

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SMT BEENA A PILLAI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6322/Del/2014
(Assessment Year: 2009-10)

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

Assessee by :	Shri K. M. Gupta, Adv Ms. Chinu Bhasin, AR Ms. Damini Agarwal, AR
Revenue by:	Shri Raman Chopra, CIT DR
Date of Hearing	15/05/2019
Date of pronouncement	14/08/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by AT&T Communications Services India private limited (appellant) against the order of The Deputy Commissioner Of Income Tax, circle 2 (1), New Delhi on 30/10/2014 u/s 143 (3) read with section 144C of The Income Tax Act 1961 determining the total income of the assessee at INR 470472900/- against the returned income of INR 178707586/-. The above assessment order was passed by the learned Assessing Officer pursuant to the direction of the learned Dispute Resolution Panel – 1, New Delhi (DRP) dated 27/8/2014 against the objections filed in the draft assessment order dated 25/11/2013.
2. The assessee has raised the following grounds of appeal:-
 - “1. *Ground No. 1 - No time available with the learned AO for making an order of assessment after excluding the period of limitation*
 - 1.1 *On the facts and in the circumstances of the case and in law, the impugned order of assessment is bad in law and void-ab-initio as the*

same has been framed by the learned AO after the expiry of time limit for completion of assessment as provided in Section 153(1) of the Act.

2. Ground No. 2 - Ad - hoc disallowance of expenses incurred on account of rejection of Master Service Agreement ('MSA')
 - 2.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in making an ad-hoc addition of Rs 15,14,74,737 by holding that 50 percent of the costs reported by the Appellant under the Managed Network Services business segment relate to Liaison and Support Services business segment and should have been billed at a mark-up of 12%
3. Ground No. 3 - Addition on account foreign exchange loss incurred on salary of expatriate employees not charged to AT&T Communication Services International Inc. ('AT&T US')
 - 3.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in making an addition of Rs. 1,87,73,806 for non-recoupment of foreign exchange loss incurred in relation to salary paid by the Appellant to expatriate employees and also in further imputing a mark-up of 12% thereon as per the MSA.
4. Ground No. 4 - Disallowance of Prior Period Expenses
 - 4.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in disallowing an amount of Rs 26,93,256 by treating the same as prior period expenses.
 - 4.2 Without prejudice to above and in the alternative, on the facts and in the circumstances of the case and in law, the learned AO erred in not concluding that if the expenses of 26,93,256 are disallowed on account of the same being relatable to preceding financial year (i.e. FY 2007-08), then the same should be allowed as tax deductible expenditure for the preceding financial year (i.e. FY 2007-08).
 - 4.3 Without prejudice to above, on the facts and in the circumstances of the case and in law, the learned AO erred in disallowing an amount of Rs 3,09,418 (out of the total disallowance of Rs 26,93,256 mentioned above) for which evidence/ details were submitted by the Appellant before the learned AO duly substantiating that these expenses relate to the subject assessment year.
 - 4.4 Without prejudice to the above, the learned AO has erred in disallowing Rs 3,09,418 on the basis that the expenditure, being road tax and MCD charges relatable to the car taken on lease by the Appellant, should be capitalised with the cost of the car, without taking cognizance of the fact that the car is not owned by the Appellant and has not been capitalised for income-tax purposes.
5. Ground No. 5 - Addition on account of non-charging of mark-up on support service charges billed to AT&T Global Network Services India Private Limited ('AGNSI')
 - 5.1 On the facts and in the circumstances of the case and in law, the learned AO erred in making addition of Rs. 1,39,41,228 on account of non-charging of mark-up on support service charges billed to AGNSI, an Indian affiliate of the Appellant.

6. *Ground No. 6 - Disallowance of year-end accruals on account of excess provisioning, non-submission of supporting documents and/ or non-deduction of tax at source thereon under section 40(a) of the Act*
 - 6.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in making disallowance of expenses, amounting to Rs 10,18,94,025, (represented by year-end accruals by alleging excess provisioning, non-submission of supporting documents and/ or non-deduction of tax at source thereon) under section 40(a) of the Act.*
 - 6.2 *On the facts and circumstances of the case and in law, the learned AO has erred in holding that reversal of year-end accruals in subsequent year(s) evidences that accruals were created without any basis, which were neither required nor backed by commercial expediency.*
 - 6.3 *On the facts and circumstances of the case and in law, the learned AO has erred in holding that tax was required to be deducted on year-end accruals, which were not only created on an estimated basis but also parties were not identifiable.*
 - 6.4 *Without prejudice to the above, on the facts and circumstances of the case and in law, the learned AO has erred in not holding that since such year-end accruals have been reversed in the subsequent financial years, the same should be allowed as tax deductible expenditure for the subsequent financial years.*
7. *Ground No. 7 - Non-grant of full credit in respect of Tax Deducted at Source ('TPS')*
 - 7.1 *On the facts and in the circumstances of the case and in law, the learned AO has erred in granting credit for TDS of Rs 3,55,05,064 instead of Rs 4,19,02,254 claimed by the Appellant in its revised return of income for the subject AY.*
8. *Ground No. 8 - Levy of interest under section 234B of the Act*
 - 8.1 *On the facts and circumstances of the case and in law, the learned AO has erred in charging interest under section 234B of the Act.*
9. *Ground No. 9 - Initiation of penalty proceedings under section 271(l)(c)*
 - 9.1 *On the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 271(l) (c) of the Act against the Appellant on account of the above adjustments made in the assessment order."*
3. Brief facts of the case is that assessee is a company engaged in the business of telecommunication services, it filed its return of income on 30/9/2009 for assessment year 2009 – 10 declaring total income of INR 1 78707586/-. Draft assessment order in this case was passed on 25/11/2013 wherein the order of the learned transfer-pricing officer was also incorporated.
4. The assessee is a wholly owned subsidiary of AT&T company services International incorporation. Business of the assessee is divided into 3 broad segments of liaison support services business segment, managed network

services business segment and network connectivity services business segment. The assessee has entered into a master service agreement with AT&T USA under which it provides market updates liaison and administrative support services along with other source support services to its overseas group companies and is compensated on a cost plus basis at a markup of 12% for the impugned financial year. These services are classified as liaison and support services (LSS) business segment. In this segment, the assessee is also rendering services to AT&T global network services India private limited wherein it provides business support services in respect of support functions such as human resources, finance, tax, legal et cetera. In the managed network services business segment assessee provides the services of the management of the network of its customers including design, implementation of India network, including provision of necessary equipment, configuration, security, capacity and problem management, contingency planning and disaster recovery. It also provides monitoring, analyzing, diagnosing, interpreting all pertinent network statistics performance indicators on a routine basis. It provides the services to the customers of the overseas group entities. In the network connectivity services business segment it provides services to its customers revenue is earned and cost incurred in relation to the customer premises-based equipment sold to the customer is recorded.

5. On the returned income, draft assessment order u/s 144C read with section 143 (3) of the income tax act 1961 was passed on 25/11/2013 determining the total income of the assessee at INR 5 95944520/-. The assessee aggrieved with the order of the learned assessing officer preferred objections before the learned DRP that passed its direction on 27/8/2014. Further During the course of assessment proceedings the learned assessing officer issued the detailed questionnaire to the assessee and found complexity in the accounts and directions were issued for special audit u/s 142 (2A) of the income tax act. The learned assessing officer proposed the special audit of the assessee as per his letter dated 26/3/2013 which was approved as per letter dated 31/3/2013 and consequently special auditor u/s 142 (2A) of the income tax act was conducted. Consequent to that assessment order u/s 143 (3) read with section 144C of

the income tax act 1961 was passed by the learned assessing officer. The assessee aggrieved with that order has preferred this appeal before us raising the ground stated herein above.

