

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA Nos.726&2361/Kol/2017

(निर्धारणवर्ष / Assessment Years: 2012-13 & 2013-14)

Almatis Alumina Pvt. Ltd. Kankaria Estate, 2 nd Floor, 6, Russel Street, Kolkata-700071.	Vs.	DCIT, Circle-8(1), Kolkata
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AACCA 2120 N		
(Assessee)	..	(Revenue)

Assessee by : Shri J.P. Khaitan, Sr. Advocate

Respondent by : Shri P.K. Srihari, CIT DR

सुनवाईकीतारीख/ Date of Hearing : 14/01/2019

घोषणाकीतारीख/Date of Pronouncement : 16/04/2019

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned two appeals filed by the assessee, pertaining to assessment years 2012-13 and 2013-14 respectively, are directed against the separate fair assessment orders passed by the Assessing Officer under section 144C(13) read with Section 143(3) of the Income Tax Act, 1961 (in short the 'Act'), which incorporate the directions given by the learned Dispute Resolution Panel-2, New Delhi.

2. Since, the issues involved in all the appeals are common and identical; therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as the facts

narrated in I.T.A. No. 726/Kol/2017, for assessment year 2012-13, have been taken into consideration for deciding the above appeals *en masse*.

3. The common grounds of appeal raised by the assessee in these two appeals are as follows:

(1) Whether the associated enterprises (AE) can be considered as a tested party as per Indian Transfer Pricing Regulation?

(2) Accepting the audited segmental analysis for the transaction of purchase of finished goods, receipt of commission and sale of finished goods by the assessee from the Associated Enterprises (AE).

(3) Administrative supports services and IT support services received by the assessee from the Associated Enterprises (AE) wrongly treated to be in the nature of stewardship functions.

4. At the time of hearing, the Id. Counsel for the assessee informs the Bench that the assessee does not want to press ground Nos. 1, 4 and 6 of ITA No.726/Kol/2017, for A.Y.2012-13. The assessee also does not press ground Nos.1 and 4 of ITA No.2361/Kol/2017, for A.Y. 2013-14. Learned Departmental Representative for the Revenue, does not object therefore, we treat these grounds to be dismissed as not pressed.

5. Ground No.6 raised by the assessee in ITA No.2361/Kol/2017, for A.Y. 2013-14 and ground No.7 raised by the assessee in ITA No.726/Kol/2017, for A.Y.2012-13, relate to initiation of penalty proceedings under section 271(1) (c) of the Act, which are premature in nature, hence do not require adjudication.

6. Now we shall take first common issue of these two appeals, which relates to whether the foreign associated enterprises (AE) can be considered as a tested party as per Indian Transfer Pricing Regulation?

7. The facts of the case which can be stated quite shortly are as follows: Almatis Alumina Private Limited ('Almatis India' or 'assessee' or 'company') is a 100% subsidiary of Almatis Holdings GmbH, Germany. It is primarily engaged in the manufacturing of alumina based refractory and ceramic raw materials. The local manufacturing activity includes crushing, screening, grinding and packaging of Tabular Alumina CD (converter discharged) balls and grinding and packaging of calcined alumina for which company imports raw materials from its AEs.

During the assessment year 2012-13, the company had several international transactions with its Associated Enterprises (hereinafter referred to as the 'AEs') which have been disclosed in the Accountant's Report in Form 3CEB report filed u/s 92E of the Act along with the return of income. The return of income was processed u/s 143(1) of the Act and subsequently taken up for scrutiny assessment u/s 143(3) of the Act. During the course of scrutiny assessment, the company's case was referred to the Transfer Pricing Officer (hereinafter referred to as the 'Ld. TPO') u/s 92CA of the Act, for determination of arms' length price in respect of international transactions entered into with its AEs. Order u/s 92CA(3) was passed on 29th January 2016 which was subsequently incorporated in the draft Assessment Order u/s 144C(1)/ 143(3) dated 10.03.2016.

The Ld. TPO has made additions with respect to the international transactions undertaken by the assessee during the Financial Year (FY) 2011-12 with its AEs, against which the assessee has filed objections before Hon`ble DRP. The Hon`ble DRP issued directions under section 144C (5) of the Act, vide its order dated 27.12.2016, which were incorporated in the final assessment order passed by AO under section 144C(13)/143(3) of the Income tax Act, 1961.

8. As per the Transfer pricing (TP) document furnished by the assessee for the A.Y. 2012-13, the assessee company has entered into the following international transactions with its Associated Enterprises (AEs).

Nature of services	Amount (Rs.)
Purchase of raw material	88,41,91,807/-
Purchase of traded or finished goods	6,03,35,496/-
Sale of finished goods	18,56,380/-

Commission received	1,13,61,927/-
Support services – Availed	5,06,94,589/-

The arm's length price of the international transactions representing different functions with associate enterprises(A.E), the method and the profit level indicator (PLI) used for bench marking such transaction are summarized in the table below:

Nature of services	Method
Purchase of Refractories	TNMM
Export of refractories	TNMM
Receipt of Agency Commission	TNMM

The assessee has benchmarked the above transaction on entity level by applying TNMM as Most appropriate method (MAM) and Operating Profit on Sales as the profit level indicator (PLI). The PLI of the entity is arrived at 2.92% while that of the comparable uncontrolled transaction was calculated at 10.48%. The assessee has justified the above transaction by working out the average weighted adjusted working capital of the comparable for the three years i.e. F.Ys 2009-10, 2010-11 and 2011-12 at 7.34%. Even though the PLI of the comparable is more than the PLI of the assessee. The assessee has not made any adjustment and has also not calculated the Arm's length price to see whether the same is within the +/- 5% range. However, it was noticed that the PLI of the comparables was arrived by considering weighted average margin of 3 years data for the A.Ys 2009-10, 2010-11 and 2011-12.

For the purpose of justifying the transaction of Services, the assessee has used TNMM as Most appropriate method and Operating Profit on Sales as the PLI. However, the assessee has Associated enterprises as the tested party. It was also observed that the assessee has not calculated the PLI of the tested party but used the cost plus markup of 9.6% as the PLI of the tested party. Thus, the assessee has justified the transaction to be at Arm's length by calculating the PLI of the comparable at 10.17% and that of the cost plus markup at 9.6%.

9. The assessee company imports raw material from its Associated Enterprises (AE) for the manufacture of aluminas based refractory and ceramic raw materials. In respect of Indian manufacture, so far, the nature of the activities is concerned, it sales the manufactured products to third party customers. The assessee company have three Associated Enterprises (AE), namely: Almatis Link (USA), Almatis GmbH (Germany) and Almatis BV (Netherlands). Before the TPO proceedings, the assessee (the Almatis Alumina Pvt. Ltd) has considered as a tested party.

