

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 1736/DEL/2015 (A.Y 2010-11)

Ericsson India Pvt. Ltd. 4 th Floor, Dhakha House, 18/17, W.E.A Pusa Lance, Karol Bagh, New Delhi AAACE0138N (APPELLANT)	Vs	ACIT Circle-8(2) New Delhi (RESPONDENT)
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Appellant by	Sh. Vishal Kalra, Adv & Ms. Sumisha Morgai, CA
Respondent by	Sh. Sandeep Kumar Mishra, Sr. DR

Date of Hearing	23.05.2019
Date of Pronouncement	14.06.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the Assessment Order dated 22.10.2015 passed by the Assessing Officer u/s 143 (3) read with Section 144C of the Income Tax Act, 1961, for Assessment Year 2010-11.

2. The grounds of appeal are as under:-

“That on the facts and circumstances of the case, and in law;

1. That the assessment order passed by the Ld. Assessing Officer (“Ld. AO”) under section 143(3) read with section 144C of the Income Tax Act, 1961 (“the Act”), in pursuance to the directions issued by the Hon’ble Dispute Resolution Panel (“Hon’ble DRP”) is a vitiated order as the Hon’ble DRP has erred both on facts and in law in confirming the addition to the extent of INR 9,67,72,825/- in part made by the Ld. Transfer Pricing Officer (“Ld. TPO”) to the Appellant’s

income, is without appropriate application of mind and in undue haste.

2. The reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO has not recorded any reasons in the assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Ld. TPO for computation of the Arm's Length Price ("ALP"), as is required under section 92CA(1) of the Act.

3. The Ld. AO pursuant to the directions of the Hon'ble DRP erred on facts and in law in enhancing the income of the Appellant by Rs 9,67,72,825/- holding that the international transactions pertaining to the receipt of second line support services do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred by:

3.1. not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;

3.2. disregarding the ALP, as determined by the Appellant in the Transfer Pricing (TP) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Indian Income tax Rules, 1962 ('the Rules') without providing the Appellant with any cogent reason for rejection of the TP documentation maintained by the Appellant .

3.3. misinterpreting the concept of shareholder services and other concepts relating to intra group services contained in the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations released by the Organization for Economic Cooperation and Development (OECD Guidelines);

3.4. disregarding the computation of cost submitted by the Appellant in support of the fee paid to Associated Enterprises for receipt of second line support services and instead, proposing a completely arbitrary methodology of cost allocation based on its own conjectures and surmises.

3.5. by proposing a flawed allocation methodology that allocates only 40% of the cost and does not take into account the business and commercial realities that would not allow any third party to absorb 60% of the cost which it incurs for rendering service.

3.6. not giving an opportunity of being heard before applying an arbitrary approach for allocation of cost, thus violating the principle of natural justice.

4. That the AO has erred both in facts and in law, in initiating penalty proceedings under section 271(1)(c).

3. Ericsson India Private Limited is a company incorporated in India and is a wholly-owned subsidiary of Telefonaktiebolaget LM Ericsson, Sweden ('LME'). During the relevant assessment year, the Assessee was engaged in the business of trading, manufacturing/ assembly of telecommunication carrier equipment for sale to independent customers, marketing and providing implementation, commissioning and support services related to telecommunication systems. In addition, telecommunication related contract software, development services were also provided by the assessee to associated enterprises ("AEs"). The various international transactions undertaken by the Assessee during the year were classified into the following primary business segments:-

- Systems segment - Under this segment, the Assessee undertakes manufacture and distribution of telecommunication carrier equipment for sale to independent customers, marketing, providing implementation, commissioning, and support services related to telecommunication systems.
- Software segment - Under this segment, the Assessee provides contract software development services to its AEs.
- Others - Under this category, non-core activities/transactions of the Assessee like cost recharges, reimbursement of expenses, etc. are covered.

