is not supposed to go into the justification of treating the same as bad or not by the assessee.

26. However, in the assessment order passed by the assessing officer in pursuance of the direction of the learned Dispute Resolution Panel repeated the above addition as per para number 4.7 of the order. The main reason for repetition of the above addition was that the learned Dispute Resolution Panel directed the assessee to produce the evidence before the Assessing Officer but assessee did not produce any details as directed by the learned Dispute Resolution Panel and therefore the learned AO repeated the above addition.

27. The learned authorised representative vehemently contested the above disallowance and submitted that assessee has submitted the complete details before the assessing officer, which is placed at page NOs. 93 – 95 of the paper book No. I. Therefore, he submitted that the complete details are already available with the assessing officer and in spite of that, the learned AO made the above disallowance.

28. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer and stated that when assessee was directed by the learned Dispute Resolution Panel to submit the details before the learned Assessing Officer, which did the assessee and therefore the learned Assessing Officer not do has repeated the above addition. He further stated that assessee can produce the above details before the assessing officer, then AO may verify the same and delete the disallowance made, if found in accordance with law.

29. We have carefully considered the rival contention and perused the orders of the lower authorities. In para number, 11 of the order of the learned Dispute Resolution Panel the complete facts are narrated which shows that assessee has only debited Rs. 9359406/- in the profit and loss account as bad debts written off. The complete details of such bad debts are provided at page No. 93 of the paper book wherein the details concerning 130 parties were mentioned. There are many credits which have been written back and there are many debits which have been written off , net sum of the above transaction is debited to the profit and loss account as bad debts of INR 9359406/-. Naturally, the above debit has been made to the profit and loss account. Therefore, they are written off in the books of accounts. Those

details were already available before the assessing officer during the assessment proceedings. However, the learned AO did not care to verify them. Even despite the specific direction of the learned Dispute Resolution Panel, the learned Assessing Officer did not look into the details submitted by the assessee. It was also not known to us whether the Assessing Officer has issued any letter to the assessee to explain the above claim. In view of this, we direct the learned Assessing Officer to examine the details submitted by the assessee at page Nos. 93 to 95 of the paper book and test it on the grounds of allowability of bad debts according to Section 36 (2) of the Income Tax Act, 1961 and then allow the same if found in accordance with the law. Accordingly, ground No. 6 of the appeal of the assessee is allowed with above direction.

30. Ground number 7, 8, 9 and 10 are general in nature and therefore they are dismissed.

31. Accordingly, appeal filed by the assessee for assessment year 2009 – 10. In ITA No. 1827/Del/2014 is partly allowed for statistical purposes.

32. Now we come to appeal of the assessee for assessment year 2010 – 11. The brief facts show that assessee filed its return of income declaring loss of INR 20602874 on 13/10/2010. During the course of assessment proceedings, it was noted by the learned assessing officer, that assessee has entered into 12 types of international transactions, which are enlisted at para number 1.4 of the order of the learned transfer-pricing officer. The transactions at serial number 1 – 8 are with respect to the export and import of commodities along with the commission. Transactions reported at serial number 9 – 12 are support services, compensation received and paid.

Except the transaction of support services, assessee adopted the cost plus method as the most appropriate method for benchmarking the international transaction of Rs 88765617/-. Assessee has received the above sum from its Hong Kong, Singapore, USA and Ireland associated enterprises. The assessee has put a markup of 5% from Hong Kong, Singapore and USA entity. Some of the transactions with Singapore associated enterprise and Ireland associated enterprise were also benchmark at cost +15%. The assessee adopted the profit level indicator of operating profit to total cost. The assessee's profit level indicator is 9.68% whereas after selection of the comparable whose is PLI was found to be 2.91%, assessee submitted that it is international transaction of business support services is at arm's-length.