However, the assessee has changed its stand first time before the DRP stating that associated enterprises (AE) would be the tested party. That is, associated enterprises (AE) with respect to their segmental data for the activity undertaken should be the tested party. To make it more clear, before the TPO proceedings, the assessee himself (Almatis Alumina Pvt. Ltd.) was taken as tested party and the transfer pricing adjustment was made treating the assessee as a tested party. However, before the 1st DRP, the assessee has changed its stand and argued that associated enterprises (AE) would be the tested party, as it is a least complex entity. However, the 1st DRP rejected the contention of the assessee therefore, the assessee is in appeal before us, with respect to its solitary grievance that associated enterprises (AE) should be the tested party.

10. Before the Dispute Resolution Panel (DRP), the assessee has raised two additional grounds pertaining to associated enterprises (AE) to be the tested party. These two grounds read as under:

1. That on the facts and circumstances of the case, the Ld. TPO and accordingly the Ld. AO failed to provide due cognizance to the fact that in relation to the purchase of raw materials, the assessee was engaged in manufacturing operations which entails entrepreneurial function and related risks, whereas, the AEs were mere suppliers of the products based on orders from the assessee.

2. That on the facts and circumstances of the case, with regard to the manufacturing function, the Ld. TPO and accordingly the Ld. AO failed to provide due cognizance to the assessee's functional, asset and risk profile,

thereby selected the assessee as the least complex entity and consequently the tested party thereby, benchmarked the profitability earned by it which is in contravention to the arm's length principle.

The assessee submitted before the Id. DRP, the following documents and evidences to demonstrate that Associate Enterprise (AE) should be the tested party.

- (i) The summary of functions, assets, risk driver of the assessee to demonstrate it as more complex entity, which are placed on paper book at page nos. 708 to 797, wherein the assessee submitted that the assessee is more complex entity therefore it should not be considered as a tested party.
- (ii) The assessee has submitted the written submissions before the Id. DRP for selection of Associated Enterprises (AE) as a tested party (vide paper book page nos. 656 to 661).
- (iii) The assessee has submitted the bench mark result of the associated enterprises for the international transaction and audited segmental results of the AE (vide paper book page nos. 798 to 801).
- (iv) The assessee has submitted the search for comparables of Almatis Inc which is given on page nos. 661 to 663 of paper book.
- (v) The search for comparables of Almatiz GmbH (Germany) and Almatis BV were furnished by assessee (vide nos. 663 to 666).
- (vi) The assessee has submitted business description of the comparables.

The Id. DRP sent these documents for examination of the TPO and to call a remand report from him. The Id. TPO submitted the remand report before the Id. DRP, where TPO accepted the Associate Enterprise (AE) as least complex party but then he again said that the AEs cannot be treated as tested party as per Indian Transfer Pricing Regulation.

The findings of the TPO in the remand report is given below:

Foreign exchange Risk

Almatis India assumes the risk of foreign exchange fluctuations as it imports the goods from its AEs in foreign currency.

Based on the above the supplier AEs were selected as the tested parties and benchmarked.

Our Comments

The assessee has submitted various documents to substantiate the above functional and risk profile, including emails for market risk, negotiation emails with customers for price risk, emails from the assessee to the customers following up for payments showing credit risk complaint emails from customers showing that the assessee is responsible for product quality and financially liable as warranty. We have also considered the documents showing foreign exchange risk borne by the assessee. It has been substantiated from these documents that the assessee performs the above functions and bears the aforesaid risks.

Based on the above assessee is characterized as entrepreneur. The AEs have been characterized as the least complex parties for which audited profitability statements have been provided.

However, the assessee failed to point out the provisions wherein an entity is allowed to take their AEs as the tested party. The arm's length approach of the assessee in considering the profit of its foreign AEs for the purposes of comparison with profit of comparables (foreign), to determine the ALP of transaction between the assessee and its foreign AEs is patently an unacceptable position having no sanction of the Indian transfer pricing law. The undersign would like to highlight that in the following Tribunal rulings it has been held that overseas entity should not be considered as tested party for the analysis. They are:

(i).CybertechSystems & Software Ltd. Vs. Assistant Commissioner of Income Tax reported in (2013) 33 Taxman.com 371 (Mumbai- Tribunal)

(ii).AurionproSolutions Pvt. Ltd. Vs. Assistant Commissioner of Income Tax, Range- 4(3), (Mumbai) I.T.A. No. 7872 (Mumbai) of 2011.

(iii). Onward technologies Limited Vs DCIT 35 taxmann.com 584 wherein it was held as under:

In the case of Cybertech Systems & Software Limited Vs. ACIT (33 taxmann.com 371) the assessee had tried to justify the arm's length value of the transaction on the ground that the overseas AE had been incurring losses on the margin retained from the assessee. On appeal, the Tribunal rejected the assessee's argument that such transactions have to be considered at arm's length on ground that there is no shifting or profits. The Tribunal categorically held that the assessee i.e., the Indian party has to be taken as the tested party and the TNMM method is to be followed. Similarly, in the case of Aurionpro and Onward foreign party as tested party has been categorically rejected.

Further, the Delhi Bench in the case of GE Money Financial Services Pvt Ltd [TS-457-ITAT-2016(DEL)-TP] explicitly discarded assessee's selection of foreign AE as tested party. While arriving at its conclusion, ITAT categorically held that under transactional net margin method ("TNMM"), it is the net margin earned by the Indian assessee and not its foreign AE which is compared with that of the comparable companies. The ITAT interpreted the meaning of word 'enterprise'

used in Rule 10B(1)(e) of the Income tax rules, 1962 ("Rules") (which describes the manner of application of TNMM) as 'Indian entity'. The Hon'ble ITAT also held that adoption of foreign AE as tested party has no legal sanctity under the Indian transfer pricing regulations. The above principle was also discussed and accepted by the Hon'ble Kolkata ITAT in the case of AT & S India Pvt. Ltd. vs DCIT, Circle-11(1) (ITA No.179/Kol /2016). Also, as also provided earlier, nowhere in the Indian TP Regulations the concept of selecting the tested party has been provided. Therefore, it is obvious that at all times it is the Indian entity's profitability from the international transaction that is required to be tested and the same has been envisaged from applicable TP provisions."

11. In response to the remand report, the assessee has submitted his rejoinder before the ld. DRP, vide paper book page no. 823 to 832. However, the ld. DRP without averting to the remand report or the assessee's reply thereto dismiss the grounds with a cryptic observation which is given below:

"All the above grounds in our view bear the same texture and complexion. In our considered view they have a tenuous link with the primary grievance of the "A" relating to the variations made by the Assessing Officer/TPO in the returned income of the "A". For want of objectivity and precision the grounds are dismissed wholesale."

