IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 1015/Del/2015
Assessment year: 2008-09

AT&T Communication Services India Pvt. Ltd., Vatika Triangle, 3rd Floor, Sushant Lok-1, Block-A, Gurgaon-122002 (PAN: AACCA8033E)	**vs**	ACIT, Circle-3(2), New Delhi.
Appellant		Respondent

ITA No. 1779/Del/2015
Assessment year: 2008-09

ACIT, Circle-3(2), Room No. 380B, DC.R. Building, I.P. Estate, New Delhi.	**vs**	AT&T Communication Services India Pvt. Ltd., Mohan Dev House, 13, Tolstoy Marg, New Delhi-110001 (PAN: AACCA8033E)
Appellant		Respondent

Assessee by : **Ms Poonam Ahuja, CA**
Ms Chinu Bhasin, CA
Department by: **Shri Sanjay Bara, CIT DR**

Date of hearing : 17.01.2019
Date of pronouncement : 26.03.2019

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

ITA No.1015/Del/2015 is the assessee's appeal preferred against the final assessment order passed subsequent to the directions of the Ld. Dispute Resolution Panel (DRP) vide directions dated 16.12.2014 and pertains to assessment year 2008-09. ITA 1770/Del/2015 is the department's cross appeal for the same year.

2.0 Brief facts of the case are that the assessee is a company incorporated under the Indian Companies Income Tax Act, 1956 and is a wholly owned subsidiary of AT&T Communication Services International Inc. USA. The business of the assessee is divided into three broad segments:-

i) Network connectivity services
ii) Market research, administrative support and liaison services
iii) Managed network services

2.1 For the year under consideration, the return of income was filed declaring an income of Rs. 6,95,74,835/-. The final assessment order was passed on 29.1.2015 at an income of Rs. 21,64,57,948/-after making the following additions/disallowances:-

i)	Addition on account of non-deduction of TDS u/s 40(a)(ia) of the I.T. Act, 1961	1,46,84,844	
ii)	Addition on account of non taxable allowances paid to the expats	2,60,90,328	
iii)	Addition on account of gratuity liability of employees transferred to AT&T GNS	48,51,041	
iv)	Addition on account of Prior Period expenses	38,55,230	
v)	Addition on account of differential amount of mark-up	57,79,795	
Vi)	Addition on account of interest not charged from AGNS	2,46,141	
vii)	Addition on account of expenses incurred on behalf of expats	15,45,155	
viii)	Addition on account of percentage of profit on Network Connectivity Services	7,92,00,000	
ix)	Addition on account of year end provisons	1,26,30,579	14,68,83,113

2.2 Prior to the passing of the final assessment order, since the assessee had entered into international transaction, a reference was made to the Transfer Pricing Officer (TPO) wherein the TPO had recommended an adjustment of Rs. 1,53,55,412/- with reference to the international transaction entered into by the assessee. In the draft assessment order, besides the adjustment relating to transfer pricing addition/adjustment, the Assessing Officer (AO) had also made adjustments pertaining to non-deduction of TDS, non-taxable allowances paid to

expatriates, gratuity liability transferred, prior period expenses, differential amount of mark up, interest not charged from the foreign AE, addition on account of Mutual Services Agreement (MSA), addition on account of tax deposited on behalf of expatriates and margins thereof, addition on account of expenses incurred on behalf of expatriates, addition on account of percentage of profit on network connectivity services and year end provisions which is reflected in the table produced above.

2.3 Aggrieved with the draft assessment order, the assessee approached the Ld. DRP and challenged the proposed adjustments/additions in the draft assessment order and the Ld. DRP partly accepted the assessee's objections. The assessee is now in appeal before this Tribunal (ITAT) and has raised the following grounds of appeal:-

"1. Ground No. 1 - No time available with the learned AO for making an order of assessment after excluding the period of limitation

1.1 *On the facts and in the circumstances of the case and in law, the impugned order of assessment is bad in law and void-ab-initio as the same has been framed by the learned AO after the expiry of/time limit for completion of assessment as provided in Section 153(1) of the Act.*

2. Ground No. 2 - Disallowance of Annual Maintenance Charges paid to Cisco Systems International BV ('Cisco') under section 40(a)(i) of the Act

2.1 On the facts and circumstances of the case and in law, the learned AO has erred in disallowing Rs 1,46,84,844 towards maintenance charges paid to Cisco under section 40(a)(i) of the Act on account of non-deduction of tax at source thereon.

2.2 Without prejudice to the above, on the facts and circumstances of the case and in law, the learned AO has erred in disallowing an amount of Rs. 89,48,681 out of the total amount of Rs/ 1,46,84,844 paid to Cisco alleging the same to be in the nature of prior period expenditure.

3. Ground No. 3 - Addition on account of non-taxable allowances paid to expatriate employees

3.1 On the facts and circumstances of the case and in law, the learned AO has erred in disallowing Rs 2,60,90,328 towards difference between the salary and other costs incurred by the Appellant in relation to the expatriate employees and taxable salary reported by the employees in India.

3.2 On the facts and circumstances of the case and in law, the learned AO has erred in holding that the subject transaction has been routed by the Appellant to understate its income and to avoid payment of taxes thereon without appreciating the fact that the entire amount proposed for disallowance (i.e. Rs 2,60,90,328) has been charged back from AT&T Communication Services International Inc. ('AT&T US') under the Master Service Agreement ('MSA') at a mark-up of 8%.

3.3 Without prejudice to the above, on the facts and circumstances of the case and in law, in case the above claim of the assessee is not accepted, then the said amount along with mark-up thereon/ 6f 8% should be reduced from the income of the assessee, being the amount claimed from/ AT&T US towards such reimbursements.

4. Ground No. 4 - Addition on account of gratuity liability of employees transferred to AT&T Global Network Services India Pvt Ltd ('AGNSI')

4.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in making an addition of Rs 48,51,041 towards gratuity liability of employees transferred by the Appellant to AGNSI.*

5. *Ground No. 5 - Disallowance of Prior Period Expense*

5.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in disallowing an amount of Rs 38,55,230 by treating the same as prior period expense.*

5.2 *Without prejudice to above and in the alternative, on the facts and in the circumstances of the case and in law, the learned AO has erred in not concluding that if the expenses of Rs 38,55,230 are disallowed on the basis that same relate to the preceding financial year (i.e. Financial Year ('FY') 2006-07), then the same should be allowed as a deduction in the preceding financial year (i.e. FY 2006-07).*

6. *Ground No. 6 - Addition on account of non-charging of mark-up on support service charges billed to AGNSI*

6.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in making an addition of Rs. 37,79,795 being the difference between the mark-up of 8% charged by the Appellant on support service charges billed to AGNSI and mark-up of 12.85% applied by the Transfer Pricing Officer ('TPO') basis direction of the Hon'ble DRP for services rendered by the Appellant to AT&T US under the MSA in the order giving effect to the *' directions of the Hon'ble DRP.*

7. *Ground No. 7 - Addition on account of interest not charged from AGNSI*

7.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in making an addition of Rs. 2,46,141 towards notional interest not charged from AGNSI by the Appellant on account of delay in settlement of invoices.*

8. *Ground No. 8 - Addition on account of expenses incurred on the expatriate employees not charged to AT&T US*

8.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in making an addition of Rs. 15,45,155 towards expenditure of Rs 13,08,677 incurred by the Appellant on the expatriate employees and increased it by the mark-up of 18.07% .*

8.2 *Without prejudice to ground 7.1 above, the learned AO has erred in applying a mark-up of 18.07% instead of the revised mark-up of 12.85% applied by the TPO basis the directions of the Hon'ble DRP, on services rendered by the appellant to AT&T US.*

9. Ground No. 9 - Addition on account of notional loss of profit to the Appellant

9.1 *On the facts and circumstances of the case and in law, the learned AO has erred in observing that the Appellant should have received compensation for the loss of revenue arising due to transfer of business to AGNSI and has thereby erred in making an addition of 7,92,00,000 on account of notional loss of profit to the Appellant.*

10.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in making disallowance of expenses, amounting to Rs 1,26,30,579 (represented by year-end accruals), by alleging the same as excessive on account of non-submission of supporting documents.

