आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "सी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.412/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Honeywell Automation India Limited,
56/57, Hadapsar Industrial Estate,
Hadapsar, Pune-411013.

PAN : AAACT3904F .... अपीलार्थी/Appellant

Vs.

JCIT, Range-7,
Pune. .... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.568/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

DCIT, Circle-7,
Pune. .... अपीलार्थी/Appellant

Vs.

M/s. Honeywell Automation India Limited,
56/57, Hadapsar Industrial Estate,
Hadapsar, Pune-411013.

PAN : AAACT3904F .... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.287/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

M/s. Honeywell Automation India Limited,
56/57, Hadapsar Industrial Estate,
Hadapsar, Pune-411013.

PAN : AAACT3904F .... अपीलार्थी/Appellant

Vs.

DCIT, Circle-11,
Pune. .... प्रत्यर्थी / Respondent

Assessee by : Shri Kamal Sawhney &
Shri Rhea Amar
Revenue by : Shri A. K. Modi

सुनवाई की तारीख / **Date of Hearing : 06.05.2019**		घोषणा की तारीख / **Date of Pronouncement: 19.07.2019**

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are three appeals under consideration. The appeals in ITA No.412/PUN/2014 and ITA No.568/PUN/2014 are the cross appeals filed by the assessee as well as by the Revenue against the order of the Assessing Officer/TPO/DRP for the assessment year 2009-10. The appeal in ITA No.287/PUN/2015 is filed by the assessee against the order of the Assessing Officer/TPO/DRP for the assessment year 2010-11.

2. First, we shall take up the said cross appeals relating to the assessment year 2009-10 for adjudication.

ITA No.412/PUN/2014 - A.Y. 2009-10 – By Assessee

3. The grounds raised by the assessee are as under :-

> *"Based on the facts and circumstances of the case, Honeywell Automation India Limited (hereinafter referred to as the 'Appellant') respectfully craves leave to prefer an appeal against the order passed by the Joint Commissioner of Income Tax, Range - 7 ('AO') dated 22 January 2014 (received by the assessee on 22 January 2014 in pursuance of the directions issued by Dispute Resolution Panel (DRP), Pune, dated 7 December 2013 under section 253 of the Income-tax Act, 1961 ('Act') on the following grounds, which are without prejudice to each other:*
>
> *On the facts and in the circumstances of the case and in law, the Hon'ble DRP and consequentially the learned AO/TPO has:*
>
> *A. General*
>
> *1. erred in assessing the total income at Rs 1,39,19,22,100 as against income of Rs 81,32,90,469 (as per the revised return of income filed by the Appellant on 19 August 2010);*

B. ***Denial of tax holiday claim under section 10A of the Act amounting to Rs. 25,91,52,428 with respect to Software Technology Parks ('STP') operations of the Appellant and tax holiday claim under section 10AA of the Act amounting to Rs. 25,19,84,775 with respect to Special Economic Zone ('SEZ') operations of the Appellant***

2. *erred in re-computing the deduction under section 10A at Rs 7,99,56,120 as against Rs 33,91,08,548 claimed by the Assessee in its return of income, thereby denying deduction under section 10A to the extent of Rs 25,91,52,428 and in re-computing the deduction under section 10AA at Rs 7,77,44,688 as against Rs 32,97,29,463 claimed by the Assessee in its return of income, thereby denying deduction under section 10AA to the extent of Rs 25,19,84,775.*

Invoking the provisions of section 10A(7) and section 1OAA(9) read with section 80IA(10) in the Appellant's case

3. *erred in invoking the provisions of section 10A(7) and section 10AA(9) read with section 80IA(10) in the Appellant's case, on the ground that transactions between the Appellant and its associated enterprises are arranged to produce more than ordinary profits;*

4. *failed to appreciate that provisions of section 10A(7) and section 10AA(9) read with section 80IA (10) could only be invoked where both the connected parties are taxable in India and there is tax erosion in India due to 'arrangement' between those persons and not otherwise;*

Usage of arithmetic mean as per the transfer pricing study report for determination of 'ordinary profits' for the purpose of section 10A(7) and section 10AA(9) read with section 80IA(10)

5. *erred in law by adopting the arithmetic mean of operating margins earned by comparable companies as per the transfer pricing study report as benchmark of 'ordinary profits' computed for the purposes of section 10A(7) and section 10AA(9) read with section 80IA(10);*

Appellant earning 'more than ordinary profits'

6. *erred in concluding that the profits earned by the Appellant are more than ordinary profits from its STP operations, without appreciating and considering the business model under which the Appellant operates;*

7. *failed to appreciate that the onus is on the Department to prove with substantial evidences that the business of the Appellant is 'arranged' so as to have supernormal profits and mere inferences without substantiating the allegations would not suffice;*

8. *should have appreciated that the Appellant has offered to tax similar level of profits in earlier and later years in case of STP operations and hence the Appellant could not be considered to have earned 'more than ordinary profits' during the year under appeal;*

C. *Restricting amount of denial of deduction under section 10A(7) and section 10AA(9) of the Act*

9. *Without prejudice to the Grounds 2-8, the learned AO should have considered 63.05% profit earned by I C S A (India) Limited (being one*

of the comparable company accepted by the TPO) to be ordinary profit and should have accordingly, restricted the amount of denial of deduction under section 10A(7) and 10AA(9) of the Act.