12. Aggrieved by the order of the ld. DRP/AO, the assessee is in appeal before us.

13.Ld Counsel for the assessee, Shri J.P. khaitan, begins by pointing out that assessee company is more complex entity and the same can be ascertained from Function, Assets and Risks (FAR profile) of the assessee company. The ld Counsel submitted that associate enterprise (AE), which is least complex entity should be selected as tested party. Before the hon`ble DRP, the assessee submitted that associate enterprise (AE) with respect to their segmental data for the activity undertaken, should be the tested party, as it is a least complex entity. The ld Counsel further submitted that taking into account the summary of functions, Assets and Risks profile of the assessee company which is given in paper book page No.683 to 601, clearly demonstrates that assessee company is a more complex entity hence it should not be selected as a tested party.The assessee company bears the credit risk, warranty risks, product liability risks, foreign exchange risks and inventory risks therefore it is more complex entity

whereas the Associate Enterprise (AE) do not bear these risks hence it is a least complex entity. The OECD guidelines and Guidance Note issued by the ICAI recommend that Associate Enterprise (AE) may be taken as tested party provided it is least complex entity. Hence, Id counsel payed the Bench that considering the factual position explained above, the Associate Enterprise (AE) should be treated as a tested party.

14. On the other hand, Id. DR for the revenue submitted before the Bench that before the TPO proceedings and in transfer pricing study report, the assessee company was treated and selected as a tested party. Later, during the DRP proceedings, the assessee took U-turn and changed its stand and pleaded that Associate enterprise (AE) is a least complex entity and therefore it should be tested party. This clearly demonstrates that the intention of the assessee is to evade the tax payment and hence the stand of the assessee that AE should be tested party is an afterthought and the same should not be entertained at any cost. The assessee company can not change its stand at a later stage for selection of tested party as per its wish. The Transfer Pricing regulation does not permit to change the tested party at a later stage because it leads to tax evasion, hence assessee company should be treated as a tested party. Apart from this, Id DR has also primarily reiterated the stand taken by the Id. Transfer Pricing Officer (TPO) which we have already noted in our earlier para and is not being repeated for the sake of brevity.

15. We have heard both the parties and perused the material available on record. We have gone through the function, asset and risk profile (FAR analysis) of the assessee company. The Id Counsel submitted before us that assessee company is more complex and the same can be ascertained from the FAR profile of the assessee company, which is given below in brief:

(i). The summary of functions, assets and risk profile of the assessee is given in paper book page 642 to 656.

(ii). Detailed evidences about FAR analysis which are mentioned at page nos. 708 to 797 of paper book.

- (iii). The functions performed by the assessee company is more complex than its associate enterprise (AE).
- (iv). Assets employed by the assessee company is more than its associate enterprise (AE).
- (v).The risk profile of the assessee company is more than its associate enterprise (AE).
- (vi).The assessee company is engaged in the function of negotiation with customers and fix the price with customers. The negotiation and price fixation is done by the assessee company with the following customers (for the sake of example):
 - (a)IFGL Ltd, paper book page 528-536.
 - (b) Tata Refractory Ltd.paper book page538 to 547.
 - (c) TRLCrosaki Ltd.paper book page548 to 555.
- (d).The credit risks are borne by the assessee company (vide paper book page nos. 556 to 577).
- (e). The assessee company bears warranty risk and product liability risk.
- (f)The assessee company handles the complaints from the customers, vide paper book page 578 to 593.
- (g) The assessee company bears the foreign exchange risk.
- (i) The assessee company also bears the inventory risk.

Having gone through the functions, assets and risks profile (FAR analysis) of the assessee company and other risks borne by the assessee company, as mentioned above, the Id Counsel claimed that the assessee company is a more complex entity therefore it should not be considered as a tested party. However, we have gone through the FAR profile of associated enterprises (AE), and we find that the associated enterprises (AE) is not so complex as the assessee company, hence based on the factual position narrated above, the associate enterprise (AE) can be treated as least complex entity and therefore it should be selected as a tested party.

16. Now, we address the main grievance of the Id DR for the Revenue that the assessee company can not change its stand at a later stage for selection of tested

party as per its wish and the Transfer Pricing regulation does not permit to change the tested party at a later stage because it leads to tax evasion, hence as per Ld DR for the Revenue, the assessee company should be treated as a tested party and not the associate enterprise (AE). We note that during the TPO proceedings, the assessee himself was selected as a tested party. The method to compute the ALP which has been chosen by the assessee as the tested party himself and therefore the assessee cannot resort to change his selection of tested party at the DRP proceedings/appellate stage, is not acceptable for the reasons given above in para No.15 of this order.

We have already noted in our earlier para No.15 of this order that assessee's function, asset and risk profile (FAR analysis) are complex. The summary of functions, assets and risk profile of the assessee company is furnished by Id Counsel before us, which is given in paper book page 642 to 656. The Id Counsel also submitted detailed evidences about FAR analysis which are mentioned at page nos. 708 to 797 of paper book. Because of these reasons, the assessee company is more complex and hence it should not be accepted as a tested party.

We are of the view that such a contention of Id DR cannot be upheld because it is found on the facts of the case that assessee company is a more complex entity and hence taking the assessee company as a tested party will not result into proper determination of ALP. The TPO or the Appellate Authorities can very well hold that why assessee company can not be tested party for getting proper determination of ALP, or the assessee can demonstrate that its AE can be tested party to justify its ALP. Thus, even after the assessee has selected himself as a tested party, then also assessee is not precluded from raising the contention before the DRP or appellate court that its AE can be a tested party, as it is least complex entity. The ultimate aim of the TPO/DRP is to examine whether the price or the margin arising from an international transaction with a related party is at ALP or not. The determination of the ALP is the key factor for which the least complex tested party is to be selected. Therefore, the TPO as well as the DRP should take into consideration such a plea before them, provided, it is demonstrated as to why the change in the tested party will produce better or more

appropriate ALP on facts of the case. Therefore, we reject the contention of the ld. DR and also the observation of the TPO that the AE can not be a tested party. We note that the associate enterprise (AE) has the following characteristics:

- (i). Performs simpler functions;
- (ii). Assumes minimal risks;
- (iii). Does not own valuable intangibles / unique assets; and
- (iv). Reliable data regarding uncontrolled comparable companies is available.