Due to the close interlinked nature of the international transactions under the Assessee's systems segment and software segment (i.e. the primary business segments), the Assessee aggregated all the international transactions undertaken by it with its AEs (except for cost reimbursements) within the said business segments to establish the arm's length nature of its international

transactions in the Transfer Pricing ('TP') documentation. During the course of assessment proceedings, the TPO accepted all the international transactions undertaken by the assessee during the relevant year, except for receipt of Second Line Support (SLS) services from its AEs amounting to Rs. 28,54,69,472/-. As per the TP study, the said international transaction had been aggregated and benchmarked by the assessee in its 'systems segment', applying Transactional Net Margin Method (TNMM) as the most appropriate method. As the margin earned by the assessee in the 'systems segment' i.e. 7% was more than the mean margin of comparable companies, i.e., -1.49. The aggregated international transactions were concluded to be at arm's length. The TPO did not consider the assessee's contentions and proceeded to make adjustment in respect of the transaction of receipt of SLS services from AEs, which was further upheld by the Dispute Resolution Panel ('DRP') following the approach adopted by the DRP in the preceding year. The ALP of the assessee's international transaction of receipt of SLS services was determined as INR 18,86,96,647 instead of the ALP determined by the assessee as INR 28,54,69,472, thereby making an adjustment of Rs. 9,67,72,825/-.

4. Being aggrieved by the Assessment Order, the assessee filed present appeal before us.

5. The Ld. AR submitted that as part of the systems segment, the assessee, inter alia, provides post-sale support for equipment sold to third party telecom service providers. The support is provided in cases where warranty of the equipment has expired. These post-sales support services are provided to the telecom service providers as part of an Annual Maintenance Contract ('AMC') entered into by the assessee with the telecom service providers/customers. As part of the AMC contract, the post-sales support services primarily include the following:-

- Customer service request handling - The same involves provision of

technical assistance and effective resolution of technical problems faced by the customers;

- Configuration management of software and hardware delivered by Ericsson;
- Provision of solution / software updates;
- Emergency handling - The said service involves providing emergency support with respect to system recovery, prevention of data loss, prevention of complete systems crash etc.;
- Solution Helpdesk / Information services - The same involves provision of technical information like handling queries of the customers pertaining to the usage of any product, handling of technical faults etc.

Further, as part of systems segment, the assessee operates a 24X7 customer helpline on which the customer can log on their complaints in case a fault is detected in the network. As soon as the complaint is logged by the telecom service provider/ customer, the customer help desk of the assessee responds and generates a Customer Service Request ('CSR). The CSR is then forwarded to the First Level Support ('FLS') technical team of the assessee who analyzes the issue and tries to resolve the same on its own. However, in cases where the assessee's FLS team is unable to resolve the error, the same is then forwarded to the relevant SLS team of the AEs. The SLS team analyses the error and based on their technical knowledge base provides a solution to the assessee. The above SLS services are extremely critical for the customers of the assessee, as faults in the systems (especially of emergency nature) can prove to be very costly for the telecom service providers/ customers. As discussed above, all routine maintenance and repair services are undertaken by the assessee using its own personnel. However, to take care of complicated technical problems, the assessee utilizes the on-call technical services provided by the AEs in the form of SLS support].

6. The Ld. AR further submitted that during the relevant year, the assessee, on a without prejudice basis, demonstrated before the TPO that based on an alternative approach of drawing up a standalone segment for AMC services by allocating costs based on revenue, the OP/TC margin of the assessee from AMC contracts on standalone basis would come to 31.37% and OP/Sales margin would be 23.88% (refer pages 192-194 & 366 of paper book) as compared to the comparable companies' OP/TC margin of 8.83% and OP/Sales margin of 7.49%. This clearly corroborates that the assessee had earned higher margins (both on the cost and sales base), as compared to uncontrolled comparable companies. Based on the above it can be seen that the assessee is directly benefiting from receipt of SLS as by availing these services the assessee is able to generate AMC revenue and also provide services to its customers that are extremely critical for them. Thus, the assessee receives benefits from services received from AEs. The allocation methodology adopted by the Assessee as per the agreement entered into by the assessee with AE for receipt of SLS. The charge of the SLS is determined based on the following:

- 60% weightage is given on the number of "Customer Service Requests" generated from India vis-a-vis the total number of "Customer Service Requests" generated globally;
- 40% weightage is given to the number of installed "Telecom Nodes" in India vis- a-vis the total number of installed "Telecom Nodes" worldwide.

