

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "J", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA Nos.1067/M/2016  
Assessment Year: 2011-12**

**ITA Nos.4713/M/2016  
Assessment Year: 2013-14**

M/s. SNC Lavalin Engineering India Pvt. Ltd., Trade Star, 2 <sup>nd</sup> Floor, A-Wing, J.B. Nagar, Andheri – Kurla Road, Andheri (E), Mumbai – 400 059 <b>PAN: AAACR 1966M</b>	Vs.	Dy. Commissioner of Income Tax-Cir.11(2)(2), IT Office, R.No.421, Aayakar Bhavan, M.K. Road, Mumbai – 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Ajit Kumar Jain, A.R.  
Shri Siddhesh Chaugule, A.R.

Revenue by : Shri Manish Kumar Singh, D.R.

Date of Hearing : 11.03.2019

Date of Pronouncement : 06.06.2019

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The above titled two appeals have been preferred by the assessee against the assessment orders dated 18.11.2015 & 27.03.2017 passed in pursuance to the of the direction of Dispute Resolution Panel [hereinafter referred to as the DRP] relevant to assessment year 2011-12 & 2013-14 respectively.

**ITA No.4713/M/2017 (A.Y. 2013-14)**

2. The grounds raised by the assessee are as under:

"1. On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer ('TPO') and the learned Assessing Officer ('AO') under the directions of the Hon'ble Dispute Resolution Panel ('DRP') erred in making an adjustment of Rs. 15,56,02,007 (under Chapter X of the Income-tax Act, 1961 ('the Act'));

2. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO erred and the Hon'ble DRP further erred in upholding the action of the Ld. TPO/AO in not providing any reasons to show that the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied before making an adjustment to the income of the Appellant.

3. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under the directions of the Hon'ble DRP erred in disregarding the transfer pricing study report maintained by the Appellant as per Section 92D of the Act read with Rule 10D of the Income tax Rules, 1962 and the various submissions made by the Appellant;

4. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under the directions of the Hon'ble DRP erred in arbitrarily rejecting Internal Transactional Net Margin Method as the most appropriate method to benchmark the International transaction pertaining to engineering consultancy services.

5. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under the directions of the Hon'ble DRP erred in arbitrarily rejecting audited and certified segmental profit and loss account duly maintained by the Appellant, without appreciating the fact that the expenditure has been apportioned between AE and Non-AE segment by adopting appropriate allocation keys.

6. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under the directions of the Hon'ble DRP erred in incorrectly computing the margin earned by the Appellant from its international transaction.

7. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under the directions of the Hon'ble DRP erred in rejecting the plea for use of multiple year data as specified in Proviso to rule 10B(4) of the Rules;

8. On the facts and in the circumstances of the case and in law, without prejudice to the other grounds of appeal, the learned TPO and the learned AO under the directions of the Hon'ble DRP erred in not allowing adjustments in accordance with the provisions of Rule 10B of the Income Tax Rules, 1962.

9. On the facts and in the circumstances of the case and in law, the learned AO erred in mentioning 'Business Income (as per revised return of income)' as Rs. 3,19,51,113 as against 'Income from Business and Profession' of Rs. 1,38,70,575, as per revised ROI, thereby erroneously computing the total income at Rs. 18,32,45,111;

10. On the facts and in the circumstances of the case and in law, the learned AO erred in short granting credit for tax deducted at source ('TDS') to the extent of Rs. 13,38,651;

11. On the facts and in the circumstances of the case and in law, the learned AO consequentially erred in levying excess interest under section 234B of the Act."

3. At the time of hearing the Ld. Counsel of the assessee submitted that ground No.1, 2 & 3 are general in nature whereas ground No.7, 8 & 9 were not argued and ground No.10 & 11 were not pressed. Therefore, ground No.1,2,3,7,8,9,10 & 11 are dismissed.

4. The only effective issue which requires adjudication has been raised in ground No.4, 5 & 6 whether the international transactions of the assessee with the AEs have been rightly benchmarked on the basis of transactional net margin method (hereinafter called as TNMM).