6. The ground number 1 and 4 of the appeal were not pressed at the time of the hearing and therefore it is dismissed.
7. Ground number 7 of the appeal is against the non-grant of full credit in respect of the tax deducted at source. The assessee claimed the tax credit of Rs. 41902254/- instead of that the learned assessing officer has granted the credit of only INR 3 5505064/-.
8. After hearing the parties on this issue, we direct the learned assessing officer to verify and grant the credit of the tax deduction at source to the assessee, as claimed, if the certificates are in proper form. The learned assessing officer may examine them and allow the credit in accordance with the law. Accordingly, ground number 7 of the appeal of the assessee is allowed.
9. Ground number 8 of the appeal is with respect to the levy of interest u/s 234B of the income tax act, which is consequential in nature and therefore it is dismissed.
10. Ground number 9 of the appeal is with respect to the initiation of penalty proceedings u/s 271 (1) (c) of the income tax act. The above ground is premature and therefore it is dismissed.
11. Ground number 2 of the appeal is with respect to the addition because of rejection of cost allocation as per the master service agreement of the assessee between various segments. As already stated the business of the company is divided into 3 statements and in the master service agreement the assessee is providing services on cost +12% mark up. The learned assessing officer has made an addition of Rs. 15.14 crores by holding that 50 percent of the costs incurred under the MNS business segment relate to the MSA business segment and should have been billed to AT&T USA along with a mark-up of 12%. The learned AO has observed that the assessee has not provided complete details to substantiate that the entire cost pertaining to the services rendered to AT&T US has been billed to it correctly. The ld DRP examined the objection of the assessee, directed assessee to produce relevant details before ld AO, assessee produced certain details.

However, Id AO was not satisfied about the completeness of the same and its bifurcation in salary and non-salary expenses. AO held that assessee has merely submitted the list of the persons in segments, submitted ledgers but substantiated with bills only to some extent. Hence he proceeded that expenditure included in managed network column amounting to INR 2 70490602 is identified as an expenditure which the assessee company has been claimed for its own business other than the business which should have been charged to the associated enterprises. Therefore, according to the AO, as the income of the assessee is based on the cost incurred, as the markup is to be applied on the total cost incurred by the assessee, the cost basis of the assessee for the purpose of markup should be proper, authentic and accurate to determine the income of the assessee. The real cause of disagreement is chart produced at page number 65 to 71 of the assessment order wherein the cost incurred by the assessee has been allocated to the various segment. The learned assessing officer wanted to verify the complete detail of the allocation of the expenditure however the assessee for substantiate it initially before the special auditor and the assessing officer by submitting the ledger accounts. Subsequently it could substantiate some of the non-salary expenditure by the bills and salary expenditure was supported only with the list of employees. Therefore the learned AO held that indirect expenditure are located of INR 2 70490602 in the managed network services should have been partly allocated to the liaison and support services segment of the assessee. Even after the direction of the learned Dispute Resolution Panel the AO was not satisfied based on details furnished by the assessee and held that assessee has failed to substantiate the cost base. In absence of the complete detail the learned assessing officer, special auditor both adopted an ad hoc approach of allocating 50% of INR 2 70490602/- as the cost amounting to INR 1 35245301/- which has escaped from billing to the associated enterprise. Further markup of 12% was charged of INR 1 6229436/- as according to the agreement the assessee is deriving revenue from cost plus markup basis, was further determined and total addition of INR 1 51474737/- was made.

12. The Id AR submitted methodology of booking expenses by the Company under each of the business segments as under :

- i. Each business segment of the Company has its own independent customers for which it renders services and earns revenue there from. For rendering such services, all business segments incur expenses, which are booked under the respective business segment. Thus, every business segment within ACSI is a profit center in itself and incurs costs for performing specific services for its separately identifiable customers, which in turn generates revenues for the respective segment.
- ii. Each business segment is further divided into Business Units ('BU') and each Business Unit has a specific Organization Code assigned to it. The complete list of organizational codes along with the business segment under which they fall is enclosed as *Annexure - 1*.
- iii. Every employee of the Company can be identified to a BU (and consequently to a business segment) based on the Organization Codes assigned to them. The list of employees along with the Organization Code assigned to them basis the BU under which they fall is enclosed as *Annexure - 2*.
- iv. Whenever an employee within a particular BU/ business segment incurs an expense, it is only for the purpose of rendering services specific to his business segment. The booking of an expense is initiated when such employee raises a requisition through a Purchase Requisition ('PR') Form. When the employee raises a PR, the BU/ business segment is automatically identified based on organization code corresponding to such employee. Further, basis the nature of expense, the corresponding expense code is reflected. Hence, for every expense booked a business segment can be identified from the organization code, which is a function of the employee who initiates the booking of an expense and customer to which it ultimately pertains to. Typically, the non-customer related expenses such as (Finance, Tax etc.) are booked under the MSA business segment and recouped from AT&T USA. There are certain common costs such as (legal and professional, forex loss etc.) amounting to Rs. 1.78 crores for Financial Year 2008-09 which have been shown as non-allocable expenses in the Final Segmental Disclosure of audited financials.
 - a. For instance, when an employee under the MNS division books an expense towards repair and

maintenance, it will get booked under the expense code E720. Thereafter, the system automatically generates an organization code ATUKMHG3K that is assigned to the Business Unit of the Employee booking the expense under the MNS division appearing at Page 10 of the enclosed *Annexure – 3*. It may be noted that if an employee of a different business segment (MSA or NCS) incurs a similar expense (i.e. for repair and maintenance); a different organization code would be generated. However, the expense code of E720 would remain constant.

- v. The PR Form generated by an employee under the MNS division then undergoes an approval process, which is also authorized by the MNS division employees. Thereafter a Purchase Order ('PO') for such expense is generated. For instance, in the enclosed Annexure - 3, the POs numbered 20801400, 2080401, 20801402 & 2080403 are placed at Pages 15, 17, 19 and 21. These PO numbers are also reflected in the summary sheet for this voucher (*Refer Page 3 of the Annexure*).
- vi. The PO is then sent to the vendor/ service provider who raises an invoice giving reference to such PO number. In our example, the invoice numbers B32 (Rs. 2,95,922), B33 (Rs. 4,47,870), B34 (Rs. 58,750) and B35 (Rs. 67,500) corresponding to these POs are placed at Pages 14, 16, 18 and 20 of the Annexure.
- vii. Once the invoice is received, an Accounts Payable voucher is generated for making payment of such invoice. In our example, the voucher placed at Page 10 captures the organization code (ATUKMHG3K) as well as the expense code (E720) on the basis of the PR Form which was initially raised by the employee of MNS Business segment. The organization code ATUKMHG3K pertains to MNS division and the expense code E720 depicts expenses towards repair and maintenance – others.
- viii. The expenses booked as depicted above are recorded in the respective ledger account. In our example expenses of Rs. 8,70,041 (sum total of all the 4 invoices) can be traced to the ledger account for "Repair and Maintenance - Others" which is identifiable with the expense code E720. Refer the line items highlighted in the ledger account enclosed as *Annexure – 4*. (*refer page 36 of the Annexure 4*)

13. He submitted that from the above, it is evident that costs are booked under the respective business segments based on whether the expenditure has been incurred for rendering services under the MNS/ NI or MSA division. For e.g. all repair and maintenance cost related to the equipment installed at the premises of a customer is booked under the Non-MSA business segment. Those costs, which are not attributable to rendering of any particular services, are recouped from AT&T USA and charged under the MSA business segment. He thus claimed that there is a well-designed robust procedure for booking of expenses under each of the business segments which has been laid down in the organization because of which there cannot be even an inadvertent error while booking expenses. The moment an employee initiates the requisition of a service, the subsequent procedure of booking expenses in respect thereof is triggered automatically. Since the entire process is system driven, an employee does not have the discretion of booking expenses in a particular business segment. The expenses will automatically and unavoidably get booked in the respective business segment to which the employee belongs. Thus, there arises no question of an expense being incorrectly booked under a business segment to which it does not pertain. He also submitted that there could not have been any error in booking of expenses in the respective business segments. For the booking of cost towards salary, it is submitted that out of total salary cost of Rs. 44.36 crores, salary cost of Rs.33.9 crores representing about 75% of the total salary cost has been allocated to this segment; whereas only Rs.10.46 crores(about 25% of total salary cost) has been allocated to the Non-MSA segments. In view of above, there is no under charging in respect of salary cost to MSA segment. He also pressed that other than salary expenses (i.e. Rs.49.39 crores), assessee submitted ledger accounts substantiating entries for expenses of Rs.41.88 crores (i.e. almost 85% of the cost other than salary and wages costs) bifurcating them into MSA and Non-MSA segments and the underlying vouchers/ invoices for expenses of Rs.19.72 crores in relation to the costs relatable to both MSA and non – MSA business segments. He therefore submitted that based on the documents/ details submitted by ACSI, it is clear that out of aggregate expenses of Rs 26.72 crores recorded under the Non - MSA business

segments (other than salary and wages expenditure of Rs. 10.46 crores), the Appellant has furnished invoices/ vouchers to corroborate expenses of Rs 16.29 crores (i.e. more than 61% of the costs incurred in relation non-MSA business segments). He therefore stated that in view of the voluminous details submitted before the learned AO and/ or the Hon'ble DRP as stated above, the Ld. AO has grossly erred in observing that the Appellant has not provided complete details to substantiate the entire cost pertaining to the services rendered to AT&T US. He also submitted that Most importantly, the learned AO has also failed to consider that assessee has reported a profitability of approx. 27% under the MNS segment, which would get increased to a whopping 64% (approx.) if effect is given to the adjustment made by the Ld. AO whereas it is unimaginable for any business to be earning such a high percentage of profit. The Ld. AO has also failed to take cognizance of the fact that already a higher cost (i.e. Rs. 45 crores) was charged under the MSA business segment rather than the cost(of Rs 43.17 crores)actually incurred in relation to the services rendered to AT&T US under the MSA business segment. In addition to the aforesaid factual position, he placed reliance on the following judicial precedents wherein it has been held that ad-hoc disallowances are bad in law:

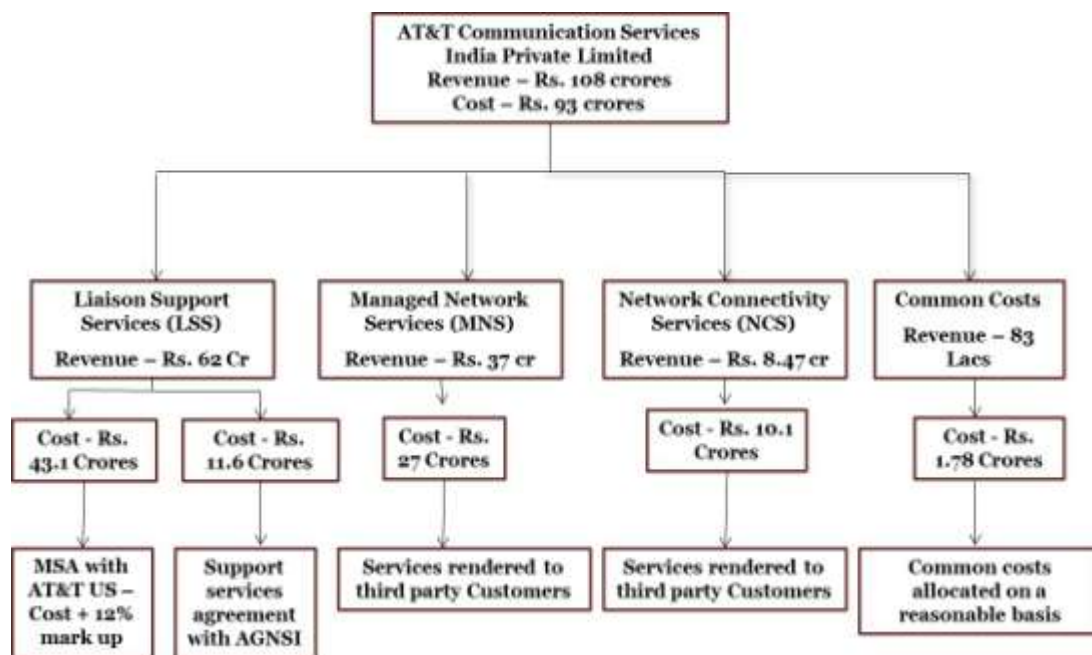
- i. Good Year India Ltd. vs. ITO (2000) 73 ITD 189 (Delhi ITAT)
- ii. Express Movers (P) Ltd. vs. DCIT (1997) 61 ITD 128 (Delhi ITAT)
- iii. ACIT vs. Arthur Anderson and Co. (2004) 94 TTJ 736

14. He further submitted that the Transfer Pricing Officer – 1(1) has duly examined the Transfer Pricing Documentation maintained by the Applicant (wherein the transaction with AT&T US was also recorded) and has not drawn any adverse inference in his order under section 92CA (3) dated January 03, 2013 with respect to the genuineness of revenues earned by ACSI from its international transactions and the costs incurred in relation to such revenues. He therefore submitted that once the TPO has passed his order, it would not be correct for the learned AO to make any adjustments in relation to the transactions already examined by the TPO. He also submitted that the assessment proceedings of the preceding year i.e. AY 2008-09 were completed subsequent to the year in question. Similar issue related to the working of MSA segmental working was analyzed in AY 2008-

09 as well and the subject addition was deleted by the Ld. AO subject to directions of the Ld. DRP. Further, the appellant would also like to submit that this addition has not been made in any of the previous or subsequent years. He stated that in view of the above facts and circumstances, the action of the Ld. AO in making an ad-hoc adjustment to the extent of 50% of the aggregate costs incurred in relation to services provided under the Managed Network Services ('MNS') business segment by alleging that such costs relate to the LSS business segment and thus, should have been charged to AT&T US/ AGNS along with a mark-up of 12% is bad in law and ought to be deleted.

15. The learned DR vehemently supported the order of the learned DRP and the learned assessing officer.
16. We have carefully considered the rival contentions and perused the orders of the lower authorities. The Company's business is divided into three broad segments namely:
 - (i) Market research, administrative support and liaison services ('MSA');
 - (ii) Managed Network Services ('MNS'); and
 - (iii) Network Connectivity Services ('NCS')
17. Under the MSA business segment, assessee has entered into a Service Agreement ('MSA Agreement') with AT&T US whereby it would provide the following services to AT&T US:
 - (i) Providing market update and identifying investment opportunities in India for the AT&T group;
 - (ii) Developing and maintaining business relationships with local carriers in India; and
 - (iii) Assisting in identification and evaluation of credibility of prospective third party distributors/ alliance candidates for AT&T services.
18. Under the terms of the MSA Agreement, ACSI recoups the costs incurred by it along with a mark-up of 12%. Under the Managed Network Services division, ACSI manages the network of its own customers (which are rank third parties in India) and provides the following services:

- (i) Analysis/ design, transition and transformation of the client’s existing network;
 - (ii) Provision, maintenance of equipment necessary for efficient running of the client’s network.
19. Under the Network Connectivity Services division, ACSI supplies equipment and provides installation and commissioning at customer’s site, software support, etc. to its customers in India.
20. Therefore it is important and of utmost importance that cost base of the assessee must be accurate as the revenue of the assessee is determined on cost plus basis.
21. A pictorial representation of the business segments along with a brief description of the services rendered and revenues earned by them is as under:



22. For the Assessment Year 2009-10, the Ld. AO has made an addition of Rs. 15.14 crores by alleging that 50 percent of the costs (Rs 27 Crores+ 12 % mark up thereon) incurred under the MNS business segment relate to the MSA business segment and should have been billed to AT&T USA along with a mark-up of 12%. The learned AO has observed that the Applicant has not provided complete details to substantiate that the entire cost pertaining to the services rendered to AT&T US has been billed to it correctly. The learned assessing officer at page number 82 of the order has held as under:-

“ The above submissions were considered in detail and the same is not accepted as in the said submission the assessee has fast simply bifurcated the total cost between salary and non-salary expenses.

Further, with respect to salary expenses of INR 44.3,6 crores the assessee has not produced any supporting evidence for allocation of the same in MSA and non-MSA segment, which is the cause of disagreement. It simply attached a list of employees claimed to be segment -wise without any supporting documents. In the light of the above, the argument of the assessee is rejected.

Further, with respect to remaining non-salary expenses of Rs. 49.40 crores, the assessee has produced invoices before the Dispute Resolution Panel of INR 8.89 crores (on sample basis) out of the total expenditure of INR 31.78 crores for which Ledger was submitted. Further, it has submitted additional invoices of INR 7.39 crore in this office during verification. Thus, it is clear that assessee has submitted the invoices of INR 16.29 crores which is just 32% of the total non salary cost of Rs. 49.40 crores and 17% of the total cost of INR 9.37crores.

From the above, it is very clear that assessee has no basis/justification of allocation of cost amongst various segments. Further, despite so many opportunities accorded to the assessee by special auditor, Dispute Resolution Panel and at the stage of finalization of the order, the assessee could produce invoices to the extent of 32%/17% only. Thus contentions of the assessee were rejected.”

Therefore, the learned assessing officer held that 50% of the expenditure incurred in non-MSA segment of indirect expenditure deserves to be allocated to the MSA segment with a markup of 12%. Naturally as per the service agreement between the assessee and the associated enterprises the remuneration of the assessee is determined as per clause number III of the compensation is determined based on the cost. If the cost is not properly determined then naturally the resultant income of the assessee from the service agreement cannot be determined. Therefore it is of paramount

importance that the cost base of the assessee should be perfect. To make it perfect, so that there is no revenue leakage of income in the hands of the assessee, the assessee should provide the complete details of the cost base of the services rendered. In the present case, as held by the learned assessing officer, special auditor and learned Dispute Resolution Panelit is apparent that assessee could submit only 32% of the total non-salary cost of Rs 49.40 crores and only 17% of non-salary cost of INR 937,600,000. Thus it is apparent that the assessee has failed to substantiate its cost base. Further the learned AO also appropriated on ad hoc basis 50% of the total indirect cost of Rs 270490602/- of non-MSA segment as cost incurred by the assessee for MSA segment. Even otherwise such percentage also does not have any sanctity. However, we are of the opinion that it is the primary duty of the assessee to substantiate the cost base of its revenue model before the assessing Officer completely. When the assessee has failed to substantiate 68% of non salary cost and 83% of salary cost before the lower authorities, we are unable to agree with the argument of the learned authorised representative that cost base of the assessee for deriving the revenue from associated enterprises is correct. In view of this we set aside the whole issue back to the file of the learned assessing officer, with a direction to the assessee to substantiate it cost base with respect to the segment, which has been challenged by special auditor and the learned assessing officer to derive at the correct income of the assessee. The learned assessing officer may examine the details submitted by the assessee and then decide the issue once again in accordance with the law. In case, if the assessee fails to furnish the adequate evidence with respect to the cost base, the AO may decide the issue accordingly. Needless to say that for adoption of the any methodology by the assessing officer in absence of submission of details by the assessee, proper opportunity of hearing is given to the assessee. In the result ground number 2 of the appeal of the assessee is set aside to the file of the learned assessing officer with a direction to pass a draft assessment order after incorporating all the arguments of the assessee so that assessee gets an opportunity to file objections before DRP. Consequently in accordance with the law the final assessment order should be passed.

23. Accordingly Ground no 2 of the appeal is allowed with above directions for statistical purposes.
24. Ground No 3 of the appeal is with respect to foreign exchange cost incurred on salaries of the expat employees, which according to AO should have been charged with a markup of 12 % thereon. According to the assessee, as assessee has entered into MSA with AT & T US for provision of market research, administrative support, liaison services and other support services, for provision of these services to AT&T US, assessee has employed senior expatriate employees, who formed part of senior management of ACSI, for development of business strategies, identification of strategic business activities, development of wireless business opportunities etc for assessee . Services rendered by the aforesaid employees were directly related to the business activities performed by ACSI and thus, were imperative for the business support services rendered by assessee to AT&T US Inc. under the Master Services Agreement. Costs incurred by assessee towards salary/ other costs relatable to the aforesaid expatriate employees were charged back to AT&T US Inc. at cost plus mark up of 12%. The foreign exchange loss arises on account of change in foreign currency exchange rate at the time of payment of the salary expense vis-a-vis at the time of booking of the salary expense is a loss which is not required to be allocated and no mark up was to be charged in cost plus agreement. The Ld. AO has observed that foreign exchange loss of Rs. 1.87 crores incurred in relation to salary of expats is incidental and ancillary to the services rendered under the MSA and should have been billed to AT&T US along with a 12% mark up. Accordingly, the Ld. AO has made an addition of 2.10 crores (Rs. 1.87 crores + Rs. 0.22 crores). The ld DRP upheld the action of the AO.
25. Ld AR submitted that The MSA provides for recoupment of the operating costs incurred by ACSI in the course of and for provision of services to AT&T US under the MSA. The MSA does not contemplate recoupment of losses, if any, incurred by ACSI, as a result of change in the foreign currency exchange rate between the date on which the expense is incurred and the date on which payment in respect of such expenses is made. It is submitted

that foreign exchange loss incurred by ACSI in relation to salary payable to expatriate employees represents loss incurred as a result of change in the foreign currency exchange rate and does not form part of operating costs incurred by ACSI for provision of services under the MSA. Hence, such loss was not charged to AT&T US under the MSA. It is further submitted that it has always been the understanding between ACSI and AT&T US that no adjustment in respect of foreign exchange gain/ loss earned/ incurred by ACSI shall be made to the operating costs incurred and charged to AT&T US for provision of services under the MSA. Even the MSA does not provide that any foreign exchange loss incurred by ACSI would be billed to AT&T US under the MSA. It may be noted that foreign exchange gain/ loss arises on account of change in foreign currency exchange rate at the time of payment of the expense vis-a-vis at the time of booking of the expense. This does not have any bearing on the services, which have already been rendered and therefore, cannot have any bearing on the operating cost of such services and the resultant price to be charged, where such price is a function of the costs incurred for provision of the services. Accordingly, it should not be considered for determining the cost base for charging the mark-up to be recovered from the service recipient. Ld AR referred to Safe Harbour Rules, wherein the Central Board of Direct Taxes ('CBDT') has clearly mentioned that foreign exchange gain / loss should not be, considered while computing the operating margin of taxpayers. Since the same is not to be considered as part of the cost base, no mark-up is required to be charged on such expenses. As per the Safe Harbor Rules it has been provided that foreign exchange gain / loss should not be considered while computing the operating margin of taxpayers. Hence, in view of the above discussion, since foreign exchange loss incurred by ACSI is a non-operating loss and does not form part of the operating costs incurred by ACSI for provision of services under the MSA, such loss was not charged to AT&T US. It is imperative here to highlight that in line with the above position, any foreign exchange gain earned by ACSI is also not considered while computing the operating costs to be charged under the MSA and hence, no benefit in relation thereto is passed to AT&T US. It was submitted that foreign exchange gain / loss should not be considered while computing the operating margin of

taxpayers since it is stemming from restatement of payables and is not related to the services rendered by ACSI under the MSA. Further, since the same is not to be considered as part of the cost base, no mark-up is required to be charged on such expenses. It was further submitted that the Transfer Pricing Officer – 1(1) has duly examined the Transfer Pricing Documentation maintained by the Applicant (wherein the transaction with AT&T US was also recorded) and not drawn any adverse inference in his order under section 92CA(3) dated January 03, 2013 with respect to the genuineness of revenues earned by ACSI from its international transactions and the costs incurred in relation to such revenues. Further, once the TPO has passed his order, it would not be correct for the learned AO to make any adjustments in relation to the transactions already examined by the TPO. Further, ACSI's margins even after considering foreign exchange losses is still higher than that of comparable companies. He also submitted that the Ld. AO failed to take cognizance of the fact that already a higher cost (i.e. Rs. 45 crores) was charged under the MSA business segment rather than the cost (of Rs 43.17 crores) actually incurred in relation to the services rendered to AT&T US under the MSA business segment. The excess cost charged covers the foreign exchange fluctuation amounting to Rs. 1.87 crores, which is alleged to be cross-charged in the present ground. Accordingly, the allegation of the Ld. AO that foreign exchange loss of Rs. 1.87 crores incurred in relation to salary of expats is incidental and ancillary to the services rendered under the MSA and should have been billed to AT&T US along with a 12% mark-up is erroneous and the addition warrants to be deleted.

26. The learned departmental representative vehemently supported the order of the lower authorities and submitted that when the salary payable to the expat employees is part of the cost basis then foreign exchange loss incurred by the assessee should also be passed on to the associated enterprise with markup thereon. He therefore submitted that there is no error in the order of the learned assessing officer as well as the direction of the learned dispute resolution panel. He further stated that the argument of the learned authorised representative with respect to the safe harbour rules does not apply, as assessee has not adopted the same. He submitted

that safe harbour rules can be taken shelter under only when the assessee adopts the same otherwise not. He as such stated that the foreign exchange loss incurred by the assessee is on account of salary of the expat employees, which is not denied to be the cost of the agreement therefore foreign exchange loss thereon, should also be considered for the purpose of the markup. It was stated that even the assessee has not considered the foreign exchange loss incurred for reimbursement of the salary of the expat. He submitted that if the foreign exchange loss or gain is on account of sale of services then only it can be considered whether it is an operating income or operating expenditure. Therefore he vehemently supported the order of the AO.

27. We have carefully considered the rival contentions and perused the orders of the lower authorities. The whole issue has been dealt with by the learned assessing officer at page number 42 of the assessment order as under:-

“7.1.2 against this addition, the assessee had filed objection before the dispute resolution panel vide objection number 6 discussed by the panel in para number 9 of the order dated 27/8/2014. The panel examined the matter in detail and held that the meaning of the cost cannot be restricted to the operating cost claimed by the assessee because of the fact that it will lead to conclusion that all the costs have not to be reimbursed along with agreed-upon markup. Further, it was noted that there was no dispute that such forex loss has been incurred in relation to the 5 expatriate’s employees whose services have been used by the AT & T US and therefore there is no basis to consider that the said cost is not the cost to be recovered along with the markup from AT & T US. . The honourable DRP also rejected the assessee’s view on treatment of forex gains/losses in the safe harbour rules on the ground that such rules are not applicable for transfer pricing study. Further, it was held that the AO is competent under the act to compute the income as well as carry out transfer pricing of international transaction and the order of the TPO becomes part of the assessment order. Accordingly, the honourable DRP upheld the addition made by

the

assessing

officer.”

Thus the learned assessing officer made an addition of INR 2 1026663/- to the total income of the assessee.

28. The learned Dispute Resolution Panel has given its direction as under:-
- “9.4 the panel has examined the matter. The compensation clause, which has been reproduced in para number 4.4.3 of this order, clearly shows that the assessee has to be compensated by AT&T US for the services provided by the assessee with a markup of 12% of such cost. The term cost has not been defined in the said revised and restated service agreement and therefore the meaning of this word cost shall be derived as a normal parlance. It cannot be restricted to operating cost was claimed by the assessee particularly because of the fact that it will lead to a conclusion that all cost have not to be reimbursed along with the agreed-upon markup. The fundamental basis on which such cost sharing through Intra /inter group service agreement is done is that the services rendering entity is firstly, not to suffer any loss on account of cost incurred by it and secondly, the services rendering entity is given suitable markup, on arm’s-length principle. In other words, the service rendering entity makes the transaction on commercial basis rather than making it either as a non-profit organization or as a charitable organization.

In the instant case there is no dispute that such forex loss has been incurred with relation to the 5 expat employees who services have been used by AT&T US and therefore, there is no basis for the assessee’s argument that it was not the cost which was to be recovered (along with markup) from AT&T US. Any so-called understanding between assessee and AT&T US that no adjustment in respect of forex gain/loss card, incurred by assessee shall be made to operating cost and charged to AT&T US, as claimed by the assessee, remains unsubstantiated particularly when the term cost has been defined in the said agreement.

The argument of the assessee about the treatment of forex gains/losses in the safe harbour rules has no correlation with the issue at hand particularly

for the reasons that firstly such rules are applicable for transfer pricing studies and secondly, the principle laid out therein will have application on such gains/losses arising out of the timing difference on invoice for the revenue et cetera raised in foreign currency rather than gain/loss arising on account of the expenses incurred by an assessee, which had to be allocated to the associated enterprise.

The contention of the assessee that no interference has been made by the learned transfer pricing officer on this account has no significance as the fact under consideration was not captured by the assessee in its transfer pricing study and came to the light due to the special audit got conducted by the Department. In any case the AO is competent under the act to compute the income as well as carry out transfer pricing of an international transaction. Moreover, the order of the TPO is not standalone order for taxation but becomes part of the assessment order and ultimately income worked out as per the computation of income is made by the AO.”

29. We do not find any infirmity in the order of the learned Dispute Resolution Panel in their direction to the assessing officer to include the same for working out the correct revenue of the assessee. Admittedly even before us the assessee did not show any clauses in the agreement, which even remotely suggest that only “operating cost”, are to be charged to the AE. According to us the assessee is to be reimbursed on “cost” plus basis with 12% mark up. In the agreement there is no reference to exclusion of any foreign exchange loss or gain or same is not to be considered as “cost”. It was not denied that the expat of salary was not related to the impugned segment and also foreign exchange loss was also on account of the salary payment. We also agree with the finding of the Id DRP with respect to applicability of safe Harbour rule. Naturally assessee has not opted for it and so cannot claim so. Further in many judicial precedents, the Forex gain and loss were held to be operating income/ loss. In view of this we do not find any infirmity in the order of the learned assessing officer. Accordingly ground number 3 of the appeal of the assessee is dismissed.
30. Ground number 5 of the appeal of the assessee is against the addition on account of non charging of the markup on support service charges billed to

AGNS amounting to INR 13,900,000. The brief facts of the issue is that AT&T Global Network Services India Pvt. Ltd. ('AGNSI'), a group company of the Appellant, commenced its business operations from AY 2008-09 onwards and did not have its own support service functions such as tax, legal, finance, HR etc., which are imperative for any business organization to carry on its business. The appellant, already in operation for more than 10 years, had a fully developed support service functions. Accordingly, since such functions were already housed in Appellant, AGNSI entered into an Operational Support Services Agreement ("Agreement") with the Appellant for provision of such support services to AGNSI to achieve maximum utilization of the existing resources available with the group and to mitigate the costs that would have been incurred by AGNSI in establishing its own support service functions. As per the Agreement, no mark-up was required to be charged on the support service charges paid by AGNSI to the Appellant.

31. The ld AO has made an addition of Rs.1.39 crores on account of non-charging of mark-up on support service charges billed to AGNSI, a group company of the Applicant in India, ignoring the terms of the support services agreement, which did not require a mark-up to be charged on the support service charges paid by AGNSI to ACSI. AGNSI, a group company of the Applicant, commenced its business operations during financial year 2007-08. AGNS did not have its own support service functions such as tax, legal, finance, HR etc., which are necessary and imperative for any business organization to carry on its business. ACSI, an entity in operations for more than 10 years by then, had established and was having fully developed support service functions. Accordingly, since such functions were already house in ACSI, AGNS entered into a support services agreement with ACSI for provision of support services to AGNS. The agreement was intended to achieve maximum utilization of the existing resources available with the group and to mitigate the costs that would have been incurred by AGNS in establishing its own support service functions. For the subject FY, mark-up of 8% was mistakenly charged by ACSI during the first 3 months. However, such mark-up was reversed during the subsequent months, in accordance with covenants of the support services agreement entered into with AGNSI.

32. Aggrieved, the Id AR submitted that :-

- a. At the outset, kind attention is drawn to the fact that the matter is squarely covered by the recent order of Hon'ble Tribunal, Delhi Benches, in its own case in AY 2010-11 (ITA No. 1016/Del/2015). In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 16, Page 13 of the ITAT Order)

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

- b. The matter is also squarely covered by the recent order of Hon'ble Tribunal, Delhi Benches, in its own case in AY 2011-12 (ITA No. 1653/Del/2016). In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 34 and 35, Page 14 of the ITAT Order)

“34. Ground No.1 relates to the addition on account of mark up not charged on support services.

35. An identical issue was considered by us in ITA No.354/Del/2017 (supra) vide ground No.4 of the appeal. For our detailed discussion therein, this ground is allowed.”

- c. Further, the extract of the ITAT order in the Assessee's own case for AY 2012-13 (ITA No. 354/Del/2017) is reproduced below: (Para 24, Page 10 of ITAT order)

“24. We have carefully considered the orders of the authorities below. The Assessing Officer has proceeded by referring to the additions made in last year. We find that in earlier year, the coordinate Bench in ITA No.1016/Del/2015, assessment year 2010-11, has deleted the similar additions. The relevant findings of the coordinate Bench read:-

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

25. Respectfully following the findings of the coordinate Bench, we direct the Assessing Officer to delete the impugned addition. Ground No.4 is allowed. ”

- d. The matter is also squarely covered by the recent order of Hon’ble Tribunal, Delhi Benches, in its own case in AY 2008-09 (ITA No. 1015/Del/2015) dt. March 26, 2019. In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 5.6.0-5.6.1, Page 38-43 of the ITAT Order)

“5.6.1 Therefore, respectfully following the order of the Coordinate Bench in assessee’s own case for assessment year 2010-11 as

aforementioned, we order deletion of addition on account of notional charging of mark-up as sustained by the Ld. DRP.”

- e. The matter is also squarely covered by the recent order of Hon'ble Tribunal, Delhi Benches, in its own case in AY 2014-15 (ITA No. 6703/Del/2018) dt. March 28, 2019. In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 8-10, Page 8 of the ITAT Order)

8. As regards Ground No.2 relating to addition on account of non-charging of mark up on support services charges able to AGNS amounting to Rs.64,45,195/-. The Ld. AR submitted that this issue is also covered by the order of the Tribunal in assessee's own case for Assessment Year 2010-11 being ITA No. 1016/Del/2015 order dated 15/2/2018.

...

10.... In the present case also the assessee as well as AGNSI are profit making entities and there was no tax incentives earned by the assessee at any point of time. Thus, charging of mark up on support service charges which were billed to AGNSI was not correct on part of the Assessing Officer. Besides that, the issue is squarely covered in assessee's own case for A.Y. 2010-11. Hence, Ground No. 2 is allowed.”

- f. ACSI provides support services to AGNSI under the Agreement. The costs incurred by ACSI for provision of such service to AGNSI are charged from AGNS. However, no mark-up is applicable and required to be charged on the support service charges paid by AGNSI to ACSI. The aforesaid fact is corroborated by the Agreement entered into between ACSI and AGNS.
- g. The provisions of the Act do not stipulate charging of any mark-up in relation to expenses cross charged between two profit making domestic entities which are not taking benefit of any exemption/relaxation under the beneficial provisions of the Income-tax Act. Since ACSI and AGNS are both Indian entities forming part of the same group, it was decided between the parties that no mark-up shall be charged by ACSI on the support service charges billed to AGNS and recovery should be made on a cost to cost basis, which is duly corroborated by the support services agreement entered into between ACSI and AGNS.
- h. That resident parties are free to agree and decide the terms of arrangement, including consideration to be paid for services rendered

by one party to another, and in absence of any specific provision under the Act to this effect, it is not open for the tax authorities to disregard such terms and make any adjustment on account of non-charging of mark-up by the service provider to the service recipient. Thus, in the present case as well, any adjustment/ addition on account of non-charging of mark-up by ACSI from AGNS would be unwarranted, unjustified and untenable in law.

- i. It has been judicially upheld that commercial expediency of a particular transaction (including expenses incurred by a businessman) would be examined from the perspective of a business man and no third party, including the tax authorities, are entitled to question the commercial reasoning/ justification of the transaction. Similarly, prudence of revenue to be charged from a domestic entity should be seen from the point of view of the businessman and not from the point of view of the outsiders (including the Revenue authorities).
 - j. Further, both AGNSI and appellant are profit making entities and hence, there was no tax incentive for the parties to deflate the revenues earned by appellant. Where a higher amount would have been charged by appellant from AGNSI, deduction for such higher amount would have been available to AGNSI and hence, no added tax advantage is being availed by appellant by charging support services cost from AGNS at cost (i.e. without any mark-up).
 - k. Further, it is submitted that the issue of non-charging of mark up on support services being billed to AGNSI was also argued in the appeal for AGNSI for AY 2008-09- AY 2011-12. In that appeal the department has raised a ground that such support services expenditure should be disallowed in the books of account of AGNSI. The order in the said appeal has been passed and it has been held that since, both ACSI and AGNSI are profit making entities, there was no tax incentive for the parties to deflate the revenues earned by AGNSI and hence, the expenditure cannot be disallowed.
- ii. Following are the relevant extracts of the Hon'ble ITAT Order of AGNSI for 2009-10 produced below: (Para 75-76, Page 88)
- a. *"75. We have carefully considered the rival contentions and perused the facts of the case. The facts of the case as explained by the appellant are that, ACSI, a group company of appellant and an entity in operations for more than 10 years by then, was having developed support services functions. Accordingly, since such functions were*

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

- b. *CIT v. Panipat Woollen & General Mills Co Ltd* (103 ITR 66) (Supreme Court)
- c. *CIT v. Sales Magnesite (P) Ltd* [1995] 214 ITR 1
- d. *Binodiram Balchand vs. Commissioner of Income Tax* (48 ITR 548)
- e. *Calcutta Landing and Shipping Co Ltd vs. CIT* (65 ITR 1) (Cal High Court)
- f. *CIT Vs B Dalmia Cement Ltd* (254 ITR 377)
- g. 76. *Respectfully following the principles laid down in the aforesaid judicial precedents, we find that where the appellant has actually incurred the aforesaid support services cost and no evidence has been brought by the Department to controvert the same, such expenditure cannot be disallowed merely on suspicion. We affirm the finding of the ld DRP on this issue. In view of the above, the appeal of the revenue on this ground is dismissed.*"
- h. Since the said expense is allowed in the case of AGNSI, still notional markup cannot be imputed in the case of appellant company.
- i. In view of the judicial precedents, it is requested that the notional markup should not be imputed in the case of appellant company.

33. The learned departmental representative supported the order of the lower authorities however could not controvert that the issue is covered in favour of the assessee by the earlier order of the coordinate benches in the assessee's own case.
34. We have carefully considered the rival contention and perused the orders of the lower authorities as well as the orders of the coordinate benches in the assessee's own case. As stated above the issue squarely covered in favour of the assessee in assessee's own case for earlier years by the order of the coordinate bench, therefore we have no reason to deviate from the same and accordingly respectfully following the decision of coordinate bench, ground number 5 of the appeal of the assessee is allowed.
35. Ground number 6 of the appeal is against the disallowance of the year under accrual is on account of excess provisioning, non-submission of the supporting documents or non-deduction of tax at source thereon under section 40 (a) of the act of INR 101,800,000.
36. The ld AR submitted that in the impugned assessment order, the learned AO has disallowed year-end accruals of Rs. 10.18 crores on account of excess provisioning, non-submission of supporting documents and/ or non-deduction of tax at source. He submitted as under :-

a. In this regard, we wish to submit that robust documentary evidence substantiating utilization (i.e. actual payment in subsequent years) and reversal of year-end accruals along with necessary clarifications were provided by ACSI to the Ld. AO.

b. At this juncture, kind attention is drawn to the fact that the matter is squarely covered by the recent order of Hon'ble Tribunal, Delhi Benches, in its own case in AY 2010-11 (ITA No. 1016/Del/2015). In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 25-26, Page 17 of the ITAT Order)

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

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

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

- c. The matter is also squarely covered by the recent order of Hon'ble Tribunal, Delhi Benches, in its own case in AY 2011-12 (ITA No. 1653/Del/2016). In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 35, Page 14 of the ITAT Order)

"Ground No.2 relates to the addition on account of year-end accruals. A similar issue was considered by us in ITA No.354 (supra) vide ground No.3 of the appeal. For our detailed discussion therein this ground is allowed."

Further, the extract of the ITAT order in the Assessee's own case for AY 2012-13 (ITA No. 354/Del/2017) is reproduced below: (Para 20, Page 8 of ITAT order)

"20. After considering the underlying facts in the issue, we find that the coordinate bench in the assessee's own case in assessment year 2010-11 has decided this issue in favour of the assessee. The coordinate Bench in ITA No.1016/Del/2015 has held as under:-

25. When undisputedly no mistake has been pointed out by the Assessing Officer in the calculation nor it is the case of the AO that the taxpayer had not paid certain bills and the taxpayer is following mercantile system of accounting and the expenses are having element of estimation as well as scientific basis, keeping in view the past trend, the expenses are required to be allowed in the year of creation itself, particularly, when the Revenue

authorities has allowed the entire claim of expenditure in the subsequent years.

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

21. Respectfully following the findings of the coordinate Bench, we order for the deletion of the said addition. Ground No.3 is allowed."

- d. The matter is also squarely covered by the recent order of Hon'ble Tribunal, Delhi Benches, in its own case in AY 2008-09 (ITA No. 1015/Del/2015) dt. March 26, 2019. In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 5.9.0- 5.9.2, Page 45-49 of the ITAT Order)

"5.9.0 In respect of ground no. 10 pertaining to disallowance of year end provisioning amounting to Rs. 1,26,30,579/-, it is seen that this issue is also covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 2010-11 in ITA No. 1016/Del/2015.

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

5.9.2 Ground no. 10 accordingly stands allowed”

The matter is also squarely covered by the recent order of Hon’ble Tribunal, Delhi Benches, in its own case in AY 2014-15 (ITA No. 6703/Del/2018) dt. March 28, 2019. In this regard, it is submitted that the facts of the present year are exactly similar to that of the preceding year. Relevant para of the order is produced below: (Para 7, Page 7 of the ITAT Order)

“7. We have heard both the parties and perused the material available on record. The issue in the present appeal is squarely covered in favour of the assessee by the Tribunal in assessee’s own case for Assessment Year 2010-11 and 2011-12.

...

In the present Assessment Year as well the Assessing Officer has not pointed out any mistake in the calculation nor there was case by the Revenue that assessee has not paid certain bills. In fact during the financial year relevant to the said assessment year, the assessee had accounted all the expenses relating to the subject Financial Year for which bills/invoices would have been received/paid after close of the Financial Year by way of year ending accruals. Thus, the issue is identical in the present assessment year as well, hence Ground No. 1 is allowed.

- e. It may be appreciated that the year-end accruals are accounted on the basis of established scientific and reasonable mechanism. The appellant follows this method of accruing provisions each year and the practice is in line with the business activity of the appellant industry. In this regard attention is placed on the decision of Hon’ble Supreme Court in the case of M/s Rotork Controls India (P) Ltd. vs. Commissioner of Income-tax (314 ITR 62)) and M/s Bharat Earth Movers (245 ITR 428) wherein the Apex Court after analyzing the provisions of the Act and accounting principles in detail laid the controversy to rest by holding that warranty expenses provided by the assessee on scientific basis in compliance with the accrual basis of accounting are allowable as deduction in the relevant financial year and no disallowance in this regard can be made by the revenue authorities.

- f. The Appellant follows a mercantile system of accounting. Accordingly, in order to arrive at the correct profit for any given year, it is required to account for all expenses pertaining to the year, in accordance with 'matching principle'.
- g. Appellant had accounted for all the expenses relatable to the subject financial year, for which bills/ invoices would have been received/ paid after the close of the financial year, by way of year-end accruals. As and when the invoices relatable to the aforesaid year-end accruals, were received/ paid by appellant in the subsequent year(s), the actual expenses were charged in the books of accounts after appropriate deduction of tax on such expenses.
- h. Accordingly, since the year-end accruals created by appellant represent accruals towards normal business expenditure incurred by appellant for the financial year relevant to the subject assessment, deduction in respect thereof should be allowed to appellant.
- i. Further, the Appellant has been able to produce documentary evidence supporting payment/reversal of majority of the expenses represented by year – end accruals, it substantiates the fact that even the balance accruals have also been created on a reasonable basis and hence, no disallowance in this regard can be made against appellant .
- j. From above, it is clearly evident that the Appellant has been able to produce documentary evidence supporting payment/reversal of more than 99% of the expenses represented by year - end accruals. It substantiates the fact that while booking year end accrual of expenses, *following the mercantile system of accounting, an element of estimation is involved. The said accrual is computed on a scientific basis, keeping in view the past trend of the company. Accordingly, keeping in view the fact that the assessee submitted evidences for majority of the expenses, it can be safely concluded that even the balance accruals have also been created on a reasonable basis. Hence, the expenses are required to be allowed in the year of creation itself.* Accordingly, it is respectfully submitted that the disallowance made may kindly be ordered to be deleted.
- k. It is reiterated that the year end provisions are estimated on scientific methodology and based on consistent trend as well as past experience of the company and hence, are allowable expenses. The year-end provisions in the instant case are an integral part of the appellant's

business functions and should be allowed, since it is a year on year unavoidable business feature.

1. In view of the above, the appellant humbly submits that since majority of the evidences for the year end accrual were produced by the appellant, it proves beyond reasonable doubt that the subject year end accruals are based on reasonable and scientific basis. Hence, in the light of order of Hon'ble Tribunal in the case of ACSI for AY 08-09, AY 2010-11, AY 2011-12, AY 2012-13 and AY 14-15, the same may be allowed since there is no change in the facts of this year.
 - m. Without prejudice to the above details furnished for reversal of year-end accruals, since the aforesaid accruals were reversed in the subsequent year and thus, resulted in reduction of aggregate expenditure claimed as an expense in the subsequent year, the amount so reversed already stands disallowed in the subsequent year and hence, any disallowance made in the subject assessment year towards the aforesaid accruals should have been allowed as a deduction in the subsequent assessment year.
 - n. Accordingly, the allegation of the Ld. AO that the excess provisioning should be disallowed on account of non-submission of supporting documents is bad in law and ought to be deleted.
37. With respect to disallowance of the year-end accruals under section 40(a) of the Act on account of non-deduction of tax at source , the ld AR submitted that :-
- i. Out of the aggregate disallowance of year-end accruals of Rs. 10.18 crores, an amount of Rs. 9.49 crores (this includes amount of Rs 5.84 crores out of the amount mentioned in point (i) above disallowed for non-production of evidences) has been disallowed by the Ld. AO on account of non-deduction of tax at source from such accruals.
 - ii. Out of the aforesaid disallowance, Rs. 4.63 crores pertained to accruals which were subsequently utilized towards payments made to Cisco Netherlands ('CISCO'), a tax resident of the Netherlands, for provision of offshore maintenance support services to ACSI. The Appellant, vide its letter dated November 12, 2013 filed detailed submission explaining that the services rendered by CISCO were standard services, and did not make available any technical skill, knowledge or experience to the Appellant. Thus the same would not fall under the purview of

FTS as contemplated by the India – Netherlands tax treaty. Further, in the absence of CISCO’s Permanent Establishment in India (evidenced by a no PE certificate), such payments would also not be chargeable to tax in India as its business income and no tax is deductible under section 195 of the Act in terms of the decision of the Hon’ble Supreme Court in the case of *GE India Technology Centre Pvt. Ltd (327 ITR 456)(2010)*.

- iii. Further, as per the withholding tax provisions, the obligation to withhold taxes arises only when the amount is payable to an identified payee, i.e. credit of the said amount should be create a ‘right to receive / enforce payment of such income’ in favor of the payee. However, since creation of the year-end accruals does not result in accrual of income to vendor, the same cannot trigger a withholding tax liability on the part of the Appellant.
- iv. Reliance in this regard is placed on the following judicial precedents wherein the Courts have time and again affirmed this position that withholding tax obligations do not arise on year-end provision as no income accrues to the payee as a result of mere entries of expenses made in the books of account of the payer which are reversed subsequently.
- v. The Hon’ble Tribunal, Delhi Benches, in the case of its sister concern, AGNSI in AY 2010-11 (1059/Del/2015) held as under. Relevant para of the order is produced below (Para 16, Page 118-120 of the ITAT Order):

1. *“16. ... Further with regard to the withholding tax obligation on such provisions, we are of a considered view that the liability to deduct tax at source arises only when there is accrual of income in the hands of the identified payee and considering the fact that the provisions made at the year- end are reversed in the beginning of the next accounting year goes to show that there was no income accrued. The existence/accrual of income in the hands of the identified payee is a pre-condition to fasten the liability of tax deduction at source in the hands of the payer. The Hon’ble Apex Court in the case of M/s GE India Technology Centre P. Ltd. Vs. CIT and another 327 ITR 456 (SC) held that if payment is not assessable to tax there is no question of tax at source being deducted. We also draw support from decisions relied upon by the assessee during*

the course of hearing to buttress its argument that no withholding tax obligation arises on the provisions:

- b. DIT vs. Ericsson Communication Ltd (2015) 378 ITR 395 (Del.)*
- c. Karnataka Power Transmission Corporation Pvt Ltd vs DCIT (2016) 383 ITR 59 (Kar.)*
- d. Dishnet Wireless Ltd vs. DCIT (Chennai Tribunal) 172 TTJ 394*

1. *Ld DR Could not point out any contrary decision . Therefore respectfully following the above decisions and in light of the factual matrix of the case we are of the considered view that since creation of the year end accruals does not result accrual of income to an identified vendor, the same cannot trigger a withholding tax liability on the part of the appellant. “*

ii. Reliance is also placed on the decision of the Hon’ble Delhi High Court in the case of a. DIT vs. Ericsson Communication Ltd (2015) 378 ITR 395 (Del.) wherein it was held that:

1. *“22. In our view, mere passing of the book entries, which are reversed, would not give rise to an obligation to deduct TAS by the Assessee, as clearly, there is no debt that can be said to be acknowledged by the Assessee. Imposition of an obligation to deduct TAS in these circumstances would amount to enforcing payments from one person towards a tax liability of another, even where the person does not acknowledge that any sum is payable. This, in our view, is contrary to the scheme of provisions relating to collection of TAS under the Act.”*

iii. Further, reliance is also placed on the decision of the Karnataka High Court in the case of Karnataka Power Transmission Corporation Limited v. DCIT (TDS) (ITA 750 and 758-759/2009) dated February 2, 2016 wherein it was held that:

1. *“If no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor. In view of the admitted fact that interest being not paid to the payees being reversed in the books of accounts, we are of the considered opinion that there would be no liability to deduct tax as no income accrued to the payees.”*

2. In the aforesaid case reliance was placed on the judgement of the apex court in the case of Kedarnath Jute Mfg. Co. Ltd. (82 ITR 363) wherein it was held that
 3. *“We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter”*
 4. The aforesaid judgement enunciates that the existence or absence of entries in the books of accounts is not decisive or conclusive factor in deciding the right of the assessee in claiming deduction.
- iv. Further, the Bangalore ITAT in the recent case of *M/s Bosch Limited v. ITO in ITA No. 1583(BNG)/2014 dated March 1, 2016* held as under:
1. *“Now to determine where there was income accrued or not considering the fact that the provisions were made at the year end is reversed in the beginning of the next accounting year goes to show that there was no income accrued. Mere entries in the books of accounts does not establish the accrual of income in the hands of the payee as held by the Hon’ble Supreme Court in the case of CIT Vs M/s Shoorji Vallabhdas & Co. 46 ITR 144 wherein it was held as follows;*
 2. *“That the subsequent agreement had altered the rate of commission in such a way as to make the income which really accrued to the assessee different from what had been entered in the books of account. This was nota case*

of a gift by the assessee to the managed companies of a portion of income which had already accrued, but an agreement to receive a lesser remuneration than what had been agreed upon. The assessee had in fact received only the lesser amount in spite of the entries in the account books, and this lesser amount alone was taxable. Income-tax is a levy on income. Though the Income-tax Act, takes into accounts two points of time at which the liability to tax is attracted, viz. the accrual of the income or its receipt, yet the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been received and is subsequently, given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account”.

3. *Thus, having regard to the ratio laid down by the Hon'ble Apex Court, it cannot be said that income had accrued in the hands of the payee. We, therefore, hold that there was no liability in the hands of the assessee company to deduct TDS, merely on the provisions made at the year end. Hence, the assessee company cannot be treated as 'assessee in default' for not deducting tax at source.*
- v. Similarly, we hereby wish to draw your attention to a recent judgment of the Hon'ble Bangalore Tribunal in case of DCIT v. Telco Construction Equipment Co. Ltd (ITA No. 478/Bang/2012), wherein the Hon'ble Tribunal has held that year-end provisions did not attract tax withholding provisions as the taxpayer credited the amount of commission payable to provision account and not to respective agents account.
- vi. The Hon'ble Mumbai Tribunal in case of Pfizer Ltd (ITA No. 1667/MUM/2010) also held that, since payees are not identifiable at the time of making provisions, tax withholding provisions are not attracted. Similar view was taken earlier also by the Hon'ble Tribunal in the case of IDBI vs. I.T.O 107 ITD 45(Mum).

38. Accordingly, he submitted that allegation of the Ld. AO that the excess provisioning should be disallowed on account of non-deduction of tax at source is bad in law and ought to be deleted.
39. The learned departmental representative could not controvert the issue but relied on the order of the learned assessing officer.
40. We have carefully considered the rival contention and perused the orders of the lower authorities. With respect to the year and accrual is the issue squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for assessment year 2010 – 11 wherein on identical facts and circumstances the addition was deleted. Similar is the decision for assessment year 11 – 12 and 12 – 13. In view of this we do not find any reason to deviate from the same and respectfully following the same we hold that the disallowance made by the learned assessing officer on account of year and accrual is not sustainable in law. With respect to the issue of tax deduction at source on the year and accrual is the issue has been decided in ITA number 1059/del/2015 in the sister concern of the assessee for assessment year 2010 – 11 wherein identical disallowance has been deleted. Therefore respectfully following the decision of the coordinate bench we also hold that no such disallowance can be made for non-deduction of tax at source when the year and provisioning are made by the assessee which are reversed on the 1st day of the subsequent year. Accordingly, ground number 6 of the appeal of the assessee is allowed.
41. In the result, appeal of the assessee is partly allowed.
Order pronounced in the open court on 14/08/2019.

-Sd/-
(BEENA A PILLAI)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 14/08/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