D. ***Short grant of credit for taxes deducted at source ('TDS')***

10. erred in granting short credit of TDS of Rs 1,51,20,075 while considering credit for taxes paid by the Assessee

E. ***Transfer Pricing adjustment*** *under provisions of Chapter X of the Act in respect of international transactions.*

11. erred in conforming the arm's length price for international transaction in respect of availing the intra-group services, i.e. Administrative and Managerial Services by the Appellant from its Associated Enterprise ('AE') at Rs. NIL as against the sum of Rs. 6,74,94,431/- as determined by the Appellant and thereby proposing an adjustment of Rs. 6,74,94,431/-.

12. erred in holding that the Appellant failed to furnish adequate evidences to demonstrate that the services were actually rendered by the AE.

13. erred in passing general remarks on the evidences filed, instead of giving specific finding on each and every evidences filed.

14. Without prejudice to above, the Ld. AO / TPO and the Hon'ble DRP have neither asked, during the assessment/appellate proceedings, nor mentioned, what further evidences were required, and thus failed to give sufficient and reasonable opportunity to the Appellant.

15. erred in alleging that no tangible or direct benefit was derived by the Appellant from receipt of the intra-group services.

16. erred in not appreciating that the AE followed a uniform compensation methodology for charging for the intra-group services which was based on the costs incurred by it in rendering the services that was thereafter allocated to the various service recipient group entities (including the Appellant) on a prudent and rational basis.

17. erred in alleging that certain intra-group services were in the nature of shareholder activities, ignoring the fact that all the shareholder/ stewardship activities were separately identified by the AE and no amount for such activities had been paid by the Appellant.

18. erred in alleging that the parent company is double charging the Appellant, i.e. charging the Appellant twice for the same service, without appreciating the fact that parent company has actually rendered different services.

19. erred in disregarding the Services Agreement entered into by the Appellant with the AE, in questioning the commercial expediency for availing such services and failed to appreciate the jurisprudence that the Ld. AO/ TPO cannot go beyond his powers in questioning commercial decision of the Appellant.

20. erred in not applying any method prescribed by the Income-tax Rules, 1962, to determine the arm's length price of the intra-group services, i.e. Administrative and Managerial Services and failed to appreciate

that the Appellant in its transfer pricing documentation has benchmarked the said intra-group services, by using the Transaction Net Margin Method ('TNMM').

21. erred in initiating penalty proceeding under section 271(1)(c) of the Act without appreciating that the Appellant has neither concealed nor furnished any inaccurate particulars of the its income."

4. **Ground no.1** is general and the same is dismissed.

5. **Grounds no.2 to 9** relate to the denial of tax holiday u/s 10AA of the Act on the ground that the margins shown by the assessee are higher than the margins of the comparables.

6. The relevant facts and the arguments raised by the ld. Counsel for the assessee in this regard includes that the assessee is an indirect subsidiary of Honeywell Inc. USA and is engaged in the business of providing software services and industrial automation manufacturing to its group concerns. The assessee being SEZ unit since A.Y. 2006-07 is located at Pune. Like in earlier assessment years, the assessee claimed deduction u/s 10AA of the Act of Rs.25,19,84,775/- for the year under consideration. The discussion given in para 7 to 7.5 of the assessment order is relevant in this regard. At the end of the assessment, invoking the provisions of section 10AA(9) r.w.s. 80IA(10) of the Act, the Assessing Officer granted only partial claim of deduction on the ground that the assessee claimed substantially higher amount of deduction reporting the profits more than the 'ordinary profits'.

7. Similar issue was raised by the Assessing Officer in the earlier assessment year i.e. A.Ys. 2006-07, 2007-08 and 2008-09 too and invoked the similar provision of the Act and denied the similar deduction partly for similar reasons. On the close connection issue, the Assessing Officer held that the US entity holds 81% of the shareholding of the assessee and thereby demonstrated the "close connection" with the assessee. As a result of such close connection, assessee generated substantially higher profits compared to that of the comparable companies. This is the consistent stand of the Revenue in all the said assessment years. This issue travelled to the file of the CIT(A).