5. The facts in brief are that the assessee is part of the SNC Lavalin Group, having expertise in oil and gas, mining and metallurgy and power including hydro and power transmission. The assessee is engaged in providing engineering services like detailed engineering services to various projects like refinery petrochemical plants etc. and also to power projects. During financial year under consideration, the assessee provided services to the associate enterprise (hereinafter referred to as AE) and unrelated third parties (non AEs). The assessee has also availed engineering services from the AE which were utilised for providing services to the non AEs. Considering the international nature of transactions with the AE, the AO referred the transactions as filed in audit report in form No.3CEB to

Transfer Pricing Officer (hereinafter referred to as TPO) to compute the arm length price (hereinafter referred to ALP) under section 92CA(1) of the Act after obtaining prior approval of Commissioner of Income Tax. During the year the international transactions by the assessee with the AE were as under:

Sr. No.	International Transactions	Amount (in INR)	Transaction in Dispute
1.	Provision of engineering and ancillary Services	7,82,44.321	Disputed
2.	Availing of Engineering Services	58,51.968	Disputed
3,	Recovery of Expenses	1,70,75,547	No Dispute
4.	Reimbursement of Expenses	2,88,27.078	No Dispute

6. The transaction as stated in Sl.No.1 & 2 of the table above were aggregated and benchmarked together under the head provisions of engineering and ancillary services and the aggregation approach of the assessee is not under dispute. The international transactions were benchmarked by the assessee by applying internal cost plus method to justify the arm length price. The gross margin by the assessee from the said international transactions with AE was at 56.15% whereas the gross margin earned by the assessee from transaction with non AEs was at 49.09%. The Ld. TPO rejected the internal cost plus method and assessee is not disputing the same. The assessee alternatively also benchmarked the international transactions using TNMM in the transfer pricing study report (hereinafter called as TPSR). Both internal TNMM and external TNMM were used in the TPSR for benchmarking purposes.

7. In order to benchmark the international transaction using the internal TNMM as most appropriate method, the assessee segmented its financials into AEs and non AEs transactions by segregating the transactions relating to revenue and cost accordingly. Accordingly, the revenue of Rs.7,82,44,321/- from AEs and corresponding cost was taken in the AE segment. Similarly, the cost of availing engineering services from AEs of Rs.58,51,968/- was also required to be clubbed with Non AEs segmental as these services were provided to the non AEs from whom the assessee generated a revenue of Rs.10,00,10,642/-. In other words, the revenue of Rs.10,00,10,642/- was generated by taking services from AEs for which the assessee incurred expenses of Rs.58,51,968/-. Thus third party transaction cost involved in this was also required to be clubbed. According to the segmentation which was part of TPSR the segmental margin under AE segment was 22.36% and non AE segment was (-)4.95%. Therefore, the transaction with AE segment was considered to be at arm length price.

8. During the course of TP proceedings the Ld. TPO called upon the assessee for audited segmental profitability along with allocation keys which was submitted by the assessee vide letter dated 05.11.2014 and is reproduced as under:

Particulars	Allocation Keys	Associated Enterprise ('AE' Segment)	Non-AE Segment	Total
<u>Income</u>				
Income from Engineering Services	Actuals	195,841,760	300,978,217	496,8 19,977

Total Income (A)		195,841,760	300,978,217	496,819,977
<u>Expenditure</u>				
Direct Expenses	Actuals	21,849,669	10,491,048	32,340,717
Salaries & Allowances	Actuals	68,480,159	103,215,475	171,701,634
Eiigg. Professional fee	Actuals	15,641,748	3 1 ,824,465	47,466,213
Selling and Marketing Expenses	Man hours	6,893,071	22.5 84, 1) 6	29,477,186
Administrative and Other Expenses	Man hours	44,093,916	136,348,883	180,442,799
Depreciation	Man hours	3,088,512	10,8.37,642	13,926,153
Sundry Balances Written Off	Actuals	-	1,366,882	1,366,882
Total Operating Cost (B)		160,053,075	316,668,510	476,721,585
Net Profit (A-B)		35,788,685	(15,690,293)	20,098,392
Net Cost Plus markup (%)		22.36	(4.95)	
MAN Hours		125,940	343,333	