The aforementioned formula is followed consistently for allocating the SLS charge to all the Ericsson group companies. Further, it is also pertinent to mention here that the said formula only talks about the allocation of cost and does not include any element of markup on these costs. At the outset, the Ld. AR submitted that the ITAT in the assessee's own case for AY 2007-08 being ITA No. 5141/Del/2011 order dated 11.05.2012 has closely analyzed the transaction of receipt of SLS services which was further followed by the

Tribunal in the assessee's own case for subsequent AYs 2008-09 being ITA No. 6082/Del/2012 order dated 29.05.2017 and 2009-10 being ITA No. 2554/Del/2014 order dated 28.07.2017. The Ld. AR further submitted that pursuant to the Tribunal's orders for AYs 2007-08 to 2009-10, the TPO, vide orders dated October 26, 2016 (for AY 2007-08) and March 27, 2018 (for AYs 2008-09 & 2009-10), examined the amended formula and based on the same, drew no adverse inference for AYs 2007-08 to 2009-10. In view of the same, the formula has been accepted by the TPO and no adjustment has been made in respect of the international transaction pertaining to receipt of SLS services. The Ld. AR further submits that the above submissions clearly demonstrate that the Assessee has received significant economic and commercial benefit from the receipt of SLS and thus the services cannot be termed as "shareholder/ routine services. Further, in view of the observation of the Tribunal in assessee's own case for AYs 2007-08 to 2009-10 and since no adverse inference having been drawn by the TPO pursuant to the orders of the Tribunal for these AYs in respect of the said international transaction, adjustment in respect of receipt of SLS services from AE warrants deletion.

6. The Ld. DR relied upon the order of the TPO & the directions of the DRP. The Ld. DR submitted that the only issue contested by the assessee pertains to Second Line Support Services (SLS) allegedly provided by the AE to the assessee for which the assessee has paid Rs. 28.5 Cr. To the AE. Assessee has marketed and sold telecom equipments (core components sourced from its AE) to Indian customers (who are telecom service providers). Assessee provided standard warranty to customers to whom sale is made. Standard warranty may be in a way taken to be linked with sale. However, SLS have, admittedly, been provided pursuant to separate Annual Maintenance Contracts (AMCs) entered into with some of the customers of the assessee. Separate revenue has also been charged and recognized from AMC activity. Therefore, transaction of SLS can in no way be linked, leave aside inseparably linked, with the

transaction of sale. As per the TP rules and regulations each international transaction should be benchmarked separately. This principle has been upheld by various courts including Hon'ble Punjab and Haryana High Court in the case of Knorr-Bremse India Ltd. (2015) 63 taxmann.com 186. Therefore, irrespective of decision on the quantum of arms length price of this transaction, the action of TPO to benchmark SLS services separately is as per the mandate of Law and should be upheld. It is trite law that the ALP of any international transaction should correspond to the functions performed, assets used and risk assumed (FAR) by the respective enterprises. In order to appreciate the FAR in relation to SLS it would be pertinent to consider the nature of these services and the role played by the AE in this regard. The assessee provides standard warranty to customers for some period. Post the expiry of warranty period, the assessee enters in to AMC with some of its customers for providing trouble shooting and rectifying faults and failures. There is a 24 hours help line for receiving complaints/Customer Service Request (CSR) from customers. Whenever a complaint is logged a CSR is generated. CSR is attended to and resolved by in house team of the assessee referred as First Line Support (FLS). Thus, it may be seen that the assessee has an In- house team to resolve the customer complaints. However, a minute percentage of complaints which cannot be resolved by the FLS or if they pertain to hardware issues (it may be recalled here that core hardwares are proprietary/patented products of AE and are sourced from AE only), the same are elevated to the Second Line Support Staff of AE which communicates solutions to the assessee who carries out the resolution of the problem. Thus, it may be appreciated the functions performed by the assessee include receiving the complaints and having requisite infrastructure for the same, maintaining the log and track record of complaints throughout its entire life cycle, resolving most of the complaints (more than 90% of them), forwarding a minute fraction of complaints to SLS team, coordinating with the SLS team for resolution of problem including on-site visits. It may be seen that the FLS and SLS are integral part of customer service support provided to customers