33. The transfer-pricing officer examined the transfer pricing documents of the assessee and found that assessee has mentioned the most appropriate method as the cost plus method. However, assessee has used transactional net margin method as entire cost of providing the services have been taken for tested party as well as in the case of comparable company. He rejected the comparables selected by the assessee and after carrying out the fresh search, applying various filters, finally selected 9 comparable companies. The profit level indicator of comparables was worked out at 23.25 percentages. Therefore the learned TPO determined the operating cost of the assessee and applied the above margin of the comparables and found that the arm's-length price of international transaction of Rs 8,87,65,617 is INR 9,97,47,889 and therefore proposed an adjustment of INR 1,09,82,272/–. Accordingly he passed the order under section 92CA (3) of the act on 20/1/2014. Incorporating the above adjustment proposed by

the learned transfer pricing officer, The learned AO passed order in terms of section 144C (1) of the act on 07/03/2014 determining total loss of INR 359068286 against the returned income of the assessee of loss of INR 2602874. From the above, He reduced the brought forward losses and unabsorbed depreciation amounting to INR 36747130. Consequently the total loss was determined at INR 322321156/–. The assessee filed its objection before the learned dispute resolution panel who passed direction under section 144C (5) of the act on 14/11/2014. Consequent to the above direction, the learned assessing officer passed order under section 143 (3) read with section 144C (13) of the income tax act, 1961 on 20/1/2015 at a loss of INR 3 22321156/–. Such order was passed, as the learned dispute resolution panel did not give any relief to the assessee. Against that, order assessee is in appeal before us.

34. Ground number 1 of the appeal is general in the nature and it in fact supports the ground number 2 of the appeal of the assessee where an adjustment on account of determination of arm's-length price of the international transaction of the assessee of INR 10982272/– is made. In view of our adjudication especially on ground number 2, the above ground number 1 becomes general in nature and hence it is dismissed.

35. The ground number 2 of the appeal is with respect to the order of the learned AO/TPO in sustaining the application of the transactional net margin method against the cost plus method adopted by the assessee for determination of arm's-length price in respect of provision of business support services to its associated enterprises and selecting the comparables

by the learned AO/TPO. This ground is similar to ground no five of the appeal of the assessee for AY 2009-10.

36. The learned authorised representative repeated the same arguments as mentioned before us. In ground number 5 of the appeal of the assessee for assessment year 2009 – 10, wherein selecting the almost identical comparables the learned transfer-pricing officer adjusted the international transactions arm's-length price. He also submitted similarly, a chart contesting various comparable supporting various judicial precedents.

37. The learned departmental representative also reiterated the same arguments as were advanced on the identical grounds in appeal of the assessee for assessment year 2009 – 10.

38. We have carefully considered the rival contentions, the orders of the lower authorities, the various submissions made by the assessee before the lower authorities, and chart submitted before us contesting various comparables. As the facts and in the present case are identical to the facts in the case of the assessee as per ground number 5 of the appeal for assessment year 2009 – 10, wherein we have set aside it to the file of the learned transfer pricing officer with certain direction to both the parties, for similar reasons and with similar direction to parties, We set aside ground number 2 of the appeal back to the file of the learned transfer pricing officer. Accordingly, ground number 2 of the appeal of the assessee is allowed with above directions.

39. The ground number 3 and ground number 4 of the appeal are with respect to the several issues raised by the assessee. However, before us no arguments were advanced and therefore, both these grounds are dismissed.

40. Ground number 5 of the appeal of the assessee says that the assessing officer has incorrectly computed the amount of set off of brought forward losses and unabsorbed depreciation of earlier years. It was mentioned that instead of allowing set off of INR 151344760/– being the aggregate amount of assessed brought forward losses and unabsorbed depreciation, the learned AO allowed only the sum of INR 36747130. The learned authorised representative submitted before us, the same arguments and stated that in fact, the assessee should have been granted the correct brought forward losses and unabsorbed depreciation.

41. The learned departmental representative also submitted that the assessee should provide the correct calculation of the brought forward losses and unabsorbed depreciation allowable to the assessee based on the past assessment record of the assessee and based on that the learned AO may verify the same.

42. We have carefully considered the rival contentions and found that the assessee has disputed the carry forward of brought forward losses as well as unabsorbed depreciation to be set off against the current income returned by the assessee. In view of this, we direct the assessee to produce the correct details of the amount of unabsorbed depreciation and amount of brought forward losses to be set off against the income with proper evidences which may be verified by the learned assessing officer and if found correct, the assessee should be granted the benefit of the same . ld AO is directed accordingly. In view of this ground, number 5 of the appeal is allowed with above direction.

43. Ground number 6 of the appeal is against the initiation of the penalty proceedings under section 271 (1) (C) of the income tax act. The above issue is premature and hence, this ground of appeal is dismissed.

44. Accordingly appeal of the assessee for assessment year 2010 – 11 in ITA No. 1847/Del/2015 is partly allowed for statistical purposes

Order pronounced in the open court on 15/03/2019.

-Sd/-	-Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 15/03/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	