10.2 Without prejudice to the above, on the facts and circumstances of the case and in law, the learned AO has erred in not observing that deduction in respect of the disallowed amount on account of year-end accruals should be allowed in the subsequent year(s) in which such accruals are reversed/ utilized.

11. Ground No. 11 - Short credit in respect of Taxes Deducted at Source ('TDS')

11.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in granting credit for TDS of Rs 1,78,55,046, as against Rs 1,93,43,8551 claimed by

the Appellant in its return of income for the subject AY.

12. Ground No. 12 - Non-grant of full credit in respect of Advance Tax

12.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in granting credit for advance of Rs 58,63,848, as against Rs 1,00,00,000 claimed by the Appellant in its return of income for the subject AY.

13. Ground No. 13 - Incorrect levy of interest under section 234B and 234 D of the Act

13.1 On the facts and circumstances of the case and in law, the learned AO has erred in charging interest under section 234B and 234D of the Act.

14. Ground No. 14 - Withdrawal of interest under section 244A of the Act

14.1 On the facts and circumstances of the case and in law, the learned AO has erred in withdrawing interest granted under section 244A of the Act.

15. Ground No. 15 - Initiation of penalty proceedings under section 271(l)(c)

15.1 On the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 271(l)(c) of the Act against the Appellant on account of the above adjustments made in the assessment order."

2.4 The department is also in cross appeal before the ITAT and the grounds preferred by the by the department are as under:-

"*On the facts and in the circumstances of the case, the Hon'ble DRP has erred on facts and in law:*

1. On the facts and in the circumstances of the case, the Ld. DRP erred in deleting the addition of Rs.98,63,013/- on

account of tax deposited on behalf of ex pat employees and margin thereof not charged under MSA as the assessee had recovered the said amount from AT&T WPS in the subsequent year.

2. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the course of hearing of the appeal."

3.0 The Ld. Authorised Representative (Ld. AR) submitted that ground no. 1 of the assessee's appeal was not being pressed; hence, the same is dismissed as not pressed.

3.1.0 Coming to ground no. 2 of the assessee's appeal, the Ld. AR submitted that this ground challenges the disallowance of maintenance charges paid to CISCO. It was submitted that the assessee had paid an amount of Rs. 1,46,84,844/- to CISCO towards Annual Maintenance Charges (AMC). It was submitted that during the year, the assessee had undertaken two separate transactions with CISCO Systems International BV which was a tax resident of Netherlands. These separate transactions pertained to purchase of equipment and provision of annual maintenance services. The Ld. AR further submitted that it was the allegation of the Assessing Officer that the assessee had not submitted particulars of the equipment purchased from CISCO in relation to which the annual maintenance charges had been paid.

It was also submitted that the Assessing Officer had alleged that no supporting evidences had been submitted by the assessee to substantiate that the equipment did not have any element of royalty embedded therein and further that the payment of annual maintenance charges did not constitute payment towards Fee for Technical Services (FTS). It was further submitted that the Assessing Officer had held that since the assessee had failed to substantiate that the said annual maintenance charges were not in the nature of fee for technical services, the impugned amount of Rs. 1,46,84,844/- was liable to be disallowed u/s 40A(ia) of the Income Tax Act, 1961 (hereinafter called 'the Act') on account of non-deduction of tax at source. It was also submitted by the Ld. AR that the Assessing Officer had alleged that out of this amount, only Rs. 57.3 lakh pertained to the year under consideration and the balance pertained to assessment years 2006-07 and 2007-08. The Ld. AR submitted that the purchase of equipment was an outright purchase transaction and, therefore, the same could not be considered as payment towards royalty. It was also submitted that the assessee had capitalized the equipment in its books of accounts and depreciation on the same had been claimed on the same in the preceding year as well

as during the the year under consideration. It was also submitted that the annual maintenance charges in question did not have any correlation with the nature of equipment purchased and, therefore, no adverse inference should have been drawn by the Assessing Officer in relation to the AMC. It was also submitted that the assessee had duly submitted the purchase orders and invoices raised by CISCO before the Assessing Officer to demonstrate that both purchase as well as payment of AMC were separate transactions. Our attention was also drawn to the copy of agreement pertaining to annual maintenance charges as well as invoices etc. which were earlier produced before the Assessing Officer and were now placed in the paper book filed by the assessee. The Ld. AR also submitted that the annual maintenance charges were incurred for the entire lot of machines purchased by the assessee and were not be identified or related to any particular equipment. It was emphasised by the Ld. AR that the payment of annual maintenance charges paid to CISCO was a regular third party transaction and not a transaction with any related party and, therefore, it should be considered as an independent transaction. It was also submitted that the maintenance services provided by CISCO did not make available

any technical knowledge, expertise, skill, know-how etc. to the assessee and, therefore, the AMC would not constitute fee for technical services under the India-Netherlands Tax treaty. Reliance was placed on the order of the ITAT Delhi Bench in the case of ACIT vs. M/s HCL Comnet Ltd. (TS-456-ITAT-2016(Del)) wherein it had been held that while analysing the taxability of annual maintenance charges, no technical services could be said to have been provided to the assessee. It was further submitted that regarding the allegation of the Assessing Officer in respect of prior period expenses, the relevant invoices had been received as well as paid in the year under consideration itself and, therefore, the liability had crystallised in the subject year itself and, therefore, the same was to be allowed as a deduction in the year under consideration only.

3.1.1 In response, the Ld. Departmental Representative (C.I.T. DR) submitted that the assessee had not filed any details regarding the annual maintenance expenses before the Assessing Officer and, therefore, the Assessing Officer had no option but to make the addition. It was also emphasised by the Ld. C.I.T. DR that a special audit u/s 142(2A) of the Act had been ordered by the Revenue in the case of the assessee and even the special

auditor appointed by the department had stated in the audit report that the assessee had not provided the relevant information, explanation, reference, documents, clarification and evidences as were required for the purpose of carrying out the special audit. The Ld. CIT DR also referred to the order of the Assessing Officer and pointed out that the Assessing Officer had provided reasonable opportunity to the assessee for furnishing the relevant details pertaining to the annual maintenance contract but the assessee had not submitted any particulars and neither had submitted any supporting evidence to substantiate that the equipment purchased did not have any element of royalty embedded therein and further that the assessee could demonstrate that the payment of AMC charges did not constitute payment towards fee for technical services. The Ld. CIT DR submitted that the disallowance had rightly been made and that even the Ld. DRP had rejected the assessee's objections in this regard and had held that the assessee had failed to discharge the onus cast upon it and, therefore, the provisions of section 40A(ia) were applicable in the case of the assessee.