pursuant to AMC and most of the functions are performed by the assessee. Most of the assets and employees of assessee are used/employed in providing the support. The risk in respect of AMC services is also borne by the assessee as it is the assessee who enters into AMC with customers. The facts related to SLS establish at least two things. Firstly, the payment made by the assessee to its AE for SLS is not commensurate to the services actually rendered by the AE. Secondly, any formula or method to arrive at the arms length price for SLS should depend on the cost incurred by AE in handling the CSRs forwarded to it and it cannot depend upon any other thing such as percentage of nodes in India as the assessee has separately made all the necessary payments for the same. As regards TP report of the assessee, the TPO held that the assessee is also making payment for the consultancy that the AE provides for the commissioning and installation of the equipment. The fact that payments have been made to the AE is also evident from Form 3CEB wherein Rs. 180,17,63,970 has been declared to have been paid to the AE under the name of systems segment. Considering that payments have already been made not just for equipment purchase but also under the name of consultancy for the commissioning and installation of the equipment any further payment calculated on the basis of nodes/equipments in India will vitiate the arms length price. TPO further held that the assessee mentioned at para 5.2 of its TP report that the core components and parts are obtained from the AE only as they hold the patents for such components and parts. The risk profiling that the assessee mentioned in TP report that in respect of products obtained from the AE, the product warranties are back to back with the manufacturer. The assessee has thus claimed that its risk is lowered on this account. The assessee also claims that it is not exposed to technology risk as the high end technical services and know how is provided by the AE. The upshot of this entire discussion is that the AE is responsible for any failure that may occur in the process of the commissioning and installation of the equipment. In that even there is no reason why the assessee should make payment for a routine service that the AE may provide. The assessee has mentioned the existence of

24*7 helpline that is the starting point for the system support. This helpline exists for the entire group and not the assessee alone. Therefore the service is in the nature of a stewardship service that the AE is providing to the subsidiaries. The details from the assessee's reply which has been quoted above mentions that if the error is related to a design fault then the matter is referred to the team who designed the product. The TPO has further held that it has been brought out that the assessee does not undertake the responsibility for the goods and parts that are procured from the AE. The assessee should not be expected to pay for a product failure that it has no part in. the assessee is making the necessary payments that need be made in the normal course of its business. This payment of Rs. 43,90,67,319/- (of which SLS s a part) is not one that an independent entity would have made under similar circumstances. Therefore, this payment is not at arm's length. DRP has considered the facts of the case related to receipts of SLS, the ITAT order for AY 2007-08, all the other payments made by the assessee to AE, the nature and quantum of CSRs actually handled by the AE and cost incurred by the AE in handling CSRs. After considering all of the above, Hon'ble DRP has held that calculation of ALP should not be based on the nodes/equipments in India. Similarly, DRP has further held that the ALP for the SLS should be based upon 40% of the CSRs actually handled by the AE. In view of the above, the Ld. DR prayed that the order of the DRP in respect of computation of ALP based only on 40% of CSRs handled by AE should be upheld.