8. Like in the past, the CIT(A) confirmed the stand of the Assessing Officer and held that the legal requirements i.e. 'close connection' and the 'arrangement' are satisfied. This issue was the subject-matter of adjudication by the Tribunal in assessee's own case for the assessment years 2006-07, 2007-08, 2008-09 & 2011-12 vide the orders of the Tribunal i.e. AY 2006-07 (ITA No.18/PUN/2011), AY 2007-08 (ITA No.2103/PUN/2012), AY 2008-09 (ITA No.359/PUN/2013) and AY 2011-12 (ITA No.446/PUN/2016). The Tribunal in the relevant appeals allowed the issue in favour of the assessee.

9. Mentioning the above background facts and developments of the issues, ld. Counsel for the assessee submitted that the issue in the present appeal stands now covered by the said decisions of the Co-ordinate Bench of the Tribunal and the facts are similar to that of the earlier assessment

years. In this regard, ld. Counsel filed a written submission and the contents of para 7 to 11 of the said written submission are relevant.

10. On the other hand, ld. DR for the Revenue relied heavily on the orders of the Assessing Officer/TPO/DRP.

11. We heard both the sides on this issue of denial of deduction u/s 10AA of the Act and find relevant to extract the said para 7 to 11 of the written submission filed by the assessee before the Bench and the same reads hereunder :-

> *"7. The issue in regards the above is squarely covered by the judgment of this Hon'ble Tribunal in the assessee's own case for AY 2006-07 (ITA 18/Pune/2011), AY 2007-08 (ITA No. 2103/PN/2012), AY 2008-09 (ITA No. 359/PUN/2013) and AY 2011-12 (ITA 446/Pun/2016).*
>
> *In ITA 18/Pune/2011 order dated 25.02.2015 this Hon'ble Tribunal has held that:*
>
> *i. Para 23 ……. The existence of substantial or more than ordinary profits by itself does not sufficiently empower the AO to disregard them and determine the profits which he may consider to be reasonably deemed to have been derived therefrom …… in other words the import of the expression "so arranged" has to be read in conjunction with the legislative intent that there should not be any abuse of tax concession by manipulation of profits. Therefore, section 10A(7) r.w.s. 80-IA(10) of the Act can be invoked only where it is shown that the course of business is so arranged which reflects an abuse of tax concession whereby the business transacted between two entities is so arranged, which produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business.*
>
> *ii. The mere existence of (i) a close connection between the assessee and the other person; and, (ii) more than ordinary profits is not sufficient to justify invoking of section 80-IA(10) of the Act in the absence of there being any material to say that the course of business between them is "so arranged" to abuse the tax concessions granted u/s 10A of the Act by manipulating profits between associated persons.*
>
> *8. It was on this basis that the Hon'ble Bench came to the conclusion that the revenue was unable to justify the business between the assessee and the AE had been arranged to produce more than ordinary profits.*

> *"Ostensibly, in the present case, the Revenue would have to justify that the course of business between assessee and the associated enterprises has been 'so arranged' which produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business with the intention of abusing the tax concession granted in section 10A of the Act."*

9. Further, in regards the expression 'arranged' the Hon'ble Bench held that a mere agreement between the assessee and the associated enterprises for transacting business is not enough to invoke section 80-IA(10) of the Act. The same is provided herein for easy reference:

"Para 27 ……. In other words, as per the Revenue, the existence of close connection and high profits would lead to a presumption that there is an "arrangement" within the meaning of section 80-IA(10) of the Act. The aforesaid plea, in our view, not only belies the language of section 80-IA(10) but also the legislative intent which seeks to curtail the abuse of tax concession by manipulation of profits between associated concerns. Therefore, an arrangement which is referred to in section 10A(7) r.w.s. 80-IA(10) of the Act has to be one which is prefaced by an intention to abuse the tax concessions, as per the intendment of the legislature. Therefore, existence of a mere agreement to do business is not enough to fulfill the requirement of section 10A(7) r.w.s. 80-IA(10) of the Act in the context of the words "the course of business between them is so arranged".

10. In addition to the above, reliance is also placed on a ruling of the coordinate bench of this Hon'ble Tribunal in the case of Eaton Industries Pvt. Ltd. v. ACIT (ITA 2544/Pune/2012 Order dated 30.10.2017) wherein it was held that:

> *"Once the arm's length price of international transactions of provision of Engineering Design Services has been accepted... by the TPO in the transfer pricing order, then the Assessing Officer cannot re-examine the said transaction to allege that the assessee had earned more than ordinary profits as compared to those of comparables Absent any evidence brought on record by AO to show that the man-hour rates charged by assessee were excessive and also to establish that there was an arrangement between the assessee and its AEs to charge such excessive rates, which resulted in more than ordinary profits in the hands of assessee, ITAT holds that "Where the assessee had adopted a price mechanism based on third party comparables, which in turn, has been accepted by the TPO to be at arm's length price, there is no merit in the order of Assessing Officer in applying the provisions of section 10A(7) r.w.s. 80IA(10) of the Act"*