3.2.0 With respect to ground no. 3, the Ld. AR submitted that this ground pertained to disallowance of non-taxable

allowances amounting to Rs. 2,60,90,328/- paid to expatriates. The Ld. AR submitted that the assessee had entered into Master Service Agreement (MSA) with AT&T Communication Services International Inc, USA for provision of market research, administrative support and liaison services and other support services. It was submitted that the copy of the Master Service Agreement was submitted before the Assessing Officer and was also now part of the paper book submitted by the assessee before this Tribunal. The Ld. AR further submitted that for the provision of some of these services, the assessee had employed senior expatriate employees and since these expatriates were to be paid directly by transfers in the overseas bank account of such expatriates, the assessee had entered into disbursing agency agreement with AT&T Worldwide Personnel Services Inc. which was an entity incorporated in the United States under which the salary payable by the assessee to such expatriate employees was disbursed to AT&T Worldwide Personnel Services Inc. which credited the same to the foreign bank account of the expatriates outside India. It was also submitted that during the year under consideration, the assessee had reimbursed an amount of Rs 3.90 crores for salary and other costs paid by AT&T

Worldwide Personnel Services Inc. whereas as per the returns of income of the expatriates, the taxable salary returned by them amounted to Rs. 1.29 crore. It was also submitted that cost + 8% was charged in this regard. The Ld. AR submitted that the Assessing Officer, on the basis of the special audit report, noted that the amount offered to tax in the returns of income of the expatriates and Form 16 issued to them reflected only Rs. 1.29 crore as against the payment of Rs. 3.90 crores made by the assessee to M/s AT&T Worldwide Personnel Services Inc. and, therefore, the differential amount was disallowed by the Assessing Officer on the ground that the assessee had not submitted any reconciliation statement to justify that the differential amount represented non-taxable component of the expatriate salary. It was also submitted that the Assessing Officer had alleged that the assessee could not substantiate that the impugned payment/s had been made only with respect to the business activity of the assessee. The Ld. AR submitted that the assessee had issued employment letters to three expatriates namely Mr. Mark Shine, Mr. VS Gopinath and Mr. Richard McComick. It was also submitted that the assessee had submitted documents like copy of master service agreement, copy

of Disbursing Agency Agreement, copies of approval letters issued by RBI, copy of invoices raised by AT&T Worldwide Personnel Services Inc., copies of Form 16 issued by the assessee to the expatriates, copies of employment letters issued to the expatriates, etc. before the Assessing Officer in support of its claim and contention. The Ld. AR also drew our attention to the copies of these documents placed in the paper book filed by the assessee before this Tribunal. The Ld. AR also submitted that the difference in the taxable salary returned by the expatriates and the payments made by the assessee also included expenditure for travel, accommodation, lodging etc. of these expatriates which, though, did not form part of the taxable income, were reimbursed to the AT&T Worldwide Personnel Services Inc. nevertheless. It was submitted that the assessee was under an obligation to reimburse other payments and costs incurred by these expatriates although they might not have been taxable under the provisions of the Income Tax Act and, therefore, the discrepancy in the two amounts was visible bu allowable.

3.2.1 In response, the Ld. C.I.T. DR submitted that the Ld. DR has noted that the assessee had, neither before the special

auditors nor before the Assessing Officer and nor even before the DRP, submitted particulars of non-taxable allowances. The Ld. C.I.T. DR pointed out to the observation of the Ld. DRP in Para 5.4.1 of its directions that the assessee had not submitted any reconciliation statement to justify its claim that the differential sum of Rs. 2,60,90,328/- actually represented non-taxable component only. It was submitted that in view of the failure of the assessee to substantiate its claim, the assessee was not entitled to make the claim.

3.3.0 With respect to ground no. 4 of the assessee's appeal challenging the disallowance of gratuity liability of employees transferred to AT&T GNS amounting to Rs. 48,51,041/-, the Ld. AR submitted that the Assessing Officer disallowed this amount alleging that the liability was transferred to AT&T GNS and had not paid been paid the employees directly. It was further submitted that the Assessing Officer had alleged that AT&T GNS had not paid this amount to the employees even on their resignation from the assessee company and, therefore, the transfer of such sum by the assessee to AT&T GNS cannot be treated as an allowable expenditure. The Ld. AR submitted that the assessee company had made payment of gratuity to AT&T

GNS which was duly recorded as a liability in the books of account of AT&T GNS. It was further submitted that the payment had been made through bank which was evidenced through the bank statement. It was further submitted that the transferred employees continued with their employment with AT&T GNS and, therefore, the question of AT&T GNS making the payment of gratuity to such employees at the time of their resignation did not arise at all. It was emphasised that the liability for making the payment of gratuity amount by AT&T GNS to the transferred employees would arise only at the time of termination of their employment with AT&T GNS. The Ld. AR also drew our attention to the copies of consent letters for six employees (on sample basis) which evidenced the consent of the employees on the terms of transfer which were duly submitted before the Assessing Officer and were now also in the paper book filed by the assessee. The Ld. AR also submitted that four employees out of the transferred employees had resigned from AT&T GNS and their gratuity amount transferred from the assessee had been duly paid to them by AT&T GNS and had not been claimed by that company as an expenditure in its return of income. It was also submitted that this fact was also submitted

before the Assessing Officer but was not given due credence by him. The Ld. AR also submitted that the provisions of Section 43B of the Act do not postulate that the payment of gratuity should be made directly to the employees and it does not provide a bar on the deductibility of the gratuity amount where such gratuity is paid to another concern to which the employees have been transferred. Reliance was also placed on the judgment of the Hon'ble Apex Court in the case of W.T. Suren & Co. reported in 230 ITR 643 (SC) wherein it had been held that in case of transfer of employees by one company to another, gratuity liability relatable to the transferred employees and paid to the transferee company was to be allowed as a deduction to the transferor company in the year of payment of the amount to the transferee company.

3.3.1 In response, the Ld. CIT DR submitted that the Assessing Officer had duly considered the ratio of the judgment of the Hon'ble Apex Court in the case of W.T. Suren & Co. Vs. CIT (supra) and had, thereafter, reached the conclusion that the facts in the assessee's case were distinguishable. The Ld. CIT DR also submitted that in terms of provisions of section 40A(7) and in view of the judgement of the Hon'ble Apex Court in the case of

Shree Sajjan Mills Limited (1986) 156 ITR 85 (SC), deduction for gratuity payment cannot be allowed on general principles under any other section of the Act. The Ld. CIT DR submitted that a perusal of the consent letters would show that there is no termination of employees by the assessee and the employees have been transferred to AT&T GNS. The Ld. CIT DR also drew our attention to the directions of the Ld. DRP, as contained in Para 4.6.3 of its directions, that the assessee had not been forthcoming in bringing out the relevant facts on record to facilitate the adjudication of the issue. The Ld. C.I.T. DR submitted that the disallowance had been correctly made and the same should be upheld.

3.4.0 With respect to ground no. 5 pertaining to prior period expenses amounting to Rs. 38,55,230/-, the Ld. AR submitted that this ground was not being pressed. Accordingly, this ground is dismissed as not pressed.