9. The assessee also furnished audited project wise man hour details of AE segment and non AE segment. The assessee also filed a reconciliation at the instance of TP of segmental furnished in TPSR with international transactions as reported in form No.3CEB which is reproduced as under:

Particulars		Amount (Rs.)
Sales to AEs disclosed in the Accountant's Report in Form No.3CEB	(A)	78,244,321
Recovery of expenses from	(B)	17,075,547

AEs as disclosed in the Accountant's Report in Form No.3CEB		
Total Income transaction with AEs as disclosed in the Accountant's Report in Form No.3CEB	(C)= (A+B)	95,319,868
Sales disclosed in the AE segment in the Segmental Profit and Loss a/c	(D)	195,841,760
<b>Difference</b>	(E)=(D-C)	-100,521,892
Sales to non-AEs pursuant to which services were received from AEs	(F)	100,010,642
Sales made to Indian AEs	(G)	511,250
<b>Total</b>	(H)=(F+G)	100,521,892
<b>(H-E)</b>		Nil

10. The TPO raised several points and objections which were addressed by the assessee in letter dated 23.12.2014. Further, on request from TPO a revised segmental was prepared in which revenue of AE was taken in the AE segment however, the related party transactions on cost side was shifted to non AE segment which is reproduced as under:

Particulars	Allocation Keys	Associated Enterprise ('AE') Segment	Non-AE Segment
<b><u>Income</u></b>			
Income from Engineering Services	Actuals	95,831,118	400,988,859
<b>Sub- Total (A)</b>		<b>95,831,118</b>	<b>400,988,859</b>
<b><u>Other Income</u></b>			
Interest Income	Non-operating	-	-
Sundry Balances Written Back	Non-operating	-	-

Sales Tax Refund	Non-operating	-	-
Misc. Income (Incl. Sale of Assets)	Non-operating	-	-
Sub- Total (B)		-	-
Total Income (A)		95,831,118	400,988,859
<b><u>Expenditure</u></b>			
Direct Expenses	Actuals	16,239,592	16,101,125
Salaries & Allowances	Actuals	29,208,535	142,493,099
Engg. Professional fee	Actuals	4,982,526	42,483,687
Selling and Marketing Expenses	Man hours	3,963,756	25,513,431
Administrative and Other Expenses	Man hours	24,641,178	155,801,621
Depreciation	Man hours	1,829,193	12,096,961
Sundry Balances Written Off	Actuals	-	1,366,882
Total Operating Cost (B)		80,864,780	395,856,805
Net Profit (A-B)		14,966,338	5,132,054
Net Cost Plus markup (%)		18.51	1.30
MAN Hours		67,439	403,834

11. The margin in the AE segment was 18.51% and non AE segment was 1.30% and therefore transactions were still at arm

length price. Pertinent to state that the assessee has maintained time sheet for recording hourly spent on each project by every employee of the assessee which were also audited. The Ld. TPO rejected the internal TNMM on the basis that details of man hours were not verifiable and audited segmental submitted by the assessee can not be verified as it seemed to be self serving document and consequently benchmarked the international transactions by applying external TNMM by taking the following comparables:

Sr. No.	Company Name	Mar 2011 NCP
1	Development Consultants Pvt. Ltd.	17.93
2	Mahindra Consulting Engineers Ltd.	30.96
3	Computronics Financial Services (I) Ltd.	29.58
4	Tata Consulting Engineers Ltd.	27.70
	<b>Arithmetic Mean (%)</b>	<b>26.54</b>

12. The Ld. TPO computed the assessee's margin on entity level at .006% and the PLI computation of the assessee by the TPO is reproduced as under:

Particulars	Amount (Rs.)	Amount (Rs.)
Sales		47,92,28,430
Misc income		5,92,215
Operating Income (OI)		47,98,20,645
Direct Expenses	3,23,40,717	
Salaries & Allowances	17,17,01,634	
Engg. Professional fee	4,74,66,213	
Selling and Marketing Kxpemes	2,94,77,186	
Administrative and Other Expenses	18,18,72,571	
Depreciation	1,39,26,153	
Less: interest expense	(55,563)	