11. Further, this issue also stands settled in favor of the appellant by the judgment of the jurisdictional High Court in the case of CIT v. Schmetz India Pvt. Ltd. (ITA No. 1382/2013 dated 24.06.2015) wherein the Hon'ble Court has held at para 8 as under:

> *"So far as question (a) & (b) are concerned, we find that the Tribunal has considered the entire evidence and on facts come to the conclusion*

> *that the profits earned by Kandla division of the respondent-assessee is not abnormally high due to any arrangement between the respondent-assessee and its German Principal. The Tribunal correctly held that extraordinary profits cannot lead to the conclusion that there is an arrangement between the parties. This would penalize efficient functioning. Further, the authorities have also recorded a finding that the industrial sewing machine needles imported and traded by the Mumbai division are different from those manufactured & exported by the Kandla division. Consequently, this also negatives any arrangement between the parties to show extraordinary profits in respect of its Kandla division so as to claim deduction under section 10A of the Act. These are findings one of fact. The appellant-revenue have not been able to show that the findings are perverse or arbitrary. In the circumstances, questions (a) and (b) as formulated by the appellant/revenue do not raise substantial questions of law in the present facts and are therefore dismissed."*
>
> *It is also pertinent to note that the SLP preferred by the Revenue department against the above ruling of the Hon'ble High Court has been dismissed - SLP CC No 2013/2016 dated 08.02.2016."*

12. From the above, it is evident that it is a settled legal proposition of law that in such cases of allegation of excessive/extraordinary profits, the onus is on the Revenue to demonstrate. Mere existence of an 'arrangement', 'close connection', more than 'ordinary profits' are not enough, the Assessing Officer needs to establish the malafide in such allegations. The Assessing Officer failed to demonstrate any malafide in matters relating to assessee price mechanism fixing of the price per man hour other invoices etc. Similar wild allegations of the Assessing Officer were dismissed by the Tribunal in assessee's own case for many earlier assessment years (supra). While giving orders, the Tribunal relied on jurisdictional High Court judgement in the case of Schmetz India (P) Ltd. (supra) and the SLP filed by the Revenue against the said judgements stands dismissed too. Considering the above written submissions and the decision of the Tribunal in assessee's own case for the assessment years

2006-07, 2007-08, 2008-09 & 2011-12, we are of the opinion that it is not a fit case for invoking the said provisions of section 80IA(10) r.w.s. 10AA(9) of the Act. Accordingly, the **grounds no.2 to 9** raised by the assessee are allowed.

13. **Ground no.10** relates to short credit of the TDS paid by the assessee. At the outset, ld. Counsel for the assessee submitted that this issue may be remanded to the file of the Assessing Officer with a direction to grant credit of the TDS after due verification of the TDS certificates and the amounts mentioned therein.

14. On hearing both the sides, we find ground no.10 is required to be remanded with the direction to the Assessing Officer to examine the TDS credits/certificates etc after granting reasonable opportunity of being heard to the assessee. In the remand proceedings, the Assessing Officer shall examine the issue, verify the claims and allow the tax credit as per law. Accordingly, **ground no.10** is allowed for statistical purposes.

15. **Grounds no.11 to 20** relate to the TP adjustments. Briefly stated the relevant facts of this issue include that the assessee paid Rs.6,74,94,431/- towards intra-group services i.e. **administrative and managerial services** and the same were not allowed by the TPO/DRP for failure to pass the test of demonstrating the proof of rendering of services. In TP study, TPO considered the said claim of expenses at Nil. The DRP confirmed the said ALP adjustments to the international transactions.

16. On this issue, ld. Counsel for the assessee submitted that this issue is also covered in favour of the assessee by the order of Pune Bench of the Tribunal in **assessee's own case** for the assessment year 2008-09 vide ITA No.359/PUN/2013 dated 02.11.2018. Further, bringing our attention to the Advanced Pricing Agreement (APA) at page 1 of the Paper Book, ld. Counsel submitted that it was agreed upon between the assessee and the CBDT vide agreement dated 30th March, 2017 on the ALP of the intra-group managerial and administrative services. In fact, this agreement is relevant for the assessment years 2015-16 to 2019-20. However, referring to the decision of the Tribunal for the assessment year 2008-09 (supra), ld. Counsel submitted that the Tribunal decided this issue and remanded the said issue to the file of the Assessing Officer/TPO for comparison of the facts of the present case with data for the assessment years 2015-16 to 2019-20 covered by the said APA. The Assessing Officer is directed to examine the facts and conclude the applicability with the said agreement between the assessee and the CBDT to the facts of the present case for the assessment year 2009-10 too. In this regard, ld. Counsel brought our attention to contents of para 4 to 6 of the said order of the Tribunal (supra).