3.5.0 Ground no. 6 of the assessee's appeal pertains to disallowance of differential mount of mark-up leading to an addition of Rs. 37,79,795/-. The Ld. AR submitted that AT&T Global Networks Services India Private Limited, a group company of the assessee had commenced its business operation during

financial year 2005-06 and it did not have its own support-service functions like tax, legal, HR etc. whereas the assessee, which was in operation for more than 10 years, had a fully developed support-service functions. It was further submitted that in view of this, the assessee entered into the support-service agreement with AT&T Global Networks Services India Private Limited for providing these support services. It was submitted that as per the support service agreement, no mark-up was required to be charged on the support service charges. It was further submitted that all the same, the assessee had charged a mark-up of 8% on the cost of support services charges billed to AT&T Global Networks Services India Private Limited. However, the Assessing Officer proposed a mark up of 18.07% which was reduced to 12.85% by the Ld. DRP against which the assessee was in appeal. The Ld. AR submitted that this issue was covered in favour of the assessee by the order of the ITAT in assessee's own case for subsequent assessment year i.e. 2010-11 in ITA No. 1016/Del/2015. Our attention was drawn to Para 16 of this order dated 15.02.2018 and it was submitted that the ITAT had deleted an identical addition in that year. It was further

submitted that this incorrect addition on account of mark-up was not sustainable in law.

3.5.1 In response, the Ld. C.I.T. DR submitted that the purpose of the assessee to charge mark-up at a lower rate was to lower the taxable income. It was also submitted that the differential mark up had been determined by the TPO by comparing it to the expenses charged to AT&T Communication Services International Inc. (US) and, further, the assessee had failed to point out the differences between the services provided to AT&T Communication Services International Inc. (US) and to AT&T Global Networks Services India Private Limited or the difference in business expediency and, therefore, the addition had been rightly made.

3.6.0 With respect to ground no. 7 pertaining to addition on account of notional interest income not charged from AT&T Global Networks Services India Private Limited, leading to addition of Rs. 2,46,141/- , the Ld. AR submitted that ground was identical/consequential to the adjudication of ground no. 6 and the arguments also would remain the same.

3.6.1 In response, the Ld. C.I.T. DR placed reliance on the findings of the Assessing Officer/TPO and the directions of the

Ld. DRP in this regard and submitted that it was a strong case for applying notional interest in the case of the assessee.

3.7.0 With respect to ground no. 8 pertaining to addition on account of certain expenses incurred on behalf of the expatriates leading to an addition of Rs. 15,45,155/-, the Ld. AR submitted that this ground was not being pressed. Accordingly, this ground is dismissed as not pressed.

3.8.0 With respect to ground no. 9 pertaining to addition on account of notional profit on transfer of business to AT&T Global Networks Services India Private Limited leading to an addition of Rs. 7,92,00,000/-, the Ld. AR submitted that the assessee had entered into a contract with Videsh Sanchar Nigam Limited (VSNL) for providing telecommunication services to the customers of AT&T in India. It was further submitted that the assessee had engaged VSNL as all the necessary corporate and legal approvals to offer such services were available with VSNL. The Ld. AR submitted that the assessee was acting as a service support organisation for VSNL which was responsible for marketing of AT&T Global Networks Services in India to the customers of the assessee pursuant to the agreement entered into between the AT&T Worldwide Telecommunication Services Singapore Pvt. Ltd.

Our attention was drawn to the copy of agreement placed in the paper book in this regard. It was also submitted that this agreement had been submitted before the Assessing Officer also. It was further submitted that the revenue earned by the assessee from the rendition of services to the customers of VSNL was accounted for under the network connectivity services business segment. It was further submitted that during the year under consideration, another group entity i.e. AT&T Global Networks Services India Private Limited commenced its business operation and this entity had obtained international long distance, national long distance and internet services licence and had also commenced providing international long distance services. Accordingly, network services were, thereafter, provided by AT&T Global Networks Services India Private Limited instead of VSNL. It was also submitted that subsequently the support services agreement with VSNL was terminated and the assessee stopped providing services to the customers of VSNL. The Ld. AR submitted that there was no transfer of business but termination of contract with VSNL as the connectivity services being provided by the VSNL were no longer required by the assessee. This led to the revenues being earned by the assessee from rendition of

support services of VSNL being reduced. It was further submitted that the Assessing Officer noted that there was a reduction in revenue from network connectivity services segment from Rs. 62.30 crores to Rs. 7.11 crore and, thereafter, the Assessing Officer alleged that the assessee had transferred assets as well as employees to AT&T Global Networks Services India Private Limited leading to reduction in revenues and further that there was a transfer of business. The Ld. AR further submitted that it was the allegation of the Assessing Officer that the assessee should be entitled to certain additional compensation from AT&T Global Networks Services India Private Limited. Accordingly, the Assessing Officer applied profit percentage and determined an amount of Rs. 7,90,00,000/- to be added to the assessee's income. The Ld. AR argued that there was no transfer of business by the assessee but only termination of the support service agreement with the VSNL which led to the decrease in revenue income. He drew our attention to the notes on account forming part of the financial statements of the assessee company (which is placed in the paper book filed by the assessee) wherein it has been specifically mentioned that the assessee company had discontinued services being provided to various customers under

services agreement with VSNL. It was submitted that the question of receiving any consideration from AT&T Global Networks Services India Private Limited does not arise. It was also submitted that there was no provision under the Act which provides for imputing consideration in the hands of the taxpayer on account of transfer of business despite there being no transfer of business. It was submitted that there was no transfer of employees as alleged by the Assessing Officer and further no assets had been transferred by the assessee and, therefore, this addition was not sustainable.

3.8.1 In response, the Ld. C.I.T. DR submitted that the Ld. DRP had observed that the setting up of a new company under the name of AT&T Global Networks Services India Private Limited was not devoid of any planned exercise and that it was only due to such restructuring of such business activities that the assessee had terminated its agreement with the VSNL. The Ld. C.I.T. DR also placed reliance on the observations of the Ld. DRP that the cancellation of contract with VSNL by the assessee was not a standalone activity as it involved shifting of 29 employees as well as transfer of relevant assets to the tune of Rs. 6,71,57,014/- (being the written down value) and, therefore, it

was obvious that there was a transfer of business. The Ld. C.I.T. DR also emphasised the fact that the assessee had not brought full facts of the transaction on record and that since by this arrangement the income of the taxpayer had substantially reduced, the proposed addition was to be upheld.

3.9.0 With respect to ground no. 10 pertaining to disallowance of Rs. 1,26,30,579/- pertaining to the year-end provisioning, the Ld. AR submitted that the assessee follows mercantile system of accounting and during the year under consideration, provision amounting to Rs. 7.12 crore had been created. It was further submitted that invoices aggregating to Rs. 5.27 crore along with extract of bank statement/s evidencing payment of such invoice in the immediately succeeding financial year were also submitted before the Assessing Officer and out of the remaining provision of Rs. 1.84 crore, additional evidences were submitted for provision of Rs. 0.09 crore with respect to foreign exchange fluctuation loss and of Rs. 0.49 crore created for lease equalisation. It was submitted that the Assessing Officer disallowed the balance amount of Rs. 1.26 crore on the ground that no documentary evidences were furnished with respect to reversal of these provisions in the subsequent year. The Ld. AR

submitted that the assessee had been able to produce documentary evidences supporting payment of more than 80% of the expenses represented by year end provisioning and it substantiated the fact that even the balance provisioning would not have been created without a reasonable basis and, therefore, no disallowance could have been made in this regard. The Ld. AR also submitted that this issue was covered in favour of the assessee by order of the ITAT Delhi Bench in assessee's own case for assessment year 2010-11 (vide ITA No. 1016/Del/2015 dated 15.2.2018) wherein the issue had been decided in favour of the assessee vide Para no. 25 and 26 of the said order.