Total Operating Cost (OC)		47,67,28,911
Net Profit (OF) -OI -OC		30,91,734
OP/OC (%)		.006%

13. Thereafter, the TPO observed that PLI of the assessee was .006% which was lower than the arithmetic mean of the PLI of the comparable which is 26.54% and thus computed the arm length transaction with the AE as under:

ALP of the transactions	
Provision of services to AE	7,82,44,321
Operating profit/Cost Ratio of the assessee	0.006%
Operating cost of the assessee on AE export	7,82,39,627
Operating profit/Cost Ratio of the comparables	26.54%
ALP of the export sale to AE	9,90,04,424
<b>Difference ALP &amp; Export Sale to AE</b>	<b>2,07,60,103</b>
(+5%) of export sale to AE	39,12,216

14. Thereafter, the final order of the assessment was framed by the AO under section 143(3) read with section 144C(13) of the Act dated 23.12.2015 by making an addition of Rs.2,07,60,103/-.

15. The Ld. DRP rejected the appeal of the assessee and upheld the adjustment made by the TPO by holding and observing as under:

**“5. Discussion and Directions of DRP:**

5.1 This ground of objection relates to the proposed adjustment by the AO/TPO u/s 92CA(3) of the Income Tax Act, 1961 aggregating to Rs. 2,07,60,1037-. The assessee company is providing engineering services to AEs as well as certain third party clients. The assessee company has in its TP study report compared the Net Cost Plus mark-up earned by the SNC, India from transactions with its AH with the NCP mark-up earned from transactions with Non-AEs. The calculation of the margins earned by the assessee from the AH clients and Non-AE clients submitted by the assessee company are summarised as below:-

Particulars	Total AE	Total Non-AE	Allocation
Income			
Income from Engineering Services	1,95,841,760	300,978,217	Actual
Total Income (A)	195,841,760	300.978,217	
Expenditure			
Direct Expenses	21,849,669	10,491,048	Actual
Salaries & Allowances	68,486,159	103,215,475	Actual
Engg. Professional fee	15,641,748	31,824,465	Actual
Selling and Marketing Expenses	6,893,071	22,584,116	Man hours
Administrative and other Expenses	44,093.916	136,348,883	Man hours
Depreciation	3,088,512	10.837,642	Man hours
Sundry Balances Written Off	-	1,366.882	Actual
Total Cost (B)	160,053,075	316,668,510	
Net Profit (A-B)	35,788,685	(15,690,293)	
Net Cost Plus markup(%)	22.36	(4.95)	
Manhours	125,940	345,333	

5.2 Based on the above table and by applying Internal TNMM the assessee company has stated that the NCP mark-up for AE is 22.6%. while the NCP mark-up for Non-AE is (-) 4.95%. thereby holding that the international transactions are at arms length.

5.3 The DRP has gone through the TPO's order and the various submissions made by the assessee company, during the course of DRP proceedings and has noted various discrepancies and anomalies in the working of the assessee company.

5.4 A perusal of the above table reveals that the total sales of engineering services to the AE is amounting to Rs.19,58,41,760/-, however this sales figure is not matching with the sales disclosed in Form No. 3CEB. As per the Form No. 3CEB, the sales to the AEs are only amounting to Rs. 7,82,44,321/-. The assessee was duly

confronted with these discrepancies and a reconciliation was filed by the assessee company, which is placed at page 610 & 611 of the assessee's paper book. A perusal of the said reconciliation reveals that an amount of Rs.10,00,10,642/- is actually sales made to the Non-AEs and not to the AE's, as claimed in the segmental data of the AE & non-AE (Refer to the table above). On this amount of sales made to the non-AE worth Rs. 10,00,10,642/-, the assessee company has just received service charges from the AEs. The DRP is of the view that an amount of Rs.10,00,10,642/- is actually sales made to Non-AE which has been categorized as sales made to AE in the above table. It is basically because of this wrong categorization that the Net Cost Plus mark-up for the AE is 22.36% while the Net Cost Plus mark-up for Non-AE segment is (-)4.95%. The assessee company was duly confronted with the fact that there is a huge difference in the NCP mark-up of AE (22.36 %) and Non-AE (-4.95%). However, the assessee company has failed to give any plausible reason for such a huge gap in the NCP mark-up of the two segments.