Therefore, the assessee pleaded before the Ld. Panel to consider the functional analysis provided above, to select the AEs as the tested party being the least complex entities. The assessee urged, the Ld. Panel to rely on the information presented above which is due to some information coming to the knowledge of the assessee tax payer which reflects facts contrary to the facts captured in the TP study. In this context, we rely on the case of Deputy Commissioner of Income- tax v. Quark Systems (P.) Ltd. ([2010] 38 SOT 307 (CHD)) wherein it was held as follows:

'37 When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. For the other side cannot claim to have a vested right in injustice being done due to some mistakes on its part.

Accordingly, on facts and circumstances of the case, we hold that taxpayer is not estopped from pointing out that Datamatics has wrongly been taken as comparable. While admitting additional ground of appeal raised by the assessee to require us to consider whether or not Datamatics should be included in the comparable, we make no comments on merit except observing that assessee from record has shown its prima facie case. Further claim may be examined by the Assessing Officer. we are inclined to take a rather liberal approach by giving assessee an opportunity to make out its case properly and place all the relevant facts before the tax authorities so that proper arm's length price can be determined in accordance with the law the proceedings before the tax authorities are not adversarial proceedings and the assessee should not, therefore, be placed at under advantage because of his inadvertent and bona fide mistakes.

(emphasis added)

It is therefore pleaded before the Ld. Panel, in order to test the transactions under analysis from a transfer pricing perspective, it is essential to appreciate the modus operandi of the operations of AlmadsIndia which undertakes entrepreneurial function and assumes significant risks in course of manufacturing operation. To summarise, the business profile of both the assessee and AE are re-summarised below:

- *The assessee is engaged in buy, manufacture and sale operation with the objective of creating and retaining a wide customer base in the competitive market*
- *In doing so, the assessee assumes market risk, price risk, credit risk and forex risk*
- *AE is primarily engaged in manufacture and supply of goods to Almatis India based on Almatis India's specific requirement*
- *AE primarily assume manufacturing (quality risk) and is absolved of all other risk*

Selection of tested party

Based on the above, it is apparent that the AE assumes lesser complex functions and bears lower level of risks as compared to that of Almatis India. It may kindly be noted that sub-rules (2) and (3) of Rule 10B of the Rules do not restrict taking an overseas entity/AE of an enterprise as the tested party. The two sub-rules provide the yardsticks for comparability of an international transaction with an uncontrolled transaction.

It may kindly be noted that in order to establish the ALP, determination of the 'tested party' plays a very important and key role since one needs to identify comparables and compare the same with tested party.

In this regard, the Ld. Panel's kind attention is also drawn to para 3.18 and para 3.19 of the TP Guidelines issued by Organisation for Economic Cooperation and Development ('OECD TP Guidelines') that also highlight the above point.

Para 3.18 states that:

When applying a cost plus, resale price or transactional net margin method as described in Chapter 11, it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis

(emphasis added)

Para 3.19 states that;

This can be illustrated as follows. Assume that company A manufactures two types of products, P1 and P2 that it sells to company B, an associated enterprise in another country. Assume that A is found to manufacture P1 products using valuable, unique intangibles that belong to B and following technical specifications set by B. Assume that in this P1 transaction, A only performs simple functions and does not make any valuable, unique contribution in relation to the transaction. The tested party for this P1 transaction would most often be A. Assume now that A is also manufacturing P2 products for which it owns and uses valuable unique intangibles such as valuable patents and trademarks, and for which B acts as a distributor. Assume that in this P2 transaction, B only performs simple functions and does not make any valuable, unique contribution in relation

to the transaction. The tested party for the P2 transaction would most often be B." (emphasis added)

17. Further, the US TP Regulations discussing the concept of tested party at 1.482-5(b) is produced below:

" the tested party will be the participant in the controlled transaction whose operating profit attributable to the controlled transactions can be verified using the most reliable data and requiring the fewest and most reliable adjustments, and for which reliable data regarding uncontrolled comparables can be located. Consequently, in most cases the tested party will be the least complex of the controlled taxpayers and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables."

(emphasis added)

18. By virtue of the above guidance, it can be reasonably concluded that the tested party should be the one, which has the following characteristics:

- Performs simpler functions;
- Assumes minimal risks;
- Does not own valuable intangibles / unique assets; and
- In respect of which, reliable data regarding uncontrolled comparable companies is available.

19. Almatis India would also place strong reliance on the United Nation's Practical Manual on Transfer Pricing for Developing Countries, 2013, India Chapter wherein it was stated as follows:

"10.4.1.3. The regulations prescribe mandatory annual filing requirements as well as maintenance of contemporaneous documentation by the taxpayer in case international transactions between associated enterprises cross a threshold and contain stringent penalty implications in case of non-compliance. The primary onus of proving the arm's length price of the transaction lies with the taxpayer. The Indian transfer pricing administration prefers Indian comparables in most cases and also accepts foreign comparables in cases where the foreign associated enterprise is the less or least complex entity and requisite information is available about the tested party and comparables."

(emphasis added)

20. We note that the landmark ruling by the Coordinate Bench, Kolkata Tribunal, in the case of Landis + Gyr Limited (ITA Nos I.TA No. 37/Kol/2012, Assessment

Year: 2007-08, & I.TA No. 1623/Ko1/2012, Assessment Year: 2008-09) spoke about overseas party as a tested party. Relevant findings are given below:

5.2.11. We find that the concept of overseas tested party and foreign comparable companies is well recognized and acknowledged by Indian Revenue as could be seen from India's commentary in United Nations Practical Manual on Transfer Pricing for Developing Countries which were placed on record by the Id AR, wherein, the following has been stated:-

10.4.1. Transfer Pricing Regulations in India

10.4.1.3. The Indian Transfer Pricing administration prefers Indian comparables in most cases and also accepts foreign comparables in cases where the foreign associated enterprise is the less or least complex entity and requisite information is available about the tested party and comparables.

In the instant case, all the requisite information was available for undertaking overseas benchmarking study and the same was also made available to the Id TPO and Id DRP's perusal. We find that the reliance placed by the Id AR on the decision of the Co-ordinate Bench of Delhi Tribunal in the case of Ranbaxy Laboratories Ltd vs ACIT reported in (2016) 68 taxmann.com 322 (Delhi Trib.) is very well founded wherein the concept of overseas tested party and foreign comparable companies for determination of Arm's Length Price has been accepted.