3.9.1 In response, the Ld. C.I.T. DR drew our attention to the comments of the special auditor in this regard that no details had been filed by the assessee and further that the Ld. DRP had partially allowed the assessee's claim. The Ld. C.I.T. DR submitted that no further relief was required to be allowed to the assessee.

3.10.0 With respect to ground no. 11 pertaining to short credit in respect of tax deducted at source, ground no. 12 relating to non-grant of full credit in respect of advance tax, both the parties agreed that suitable directions may be given to the

Assessing Officer to allow full credit to the taxpayer after due verification.

3.11.0 With respect to ground no. 13 pertaining to levy of interest u/s 234B and 234D of the Act, ground no. 14 pertaining to withdrawal of interest under section 244A of the Act, both the parties agreed that these grounds were consequential.

3.12.0 With regard to ground no. 15 pertaining to initiation of penalty proceedings u/s 271(1)(c), the ld. AR fairly agreed that this ground was premature in the quantum proceedings.

4.0.0 Arguing for the department's appeal in ITA No. 1779/Del/2015, the Ld. CIT DR submitted that the sole ground under challenge was the direction of the Ld. DRP in directing deletion of addition of Rs. 98,63,013/- on account of tax deposited on behalf of the expatriate employees and margin thereof not charged under MSA as the assessee had recovered the said amount from AT&T WPS. The Ld. C.I.T. DR submitted that the special auditor had stated that while remitting the amount of salaries of the expatriates, tax had not been deducted and, therefore, by reason of such non-deduction of taxes, such amount has been shortly charged under the Mutual Services Agreement. The Ld. C.I.T. DR also drew attention to the

observations of the Assessing Officer that no reconciliation or any corroborative evidence had been filed by the assessee in this regard and, therefore, the assessee's contention that such amount has been charged under the mutual services agreement is not tenable.

4.0.1 In response, the Ld. AR submitted that the tax and the liability were paid by the assessee in the month of July 2008. Our attention was drawn to the copy of *challans* evidencing the payment of the same and attached as Annexure to the written submissions filed before the Bench. He also drew our attention to copy of bank statements in this regard. He also drew our attention to the directions of the Ld. DRP as contained in Para 11.4 of its directions wherein it has been duly noted that the since taxpayer has borne the tax to the extent of income offered for taxation in India by such expatriate employees in India and the balance tax payable in the home country is borne by the employee/s concerned, the addition was not warranted. The Ld. AR submitted that in view of the factual finding recorded by the Ld. DRP, the department's challenge to the deletion does not stand.

5.0 We have heard the rival submissions and perused the material available on record. We now take up the appeals one by one. First we take up the assessee's appeal no. 1015/Del/2015.

5.1 Ground no. 1 is dismissed as not pressed.

5.2.0 Ground no. 2 challenges the addition of Rs. 1,46,84,844/- on account of maintenance charges paid to CISCO Systems International BV. This disallowance has been made on the ground of the assessee's failure to deduct tax at source. It has been submitted by the Ld. AR that no identical disallowance had been made either in the preceding or subsequent assessment years and the department has accepted the annual maintenance charges paid to CISCO Systems International BV in these years but has given an altogether new dimension to the issue by taking a view that annual maintenance charges paid were in the nature of fee for technical services and that the payment for purchase of machinery had an element of royalty in it and, therefore, the assessee was liable to deduct tax at source prior to making payment for the annual maintenance charges. The Ld. AR has referred to voluminous documents claiming to have been filed before the lower authorities in this regard which include agreements, invoices and FAQs issued by CISCO. It has already

been submitted by the Ld. AR that these documents were entirely disregarded by the lower authorities and even the submissions of the assessee were not considered. It has been emphasised by the Ld. AR that the annual maintenance contract was for the purpose of providing regular maintenance services and it did not have any element of 'make available'. On the other hand, it is the contention of the department that no details were filed before the Assessing Officer and a reference has also been made to the comments contained in the special audit report wherein it has been mentioned that the assessee had not cooperated during the proceedings of special audit. It has already been pointed out by the Ld. C.I.T. DR that even the Ld. DRP has taken note of non-compliance by the assessee during the course of special audit and further that the relevant documents in respect of this claim were not furnished before the lower authorities. Thus, the stand of the department and the assessee is contrary on the factual aspect of the issue i.e. as to whether the assessee had provided the relevant details and documents before the Assessing Officer or not. Looking into the facts of the case and in the interest of justice, it is our considered opinion that the issue should be re-examined by the Assessing Officer specially in the light of claim

of the assessee that the assessee had submitted voluminous documents and explanations before the Assessing Officer which had not been given due credence by the Assessing Officer. Accordingly, the issue of payment of annual maintenance charges paid to CISCO System International BV stands restored to the file of the Assessing Officer with the direction to the Assessing Officer to re-examine the issue and pass appropriate orders in accordance with law after giving due opportunity to the assessee to present its case. We also direct the assessee to cooperate with the assessing authority and furnish all the relevant details and documents when called upon to do so by the Assessing Officer failing which the Assessing Officer shall be at liberty to proceed *ex parte qua* the assessee and pass appropriate orders in accordance with law.

5.2.1 Ground no. 2 stands allowed for statistical purposes.

5.3.0 Ground No. 3 challenges the disallowance of Rs. 2,60,90,328/- being non-taxable allowances paid to the expatriates. This addition pertains to the differential amount which the assessee had paid to AT&T Worldwide Personnel Services Inc. being a sum of Rs. 3.90 crore being salary and other expenses paid to expatriates outside India and the taxable salary

returned by the expatriates amounting to Rs. 1.29 crore. In this regard, the assessee has submitted copies of Master Service Agreement and has also submitted that cost plus mark-up of 8% had been charged in this regard. It has also been submitted that the entire cost has been recovered by the assessee as income along with mark-up. The Ld. AR has also submitted that the difference between the two amounts was on account of expenses incurred on behalf of the expatriates which were in the nature of reimbursements and were not in the nature of salary which would fall within the ambit of taxability under the Indian Income Tax Act. It has been submitted that Form 16 had been issued to the expatriates only for the amount/s which had been paid as salary and, therefore, the difference arose. The Ld. C.I.T. DR has emphasised that the invoices submitted by the assessee in this regard were not specific and clear so as to verify the claim of the assessee in this regard. The Ld. C.I.T. DR has also referred to the observations of the Ld. DRP on the issue wherein it has been noted by the Ld. DRP that the assessee did not submit any reconciliation statement to justify its claim that the differential sum of Rs. 2,60,90,328/- actually represented the non-taxable component. The Ld. C.I.T. DR, however, has submitted that the

matter could be re-examined by the Assessing Officer. Accordingly, in view of the divergent claims of both the parties regarding the factual aspect of the issue and in the interest of justice, we deem it fit to restore this issue also to the file of the Assessing Officer with the direction to the Assessing Officer to re-examine the issue and pass appropriate orders in accordance with law after giving due opportunity to the assessee to present its case. We also direct the assessee to cooperate with the assessing authority and furnish all the relevant details and documents when called upon to do so by the Assessing Officer failing which the Assessing Officer shall be at liberty to proceed *ex parte qua* the assessee and pass appropriate orders in accordance with law.

5.3.1 Ground No. 3 stands allowed for statistical purposes.

5.4.0 Ground no 4 of the assessee's appeal challenges the disallowance of gratuity amounting to Rs. 48,51,041/- pertaining to employees who have been transferred from AT&T Global Network Services India Pvt. Ltd. It is seen that the disallowance has been made on the ground that it is just a transfer of liability from the assessee company to AT&T Global Network Services India Pvt. Ltd. and it is not an actual payment to the employees

directly on their attaining superannuation or in the event of their resignation. It has been submitted by the Ld. AR that the assessee company has made the payment of gratuity liability to AT&T Global Network Services India Pvt. Ltd. which was recorded as a liability in the books of accounts of that company. Reliance has also been placed on the evidence in the form of bank statement which evidenced the payment of the impugned amount to the other company. It has also been submitted that since the transferred employees continued their employment with the other company, therefore, the question of AGNS making payment to such employees at the time of their resignation/superannuation does not arise. It has also been emphasised that out of the transferred employees, four employees resigned from AT&T Global Network Services India Pvt. Ltd. and their gratuity amount had been duly paid by that company but had not been claimed as a deduction by that other company in its return of income. Apart from this, reliance has been placed on the judgment of Hon'ble Apex Court in the case of W.T. Suren & Co. Ltd. (1988) 230 ITR 643 (SC) for the proposition that where the employees are transferred from one unit to another with continuity of services, payment of gratuity to transferee could be allowed as deduction

in the hands of the assessee. On the other hand, it is the contention of the department that the Ld. DRP has noted that the taxpayer had not been forthcoming in bringing out the relevant facts on record to enable adjudication of the issue in proper perspective. It has been noted by the Ld. DRP that in the absence of relevant facts, it could not be said that the impugned amount had become payable during the year under consideration and was therefore allowable u/s 40 A(7)(b) of the Act. The Ld. DRP has also noted that the judgment of the Hon'ble Apex Court in the case of W.T. Suren & Co. Ltd. (supra) pertained to the 1922 Act in which there was no provision equivalent to section 40A(7) of the 1961 Act. On an overall consideration of the facts, especially in view of the submissions of the Ld. AR that no deduction has been claimed by the transferee company in this regard and further the payment of gratuity of transferred employees had been paid through banking channels which could be evidenced from the bank statement coupled with the fact that the Ld. DRP has noted that the taxpayer had not been forthcoming in bringing relevant facts on record to facilitate the adjudication, in our considered opinion, ends of justice would be met if this issue is also restored to the file of the Assessing Officer

for examining them afresh and thereafter passing an order in accordance with law. We deem it fit to restore this issue also to the file of the Assessing Officer with the direction to the Assessing Officer to re-examine the issue and pass appropriate orders in accordance with law after giving due opportunity to the assessee to present its case. We also direct the assessee to cooperate with the assessing authority and furnish all the relevant details and documents when called upon to do so by the Assessing Officer failing which the Assessing Officer shall be at liberty to proceed *ex parte qua* the assessee and pass appropriate orders in accordance with law.

5.4.1 Accordingly, ground no. 4 stands allowed for statistical purposes.

5.5.0 With respect to ground no 5 pertaining to disallowance of prior period expenses, since it has been submitted by the Ld. AR that this ground is not being pressed, the same is being dismissed as not pressed.

5.6.0 With respect to ground no. 6 which pertains to disallowance of differential amount of mark-up with respect to services provided by the assessee to AT&T Global Network Services India Pvt. Ltd. leading to an addition of Rs. 53,15,246/-

and ground no. 7 pertaining to addition of Rs. 2,46,141/- being addition on account of notional interest income not charged from AT&T Global Network Services India Pvt. Ltd., it is seen that both these issues are covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 2010-11 in ITA No. 1016/Del/2015. Vide order dated 15th February, 2018, an identical issue has been discussed and adjudicated by the Coordinate Bench of the Tribunal in paragraphs 10 to 16 which are being reproduced hereunder for ready reference:-

> *"10. The AO made addition of Rs.1,84,14,784/- on account of non-charging of mark-up on support service charges billed to AT&T Global Network Services India Pvt. Ltd. (AGNSI), a group company of the taxpayer which has started its operation from AY 2008-09 on the ground that without any profit motive, no such services can be provided in a business set up. The AO noticed that the taxpayer has charged mark up of 8% from AGNSI in AY 2008- 09 and first three months of AY 2009-10 and thereafter unilaterally reversed the same on the plea that it was management decision and AO considered it an after-thought due to lack of complete documentation in this regard. The ld. DRP held the decision of AO to the extent that the AO should restrict the mark-up as finally determined by the TPO pursuant to the directions issued by this order on TP matters.*
>
> *11. Challenging the impugned order passed by AO/DRP, the ld. AR for the taxpayer contended that there is no provision under the Act to impute notional income for domestic transactions and moreover transfer pricing provision as has been amended by the Finance Act, 2012 specifically to cover the domestic transactions, however*

w.e.f. April 1,2013, and would not be applicable to the transaction prior to April 1, 2013; that no mark up is applicable and required to be charged on the support services charges paid by AGNSI to ACSI as is duly explained in the agreement between ACSI and AGNS; that it was decided between the parties that no mark up is charged by ACSI on the support service charges billed to AGNS and recovery should be made on cost to cost basis as per agreement; that commercial expediency of a particular transaction would be examined from the perspective of a businessman; that both AGNSI and the taxpayer are profit making entities and there was no tax incentives for the purpose to deflate the revenues earned by the taxpayer and relied upon the judgment of Hon'ble Apex Court in CIT vs. A. Raman & Company (1968 AIR 49) and the judgment of Hon'ble Allahabad High Court in Smt. Sumanlata Didwania vs. ITO (1986) 17 ITD 830 (All.).

12. However, on the other hand, the ld. DR for the Revenue contended that if something is charged by a company, there must be some agreement that there is no mark up and in this case, no such agreement has been produced and relied upon the order passed by the AO/DRP.

13. Undisputedly, the taxpayer as well as AGNSI, its group company are profit making entity and there is no tax incentive for the purpose to deflate the revenues earned by the taxpayer. Even in case higher amount have been charged by the taxpayer from AGNSI, no added tax advantage is being availed by the taxpayer by charging support services cost from AGNSI at cost to cost basis without any mark up.

14. Issue of non-charging of mark up on support services being built up to AGNSI has come up in the appeal for AGNSI for AY 2008-09 to AY 2011-12 wherein the Revenue has raised a ground that such support services expenditure should be disallowed in the books of account of AGNSI.

15. The coordinate Bench of the Tribunal in case of AGNSI for AY 2009-10 in ITA No.2538/Del/2014 upheld the

decision rendered by the ld. DRP in favour of the assessee on identical issue by returning the following findings :-

"75. We have carefully considered the rival contentions and perused the facts of the case. The facts of the case as explained by the appellant are that, ACSI, a group company of appellant and an entity in operations for more than 10 years by then, was having developed support services functions. Accordingly, since such functions were already housed in ACSI, appellant entered into a support services agreement with ACSI for provision of the aforesaid support services to appellant. We have gone through the submission of the assessee and find that necessary evidences in the form of the support service agreement, invoices, the details of payments made and the bank statements evidencing the payment thereof have been furnished by the assessee to prove the genuineness of the expenses. We find that no evidence has been brought on record by the Department to dispute the said claim. Rather, the Department's claim is merely based on suspicion as also noted by the DRP while deleting the above disallowance. We also find that even otherwise, both ACSI and appellant are profit making entities and hence, there was no tax incentive for the parties to deflate the revenues earned by appellant. The decision was totally based on commercial considerations. By transferring the cost from ACSI to appellant no added tax advantage is being availed by appellant. We are also of the view that commercial expediency of a particular expenditure incurred by a businessman should be examined from the perspective of the business person and no third party, including the tax authorities, is entitled to question the commercial reasoning/ justification of the expenditure so incurred. Reliance in this regard is placed on the following judicial precedents furnished by the assessee:

i. CIT v. Panipat Woollen & General Mills Co Ltd (103 ITR

66) (Supreme Court) ii. CIT v. Sales Magnesite (P) Ltd [1995) 214 ITR 1 iii. Binodiram Balchand vs. Commissioner of Income Tax (48 1TR 548) iv. Calcutta Landing and Shipping Co Ltd vs. CIT (65 ITR 1) (Cal High Court) v. CIT Vs B Dalmia Cement Ltd (254 ITR 377)

76. Respectfully following the principles laid down in the aforesaid judicial precedents, we find that where the appellant has actually incurred the aforesaid support services cost and no evidence has been brought by the Department to controvert the same, such expenditure cannot be disallowed merely on suspicion. We affirm the finding of the ld DRP on this issue. In view of the above, the appeal of the revenue on this ground is dismissed."

16. So, in the instant case also, the Revenue has failed to controvert the invoices, the details of payment made and evidencing the payments thereof to dispute the genuineness of the expenses and the fact that the taxpayer as well as AGNSI are profit making entities and there was no tax incentives for the purpose to deflate the revenues earned by the taxpayer, the Revenue has based its decision on commercial consideration. Moreover, in case of both the resident parties, terms and conditions of the arrangement cannot be questioned by the Revenue unless specifically provided under the Act. In case of a contract by both the parties who are admittedly resident Indian entities, they make the law for themselves which cannot be interfered unless contract is unlawful or specially barred by the law of the land. Moreover by such a decision of not charging mark up by the taxpayer on support services charges billed to AGNSI, no loss of tax has been caused to Revenue. So, the findings of the TPO/DRP that the taxpayer is not only to cut charges but mark up also is not sustainable in the eyes of law. So, we order to delete the addition on account of not charging of mark up on support services charges billed to AGNSI."

5.6.1 Therefore, respectfully following the order of the Coordinate Bench in assessee's own case for assessment year 2010-11 as aforementioned, we order deletion of addition on account of notional charging of mark-up as sustained by the Ld. DRP. On the same reasoning, we allow ground no. 7 also and

hold that notional interest could not have been charged on this account and we order deletion of this addition also.

5.6.2 Accordingly, ground nos. 6 and 7 stand allowed.

5.7.0 With respect to ground no. 8 pertaining to addition of Rs. 15,45,155/- in respect of expenses incurred on behalf of expatriates, the Ld. AR has submitted that this ground is not being pressed. Accordingly, ground no. 8 of the assessee's appeal stands dismissed as not pressed.

5.8.0 Ground no. 9 pertains to addition of Rs. 7,92,00,000/- on account of percentage of profit of network connectivity services which has been added to the income of the assessee on a notional basis. The main reason behind this addition is the reduction in revenue of Network Connectivity Services segment from Rs. 62.30 crores to Rs. 7.11 crore for the reason that the assessee had terminated the support services agreement with VSNL after the commencement of business of AT&T Global Network Services India Pvt. Ltd. It is the allegation of the department that the reduction of revenues under this segment was on account of termination of the support services. It is a further allegation that this arrangement and termination of agreement had been executed by the assessee with a view to reduce its taxable profits.

In this regard, the Ld. DRP has also noted that the taxpayer has not explained/brought on record any document either before the Assessing Officer or before the DRP so as to explain:-

i) Why a new entity namely AT&T Global Network Services India Pvt. Ltd. was set up by the AT&T Group?

ii) What were the contents of the restructuring exercise of the AT&T Group operations in India?

iii) If there was any resolution of the Board of Directors on this issue, what were the contents of the said resolution?

iv) Whether the clients of the AT&T were informed of the employee structure or whether they remained under the impression that the services were being rendered to them in the same manner by the same entity?

v) Whether the relevant facts were brought to the knowledge of any competent authority in this regard?

5.8.1 Apart from this, the Ld. DRP has also noted that 29 employees were shifted from the assessee company to AT&T Global Network Services India Pvt. Ltd. who were performing relevant activities in this segment and further there was a transfer of assets to AT&T Global Network Services India Pvt. Ltd.

from the assessee company to the tune of Rs. 6,71,157,014/-. However, on the other hand, it is the contention of the assessee that neither were any employees transferred with respect to this segment nor were any assets transferred to the other company with respect to this segment and, therefore, there was no transfer of business as alleged by the department. Thus, in view of the contradictory stand of both the parties with reference to the relevant facts, we have no other option but to restore this issue also to the file of the Assessing Officer with the direction to the Assessing Officer to re-examine the issue and pass appropriate orders in accordance with law after giving due opportunity to the assessee to present its case. We also direct the assessee to cooperate with the assessing authority and furnish all the relevant details and documents when called upon to do so by the Assessing Officer failing which the Assessing Officer shall be at liberty to proceed *ex parte qua* the assessee and pass appropriate orders in accordance with law.

5.8.2 Accordingly, Ground no. 9 also stands allowed for statistical purposes.

5.9.0 In respect of ground no. 10 pertaining to disallowance of year end provisioning amounting to Rs. 1,26,30,579/-, it is

seen that this issue is also covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 2010-11 in ITA No. 1016/Del/2015. The relevant observations of the ITAT are contained in Para 17 to 26 and the same are being reproduced here in under for a ready reference:-

> *"17. AO disallowed an amount of Rs.56,15,035/- and added back the same to the income of the taxpayer on the ground that the taxpayer does not have the basis of recording year end accrual. The ld. DRP approved the proposed addition on this account.*
>
> *18. Undisputedly, the detail of year end accrual outstanding as on March 31, 2010 are as under :-*
>
> | *Particulars* | *Accruals as on March 31, 2010* |
> |---|---|
> | *Accrual Control Account* | *11,25,51,600* |
> | *Salary payable* | *50,26,782* |
> | *IPA Accruals* | *24,21,901* |
> | *SIP Accruals* | *51,00,353* |
> | *Internal LSP Liability* | *25,24,592* |
> | *Total* | *12,76,25,228* |
>
> *19. It is also not in dispute that out of the aforesaid amount of Rs.12.76 crores, invoices of Rs.10.69 crores were submitted and accepted by the AO. It is also not in dispute that reversal entries of Rs.1.50 crores were made in the succeeding years by giving benefit of the same to the taxpayer. It is also not in dispute that Rs.5.02 crores for the disallowance made in the preceding assessment year has been allowed to the taxpayer against the above disallowance resulting in credit of Rs.4.46 crores. It is also not in dispute that taxpayer is following mercantile system of accounting and has produced documentary evidence supporting payment/reversal of more than 95% of the expenses represented by the year end accrual.*

20. The ld. AR for the taxpayer contended that year end accruals being provisions made towards routine business expenditure incurred are based on past trends as well as scientific and reasonable basis and are liable to be allowed as deduction in view of the decisions rendered by Hon'ble Apex Court in Rotork Controls India (P) Ltd. - 314 ITR 62.