5.5 If the Non-AE sales amounting to Rs. 10,00,10,642/- are correctly reflected in the above table, the correct NCP mark-up for the AE or Non-AE segment will be as below:

Particular	AE	Non-AE
(A) Income from Engineering services	9,53,19,868	40,09,88,859
(B) Total cost	16,00,53,075	31,66,68,510
Net Profit (A-B)	-6,47,33,207	8,43,20,349
Net Cost Plus mark-up(%)	-40.44%	26.62%

5.6 Thus, the above revised AE and Non-AE. NCP mark-ups reveal that the sales to the AE are not at Arm's Length. It may be noted that while drawing up the above table, no changes have been made in the figures of the cost allocated to the AE & non-AE segment. The reason for this lies in the fact that the assessee company has during the course of the DRP proceedings vehemently stated that it is based on actual man-hours of each segment. However, in the absence of relevant details and evidences on record and the above discussion, the DRP is in no position to give a finding that the segmental provided by the assessee company are reliable.

5.7 Further, the DRP has noted that the details of man hours, which has been taken as a basis for allocation of the expenses amongst the AE & non-AE segment is not verifiable. Thus, the fact is that the segmental results of the AE & Non-AC submitted by the assessee company remained unverified. A perusal of the tabular segmental data presented by the assessee company clearly reveals that the Non-AE segment has been heavily loaded with large amount of expenses on the basis of man hour. This has resulted in an increase in the net NCP mark-up for the AE segment and a consequent substantial decrease in the NCP mark-up of Non-AE segment. It is seen that the income from engineering services of the Non-AE segment is 1.53 times of the AE segment, but the selling and marketing expenses, administrative and other

expenses and depreciation are 3.27 times, 3.09 times and 3.51 times respectively. The assessee company has also submitted a detailed chart of the employees, wherein the same employee has worked for both the AE and Non-AE segment. The assessee company was duly confronted with the fact that the data given in the paper book on the man hour basis for the AE & non-AE segment is unverifiable & is not supported by any documentary evidence. In view of these circumstances, the AO has rightly noted in the assessment order that the data of the man hours on the basis of which allocation has been made is a self serving document.

5.8 In view of the fact that there is material discrepancy between the data contain in the audited Form 3CEB and the segmental AE/Non-AE data furnished during the proceedings coupled with the fact that hardly any expenses has been allocated to the AE segment on the basis of man hours, the Internal TNMM analysis done by the assessee company has been correctly rejected by the TPO. After rejecting the Internal TNMM analysis, the TPO has rightly benchmarked the international transactions based on External TNMM by comparing the margins earned by the assessee company from its AH and the broadly similar comparable companies.

5.9 The TPO has rejected 2 out of the 4 comparables taken by the assessee company, the first one is M/s Babcock Borsig Softech Pvt. Ltd and the second is M/s Desein Pvt. Ltd. It is an undisputed fact that the data provided by the assessee company which is placed from Page 276 onwards of the assessee's paper book only data for the F.Y. 2009-10 relevant to A.Y. 2010-11 has been placed before the DRP. Similarly, in the case of M/s Desein Pvt. Ltd.. the data which has been placed in the assessee's paper book from Page 313 onwards relates to F.Y. 2011-12 relevant to A.Y. 2012-13. Thus, for both the companies, the assessee company could not produce data for the current year under consideration. In view of this, the DRP is of the view that the TPO has rightly rejected the 2 comparables, namely M/s Babcock Borsig Softech Pvt. Ltd and M/s Desein Pvt. Ltd.

5.10 The TPO has also considered 2 new comparables namely M/s Computronics Financial Services (I) Ltd. and Tata Consulting Engineers Ltd. The objection of the assessee company regarding Computronics Financial is that the company is engaged in data processing. However, the material placed on record reveals that the company is engaged in providing consultancy services and hence, functionally similar to the assessee company. In this regard, the data of Computronics placed in the paper book on page 626 & 627 is relied upon.