7. The Ld. AR in rejoinder submitted that the Ld. DR has not understood the functions, assets and risks performed/employed by the assessee in relation to the systems segment and why the aggregated approach using transactional net margin method (TNMM) was applied to benchmark the said segment. In the systems segment, the assessee is manufacturing/assembling telecom carrier equipment. The assessee's manufacturing/assembling facility is situated at Jaipur. The assessee for the purposes of manufacturing/assembling of the telecom equipment uses non-core raw material/ components and core raw

material /components. The non-core raw material/components are procured from local vendors in India and the core components (being patented) are procured from the AEs. The assessee further for smooth running of the equipment supplied to telecom carriers also provide system support services. The assessee resolves the first level trouble shooting through its in-house personnel and more complex trouble-shooting is referred to AEs. The above system support services are extremely critical for the customers of the assessee. The system support services being inextricably linked to the system hardware provided by the assessee, the same were benchmarked by way of aggregation by applying TNMM. In this regard, the Ld. AR submitted that though the TPO initially contended that transaction-by-transaction approach should be followed for benchmarking the international transaction pertaining to receipt of SLS, however, ultimately, basis the DRP directions, the formula for computing cost of the SLS services was only modified. The DRP also relied on its directions for preceding assessment year to modify the cost formula without changing the benchmarking analysis conducted by the assessee, i.e., aggregated approach using TNMM. Therefore, the Ld. AR submitted that if the Revenue wants to challenge the directions of the DRP, the same could have been done only by way of filing an appeal with the Tribunal. Since the Department has not filed appeal before the Tribunal, the Ld. DR cannot raise a new plea of benchmarking using segregation approach, especially when the same is not emanating from the orders of lower authorities. The only point of difference between the assessee and the Department is how the cost have to be allocated i.e., using the formula of the assessee or the ad hoc approach of the lower authorities. Therefore, the Ld. DR has erred in pleading something before the Bench, which is not the case of lower authorities, that too, de hors a Departmental appeal. The Ld. AR further submitted that the Ld. DR by bringing out such arguments which was never the case of the DRP/TPO, is trying to build an altogether a new case, that too without an appeal against the order of the DRP. The Ld. AR relied upon the decision of the Special Bench of the Tribunal in case of Mahindra & Mahindra Ltd. vs. DCIT (2010) 122 ITD 216

(SB), wherein the Court held that the DR has no jurisdiction to go beyond the orders passed by the lower authorities. The Ld. AR further submitted that the Tribunal cannot take away what the lower authorities have granted. The Ld. AR relied upon the decision of the Hon'ble Apex Court in case of Mcorp Global Pvt. Ltd. vs. CIT (2009) 309 ITR 434 (SC). The Ld. AR further submitted that the benchmarking the international transaction pertaining to SLS was upheld by the Tribunal in assessee's own case for A.Ys. 2007-08 to 2009-10. Further, the formula adopted by the assessee for computing SLS cost in the subject assessment year was also accepted by the TPO in remand proceedings for AYs. 2007-08 to 2009-10. The Ld. AR further submitted that the said formula was submitted before the Tribunal during the course of hearing for A.Y. 2007-08 and the Tribunal remanded the matter back to the file of the Assessing Officer/Transfer Pricing Officer to examine the reasonableness of the formula. The TPO, after examining the formula, held the same to be appropriate as it gives higher weightage to the variable component, i.e., the CSR relevant to India and lesser weightage to number of nodes. Further, the TPO has accepted the formula to be appropriate for computing arm's length SLS charge in its orders for A.Ys. 2008-09 and 2009-10. The Ld. AR further submitted that since the TPO himself has accepted the factual matrix and the formula on remand, the issue involved in the subject assessment year being identical to that in immediately preceding years, the Ld. DR cannot be allowed to allege at this stage that the formula, accepted by the TPO as reasonable and appropriate in earlier assessment years, is required to be modified. The Courts have repeatedly held that it is incorrect to arrive at different conclusion on similar set of facts and circumstances. The Ld. AR relied upon the following decisions:

- Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC)
- CIT vs. Neo Polypack Private Limited (2000) 245 ITR 492 (Del)
- NGC Networks (India) Pvt. Ltd. vs. ACIT (2011) 10 Taxman 140 (Mum.)