17. On hearing both the sides on this issue of applicability of Advanced Pricing Agreement for the year under consideration, we find the said issue

was already adjudicated by the Co-ordinate Bench of the Tribunal in assessee's own case (supra) as per the discussion given in para 4 to 6 and remanded the same to the file of the Assessing Officer for fresh examination. We find it relevant to extract the said para 4 to 6 of the said order of the Tribunal (supra) and the same are extracted hereunder :-

> *"4. Regarding the TP issues, i.e. Ground Nos. 14 to 17, Ld. Counsel for the assessee submitted that the issues raised in these grounds are identical both on facts and on law to that of the issues settled vide the Advanced Pricing Agreements (APA) made u/s.92CC of the I.T. Act, 1961. Bringing our attention to the Advanced Pricing Agreement, Ld. Counsel submitted that it was agreed upon between the assessee and the CBDT vide agreement dated 30-03-2017 on the AP of the Intra-group Managerial & Administrative Services and the same is relevant for the A.Yrs. 2015-16 to 2019-20.*
>
> *5. Referring to the issues in the present assessment year under consideration, i.e. A.Y. 2008-09, Ld. Counsel fairly submitted that this year is not actually covered by the said agreement. However, he brought our attention to various decisions as well as the facts relevant to the year under consideration and submitted that the issue stands covered by the said Advanced Pricing Agreement for this year also. In this regard, he filed the following written submissions :*
>
> > *"On March 2017, the Appellant has entered into a unilateral APA with CBDT for the transaction of Availing of centralized management, administrative and other services from Honeywell International Inc., USA (H11) (Transaction I). The Agreement is valid from A.Y. 2011-12 to A.Y. 2014-15 (rollback period) and AY.2015-16 to 2019-20 (APA Period).*
> >
> > *Though, A.Y. 2008-09 is not covered under the APA, the Appellant wishes to submit that the facts of the said transaction are similar to the facts as covered in the APA year.*
> >
> > *Under the APA, Transactional Net Margin Method ('TNMM') was selected the most appropriate method and the AE; i.e. H11 as tested party."*
>
> *5.1 Further, bringing our attention to the decision of Coordinate Bench of the Tribunal in the case of Abicor Binzel Production (India) Pvt. Ltd. Vs. Dy.CIT in ITA Nos.2253 to 2255/PUN/2014 and ITA No.139/PUN/2014, Ld. Counsel for the assessee submitted that in this case the APA is found applicable to the earlier assessment years in those cases, as the case may be, when the facts of the A.Y. 2008-09 are similar to that of the assessment year covered in the APA. For the sake of convenience, the same are extracted here as under :*

1. *In the case of Abicor Binzel Production (India) Pvt. Ltd. Vs. Dy.CIT (ITA Nos. 2253 to 2255/PUN/2014*

"In the light of fact that assessee has entered into APA, the Coordinate Bench of the Tribunal in the assessment year 2009-10 has directed Assessing Officer to decide the issue in accordance with the terms and conditions of APA as nature of transactions are similar.
..

If they are of similar nature, the same can be decided afresh in line with the terms and conditions of APA. The appeals of the assessee are thus, allowed for statistical purpose with aforesaid directions."

2. *In the case of Abicor Binzel Production (India) Pvt. Ltd. Vs. Dy.CIT (ITA No.139/PN/2014)*

"The assessee has made a request since it had entered into Advance Pricing Agreement (APA) with CBDT covering nine years from AY 2010-11 to AY 2013-14 under rollback provisions and from AY 2014-15 to 2018-19 being the balance APA period, similar proposition should be applied to the year under consideration also as the international transactions entered into by the Assessee with its AEs in the instant assessment year are identical to the international transactions which were part of the APA proceedings. …The grounds of appeal raised by the assessee are thus, allowed."

3. *In the case of Ranbaxy Laboratories Ltd. Vs. ACIT (ITA No.196/Del/2013)*

"it is clear that if the international transactions are same in the year of APA and the year for which rollback is applied, roll back is allowed to the assessee on certain normal condition of filing return of income, Report of accountant and a request in specified format. Offcourse, it has also normal revenue safeguarding exclusion clauses of income going below the returned income and where ITAT has passed an order on the subject. Therefore even the rules provide that if the International Transactions are same in the year of APA and in the past year than both the parties, assessee and CBDT may agree for applying the agreements contained in APA agreed.

…

Needless to say that Ld.TPO/AO shall give due weightage to the Advance Pricing agreement signed by the assessee with CBDT on other issues also (other than the issue of selection of tested party) for determination of ALP and in case of any divergent view, the assessee shall be granted an adequate opportunity to substantiate any claim/arguments on the manner of determination of ALP.