5.11 In the case of Tata Consulting Engineering Ltd., the only objection of the assessee company is that the turnover of the comparable is 9 times of the turnover of the assessee company. In this regard, it is stated that in the TP study report the assessee company has not applied any upper turnover filter. As far as turnover is concerned, the assessee company has applied a lower turnover filter of sales less than Rs. 1 crore, only. Since, the assessee company has itself not applied any upper turnover filter in its TP study report it cannot find fault with the TPO's comparable on the basis of high turnover. Further, there are a large number of decisions of various Appellate Authorities, wherein it is held that if the turnover of the comparable is same then turnover is not a criterion to reject particular comparable.

5.12 This argument of the assessee of high turnover has been considered by the Hon'ble ITAT Mumbai, in the case of M/s Willis Processing Services (India) Pvt Ltd in ITA No.4547/Mum/2012, wherein it was held that turnover is not a criteria as prescribed under the Rule 10B(2) for selecting the comparables. It is a settled proposition that the decisive factor for determining inclusion or exclusion of any comparable is prescribed under Rule 10B(2), which does not specify any such factor of turnover on the basis of which a particular entity can be included or excluded in the list of comparables. When the assessee has not made out a case as to how the high or low turnover has influenced operating margin, then a comparable cannot be rejected solely on the basis of high turnover.

5.13 In view of this, the PLI working by the TPO by taking 4 comparables at 26.54% is held to be correct. In view of the above mentioned facts and circumstances of the case, the DRP is of the view that adjustment of Rs.2,07,60,103/- made by the TPO does not require any interference and the ground of objection of assessee company in this regard, is rejected."

16. The Ld. A.R. submitted before the Bench that assessee has benchmarked the international transaction by applying internal TNMM. The Ld. A.R. stated that assessee has prepared audited segmental working of transactions with AE and transactions with non AE on the basis of audited man hour details and also drew our attention to the page No.118 to 249 of the paper book wherein the comprehensive details of man hours were filed. The Ld. A.R. submitted that preparation of audited segmental on the basis of man hour details is the most scientific method. The Ld. A.R. submitted that assessee has two offices one in Delhi and second in Mumbai. Details of man hour in both the offices were bifurcated into AE and non AE segment. Details whereof are filed at page No.84 to 86 of the assessee's paper book. The Ld. A.R. submitted that TPO rejected the segmental at para 6.1.3 by observing that details of man hours taken as basis of allocation is not verifiable as it seems to be self serving document and accordingly TNMM analysis was rejected and discarded. The Ld. A.R. submitted that on the stance of TPO to furnish the revised working of segmental by taking only AE sales in AE segment and

by taking AE cost in non AE segment which is reproduced above even the margin of AE segment and non AE segment were Rs.18.51% and 1.30% which were even rejected by the TPO without even assigning any reason whatsoever. The Ld. A.R. submitted that the assessee has benchmarked the international transactions under internal TNMM method by comparing the margin earned from AE transactions with margin earned from non AE transactions which is part of the TPSR and according to the said method the margin under AE segment was 22.36% and non AE was (-) 4.95% and thus the transaction with AE segment was considered to be at arm length. The Ld. A.R. referred to the third member ruling of the Mumbai, ITAT in the case of M/s. Tecnimont ICB Private Ltd. vs. Addl. CIT in ITA No.4608/M/2010 wherein the Hon'ble Third Member has held that internal TNMM has to be preferred over external TNMM for benchmarking the international transactions. The Ld. A.R. submitted without prejudice, it is pertinent to submit that segmental bifurcation as directed by TPO suffered from basic flaws. Controlled transaction is being compared with another controlled transaction i.e. the AE segmental has revenue from sales to AE and non AE segment has cost related to AE segment. Therefore such a comparison is against the principle of transfer pricing provisions. The Ld. A.R. submitted that in the aforesaid decision the Hon'ble Third Member has held that it is evident that rule 10B(e) vividly referred to making a comparison of net profit margin with some comparable uncontrolled transaction and there is no reference of making comparison of assessee's international transaction with comparable controlled transaction. It was observed by the Hon'ble Third Member that