The Ld. AR further submitted that it is well settled and consistently upheld by the Courts that the Department cannot sit in the armchair of the businessman

and question the business rationale or commercial wisdom of the businessman. At the outset, the Ld. AR submitted that the assessee's risk/responsibility in respect of goods and parts procured from its AE is low because the AE bears the risk relating to products during the warranty period. However, once, the warranty period is over, the assessee itself is obligated to provide necessary support services to its customers for which it has entered into AMC contracts or for the equipment /parts which have been procured locally. In this regard, the Ld. AR submitted that the DRP passed its directions for the subject assessment year on December 16, 2014 on which date the TPO's order October 26, 2016, passed pursuant to the decision of the Tribunal for A.Y. 2007-08, verifying the formula for computing the SLS charge and accepting it as reasonable/ appropriate was not available. In other words, there was no occasion before the DRP for analyzing the formula, which was the domain of TPO upon remand by the Tribunal. Thereafter, the TPO in A.Ys. 2008-09 and 2009-10, consistently accepted the formula used by the assessee for computing SLS charge. Thus, there being no change in the facts or in the formula, alleging inappropriateness of the formula, once the Department has consistently approved the same is not warranted. In view of the above, the Ld. AR submitted that the international transaction of receipt of SLS services basis the accepted allocation formula deserves to be accepted and the adjustment be deleted.

8. We have heard both the parties and perused the material available on record. As regards Ground No. 1 & 2 are general in nature and Ground No. 4 is consequential in nature. Therefore, Ground No.1, 2 are dismissed. As regards Ground No. 4 the same is not adjudicated at this juncture as the same are consequential in nature. As regards to Ground No. 3, 3.1 to 3.6, it is pertinent to note that the TPO as well as DRP has followed the TPO's order for Assessment Year 2007-08 which was contested before the Tribunal and the Tribunal has remanded back the matter to the file of the TPO. This was again for Assessment Year 2008-09 & 2009-10 has been remanded back to the file of

the TPO. The Tribunal in A.Y. 2007-08 held as under:

“29. We have carefully considered the rival submissions in the light of material placed before us. The facts have already been discussed in detail in the above part of this order. Mainly it is the case of the Revenue that assessee does not require to make any payment with regard to Second Line Support (SLS) obtained by it from its AE. As against that it is the case of the assessee that SLS services have been availed to minimum level where the assessee on its own is not able to resolve the problem as most of the problems have been resolved at the level of the assessee. It has been submitted that during the relevant assessment year the assessee has received customer service request to the tune of 11,108 out of which 1,245 have been addressed for SLS. No doubt that equipment has been supplied by the parent company of the assessee and the parent company of the assessee, who has supplied the instruments, can only resolve the complicated problems. During the warranty period, it is the liability of the parent company to resolve the problem without any charge. Therefore, reference to the warranty period is not relevant in the present case more particularly as AMC itself stands on different footings for which separate revenue has been received by the assessee. Supply of equipments is one thing and service of the equipments after the warranty period is another thing. In commercial words it is well known that after the expiry of warranty period the AMC is obtained for the faultless working of the equipment. The assessee is receiving separate consideration on account of AMC after the expiry of the warranty period and the figures relating to that have already been mentioned. The gross revenue has been earned at Rs. 118,94,04,863/- . To ensure the faultless working of the equipment the assessee, as a matter of business expediency, has to resolve all the problems relating to that instrument. The assessee has its own set up for resolving the minor problems which it has resolved at its own. The assessee is aware of the fact that it has to incur expenditure with respect to each of the SLS invoked by him, therefore, from the data it is clear that minimum number of problems have been referred to