> *4. In the case of RBS India Development Centre Pvt. Ltd. VS. ACIT (ITA No.5538/Del/2010), the TPO did not take into consideration other income which was in the nature of operating income. The AR placed the APA before the Hon'ble Bench and pointed out that the other income was part of operating income as per the terms of the Agreement. The issue was restored back to the file of the Ld. AO/TPO for verification of the assessee's claim."*

> *6. Considering the above, we are of the opinion that the matter should be remanded to the file of AO/TPO, as the case may be, for the purpose of comparing the facts of the case and the relevant terms of agreement between the CBDT and the assessee. AO is directed to examine the facts closely and conclude the assessee on the issue of applicability of APA to the assessee's case for the year under consideration in principle. AO is also directed to consider the above cited decisions of Pune Bench of the Tribunal as well as Delhi Bench of the Tribunal for the legal proposition of deciding the issue in the light of APAs. Accordingly, the grounds Nos. 14 to 17 raised by the assessee are allowed for statistical purposes."*

18. Considering the parity of reasoning, we remand this issue to the file of the Assessing Officer with identical direction of the Tribunal in assessee's own case for assessment year 2008-09 (supra). Thus, the **grounds no.11 to 20** raised by the assessee are allowed for statistical purposes.

19. **Ground no.21** being the one relating to the penalty u/s 271(1)(c) of the Act, constitutes a premature one. Accordingly, the same is dismissed as premature.

20. In the result, the appeal of the assessee in ITA No.412/PUN/2014 for the assessment year 2009-10 is partly allowed for statistical purposes.

ITA No.568/PUN/2014 - A.Y. 2009-10 – By Revenue

21. The grounds raised by the Revenue are as under :-

> *"1. Whether Hon'ble DRP was correct in law and facts in deleting an adjustment of Rs.5,13,26,406/- to be recovered as a mark-up on the arms*

length price of the international transaction in respect of ***recovery of expenses****.*
2. Whether Hon'ble DRP was correct in law and facts in deleting the addition even when the Assessee has rendered ITES to its AE, it should have charged appropriate markup on the costs incurred. The Assessee company's role /functions performed, utilized and risks undertaken were the same and identical to the FAR of other engineering services rendered to the AE.
3. Whether Hon'ble DRP was correct in holding that CUP method is preferred on TNMM method even when no mark up was charged on operating costs."

22. Briefly stated the relevant facts include that the TPO made adjustments of Rs.5,13,26,406/- to be recovered as a mark-up on the ALP of the international transaction in respect of recovery of expenses. During the proceedings before the TPO, the assessee submitted that the same constitutes **"reimbursement"** of expenses. However, the said reimbursement of expenses of the assessee was dismissed. The assessee furnished the details of such recovery of expenses and also furnished the evidences and invoices/documents and submitted before the DRP that there is no requirement of any adjustment on account of reimbursement. The principle of mark-up is not applicable to the reimbursement expenses. In this regard, ld. Counsel made various submissions before the DRP and the DRP granted relief to the assessee as per the discussion given in para 2.2.1 to 2.2.10 of his order.

23. Aggrieved with the above relief granted by the DRP, the Revenue is in appeal before the Tribunal with the above extracted grounds.

24. The ld. Counsel for the assessee filed a note raising the assessee's arguments and justifying the directions of the DRP. For the sake of completeness, the said arguments and directions are extracted as under :-

"3 Assessee's Arguments

3.1 The Assessee provides software engineering services to its AEs for which it bills the AEs at agreed hourly rate.

3.2 The Para 4 of the hourly service agreement entered into by the assessee with the AE, states that the incidental expenses will be reimbursed to assessee by the AEs. The relevant extract of the agreement is provided below for your goodself's reference (page 879 to 890 of PB):

> *"Expenses of HAIL incurred or arising out of the Engineering Services hereunder shall be reimbursable to the extent provided under HAlL's standard conditions and policy for foreign business travel and foreign assignments. The conditions included in the standard shall be constructed to ensure that HAIL's employees are reimbursed for reasonable travel and living costs arising out of the Engineering Services hereunder".*

3.3 During the course of provision of these services, the employees of the Assessee have also to travel abroad to understand the requirements of the project and what is expected from the software that needs to be developed for that particular project, etc.