comparable may be internal or external but in any case such comparable must be that of uncontrolled transactions or number of such uncontrolled transactions and thus stated that the approach of the TPO is fallacious and wrong. The Ld. A.R. submitted that the DRP has misunderstood the segmental results and shifted the third party revenue from AE segment to non AE segment. However, the DRP has failed to appreciate that if third party revenue is shifted from AE segment to non AE segment then corresponding cost is also required to be shifted from AE segment to non AE segment and thus the DRP has misunderstood the issue of internal segmental and has recomputed the figure which are beyond accounting norms. Finally the Ld. A.R. submitted that the internal segmental of the assessee may be accepted and the international transaction of the assessee may be accepted at arm length price.

17. The Ld. D.R., on the other hand, relied on the order of TPO and DRP by submitting that the application of internal TNMM is not based on scientific and reliable man hours as has been done by the assessee as same could not be verified on the basis of records produced by the assessee. Under these circumstances, the Ld. D.R. submitted that the only option left with the TPO was to recompute margins by repositioning the sales and cost of AEs and non AEs which was rightly done and upheld by the DRP. So far as the allocation of revenue from non AEs to AE and non allocation of cost relating thereto as AEs are concerned, the Ld. D.R. prayed before the Bench that the DRP finding may be upheld in view of the non reliable benchmarking done by the assessee.

18. We have heard the rival contentions and submissions of both the parties and perused the material on record. We observe that the assessee has maintained the AE and non AE segmental which were duly audited and applied internal TNMM for benchmarking the international transaction with the AEs. We observe from the above that TPO has rejected the internal TNMM method for benchmarking the international transaction as done by the assessee on the ground that the man hour allocated to AEs and non AEs were not reliable. Whereas, on the other hand, we find that the assessee has maintained comprehensive records of manpower utilisation and allocation which were duly audited and there is no deficiency in that. The Ld. TPO adopted the external TNMM for benchmarking the international transaction and computed the arithmetic mean at 26.54% and the assessee's margin on entry level was calculated at .006% as reproduced above. The method adopted by the Ld. TPO is arbitrary and can not be accepted. Similarly, the Ld. DRP has also gone a step ahead by just mixing up the data of AE and non AEs and thereby misunderstanding the audited segmental and recasting the same by shifting the revenue receipts from non AE of Rs.10,00,10,642/- to non AE segment however, not shifting the corresponding cost which was paid to AE for the services rendered to Non AE and thus DRP rejected the request of the assessee that the margin as per audited segmental i.e. 22.36% may be accepted at arm length price. However, DRP computed the margin of AE segment and non AE segment at (-) 40.44% and 22.26% respectively. We observe that DRP has wrongly rejected the internal TNMM and upheld the external TNMM as applied by the TPO and thus we are not in agreement with the

order passed by the DRP on this issue. Accordingly, we hold that the assessee has rightly benchmarked the transaction with the AE on the basis of audited segmental by following internal TNMM. Accordingly, we are inclined to set aside the order of Ld. DRP and direct the Ld. TPO/AO to delete the disallowance.

19. In the result, the appeal of the assessee is allowed.

**ITA No.1067/M/2016 (A.Y. 2011-12)**

20. The issue raised by the assessee in this appeal is identical to one as decided by us in ITA No. 4713/M/2016 wherein the internal TNMM has been held to be most appropriate method to bench the international transactions with AE. Therefore our decision in ITA No. 4713/M/2016 would, mutatis mutandis, apply to this appeal as well. Accordingly the appeal of the assessee is allowed.

21. In result both the appeals of the assessee are allowed.

**Order pronounced in the open court on 06.06.2019.**

**Sd/-  
(Saktijit Dey)  
JUDICIAL MEMBER**

**Sd/-  
(Rajesh Kumar)  
ACCOUNTANT MEMBER**

Mumbai, Dated: 06.06.2019.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.