In View of the above discussions, in order to meet the ends of justice in the facts and circumstances of the case, we deem it fit and appropriate, to set aside this issue to the file of the Id TPO / Id AO for determination of Arm's Length Price based on transaction to transaction approach submitted by the assessee taking the AE as a tested party using CPM as the Most Appropriate Method

(emphasis added)

21. The concept of tested party was also dealt in detail by Coordinate Bench of ITAT Ahmedabad, in the case of General Motors India Private Limited, in I. T.A. Nos. 3096/Ahd/2010 and 3308/ Ahd/2011, wherein the tribunal has concluded that the foreign AE should be considered as the tested party being the least complex of the transacting entities and has relied on the UN TP Manual and various judicial precedents on this issue. The relevant extract of the order has been given below:

"Taking all the above facts and circumstances of the issue as discussed in the foregoing paragraphs, in consonance with the case laws quoted (supra)

and also the United Nation's Practical Manual on transfer pricing, we direct the TPO to adopt GMDAT as the 'tested party' for analysing the inter- company transactions of the assessee for both the AYs under consideration. To facilitate the TPO to analyse the inter-company transactions in the case of the assessee by selecting GMDAT as 'tested party' as directed above, this issue is restored on the files of the TPO. It is ordered accordingly.

(emphasis added)

22.Further, the Coordinate Bench of Kolkata Tribunal in the case of Development Consultants Private Limited [2008-TII-03-ITAT-KOL-TP] affirmed that in order to select the most appropriate method for determining the arm's length price, it is first necessary to select the tested party, which will be least complex of the controlled tax payers engaged in the transaction and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables. The relevant extract has been given below:

"5 However, in order to determine the most appropriate method for determining the arm's length price, it is first necessary to select the tested party'. The transfer pricing legislation in India does not provide any discussion or mention of the concept of 'tested party'. In order to understand the concept of tested party we need to refer to the transfer pricing legislations of developed countries where the principles of transfer pricing have been in use for a long time and act as a guiding force for all the developing economies. The transfer pricing guidelines issued by the US Internal Revenue Services under section 482 provide and discuss the concept of transfer pricing. Section 1.482-5 of the US transfer pricing regulations state that "the tested party will be the participant in the controlled transaction whose operating profit attributable to the controlled transactions can be verified using the most reliable data and requiring the fewest and most reliable data and requiring (he fewest and most reliable adjustments, and for which reliable data regarding uncontrolled comparables can be located. Consequently, in most cases the tested party will be the least complex of the controlled taxpayers and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables. Thus, in a sense, the tested party would have lesser risk as compared to the other transacting party or the real entrepreneur. "

(emphasis added)

23. The above concept of "tested party" has also been confirmed by Coordinate Bench of Delhi Tribunal, in the case of Ranbaxy Laboratories Ltd. v. Additional Commissioner of Income-tax (110 ITD 428) wherein, it was held as follows:

"58 The tested party normally should be the party in respect of which reliable data for comparison is easy and readily available and fewest adjustments in computations are needed. It may be local or foreign entity, i. e., one party to the transaction. The object of transfer pricing exercise is to gather reliable data, which can be considered without difficulty by both the parties, i.e., taxpayer and the revenue. It is also true that generally least of the complex controlled taxpayer should be taken as a tested party"
(emphasis added)

24. We would also make a passing reference to the judgment of the Coordinate Bench of Ahmedabad Tribunal, in the case of Mastek Limited v. Addl. CIT (ITA NO.3120/Ahd/2010), wherein the selection of overseas AE as tested party was not disputed by the Bench and it was held as follows:

"we are of the view that in order to determine the most appropriate method for determining the arm's length price, first it is necessary to select the 'tested party' and such a selected party should be least complex and should not be unique, so that prima facie cannot be distinguished from potential uncontrolled comparables "

(emphasis added)

Typically, the "tested party" would be the least complex of the transacting entities, i.e. the simpler entity in terms of intensity of functions performed and risks assumed; and would also not own valuable or non-routine intangibles. Accordingly, this entity would also typically earn routine but steady returns. As a general rule, entrepreneurs should not be considered as "tested parties" and accordingly benchmarked, since, by virtue of their complex functional and risk profiles, their margins fluctuate heavily with the vagaries of the economy, thus making comparability analysis extremely difficult and unreliable. Further, the financial results of the entrepreneur, being the ultimate fallout of third party businesses, often depend on external economic factors in the market; and not on the internal pricing policies of the MNC group. This concept of "tested party" is fundamental to transfer pricing.

Based on the above analysis of the functions and risks assumed by both the parties, it can be reasonably concluded that Almatis India is engaged in operation that entails entrepreneurial function and related risks. The AE, on the other hand, based on the functional and risk profile, can be characterized as a manufacturer engaged in manufacturing and supply of the products based on orders from Almatis

India. Considering the above functional and risk profile and the resulting characterization, we should appreciate and give due cognizance to the assessee's business profile for the relevant year under consideration. Arm's length analysis and conclusion derived without appreciating the business profile would defeat the cardinal principles of transfer pricing.

25. We note that the assessee had prepared and submitted a transfer pricing study report in accordance with the Indian transfer pricing provisions contained in sections 92 and 92A to 92F of the Act, read with Rules 10A to 10E of the Rules. In the said transfer pricing study report, the assessee has used the transactional net margin method and tested the margins of Almatis India. We note that the assessee adopted an incorrect approach of considering Almatis India as the tested party for analysis without appreciating the business profile of both Almatis India and its AE based on the functional and risk profile, and it has been clearly demonstrated that the AEs are the least complex entities vis-a-vis the assessee company.

26. To conclude, we note that the Id counsel for the assessee pleaded before us to accept the AE as the tested party, as the initial approach adopted by the assessee and consequently the TPO, was a bona fide mistake. In the interest of natural justice, we note that the facts placed before us shows that AE should be tested party. The AE to be the tested party, and the said approach has been made considering all relevant facts and circumstances and is well supported by judicial precedents cited above and transfer pricing regulations mentioned above. Therefore, the overseas AEs, being the least complex transacting entities be selected as the tested party and the margin earned by them should be tested from arm's length perspective, as the AE performed simpler functions and do not assume any significant risks contrary to the assessee.

Having gone through the functions, assets and risks profile (FAR analysis) of the assessee company and other risks borne by the assessee company, as mentioned

above, we noticed that the assessee company is a more complex entity therefore it should not be considered as a tested party.

However, we have gone through the foreign associated enterprises and its profile and we find that the foreign associated enterprises can be treated as a tested party because it is the least complex party. For that our views are fortified by the following judgments of the Co-ordinate Benches of Kolkata and Delhi which are already discussed above in detail:

- i) Landys + Gyr (Kolkata) (supra) page 21 para 5.2.11
- ii) Ranbaxy Laboratories Ltd. vs. ACIT (supra) (110 ITD 28) (ITAT Delhi)

We note that Indian Transfer Pricing guidelines issued by the Institute of Chartered Accountant of India vide guidance noted on report u/s 92E by ICAI and transfer pricing guidelines issued by the OECD and considering the united nation practical manual of transfer pricing for developing country, we note that in the assessee's case under consideration, the Associate Enterprise(AE) can be selected as a tested party. Therefore, we direct the ld. TPO / Assessing Officer to treat the foreign associated enterprises as a tested party and compute the arms' length price adjustment accordingly.

27. Ground no. 2 raised by the assessee relates to accepting the audited segmental analysis for the transaction of purchase of finished goods, receipt of commission and sale of finished goods by the assessee from the Associated Enterprises (AE).

28. The brief facts qua the issue are that the assessee purchased finished goods from the Associate Enterprises (AEs) for sale to third parties. It may also have ad-hoc sales of traded finished goods lying in stock to Associate Enterprises(AE). Further, the assessee received commission @ 3% on account of facilitating the direct sales by the AE to third parties in India. So far, the nature of activity is concerned, the assessee made purchases only from AEs and received commission from AEs. The assessee have three Associate Enterprises (AEs), namely: Almatis Inc. USA, Almatis GmbH (Germany) and Almatis BV (Netherlands). The transfer Pricing Officer (TPO) took the entity level margins of the assessee and made the transfer pricing adjustment on that basis. The TPO

made the transfer pricing adjustment to the tune of Rs. 22,95,822/- which is confirmed by the Id. DRP.

29. Aggrieved by the order of the DRP/AO, the assessee is in appeal before us.

30. We have heard both the parties and perused the material available on record. Before us, the Id Counsel for the assessee reiterated the submissions made before the Id DRP whereas Id DR for the Revenue relied on the order passed by the Id TPO. We note that the assessee has also not raised this issue during the TPO proceedings, however the assessee raised this issue,(pertaining to segmental accounts), first time before the Id. DRP proceedings. The additional ground No. 3 raised by the assessee before the Id. DRP reads follows:

3. That on the facts and circumstances of the case, the Ld. TPO and accordingly the Ld. AO failed to provide due cognizance to the fact that in relation to the purchase of finished goods, receipt of commission and sale of finished goods, the assessee was engaged in trading functions and on the contrary selected a set of comparables having different functional profile.

The assessee submitted before the Id. DRP, a written note about bench mark results of trading activities of the assessee, search for comparables and business description of comparables.

31. After getting the submissions of the assessee, the Id. DRP sent the submissions of the assessee to the Id. TPO for its examination. The Id. TPO after going through the assessee's submission rejected the segmental analysis of the assessee on the ground that the same was without any basis, far-fetched and not audited. The finding of the Id. TPO during the remand proceedings are given below for ready reference:

"B. Additional Ground No. 3

That on the facts and circumstances of the case, the Ld. TPO and accordingly the Ld AO failed to provide due cognizance to the fact that in relation to the purchase of finished goods, receipt of commission and sale of finished goods, the assessee was engaged in trading functions and on the contrary selected a set of comparables having different functional profile,

Assessee's Submission

The assessee has submitted that it performs trading activities wherein it buys finished products from its AEs for resale in the Indian market. Further, certain products which

are not in the product repertoire of Almatis India are directly sold by AE to third parties, in India. Almatis India provides certain support for such sale made by the AE in the form of liaison and administrative services. AE pays a commission to Almatis India for such support rendered. In addition, Almatis India has made a sporadic sale of traded goods to its AE in China which is due to immediate requirement in the China plant which could be met from India.

Further, Almatis India does not employ any major assets for the class of transactions mentioned above. The AEs, on the other hand, employ their manufacturing and office facilities for the above transactions.

For the above international transactions, the AEs are responsible for performing all manufacturing functions, including raw material sourcing, performing the manufacturing, inventory and manpower planning. In case of direct sale to customers in India, the AE also bears price risk as it is responsible for price negotiations. In both cases, the AE is responsible for maintaining the product quality and bears inventory and warranty risk.

The assessee has contended that for the purchase of finished goods, receipt of commission and sale of finished goods, the assessee's segment should be considered as the tested party.

Our Comments

We agree with the assessee's contention that it should be selected as the tested party for these functions being the least complex entity. The segmentation of profitability provided by the assessee has no basis, is far-fetched and not audited. Based on the same, since it should be selected as the tested party for all transactions, the entity level margins should be considered. Hence the segment of the assessee is rejected."

32. The assessee has submitted the rejoinder to the remand report of the Id. TPO and submitted the audited segmental result of the assessee vide paper book page no. 915 to 916. We note that in subsequent assessment year vide assessment year 2013-14 and A.Y 2014-15 (vide page no. 4 of the Id. DRP order) wherein the Id. DRP held that the adjustment can be made only on the basis of transaction and not on aggregation and accepted the segmental analysis of the assessee. The assessee's audited segmental analysis submitted before the Bench is placed on paper book page 915 to 916. However, we note that the Id. DRP without assigning any valid reasons rejected the assessee's submission and dismiss the ground with a cryptic observation which is given below:

"All the above grounds in our view bear the same texture and complexion. In our considered view they have a tenuous link with the primary grievance of the "A" relating to the variations made by the Assessing Officer/TPO in the returned income of the "A". For want of objectivity and precision the grounds are dismissed wholesale."

33. We note that in order to justify the transfer pricing adjustment the segmental results should be considered. We note that the assessee has not submitted the

segmental reports before the TPO, however, the assessee has submitted during the DRP proceedings which has not been considered by the Id. DRP.

At the cost of repetition, we would like to state that in subsequent assessment year vide assessment year 2013-14 and A.Y 2014-15 (vide page no. 4 of the Id. DRP order) wherein the Id. DRP held that the adjustment can be made only on the basis of transaction and not on aggregation and accepted the segmental analysis of the assessee based on the same facts and circumstances and there is no change in law. Therefore, it is abundantly clear, that Id DRP in subsequent years have accepted the segmental analysis of the assessee. The assessee's audited segmental analysis submitted before the Bench is placed on paper book page 915 to 916.

We note that where segmental results are available, the adjustment can be made only on the basis of transaction and not on aggregation, for that we rely on the following judgments of Coordinate Benches:

(i).M/s Syniverse Mobile Solutions Pvt. Ltd., Hyderabad [TS-51-ITAT-2015] (page 7 to 9) (para 9), wherein it was held as follows:

“9. We have heard the arguments of both the sides and also perused the relevant material on record. As rightly submitted by the learned counsel for the assessee, segmental details taken by the assessee in its TP analysis cannot be rejected merely on the ground that they are unaudited, as done by the TPO and this position duly supported by several decisions of the Tribunal is not disputed even by the Learned Departmental Representative. He however, has submitted that the segmental details and financials were rejected by the TPO not merely on the basis of unaudited aspect, but he has also given certain specific reasons, such as assumptions and presumptions involved in the allocation of various expenses between different segments. He has also contended that the different segments of the assessee company are heterogeneous and in order to rely upon the financials of such segments for the TP analysis, it is always better to have the same duly audited. He has contended that although there is no legal M/s. Syniverse Mobile Solutions Private Limited, Hyderabad requirement to get the segmental financials audited, it is always preferable for establishing the reliability.”

(ii) Brigade Global Service Pvt. Ltd. TS-730-ITAT 2012 (Hyd)-TP-Paras 33 to 38, page 22 to 25

“The AR submitted that, in respect of F.I. Sofex (item No. 11 in the chart) introduced by the assessee but rejected by Learned CIT (Appeals) as well as TPO on the ground that no segmental details were available. Whereas the fact remains that the assessee had furnished the segmental data. The Mumbai Tribunal in the case of Addl. CIT v. Technimont ICB India (P) Ltd. 148 TTJ (Mumbai) (TM) 547 had held that where the segmental data was furnished rejection of such cases as comparable is not justified. It was further held by both the lower authorities that bad debts written off cannot be allowed as operating cost. The Assessee respectfully submits that bad debts written off forms part of operating cost. In this connection, reliance is placed on the decision of

Tribunal in the cases of CA Computer Associates (P.) Ltd. v. Dy. CIT [2010] 37 SOT 306 (Mum. Tribunal) and Dy. CIT v. Vertex Customer Services India (P.) Ltd. [2009] 34 SOT 532 (Delhi).

34. The DR submitted that segmental total cost not available and that the subsidiary in India incurred a loss due to which the entire investment as well as recoverable advance had been fully provided for in the books of account. Being so it is not comparable with the assessee company.

35. We have considered the arguments of both the parties. In our considered view for computing the net margin of the assessee for the purpose of transfer pricing only the cost related to the transaction with the AEs has to be considered and accordingly, we agree with the argument that segmental financial data is to be considered for the purpose of arriving at the net margin on an international transaction with the assessee's enterprises in respect of transactions carried on by the assessee. This view of ours is also supported by the order of the Hyderabad Bench of the Tribunal in the case of Foursoft Ltd. vs. DCIT (62 DTR 308) (Hyd). Same view has been taken by the Tribunal in various cases stated by the assessee."

Therefore, respectfully following the findings of the Co-ordinate Benches in the above noted two judgments we direct the Id. TPO/Assessing Officer to consider the assessee's audited segmental results to compute arm's length price (ALP).

34. Ground no. 3 raised by the assessee relates to administrative supports services and IT support services received by the assessee from the Associated Enterprises (AE) wrongly treated to be in the nature of stewardship functions.

35. Brief facts qua the issue are that the assessee receives, administrative and IT services from its Associate Enterprise(AE). The transfer pricing officer treated the arms' length price, of the said transactions as NIL by observingas follows:

- (i) Benefit of services received have not been proved and no documentation produced,
- (ii). No evidences as to the cost benefit analysis,
- (iii)Benefits are not tangible or real,
- (iv).The payment of fee is an arrangement without any economic substance in the transaction.

Based on these observations the transfer pricing adjustment to the tune of Rs. 5,06,94,589/- was made by Id TPO.

36. Aggrieved, by the order of the Id TPO, the assessee carried the matter before the Id DRP by filing objections. The Id DRP held that these administrative supports services and IT support services received by the assessee from the Associated Enterprises (AE) are to be stewardship activities and hence confirmed the order of the Id TPO.

37. Aggrieved by the order of the Id DRP/AO, the assessee is in appeal before us. We have heard both the parties and perused the material available on record, we note that the Id. Counsel for the assessee invited our attention to the order dated 09.06.2017, passed by the division bench of this Tribunal in assessee's own case in I.T.A. No. 283/Kol/2016, for assessment year 2011-12, whereby the issue of administrative supports services and IT support services received by the assessee from the Associated Enterprises (AE), has been discussed and adjudicated in favour of assessee. The Id. Counsel for the assessee also submitted that the present issue is squarely covered by the aforesaid order of the tribunal, a copy of which was also placed before the Bench.

38. The Id. DR for the Revenue has primarily reiterated the stand taken by the Id TPO/Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

39. We see no reason to take any other view of the matter then the view so taken by the division bench of this Tribunal in assessee's own case vide order dated 09.06.2017. In this order, the Tribunal has inter alia observed as follows:

“20. Aggrieved by the order of the AO incorporating the directions given by the DRP in the fair assessment order, the Revenue has preferred appeal being ITA No.283/Kol/2016. The grounds of appeal raised by the Revenue before the Tribunal reads thus:

“1. Whether on the facts and in the circumstances of the instant case, the Id DRP has erred in not evaluating the cost benefit analysis, in respect of such services without evaluation of comparable cost for such services, if procured from independent unrelated services, before concluding that payments made under the head management & IT Services were at arm's length.”

The Almatis India (Assessee), has filed the Cross Objections, vide CO.No.23/K/2016 wherein the solitary grievance of the assessee is that the services received by assessee is not in the nature of Stewardship Services and therefore the assessee defended the order passed by the DRP. The assessee has raised eight grounds of Cross Objections but we are not reproducing them for the sake of brevity, as we have already noted the solitary grievance of the assessee in these cross objections. Since common issue is involved in Revenue appeal and cross objections, therefore, these are being adjudicated together.

21. *The learned counsel for the Assessee reiterated submissions made before the DRP/TPO and drew our attention to the evidence in support of the services received by the Assessee from its AE-Almatis Germany, the rationale/need for services so received vis-à-vis the business of the Assessee, benefit received by the Assessee, the benchmarking approach adopted by the Assessee from recipient's perspective and also from the service provider's perspective, manner of allocation of costs by the service provider vis-à-vis the Assessee. He also explained the meaning of nature of stewardship services and as to how the payment made by the Assessee to its AE-Almatis Germany, are not in the nature of stewardship services. He drew our attention to certain decided cases of Hon'ble High Courts in India and various Benches of Income Tax Appellate Tribunal on the approach that should be adopted in determining ALP in cases of intra group services received from group companies (AE).*

22. *The learned DR supported the order of the TPO. According to him the conclusions drawn by the TPO are just and proper and calls for no interference.*

23. *We have given a careful consideration to the rival submissions. As per the OECD Guidelines paragraph 7.2:*

“Nearly every MNE group must arrange for a wide scope of services to be available to its members, in particular administrative, technical, financial and commercial services. Such services may include management, coordination and control functions for the whole group.”
(emphasis added)

The U.S. regulations define an intra-group service in the following manner (Treas. reg. § 1-482-9(1)(1)):

“Controlled services transaction - (i) In general. A controlled services transaction includes any activity (as defined in paragraph (1)(2) of this section) by one member of a group of controlled taxpayers (the renderer) that results in a benefit (as defined in paragraph (1)(3) of this section) to one or more other members of the controlled group (the recipient(s)).”