3.4 As a matter of administrative convenience, such travel expenses are initially paid for by the assessee (to independent third parties like, travel agents, hotels, taxis etc.) and then recovered from the AEs as reimbursements. All such travel expenses are related to the software segment. Such expenses are incurred on behalf of the AEs and no service element is involved in the same. (AE invoices -Page 1561 to 1608 - listing of invoices / Page 1609 to 1657 for invoices)

3.5 The Assessee has also recovered the expenses of similar nature from third parties in relation to software projects. The details of recoveries made from third parties, along with copy of invoices are enclosed (Non AE invoices -1658- listing of invoices /Pages 1659 to 1704 for invoices for Non AEs)

3.6 Thus the charges received by the assessee for rendering software services to AEs are in the form of fixed hourly rates plus the overseas travel costs of the employees.

3.7 Though the assessee does not follow cost plus model for charging the AEs for software services, for the purpose of benchmarking the service charges received as agreed hourly rate plus overseas travel costs translate into cost plus margin of 74.56% (as against arithmetical mean of 18.08 percent earned by of the comparable companies).

3.8 So the recovery of expenses transaction is not an independent transaction but it is inextricably linked with the hourly service charge and therefore both the hourly service charge and the recovery of expenses need to be aggregated for benchmarking the software development charges received by the assessee from the AE.

3.9 Rule of Consistency - The transaction was undisturbed in previous year i.e. AY 2008-09 (Refer handout) and the subsequent year i.e. AY 2010-11 (Refer Page 42 of the TP Order for AY 2010-11)

3.10 In the DRP directions, the Hon'ble DRP agreed with the following contentions made by the Assessee:

- *Expenses recovered are in the nature of 'Travel and Living': the TPO has allowed the recovery of expenses in the nature of 'Travel and Living' and 'Payroll Taxes' amounting to Rs. 13,48,70,771 and alleged*

that other recoveries of Rs. 28,90,16,937 were in the nature of provision of services.
However, the DRP noted as follows (Page 19 of the DRP Directions):
".. but on examination of the invoices attached with respect to other recoveries, the recoveries were also made on travelling cost, accommodation per diem cost... '
Therefore, the balance amount are also in the nature of travelling cost, accommodation, per diem cost and does not warrant any mark-up (Refer page 1561 onwards).

- *It would be pertinent to note that the assessee merely made payments to independent third party (namely, travel agents, hotels, taxis etc.) and then recovered the same from AEs on a cost-to-cost basis.*
- *The software segment was held to be at arm's length: The software segment in which the recovery of expenses transaction pertains (and also aggregated with) was considered to be at the aim's length at Transactional Net Margin Method level.*
- *The TPO has accepted it in the TP Order for AY 2010-11 - The TPO had issued a Show cause notice for AY 2010-11 for recovery of expenses (Refer handout) and the Assessee filed a reply for the same (Refer handout). The TPO accepted the assessee's submission and proceeded to hold the recovery of expenses at arm's length (Refer TP Order page 41-42 of the handout).*
- *The TP Orders for subsequent years - The TPO has not challenged the transaction in any of the subsequent years for the Assessee."*

25. The ld. Counsel also read out the contents of para 2.2.4 to 2.2.10 of the order of the DRP.

26. We heard both the sides on this issue and perused the said note on one side and the contents of para 2.2.4 to 2.2.10 of the order of the DRP on the other. Perusing the said para 2.2.4 to 2.2.10 of the order of the DRP, we find that the DRP not only relied heavily on the order of the ITAT, Delhi Bench in the case of DCIT vs. M/s. Cheil Communications India Private Limited, ITA No.712/Del/2010 dated 30.11.2010, but also followed the principle of "rule of consistency" applied by the TPO in the assessee's own case for the assessment year 2008-09. Considering the above, we are of the opinion the order of the DRP is fair and reasonable on this issue and it does

not call for any interference. Thus, the grounds raised by the Revenue are **dismissed**.

27. In the result, the appeal of the Revenue in ITA No.568/PUN/2014 for the assessment year 2009-10 is dismissed.

ITA No.287/PUN/2015 - A.Y. 2010-11 – By Assessee

28. In this appeal, the assessee raised multiple/various grounds, which are almost similar/identical to grounds raised by the assessee in ITA No.412/PUN/2014 for the assessment year 2009-10. For the sake of brevity, we do not reproduce the grounds raised by the assessee in this appeal but we proceed to adjudicate the grounds/issues in the following manner.

29. **Ground no.1** is general and the same is dismissed.

30. **Grounds no.2 to 9** relate to the denial of tax holiday u/s 10A(7), section 10AA(9) r.w.s. 80IA(10) of the Act. These grounds have already adjudicated by us while deciding the grounds no.2 to 9 raised in appeal of the assessee in ITA No.412/PUN/2014 for the assessment year 2009-10. Therefore, our decision in grounds no.2 to 9 in ITA No.412/PUN/2014 shall apply *mutatis-mutandis* to these grounds no.2 to 9 in ITA No.287/PUN/2015 for the assessment year 2010-11. Thus, the grounds no.2 to 9 raised by the assessee are allowed.