21. The ld. AR for the taxpayer further contended that the issue is also covered by the decision of the coordinate Bench of the Tribunal in case of AGNSI in ITA No.1059/Del/2015 for AY 2010-11.

22. Ld. DR for the Revenue contended that before the ld. DRP, the taxpayer has not produced any documentary evidence nor pressed the addition and moreover AO has already been directed to verify and proceed accordingly.

23. So far as question of not pressing the issue before the ld. DRP, as contended by the ld. DR for the Revenue, is concerned, when we see the entire discussion on this issue in para 8.1, it goes to prove that the issue was pressed and disposed of by the ld. DRP on merits and merely on the basis of one sentence it cannot be said that the issue has not been pressed.

24. Hon'ble Supreme Court in case cited as Rotork Controls India (P) Ltd. (supra) decided the identical issue in favour of the taxpayer by returning the following findings :-

" Held, reversing the decision of the High Court, that the valve actuators, manufactured by the assessee, were sophisticated goods and statistical data indicated that every year some of these were found defective; that valve actuator being a sophisticated item no customer was prepared to buy a valve actuator without a warranty. Therefore, the warranty became an integral part of the sale price; in other words, the warranty stood attached to the sale price of the product. In this case the warranty provisions had to be recognized

because the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of the obligation. Therefore, the assessee had incurred a liability during the assessment year which was entitled to deduction under section 37 of the Income-tax Act, 1961.

The present value of a contingent liability, like the warranty expense, if properly ascertained and discounted on accrual basis can be an item of deduction under section 37. The principle of estimation of the contingent liability is not the normal rule. It would depend on the nature of the business, the nature of sales, the nature of the product manufactured and sold and the scientific method of accounting adopted by the assessee. It would also depend upon the historical trend and upon the number of articles produced.

A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation, and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not me, no provision can be recognized.

The principle is that if the historical trend indicates that a large number of sophisticated goods were being manufactured in the past and the facts show that defects existed in some of the items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under section 37."

25. When undisputedly no mistake has been pointed out by the AO in the calculation nor it is the case of the AO that the taxpayer had not paid certain bills and the taxpayer is following mercantile system of accounting and the expenses are having element of estimation as well as scientific basis, keeping in view the past trend,

the expenses are required to be allowed in the year of creation itself, particularly, when the Revenue authorities has allowed the entire claim of expenditure in the subsequent years.

26. So, following the law laid down by the Hon'ble Apex Court in Rotork Controls India (P) Ltd. (supra) and the decision rendered by the coordinate Bench of the Tribunal in AGNSI in ITA No.1059/Del/2015 for AY 2010-11, we are of the considered view that when the taxpayer has worked out the liability by using a substantial degree of estimation by proving 95% of the invoices on the basis of historical trend, no disallowance can be made. So, we order to delete this addition."

5.9.1 In the present appeal also, undisputedly no mistake has been pointed out by the Assessing Officer in the calculation and nor is it the case of the Revenue that the taxpayer has not paid certain bills. It is also undisputed that more than 80% of the evidence/s for the year end provisioning have been produced by the assessee and there is no finding by the Assessing Officer that the provisioning was not reasonable or did not have any scientific basis. Therefore, respectfully following the law laid down by the Hon'ble Apex Court in the case of Rotork Controls India Pvt. Ltd. and also the order of the Coordinate Bench in assessee's own case for assessment year 2010-11 as aforesaid, we order deletion of this addition.

5.9.2 Ground no. 10 accordingly stands allowed.

5.10.0 Ground no. 11 agitates the action of the department in allowing short credit in respect of the tax deducted at source and ground no. 12 agitates non-granting of full credit. We deem it fit to restore these issues to the file of the AO with a direction to give due credit to the assessee both in respect of tax deducted at source and advance tax after due verification at his end. The Assessing Officer shall also give an adequate opportunity to the assessee in this regard. Accordingly, ground nos. 11 and 12 stand allowed for statistical purposes.

5.11.0 Ground nos. 13 and 14 pertaining to incorrect levy of interest u/s 234B and 234D of the Act and withdrawal of interest under section 244A of the Act are consequential and the AO will take adequate steps in this regard.

5.12.0 Ground no. 15 challenging the initiation of penalty proceedings u/s 2712(1)(c) is dismissed as being premature.

6.0 In the result, the assessee's appeal bearing ITA No. 1015/Del/2015 stands partly allowed for statistical purposes in light of our specific observations and directions.

7.0.0 We now take up department's appeal. The only ground being agitated is the direction of the Ld. DRP in deleting the addition of Rs. 98,63,013/- on account of taxes deposited on

behalf of expatriate employees. In this regard, it is seen that the Ld. DRP has given a categorical finding that the assessee had borne the taxes to the extent of the income offered for taxation in India and the balance tax payable in the home country was borne by the employee/s concerned. The relevant observations of the Ld. DRP are contained in Para 11.4 of its directions and the same are being reproduced hereunder for a ready reference:-

> *"11.4 The Panel has examined the matter. The draft assessment order shows that the AO proposed to disallow the payment (along with mark-up) for the reason that he considered that the taxpayer has borne the expenses of tax of the expat employees and did not deduct the same while reimbursing AT&T WPS. In other words, the AO is of the view that ultimately the employees concerned should have borne the tax expenses rather than the taxpayer and for this reason, the taxpayer should have paid lesser amount to AT&T WPS correspondingly. The AO has not disputed the taxpayer's version that the tax amount of Rs.83,53,530/- has been recovered along with mark-up of 8% from AT&T US in August 2008. The primary argument of the AO has been that the taxpayer has been burdened by the tax of Rs.83,53,530/- which should have been otherwise pertaining to the employees themselves and to that extent, the profits are relatively lesser.*
>
> *11.4...*
> *From the above, it is evident that the taxpayer has borne the taxes to the extent of the income offered for taxation in India by such expat employees in India and the balance tax payable in the home country is borne by the employee concerned. Thus, the view of the AO that the amount of tax borne by the taxpayer should have been reduced while making payment to AT&T WPS is not*

correct as the Indian component of tax has been borne by the taxpayer under a contractual obligation. The Panel further notices that the taxpayer has recovered the said amount from AT&T US in the next year i.e. FY 2008-09 in August 2008 and accordingly, it has not ultimately suffered out go on this account. Thus, the Panel is of the view that the addition proposed by the AO is not on the sound footing. Consequently, when the addition is held to be not warranted, the Panel is of the view that the issue of mark-up on such amount does not require any discussion. The AO is therefore, directed to delete the addition proposed on this account."

7.0.1 The Ld. CIT DR could not point out any factual inaccuracy in the directions of the Ld. DRP. Accordingly, we find no reason to interfere with the finding of the Ld. DRP in this regard as the ld. DRP has recorded a categorical finding and has held that even an addition proposed by the Assessing Officer was not on a sound footing. Therefore, ground no. 1 raised by the department stands dismissed.

7.1.0 Ground no. 2 is general in nature and does not need any separate adjudication.

8.0.0 Therefore, the department's appeal stands dismissed.

9.0.0 In the final result, the appeal of the assessee stands partly allowed for statistical purposes whereas the appeal of the department stands dismissed.

Order pronounced in the open court on 26th March, 2019.

Sd/-	**Sd/-**
(R.K. PANDA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 26th MARCH, 2019
'GS'

Copy forwarded to: -

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

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By Order

ASSTT. REGISTRAR

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	