Thus, as per this definition of services, first there should be an activity performed by one of the members of a group of related parties which lies within the ambit of definition of activity (the 'activity test') and second, that activity should result in a benefit (the 'benefit test') to one or more members of that group of related entities.

The OECD Guidelines also concur with this view in paragraph 7.5:

“There are two issues in the analysis of transfer pricing for intra-group services. One issue is whether intra-group services have in fact been provided. The other issue is what the intra-group charge for such services for tax purposes should be in accordance with the arm's length principle. “
(emphasis added)

24. The Assessee does not have a full capacity to provide a range of services to its business and to the personnel working for it. In the interests of economy and efficiency the assessee desired to obtain these services from its associated enterprise Almatis-Germany. Almatis-Germany has expert resources in commercial, financial, accounting and other matters which would be employed for the benefit of the Almatis India. The Almatis India would have access to the resources and would pay appropriate consideration which would be commensurate with the amount paid to third party service providers. These support services relate to certain functional categories which have set out in the earlier part of this order and hence, we do not wish to repeat the same. As we have already observed in the earlier part of this order, the practice of multinational enterprises providing intra group services is a global practice wherein, various activities are frequently concentrated for the benefit of the entire group. Since, the multinational group operates globally, such concentration is essential to be able to react in the most flexible and cost effective manner. According to the assessee the benefits derived from availing the above services outweigh the cost incurred in receiving such services. It is also the claim of the Almatis India that with the help of such services it achieved substantial cost efficiencies and hence it would be incorrect to categorise such services to be in the nature of stewardship services. It is the claim of the Assessee that the above services are essential for the operations of the Assessee and had it not received the access to the above services, it would have been required to perform them by itself (in-house) or by hiring experienced service providers. The OECD Guidelines in this regard (para 7.6) lays down the following:

“Under the arm's length principle, the question whether an intragroup service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance its commercial position: This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity inhouse for itself. If the activity is not one for which the independent enterprise would have been willing to Pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle. “
(emphasis added)

25. As far as the services rendered by Almatis Germany, are concerned, expertise in the field of HR, Operations and Purchasing, IT, Marketing, Finance and Planning areas have been developed and with a view to enable the Almatis India to have full access to this extensive knowledge and expertise. Almatis Germany

provides these services to Almatis India. Besides expertise, there has been substantial savings in total costs when compared with those which would otherwise be incurred if they were borne by the individual Almatis India. It is not disputed by the TPO that had the assessee not received such support from Almatis Germany, it would need to perform the functions in-house, or hire experienced and trained service providers. Such services are thus not in the nature of simply oversight functions, which have been performed by Almatis Germany to protect its investment in the company. With regard to the services received from Almatis Germany, the company has submitted detailed evidences to the Ld. TPO in the form of emails, communications and reports which evidence the rendering of services and the ensuing benefits. Nature of service i.e. Information Technology, Human Resource, Operations, Purchasing, Marketing Support, Finance and Planning has been evidenced by way of such communication/ documents. It was neither disputed by the TPO that apart from services which are received in the form of emails, reports, documents etc. from Almatis Germany, the assessee also received constant and continuous information over calls, audio-video conferences, personal visits etc. Therefore, the benefits received in the above form ought to have been given due consideration. Hence, for the purpose of demonstration and explanation, the assessee has submitted documents evidencing the regular flow of valuable commercial services. From the above details submitted by the assessee it has been amply demonstrated that the benefits generated by the said services during the relevant financial year have undeniably added economic / commercial value to enhance the commercial position of the assessee and such services are received by the assessee on a continuous basis. Hence it is erroneous to classify the services to be in the nature of stewardship services.

The DRP in its order has not accepted the findings of the TPO. The DRP was of the view that the services were rendered by Almatis Germany to the Assessee and that the Assessee benefitted from such services. Once this conclusion is arrived at then the case of the TPO that the nature of services were stewardship activity cannot be sustained.

26. We therefore conclude that the assessee has established the nature of services including quantum of services received from Almatis Germany, that services were provided in order to meet specific need of the assessee for such services, the economic and commercial benefits derived by the assessee. Almatis India claims that his arm`s length price claimed in General Service Agreement (GSA), @ 9.6% is less than 11.24% therefore, all the transactions are at arm`s length. The TPO has not disputed the above cost allocation as well as the fact that the comparative cost charged by unrelated parties for similar services was at a margin of 9.6% of the cost.

Besides, in this case the TP study report as well as comparables selected by the assessee to compute the arm`s length price @ 9.6% were available before the TPO and DRP. Neither TPO nor the DRP has objected the comparables selected by the assessee to compute the ALP @9.6%. Had the TPO not been agreed then he would have appeared in the course of hearing before the DRP and could object the ALP and comparables selected by the Almatis India. Therefore, we are of the view that

DRP as well as TPO, both had agreed with the ALP computed by the Almatris India and comparables selected by the Almatris India.

In view of our conclusion, the TPO were in error in holding that the nature of services rendered by Almatris Germany, were in the nature of stewardship activity. The charges paid by the Almatris India to AlmatrisGermany are held to be at Arm's Length. Consequently, we confirm the order passed by the Id DRP and the appeal of the Revenue ITA No. 283/Kol/2016 is dismissed."

40. We also note that in subsequent assessment year 2014-15, the Id DRP, in assessee's own case (vide page 6-7), based on the same facts and circumstances, deleted the addition made by Id TPO on account of administrative supports services and IT support services received by the assessee from the Associated Enterprises (AE), which was wrongly treated by Id TPO to be in the nature of stewardship functions.

41. As the issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench , in assessee's own case (supra) and there is no change in facts and law and the revenue is unable to produce any material to controvert the aforesaid findings of the Co-ordinate Bench in assessee's own case, for assessment year 2011-12 (supra), we find that the issue is squarely covered in favour of the assessee and therefore we allow the ground no. 3 raised by the assessee.

42. In the result, boththe appeals of the assessee in ITA No.726/Kol/2017 for A.Y.2012-13 and ITA No.2361/Kol/2017 for A.Y.2013-14 are allowed.

Order is pronounced in the open court on 16.04.2019.

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 16/04/2019

(SB, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant –Almatis Alumina Pvt. Ltd.
2. प्रत्यर्थी/ The Respondent –DCIT, Circle-8(1), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता/** DR, ITAT,
Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

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By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.