the AE. Therefore, for availing the services of the AE for resolving the complicated problems the prerogative is of the assessee and the Department cannot say that the assessee does not require to make any payment for resolving the complicated problems of the instruments. Anybody obtaining AMC must have intention that the instrument which he is operating for his use should run continuously and effectively and it is for that purpose only one would avail AMC. Anticipating that some problems may not be resolved at the level of the assessee's own staff available with as the said staff may not be having the skill upto the level which requires to resolve complicated problem and in turn assessee adopted a mode according to which it is ensured that all the problems arising in the functioning of the instrument are efficiently resolved. That decision of the assessee is business expediency of the assessee so that the customers to whom the instruments have been supplied remain satisfied about the functioning of the equipment. Therefore, we find no force in the claim of the Revenue that for availing these services the assessee was not required to make any payment. The assessee has the right to enter into an arrangement according to which its business interests are protected and for protection of such interests of the business of the assessee, it has entered into an agreement with its AE. To hold that is the prerogative of the assessee to see and decide the business expediency, the reference can be made to the decision of Hon'ble Delhi High Court referred to by learned AR in the case of CIT vs. EKL Appliances Ltd. (supra) wherein their Lordships have observed that even Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in view of the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. Whether or not to enter into the transaction is for the assessee to decide. It will be relevant to reproduce these observations of their Lordships which is contained in para 22 of the order as under:

“22. Even Rule 10B(1)(a) does not authorize disallowance of any

expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in view of the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorized.”

30. *Keeping in view the aforementioned decision of Hon’ble Delhi High Court, we are of the opinion that it will be wrong to hold that the expenditure should be disallowed only on the ground that these expenses were not required to be incurred by the assessee. At the same time it has also to be seen that whether the price paid by the assessee is at arm’s length. The term ‘arm’s length price’ has been defined in section 92F which means a price which is applied or proposed to be applied in the transactions between the persons other than Associate Enterprises in uncontrolled conditions. It is only because of that their Lordships in the aforementioned decision have observed that “the quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses”. Earlier to this they have observed that Revenue cannot disallow any expenditure on the ground*

that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative. Looking into observations of their Lordships, it has to be held that reasonableness of an expenditure has not been excluded from determination. Here it can be mentioned that the formula, which was placed before the Assessing Officer, TPO, and DRP, was different from the formula according to which the impugned amounts have been calculated. For the first time it is brought to our notice that an amended formula has been adopted to calculate the impugned amount. Though it is the case of the learned AR that this formula is more logical and reasonable but at the same time this formula has not been examined by the authorities below. Though on the face of it the arguments of learned AR appear to have force but unless the new formula is also confronted to the Assessing Officer, it will be wholly unjustified to uphold the correctness & reasonableness of this formula which has been placed before us for the first time. Therefore, we consider it just and proper to restore the issue regarding determination of arm's length price with regard to the impugned transaction to the file of the Assessing Officer redetermine the same in the light of the aforementioned observations. Needless to observe that assessee should be given reasonable and sufficient opportunity of hearing for presenting its case.

31. *With these observations, grounds relating to addition of Rs. 31,34,48,369/- are disposed of and are considered to be partly allowed for statistical purposes."*

The facts are identical and no distinguishing facts in the present Assessment Year was made either by the Ld. AR or by the Ld. DR. Therefore, it will be appropriate to remand back this issue to the file of the TPO with the direction to taken into account, the Tribunal's direction for Assessment Year 2007-08, 2008-09 & 2009-10 as well as the order giving effect to the Tribunal's order for Assessment Year 2007-08 passed by the TPO and decide the issue afresh as per facts and law. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Therefore, Ground No. 3

and 3.1 to 3.6 are partly allowed for statistical purpose.

9. In result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 14th June, 2019.

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

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 14/06/2019
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	23.05.2019
Date on which the typed draft is placed before the dictating Member	23.05.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	14.6.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	14.6.2019
Date on which the fair order comes back to the Sr. PS/PS	14.6.2019
Date on which the final order is uploaded on the website of ITAT	14.6.2019
Date on which the file goes to the Bench Clerk	14.6.2019
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	