31. **Grounds no.10 to 21** relate to the TP adjustments. These grounds have already adjudicated by us while deciding the grounds no.11 to 20 raised in appeal of the assessee in ITA No.412/PUN/2014 for the assessment year 2009-10. Therefore, our decision in grounds no.11 to 20 in ITA No.412/PUN/2014 shall apply *mutatis-mutandis* to these grounds no.10 to 21 in ITA No.287/PUN/2015 for the assessment year 2010-11. Thus, the grounds no.10 to 21 raised by the assessee are allowed for statistical purposes.

32. **Ground no.22** is not pressed and the same is dismissed as not pressed.

33. **Ground no.23** relates to the addition of Rs.18,56,131/- on account of reconciliation of receipts with Form 26AS.

34. On hearing both the sides, we find an identical issue came up before the Tribunal in assessee's own case vide ITA No.446/PUN/2016 for the assessment year 2011-12 dated 06.03.2019; where, the Tribunal set aside the said issue to the file of the Assessing Officer for fresh adjudication. For the sake of completeness, the operational portion of the order of the Tribunal (supra) is extracted hereunder :-

> *"16. We have perused the case records and analyzed the facts and circumstances with regard to this issue. Herein, the assessee has stated that whatever receipts are acquired, they have reflected in their books of account. If there is any discrepancy, it is upon the Department to reconcile the same and that burden is shifted to the Department. However, while saying so, the assessee accepts TDS components involved in the transactions. If Form 26AS reveals Rs.100/- as received by the assessee while in the books account, the assessee has recorded Rs.90/- and there is discrepancy of Rs.10/-. However, for getting the benefit of TDS, the assessee accepts TDS with regard to Rs.100/- and not Rs.90/-. If the TDS benefit is availed by the*

assessee of Rs.100/- then it is also onus on the assessee to prove and reconcile the said difference of Rs.10/- as to how Rs.90/- is recorded in their books of account.

The Ld. AR of the assessee heavily placed reliance upon the decision of Mumbai Bench of the Tribunal in ITA No.4828/Mum/2012. That on perusal of the said order, we find that it is substantially different on the facts from the present case of the assessee. In the case before the Mumbai Bench of the Tribunal, the assessee has in his possession the TDS certificate based on which it wants relief credited from Revenue Authority. There was discrepancy only to the extent of credit reflected in the Form 26AS. In the instant case, while the assessee is claiming benefit of entire TDS components involved in the transactions, however, records different amount in his books of account as appearing in Form 26AS. As examined earlier, since the assessee is taking benefit of entire TDS components, the burden of reconciliation also lies on the assessee.

17. In the interest of justice, we remand this matter to the file of AO for adjudication and direct the assessee to provide reconciliation of statement between Form 26AS and their books of account. The burden is clearly on the assessee since on TDS component benefit, they are taking it entirety. If the assessee is not able to reconcile the difference, then the AO may add the amount in difference to the income of the assessee.

With these observations, this ground is set aside to the file of the AO for adjudication. Needless to say, principle of natural justice should be followed by the AO while adjudicating this issue. Thus, ground No.14 raised in appeal by the assessee is allowed for statistical purpose."

35. Following the parity of reasoning, we remand this issue to the file of the Assessing Officer for fresh adjudication. The assessee is also directed to provide reconciliation of statement between Form 26AS and their books of account. Needless to say, the Assessing Officer shall decide the issue after granting reasonable opportunity of being heard to the assessee. Thus, the ground no.23 is allowed for statistical purposes.

36. **Ground no.24** relates to **short credit of the TDS** paid by the assessee. This issue has already adjudicated by us while deciding the ground no.10 raised in appeal of the assessee in ITA No.412/PUN/2014 for the assessment year 2009-10. Therefore, our decision in ground no.10 in

ITA No.412/PUN/2014 shall apply *mutatis-mutandis* to this ground no.24 in ITA No.287/PUN/2015 for the assessment year 2010-11. Thus, the ground no.10 raised by the assessee is allowed for statistical purposes.

37. **Ground no.25** is premature ground and the same is dismissed as premature.

38. In the result, the appeal of the assessee in ITA No.287/PUN/2015 for the assessment year 2010-11 is partly allowed for statistical purposes.

39. To sum up, the appeals of assessee in ITA No.412/PUN/2014 and ITA No.287/PUN/2015 are allowed for statistical purposes and the cross appeal of the Revenue in ITA No.568/PUN/2014 is dismissed.

Order pronounced on 19th day of July, 2019.

Sd/-	**Sd/-**
(SUSHMA CHOWLA)	**(D. KARUNAKARA RAO)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक Dated : 19th July, 2019.
Sujeet

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The DRP, Pune;
4. The CIT-V (DRP), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**सी**" / DR 'C', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune