

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

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAVISH SOOD, JM**

**ITA No.1626/Mum/2014
(Assessment Year : 2009-10)**

The Dy. Commissioner of Income Tax 10(3), Room No.451, 4 th Floor Aayakar Bhavan Maharshi Karve Road Mumbai – 400 020	Vs.	M/s. Chemtex Global Engineers Pvt. Ltd., Chemtex House, Main Street, Hiranandani Gardens, Powai, Mumbai – 400 076
PAN/GIR No. AACCC4458P		
(Appellant)	..	(Respondent)

**ITA No.1797/Mum/2014
(Assessment Year : 2009-10)**

M/s. Chemtex Global Engineers Pvt. Ltd., Chemtex House, Main Street, Hiranandani Gardens, Powai, Mumbai – 400 076	Vs.	The Dy. Commissioner of Income Tax 10(3), Room No.451, 4 th Floor Aayakar Bhavan Maharshi Karve Road Mumbai – 400 020
PAN/GIR No. AACCC4458P		
(Appellant)	..	(Respondent)

Revenue by	Shri Pavan Kumar Beerla
Assessee by	Shri Ajit Kumar Jain / Shri Akshay Kenkre & Ms. Asmi Nandola
Date of Hearing	03/07/2019
Date of Pronouncement	01/10/2019

आदेश / ORDER**PER M. BALAGANESH (A.M):**

These cross appeals in ITA Nos.1626/Mum/2014 & 1797/Mum/2014 for A.Y.2009-10 preferred by the order against the final assessment order passed by the Assessing Officer dated 09/01/2014 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel-III (DRP in short) u/s.144C(5) of the Act dated 31/12/2013 for the A.Y.2009-10.

ITA No.1797/Mum/2014 (Assessee Appeal) (A.Y.2009-10)

2. The ground Nos. 1.1 to 1.3 raised by the assessee is with regard to transfer pricing adjustment of Rs.4,23,17,761/- in respect of international transactions relating to provision of engineering service fees with its Associated Enterprises(AEs).

3. The brief facts of this issue are that the assessee is engaged in providing basic and detailed engineering services to its Associated Enterprises ('AEs') as well as to unrelated parties (Non- AEs). Such engineering services are provided mainly to companies belonging to the chemical and textile industries. The assessee is a subsidiary of Chemtex Engineering of India Private Limited, which in turn is a wholly owned subsidiary of M & G Finanziaria Industrial S.p.A. The international transactions carried out by the assessee as reported in Form. No. 3CEB comprised of provision of engineering services to its AEs aggregating to INR. 29,49,96,776/-.

3.1. The details of such services rendered by the assessee to various AEs and the method adopted for benchmarking the said transactions are as under:-

Sr No	Nature of transactions	Details of AE	Amount (Rs.)	Method Adopted by Assessee
1	Provision of services - Engineering Service Fees	Chemtex International Inc.	1,95,936,368	Internal TNMM/CUP
		Chemtex Italia Sri.	94,376,009	
		Chemtex Engineering Co. Ltd.	4,164,414	
		Chemtex (Sanghai) International Trading Co. Ltd.	519,985	
	Total		2,94,996,776	

As per the transfer pricing study report prepared by the assessee, the assessee has adopted the Internal TNMM as the primary method of benchmarking of its international transactions and further relied on the Internal CUP method as a secondary method of benchmarking the international transactions. Therefore, by considering both the methods, the assessee pleaded that the international transactions were at Arm's Length. This was done in light of the fact that the assessee is engaged in providing similar engineering services to unrelated parties and AEs, and that the assessee maintains a continuous and detailed record of the actual man-hours worked, on a project by project basis.

3.2. The Id. TPO observed that according to the FAR analysis in the TP study report, the AEs are the management service providers and carry most of the risks towards the execution of the contract with various

companies whereas the assessee is a provider to export technical services to its AEs. Since the assessee's service fees are as per "man hour supply" agreement on per hour basis, it is AE's responsibility to get the work done from the assessee's personnel, however, the AEs have to ensure that the service provided by the assessee should adhere to clients quality and timing requirement. As per the TP study report, the assessee has selected Berry Ratio as the most appropriate Profit Level Indicator (PLI). Berry ratio is defined as follows:-

Berry Ratio = Operating Revenue / Operating Expenses

Operating Expenses = Operation Expenses excluding non-recurring expenses

Operating Revenue = Net revenue from service operations.

3.3. The workings of Berry Ratio and Segmental Profit and Loss Account as submitted by the assessee in its TP study report are as under:-

Particulars	Related Party Transactions (Exports)	Unrelated Party Transactions (Domestic)	Total
INCOME			
Engineering Service Fees			
Export	306,492,800		306,492,800
Domestic	412,000	98,926,911	99,338,911
Other Income		2,981,281	2,981,281
	306,904,800	101,908,192	408,812,992
% turnover	75	25	100
Chargeable hours	76	24	100
EXPENDITURE			

Payments to and Provisions for Employees (in the ratio of turnover 75:2)	193,393,929	64,464,643	257,858,572
Operation and Establishment Expenses (in the ratio of turnover 76: 24)	93,261,434	31,087,145	124,348,579
Depreciation (in the ratio of turnover 76: 24)	7,225,991	2,408,664	9,634,654
Provision for Contingencies (actuals for Local)		1,875,000	1,875,000
	293,881,354	99,835,451	393,716,805
Profit/ (Loss) for the year before prior period and extraordinary items	13,023,446	2,072,741	15,096,187
Extraordinary Items			
Employee Separation Cost	-		
Profit/ (Loss) for the year after	13,023,446	2,072,741	15,096,187
Extraordinary Items			
Tax paid for earlier years	-	-	-
Profit/ (Loss) for the year after prior period and extraordinary items	13,023,446	2,072,741	15,096,187
Provision for Current Tax (in the ratio of 76: 24)	(6,318,750)	(2,106,250)	(8,425,000)
Provision for Wealth Tax	(15,750)	(5,250)	(21,000)
PROFIT AFTER TAX	6,688,946	(38,759)	6,650,187
Adjusted Revenues	306,904,800	98,926,911	405,831,711

Adjusted Costs	293,881,354	97,960,451	391,841,805
Berry Ratio	1.04	1.01	1.04

3.4. Thus, the assessee claimed that it had earned better margin in rendering engineering services to AE i.e. Berry Ratio of 1.04 vis-à-vis rendering engineering services for non-AE i.e. Berry Ratio of 1.01 and accordingly, it was claimed that its international transaction were at ALP. The assessee in its TP study report observed that Internal TNMM was applied on the basis of segmental profit and loss account prepared by allocating the expenses into AE's segment and unrelated party segment in the ratio of 75:25. During the transfer pricing assessment proceedings, the assessee justified the margin using Internal TNMM and also submitted comparative charts for Internal Comparable Uncontrolled Price (CUP) method. The assessee submitted utilisation statement on actual chargeable man hours received and subsequent calculation and comparison of the project wise man hourly rate for AE projects and unrelated party projects for the year under consideration. The assessee contended that since the rate per man hour for the AE projects was higher than the rate per man hour for the un-related party projects, the international transactions were at arm's length even under the Internal CUP method. The assessee submitted that billing to AE was done on hourly basis whereas billings to non-AE were done on lump sum basis but hourly rate for rendering of service details were available with the assessee. The agreement also provided for billing of additional work based on hours spent. The assessee under Internal TNMM in its Segmental Profit and Loss Account allocated the Operation and Establishment expenditure in the ratio of turn over i.e. 75:25. The assessee under Internal CUP method gave the workings of utilisation statement on a monthly basis in a tabular form before the Id. TPO vide

letter dated 07/11/2012 containing chargeable resources; chargeable hours; overtime hours and chargeable total hours. The said tabular form also contained the resources under utilisation summary as under:-

Man Hours Capacity of the Resources	-	689280
Revenue Penalty Man Hours	-	557079
Utilisation Percentage	-	80.82%
Net Utilisation Percentage	-	19.18%

3.5. During the transfer pricing assessment proceedings, the Id. TPO requested the assessee to provide the segmental profitability derived from the actual cost bookings in addition to the man hours. The assessee submitted the detailed segmental financial statements providing break-up of employee cost at actual and accordingly, the AE segment resulted in a profit of 25% on cost as against loss of 32% in the non-AE segment. The assessee's benchmarking of the international transaction of receipt of engineering services fee is done by using the Internal TNMM method. The ratio of turnover of AE and non-AE segment was 75:25. The operating margins of these segments was computed by allocating indirect expenses in the ratio of 76:24. The segmental analysis of related party transactions and unrelated party transactions is based on allocation of expenditure in the ratio of turnover. However, the revenue i.e. turnover is the subject matter of verification for transfer pricing and hence, the tainted transaction cannot be considered as an allocation key for allocation of the expenditure. Thus, the allocation of expenditure based on turnover and subsequent computation of operating profits of AE segment and non-AE

segment cannot be accepted. Accordingly, the assessee's benchmarking was rejected and a detailed show cause notice dated 14/01/2013 was issued to the assessee. The assessee in its reply dated 22/01/2013 submitted that the costs were allocated not on the basis of turnover but on the basis of 'chargeable hours'. The assessee's submission is discussed in detail in subsequent paragraphs. The assessee has submitted that out of the total man-hours spent, the man-hours spent on the projects of third parties were 24% whereas man-hours spent on the projects of AEs were 76%. The assessee has not submitted any documents in support of its claim. These figures are not appearing in the audited report of the assessee. Besides this, the cost of employee allocated to AE segment and non-AE segment which has been claimed to be at actual by the assessee is not in the same ratio. (This aspect is discussed in detail in the subsequent paragraphs.) Hence, these figures cannot be relied upon and the benchmarking depending upon such figures is to be rejected.

3.6. The Id. TPO with regard to adoption of Internal CUP method as MAM observed as under:-

“7.2 During the TP assessment proceedings before the issue of final show cause notice, when this was communicated to the assessee, it submitted CUP details for benchmarking vide submissions dated 10/09/2012, 7/11/2012 and 3/12/2012. In these submissions, the assessee has benchmarked the international transaction of receipt of engineering service by using Internal CUP. The assessee has compared "man hour rates" charged by the assessee to the AE and the domestic third parties for rendering engineering services. The assessee has contended that 'man hour rates' charged to the AEs were more than those charged to third parties. The assessee was asked to submit the details along with supporting documents. Accordingly, it has submitted

copies of agreements executed with the AEs and third parties. After considering the details, assessee's benchmarking by using CUP method is also rejected on the following reasons:

i) The assessee has submitted that it had entered into similar arrangement with the related and unrelated parties. However, it was not found true. A perusal of contract agreements with the AEs shows that the pricing of the contract is based on fixed "man hour rates". However, the perusal of contract agreements with other third parties shows that the pricing of the contract is not based on any fixed "man hour rates". The services are provided to the third parties with the provision of a lump-sum fee in the respective contract agreements.

ii) A perusal of copies of invoices submitted by the assessee also shows that there is mention of "man hour rates" on the invoices raised to the AEs. However, there is no such mention of any "man-hour rates" on the invoices raised to the third parties.

iii) The assessee has submitted the working of man-hour rates of the AE and the third parties vide its submission dated 10/09/2012. It again submitted revised working vide submission dated 7/11/2012. A perusal of these workings shows that the "man-hour rates" of the third parties are estimated by using certain base rate. This base rate is not mentioned in any of the contract agreement or the invoices. Hence, the same cannot be accepted as actual price charged to the third parties but is estimation only.

iv) All the transactions with the AE are international transactions i.e. exports whereas all the transactions with third parties are domestic sales. Thus, the assessee has compared the controlled transactions and uncontrolled transactions whose geographical locations are not similar.

v) The contracts for supply of engineering services with the AEs are 'duration specific'¹. The corresponding clause of these agreements reads such as 'This agreement shall be deemed to have commenced on the effective date of this agreement and shall remain in force until December 31, 2009.' The assessee has agreed to provide engineering services to these related parties for a particular period for fees charged as per agreed 'man-hour rates'. The services may be provided for one or more projects during the said period. However, the contracts with the third parties are 'project specific'. The assessee has agreed to provide engineering services to these parties for a particular project for a lump-sum fee.

vi) Though there is mention of man-hour rate for additional work in few of the agreements with third parties, these figures cannot be considered as the man-hour rates charged to third-party projects. The clause of remuneration for additional work is generally introduced in the agreement to avoid

litigation and safeguard the contractor's/consultant's interest. This clause is generally taken as an abundant precaution as the lump-sum amount, as admitted by the assessee, is quoted after estimating the total man-hours required to complete the project. Under such circumstances, the client always expects the additional work to be done at lower rates and the negotiations are generally made on those lines. The terms of negotiations for lump-sum remuneration and rates for additional work are always different. Hence, the rates for additional work cannot be taken as the rates charged for the whole project.”

3.6. The Id. TPO communicated his observations to the assessee vide show-cause notice dated 14/01/2013. In response, the assessee filed written submission on 22/01/2013 as under:-

"4. Reasons for Comparability of Agreements with Third Parties and AEs
Your goodself will appreciate that due to following reasons the agreements entered into with the third parties and AEs are comparable:

a.- Similar Functional Profile:

Your goodself will appreciate that in case of contracts with both AEs and third parties the functional profile is same, wherein CGPL Is performing the engineering services.

b. Same facilities and resources are deployed;

The design and engineering work is carried out in the same office premises irrespective of whether the service provided are for local or for overseas associated clients and are executed by deploying employees within the Qurce pool of the organization and the infrastructure which is common to both type of the services rendered.

c. Services rendered from India in both cases: In both cases the services are rendered from India.

Your good self in the SON has stated that the agreements entered into with the AEs are not comparable with the agreements entered into with the third parties.

Your good self will appreciate that the design and engineering services carried out by the company are in the same office premises irrespective of whether the services provided are for local or for overseas associated clients and are executed by deploying employees within the same resource pool of the organization and using the same infrastructure, hence the services rendered in respect of the AE and the third parties are therefore comparable. Further, the allegation that the agreements entered into with the third parties and AEs are not comparable needs to be deleted.

5. Allocation keys used for segmental

The assessee's benchmarking was rejected on the grounds that the allocation of the expenditure between related and non-related transactions was done on the basis of turnover. Since the revenue earned i.e. the turnover was the subject matter of verification, the same cannot be used as the allocation key.

We would humbly like to bring to the notice of your goodself that vide the attachment of the submission dated 3rd December, 2012 the costs were allocated to the related and non-related parties on the basis of the actual chargeable hours and not on the basis of the revenue, which is the subject matter of verification. Further the use of above allocation keys are as per common business practices.

6. Use of base rate in calculating the "man-hour rates" of third parties

It has been alleged that a certain base rate has been used to derive the "man-hour rates" of the third parties. With regard to the above, we would like to make the following submission:

The man hour rates charged in AY 2009-10 are computed by dividing the revenue earned on a particular project during the year under consideration by the total hours booked on the project during the same year.

We would like to further bring it to the notice of your good self that an estimation of the number of hours to be employed to the project is made before the project is undertaken. On the basis of the same, the lump-sum amount to be charged for a particular project is determined. You will appreciate the fact that no third party will enter into any agreement if the total liability to be borne at the end of the project is not determined upfront. In other words, no third party will enter into an agreement on the basis of man-hour rates, as it would not be able to budget the total cost of the engineering services. If the projects are negotiated on the basis of man-hour rates, it is more likely than not that the project will be handed over to one of the competitors.

Your goodself will appreciate that in some cases where there is change of order or some rework is required under any contract, AEs are more accommodating compared to third parties. Further, in case of contracts with AEs, CGPL does not incur any marketing expenses and the bad debt risk is insignificant.

Further we would like to draw your attention that even after rendering services to AEs, CGPL had an unutilised capacity of significant hours and the contracts with third parties helped the company to utilise the same and to recover the fixed cost.

Based on above we hereby submit and reiterate that our benchmarking exercise needs to be accepted.”

3.6. The Id. TPO did not accept the benchmarking using Internal TNMM or Internal CUP. The Id. TPO was of the view that most of the Non-AE contracts are lump sum contracts and the AE contracts are per man hour contracts and the same cannot be compared. The TPO was of the view that Internal TNMM cannot be accepted for the reason that the allocation of expenditure has been made at the rate of 75:25 in the transfer pricing study report whereas when the actual data is furnished in the ratio of employee cost which works out to 55:45 which was earlier submitted as 76:24 in the ratio of man hours. The Id. TPO also stated that if the actual employee cost is in the ratio of 55:45, how can the actual consumption of man hours be in the ratio of 76:24? Therefore, the Id. TPO rejected the Internal TNMM and Internal CUP and proceeded to benchmark the international transactions applying External TNMM as the MAM. For this purpose, he arrived at the final set of comparables and arrived at their operating mean margin of 14.31% as under:-

SrNo	Name of the Company	Operating Margins (%)
1	Semac Limited	16.52
2	TOE Consulting Engineers Limited	19.87
3	Wapcos Limited	6.72
	Arithmetic Mean	14.37

3.7. The Id. TPO made an adjustment to ALP in respect of engineering services rendered by the assessee to its AE in the sum of Rs.4,23,17,761/- as under:-

Particulars	Amount (Rs)
Operating Income (A)	405,831,711
Operating costs (B)	391,841,805
Operating profit (C)	13,989,906
OP/OC (actual)	3.57%
Arm's length OP/OC	14.37%
Arm's length operating profit (D) = B x 14.37%	56,307,667
Arm's length operating income (E) = D+B	448,149,472
Adjustment = E-A	42,317,761

3.8. The assessee filed objections before the Id. DRP. Among other objections, one of the objections raised by the assessee was that the mark up of 14.37% was applied on the entire cost of the assessee by the Id. TPO which was wrong. The Id. DRP however, rejected all the arguments of the assessee and upheld the action of the Id. TPO including the adjustment proposed thereon.

4. Aggrieved by the final assessment order passed by the Id. AO pursuant to directions of the Id. DRP, the assessee is in appeal before us. The various arguments of the Id. AR could be summarised as under:-

a) The contracts between AE and non-AEs are comparable even though the AE contracts are based on man hour rate and non-AE contracts are lump sum contracts. This comparison is possible since the assessee maintains full time log of each and every hour spent on the engineering job of AE as well as Non AE. Further, even in lump sum contracts, a rate per hour has also been agreed and mentioned in the agreements for any additional work to be done by the assessee with the Non AEs.

b) Such per hour rates when applied in conjunction with the time involved, ultimately formed the basis of framing Internal TNMM analysis and profitability statement as available on page number 269 of

the paper book. The revised segmentals as available on page 269 were based on the actual cost and actual man-hours spent for projects of AE and unrelated parties. Accordingly, the international transaction was considered to be at arm's length.

c) The chargeable man-hours were calculated and documented at actuals by following a scientific method on a project by project basis for AE and Non AE projects. Due to the nature of the services provided by the company, the company had a detailed log of actual time logged on to respective projects. This percentage of chargeable hours for the AE projects is 76%, derived as a percentage of the actual man-hours for AE projects divided by the actual revenue generated man-hours.

The calculation of the same is tabulated as follows:

Sr. No.	Particulars	Values
A)	Actual man-hours for AE projects	4,23,747 hours
B)	Actual revenue generated man-hours	5,57,079 hours
C)	Thus, percentage of chargeable hours for the AE projects (A / B)	76%
D)	Percentage of chargeable hours allocable to Non AE projects	24%

d) In the revised segmentals, the employee costs was taken on actual basis and the other expenses were allocated in the ratio of chargeable hours i.e. ratio of 76:24. The results of such revised segmentals reflected an Operating Profit/ Operating Cost ratio of 25% for the AE segment, and (32%) for the unrelated party segment. This indicated that the profitability of the assessee from the AE segment is higher than that from the Non AE segment. As the segmental using actual bifurcation of employee cost is a reflection of the true nature of the business of the assessee, the same is considered to be at Arm's length.

e) In support of the acceptance of the segmentals, assessee placed reliance on the decision of co-ordinate bench of this Tribunal in the case of M/s. SI Group India Limited vs. ACIT in ITA No. 1745/Mum/2014 (Assessment Year 2009-10) dated 19/06/2019.

f) The assessee further explained that the TPO, in his order, without appreciating that the revised segmental was based on actual chargeable hours, got confused and mixed up both the segmentals and calculated various ratios, as evident from the transfer pricing order (page no.9 of TPO's order).

g) The assessee explained that 55:45 ratio is the bifurcation of the actual cost of employees accounted for, whereas 76:24 is the ratio of actual man-hours spent and recorded on project by project basis. The assessee explained that in a project the composition of employees may

be different from another project. Therefore while the actual time spent on AE and non AE projects are in the ratio of 76:24, however, due to the different salary structure of the employees, the actual cost is in the ratio of 55:45. To explain it further, a project may require more time of an engineer than a draftsman. In another project more of semi technical or non-technical employees may be working as against the highly paid engineers. Thus, both the ratio of 76:24 as well as 55:45 are correct as they represent different numbers. The ratio of 76:24 represents the actual time spent by various employees on projects. It is not necessary that the cost would also be in ratio of 76:24, since different level of employees are working on different projects. The ratio of 55:45 correctly represents the actual cost of employees in AE and non-AE segment.

h) The TPO on page 9 of his order calculated the ratio of 'Income to Employee Cost' and the ratio of 'PBIT to Income ratio', which are irrelevant to the case. Further, the assessee points out that the ratio of PBIT to income was calculated which is an incorrect measure since revenue is the controlled transaction in the present case.

i) Further, in support of the fact that when Internal segments are available, such Internal comparability should be considered for benchmarking of international transactions rather than applying an external comparability, the assessee also placed reliance on the decision of co-ordinate bench of this Tribunal in the case of M/s. SI Group India Limited vs. ACIT (supra), referring to the decision of the Third Member Bench in the decision of co-ordinate bench of this Tribunal in the case of M/s. Tecnimont ICB India (P.) Ltd vs. ACIT in ITA No. 4608/Mum/2010, wherein it was held as under:-

"5.....We find that the reliance has been rightly placed on the decision of Third Member of Mumbai Tribunal in the case of Tecnimont ICB India (P.) Ltd reported in [2012] 138 ITD 23 (Mumbai) (TM) wherein it was held that the Internal comparability should be given preference over external comparability....." (page 10 of the order)

j) Thus, in a nutshell the assessee argued that in the case of the assessee Internal comparability in the form of Internal TNMM as well as Internal CUP is available and therefore, the same should be preferred over external comparability. The assessee thus prayed that following Internal TNMM, which is based on scientific basis of cost allocation, the margins of AE segments are at arm's length."

4.1. The Id. AR argued without prejudice to the aforesaid arguments, that some of the comparables chosen by the Id. TPO using External

TNMM cannot be used as comparables. The Id. AR also argued without prejudice, that, in any case, the mark up of 14.37% cannot be applied on the entire cost of the assessee and the same could be applied only on the cost incurred for international transactions. Reliance in this regard was placed on the decision of Co-ordinate Bench of this Tribunal in SI Group India Ltd, supra and also on the decision of the Hon'ble Jurisdictional High Court in the case of Sandvik Asia Pvt. Ltd., in ITA No.1088/2015 dated 28/04/2018 wherein it had been categorically held that adjustment should be restricted only to international transactions and not be made on all other non-AE transactions.

4.2. The Id. AR further argued, without prejudice to the aforesaid arguments, by submitting the following workings and explanation that even if the arm's length mark up calculated by the Id. TPO is applied on the actual AE segment cost, it could be observed that the actual revenue earned by the assessee is higher than arm's length revenue so calculated by the Id. TPO:-

Particulars	Rs.
Associated Enterprise ('AE') cost as per revised Financial segmentals	24,47,42,243
<u>Add:</u> Arm's length Mark-up (Operating Profit / Operating Cost) as per External TNMM applied by the TPO @ 14.37%	3,51,69,460
Total i.e. Arm's Length Revenue	27,99,11,703
Actual Revenue earned by Assessee from AE	30,64,92,800

5. Per contra, the Id. DR vehemently argued that the nature of billing with AE and non-AE are totally different and vehemently relied on the directions of the Id. DRP. In rejoinder, the Id. AR drew the attention of this Bench to page No.4 of the directions issued by the Id. DRP wherein the Id. DRP had noted that "obviously two segments of assessee's business did not follow the same profit earning capacity." He argued that

the transfer pricing regulations requires the benchmarking of the international transactions and do not require revenue authorities to examine the profit earning capacity of the tested party. Without prejudice, he also argued by pointing out that no two businesses whether it is Internal or External can lead to same or similar profit earning capacity and therefore, this finding of the Id. DRP is without any merits.

6. We have heard rival submissions and perused the materials available on record. We find that the billing has been done to AE for rendering engineering services on man hour basis which is part of the agreement. The agreement also specifically provides that for the additional work done, the billing shall be done on man hour basis. In respect of billings done to non-AEs, same are done on lump sum basis though the workings on man hour basis is undisputedly available with the assessee, which are placed on record before the Id. TPO and Id. DRP. Since the log book is properly maintained duly mentioning the man hours devoted for rendering each and every service for AE as well as non-AE, on the engineering job, the comparison of AE and non-AE billings on man hour basis is indeed correct. We find that applying the said man hours in conjunction with the time involved which had formed the basis of preparation of Segmental Profit and Loss Account which is enclosed in page 269 of the paper book and reproduced hereunder for the sake of convenience :-

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(422)

CHEMTEX GLOBAL ENGINEERS PVT. LTD.

Segmental Profit & Loss Account for the year ended 31st March, 2009

Annexure 3

Amount in INR

	Related Party Transactions (Exports)	Related Party Transactions (Domestic)	Total
INCOME			
Engineering Service Fees			
Export	306,492,800	-	306,492,800
Domestic	412,000	98,926,911	99,338,911
Other Income		2,981,281	2,981,281
	306,904,800	101,908,192	408,812,992
% Turnover	75	25	100
Chargeable Hours	76	24	100
EXPENDITURE			
Payments to and Provisions for Employees (Actuals)	142,914,986	114,943,586	257,858,572
Operation and Establishment Expenses (in the ratio of chargeable hours 76:24)	94,504,920	29,843,659	124,348,579
Depreciation (in the ratio of actuals chargeable hours 76:24)	7,322,337	2,312,317	9,634,654
Provision for Contingencies (actuals for Local)		1,875,000	1,875,000
	244,742,243	148,974,562	393,716,805
Profit/ (Loss) for the year before prior period and extraordinary items	62,162,557	(47,066,370)	15,096,187
Extraordinary Items			
Employee Separation Cost			
Profit/ (Loss) for the year after Extraordinary Items	62,162,557	(47,066,370)	15,096,187
Tax paid for earlier years			
Profit/ (Loss) for the year after prior period and extraordinary items	62,162,557	(47,066,370)	15,096,187
Provision for Current Tax (in the ratio of 75:24)	(6,403,000)	(2,022,000)	(8,425,000)
Provision for Wealth Tax (in the ratio of 76:24)	(15,960)	(5,940)	(21,900)
Provision for FBT			
Less Provision for contingencies			
PROFIT AFTER TAX	55,743,597	(49,093,410)	6,650,187
Adjusted Revenues	306,904,800	98,926,911	405,831,711
Adjusted Costs	244,742,243	147,099,562	391,841,805
Berry Ratio*	1.25	0.67	1.04
* The Profitability of the company has been impacted due to unutilized capacity.			
PERIDA			
Operating Cost	62,162,557	(47,066,370)	15,096,187
Cost Plus Ratio (Op. Profit/Op. Cost)	244,742,243	147,099,562	391,841,805
	25	(32)	4

CHEMTEX GLOBAL ENGINEERS PVT. LTD.
MUMBAI
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6.1. We find that the Id. AR had submitted that the chargeable billing hours were calculated and documented at actuals following a scientific method for each project for AE and non-AE separately. These details are available in the detailed log of actual time consumed in the respective projects. We find that the Id. AR had proved on record that the percentage of chargeable hours for the AE project is 76% derived as the percentage of actual man hours for AE projects divided by actual revenue generated man hours as tabulated supra by proper documentation annexed in the paper book. We also find lot of force in the argument of the Id. AR that the employee cost was taken on actual basis (which worked out to ratio of 55 : 45 in the aforesaid Segmental Profitability

Statement) and the other operation and establishment expenses and depreciation were allocated in the ratio of chargeable hours i.e. 76:24. The result of such revised segmentals as tabulated hereinabove reflected on operating profit / operating cost ratio of 25% for the AE segment and loss of 32% for non-AE segment. This indicated that the profitability of the assessee from AE segment is more than that of the non-AE segment. We also find that even if the entire expenses are to be allocated in the ratio of 55:45 which is ratio of employee cost on actual basis, as per the Id. TPO, then it would only result in increased margins in the AE segment as admittedly the assessee has allocated 76% of expenses for the AE segment, which is sought to be disturbed by the Id. TPO while allocating only 55% thereon. This would obviously increase the profitability of the AE segment which will only improve the margins of the assessee warranting no adjustment to ALP. Hence, we hold that the segmental profitability statement given by the assessee in page 269 of the paper book deserves to be accepted in all force.

6.2. We hold that when Internal segmentals are available, the said Internal comparability should always be considered and preferred for benchmarking of international transactions rather than applying external comparability. Reliance in this regard has been rightly placed on the third member decision of Mumbai Tribunal in the case of Technimont ICB India Pvt. Ltd. reported in 138 ITD 23 Mumbai (TM).

6.3. In view of the aforesaid observations and respectfully following judicial precedents hereinabove, we hold that assessee's Internal comparability in the form of Internal TNMM as well as Internal CUP is available and the same should be preferred over external comparability and external TNMM. Accordingly, we hold that Internal TNMM should be

accepted as most appropriate method, which, when applied, the margins of AE segment is at arm's length. Hence, no adjustment to ALP in the sum of Rs.4,23,17,761/- is warranted. Accordingly, the ground Nos. 1.1 to 1.3 are allowed.

7. The ground No.2 raised by the assessee was stated to be not pressed since the relief has already been granted by the Id. DRP by rectifying its directions. Accordingly, the ground No.2.1 to 2.4 raised by the assessee are dismissed as not pressed.

8. The ground No.3.1 to 3.3 raised by the assessee are only relating to short credit of grant of TDS in the sum of Rs.1,72,249/- which we direct the Id. AO to verify that the relevant evidences and grant the same in accordance with law and accordingly the ground Nos. 3.1. to 3.3. are allowed for statistical purposes.

9. The ground No.4 raised by the assessee is general in nature and does not require any specific adjudication.

10. In the result, appeal of the assessee in ITA No.1797/Mum/2014 for A.Y.2009-10 is partly allowed for statistical purposes.

ITA No.1626/Mum.2014 -A.Y.2009-10 (Revenue Appeal)

11. The Revenue has raised the following grounds:-

1. On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in deleting the disallowance of Business Development expenses amounting to Rs. 18,15,060/- and Legal & Profession Fees amounting to Rs. 2,41,084 / - without appreciating that the Assessee Company did not discharge their onus of proving the genuineness of their claim before the Assessing Officer as held by Full Bench decision of the Kerala High Court in the case of Ram Bahadur Thakur Ltd. 261 ITR 390.

2. On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in deleting the disallowance of Business Development expenses amounting to Rs. 18,15,060/- and legal & Professional Fees amounting to Rs. 2,41,084/- without appreciating that the Assessee Company did not offer any additional evidence before the DRP and the disallowance made by the AO are valid in view of the Hon'ble Supreme Court in the case of Madras Auto Services P Ltd. (1998) 233 ITR 468 (SC), Bombay High Court judgment in the case of Patel International Films Ltd, 102 ITR 209, Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Ltd. 27 ITR 34 and Alembic Chemical Work, 177 ITR 377.

3. The appellant craves leave to add, amend, vary, omit or substitute any of aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

4. The appellant prays that the direction of DRP, Mumbai on the above directions be set-aside and of the assessing officer be restored.

12. We have heard rival submissions. We find that the Id. AO during the course of assessment proceedings observed that the assessee had incurred business development expenses and legal and professional expenses and treated the same as capital expenditure. The Id. DRP in its directions directed the Id. AO to allow the said expenditure in the sums of Rs.18,15,060/- and Rs.2,41,084/- respectively as revenue expenditure by giving a categorical finding that they are not related to any new business of the assessee. Obviously, this finding was rendered by the Id. DRP after going through various details that are already available on record with regard to the aforesaid expenditure. Hence, it could be safely concluded that the entire details of expenditure are very much available before the Id. AO itself which is also admitted by the revenue in their ground No.2 by stating that no additional evidence has been filed by the assessee before the Id. DRP with regard to said expenditure. Hence, the short dispute before us should be whether the aforesaid business development expenses and legal and professional expenses should be capital

expenditure or revenue expenditure. But we find that the revenue has admittedly raised a ground questioning the genuineness of the incurrance of the expenditure per se, which in our considered opinion, does not emanate from the orders passed by the lower authorities. We find that the genuineness of incurrance of the expenditure for the purpose of business of the assessee was never disputed or doubted by the lower authorities. Hence, we are inclined to dismiss the ground of the revenue as not emanating from the orders of the lower authorities. Accordingly, the appeal of the revenue is dismissed.

13. TO SUM UP:-

ITA NO.	AY	APPEAL BY	RESULT
1797/Mum/2014	2009-10	Assessee	Partly Allowed for Statistical purposes
1626/Mum/2014	2009-10	Revenue	Dismissed

Order pronounced in the open court on this 01/10/2019

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 01/10/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai