

INCOME TAX APPELLATE TRIBUNAL
 DELHI BENCH "I-2": NEW DELHI
 BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
 AND
 SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 996 & 3007/Del/2011
 (Assessment Year: 2002-03, 2003-04)

DCIT, Circle-2(1), New Delhi	Vs.	M/s. BBC Worldwide (India) Pvt. Ltd, 518- 522, World Trade Centre, Baba Road, New Delhi PAN: AABCB5209Q
(Appellant)		(Respondent)

CO No. 315 & 231/Del/2011 & 2012
 (In ITA No. 996 /Del/2011, 3007/Del/2011 & 495/Del/2012)
 (Assessment Year: 2002-03, 2003-04 and 2005-06)

M/s. BBC Worldwide (India) Pvt. Ltd, 518-522, World Trade Centre, Baba Road, New Delhi PAN: AABCB5209Q	Vs.	DCIT, Circle-2(1), New Delhi
(Appellant)		(Respondent)

ITA No. 5441/Del/2014
 (Assessment Year: 2007-08)

M/s. BBC Global News India Pvt Ltd (formerly known as BBC World (India) Pvt. Ltd, Unit No. 3.1, 3 rd Floor, Sourthern Park, Plot No. D- 2, Saket District Centre, New Delhi 110016 PAN: AABCB5209Q	Vs.	ACIT, Circle-2(1), New Delhi
(Appellant)		(Respondent)

ITA No. 495 /Del/2011
 (Assessment Year: 2005-06)

ACIT, Circle-2(1), New Delhi	Vs.	M/s. BBC Worldwide (India) Pvt. Ltd, 518- 522, World Trade Centre, Baba Road, New Delhi PAN: AABCB5209Q
(Appellant)		(Respondent)

CO No. 51 & 52/Del/2012
(In ITA No. 495 & 5640/Del/2011)
(Assessment Year: 2004-05 & 2005-06)

M/s. BBC World (India) Pvt. Ltd, 518-522, World Trade Centre, Baba Road, New Delhi PAN: AABCB5209Q	Vs.	ACIT, Circle-2(1), New Delhi
(Appellant)		(Respondent)

ITA No. 5556/Del/2014
(Assessment Year: 2007-08)

DCIT, Circle-2(1), New Delhi	Vs.	M/s. BBC World (India) Pvt. Ltd, E-21, Hauz Khas Market, New Delhi PAN: AABCB5209Q
(Appellant)		(Respondent)

ITA No. 5640/Del/2014
(Assessment Year: 2004-05)

ACIT, Circle-2(1), New Delhi	Vs.	M/s. BBC World (India) Pvt. Ltd, E-21, Hauz Khas Market, New Delhi PAN: AABCB5209Q
(Appellant)		(Respondent)

ITA No. 4304/Del/2010
(Assessment Year: 2006-07)

M/s. BBC World (India) Pvt. Ltd, E-21, Hauz Khas Market, New Delhi PAN: AABCB5209Q	Vs.	Income Tax Officer, Ward-2(4), New Delhi
(Appellant)		(Respondent)

For Assessee	Shri Gaurav Gupta, Adv.
For Revenue	Shri H.K. Choudhary, CIT DR Shri Rakesh Kumar, Sr. DR
Date of Hearing	25/07/2019
Date of pronouncement	18/10/2019

O R D E R

PER BENCH

1. This is the bunch of 11 appeals and cross objections by the parties in case of one Assessee, appellant/respondent involving similar issue and therefore they are heard together and disposed of by this common order.

ITA number 996/del/2011 and CO number 315/del/2011
assessment year 2002 – 03

2. ITA number 996/del/2011 is filed by the Deputy Commissioner Of Income Tax, central circle – 2 (1), New Delhi (the learned AO) against the order of The Commissioner Of Income Tax (Appeals) – XX, New Delhi dated 30/12/2010. The Revenue has raised the following grounds of appeal for the Assessment Year 2002-03:-

“1. *The ld CIT(A) has erred on facts and in law in deleting addition of Rs. 3,52,71,454/- made on account of transfer pricing adjustment as:-*

- a. *The ld CIT(A) has erred in law in accepting the assessee's contention that it is only intermediary between third party and AE.*
 - b. *The soul of the market support services functions is present in India as the assessee company is responsible for discharging such functions as an independent organization and a lot of effect is required to be put into by it providing business promotion and research services and, therefore, it needs to be adequately compensated for such efforts. Therefore, such cost cannot be ignored and excluded for the purpose of computation of Arm's Length Price of Market support services fee."*
3. The assessee has raised the following grounds of appeal in Cross objection No. 315/Del/2011 in ITA No. 996/Del/2011 for the Assessment Year 2002-03:-
 - “1. *On the facts and circumstances of the case and in law, we wish to rely on order dated December 30, 2010 issued under section 250 of the Income Tax Act, 1961 passed by Commissioner of Income-tax (Appeals)-XX, New Delhi.*”
4. Brief facts of the case for that year shows that assessee filed its return of income on 30/10/2010 declaring loss of Rs 29905615/-. During the year, the assessee has acted like as an authorised agent for BBC worldwide Ltd (UK entity) for soliciting orders for sale of Air time, advertisement on BBC world channel, besides other market support services like collection of revenue, providing marketing, public relations and distributing services for its principles.
5. During the year, it was found that assessee has undertaken international transaction as per form No. 3CEB filed along with the return of income and therefore the case of the assessee was referred to the learned Transfer Pricing Officer on 10/12/2003 u/s 92CA of the income tax act.

6. The learned Transfer Pricing Officer passed an order u/s 92CA (3) of The Income Tax Act on 31st of March 2004 wherein only dispute was with respect to the market support services agreement of the assessee.
7. The assessee has entered into an agreement with BBC worldwide Ltd to act as an exclusive agent for marketing and distribution of BBC world channel in India, to carry out research in respect of performance and viewership of BBC world channel in India and to carry out distribution and marketing activities of BBC world channel with appropriate promotional material provided by them from time to time. The assessee was primarily engaged to promote and enlarge the viewer of BBC world channel in India. For such services, the assessee charged as per terms of agreement cost +10% mark up. The assessee rendered total market support services revenue of INR 73780695/-. The learned transfer pricing officer noted that no significant assets employed for this function except normal office appliances, furniture vehicles etc. and no significant risk was also assumed apart from minor risk of fluctuation in the exchange rate for its foreign exchange loans and its use. The assessee has also entered into another international transaction with **issue of media Inst for** providing trainers to them for running the news journalism course at the Institute where the salaries were reimbursed to the assessee on cost to cost basis without any mark up. The total receipt from the same was INR 15.5 lakhs against the expenditure of INR **20 140 08/02/2003**/-. Assessee has also taken pound dominated external commercial borrowing of INR 1,000,000 for working capital requirements where part of the loan is s interest free and other loan on interest rate of LIBOR

+0.06 percentage. The method adopted by the assessee for benchmarking of the other international transaction was CUP Method and assessee has compared the rate of commission charged by it with the commission charged by an unrelated 3rd party in India who paid commission at the rate of 10% for marketing advertisement Air Time sponsorship for BBC world channel in India.

8. For market support services it was found that the functions performed by the assessee are much simpler thus it was taken as tested party. The assessee selected Transactional Net Margin Method [TNMM] for determination of arm's-length price using net profit based on cost [NP/ TC] as profit level indicator . As the assessee has earned the margin of 10% on cost from these activities, the assessee selected prowess database which resulted into a set of 5 independent comparable companies and stated that the international transaction of the assessee is at arm's-length. The learned TPO noted that assessee is broadly functioning in two categories (1) market support services, (2) marketing and promotion of advertisement air time on BBC channel. He noted that in the profit and loss account the total receipts are INR 97868237 and the total expenditure is INR 125075588 and thus there is a loss of INR 27207351. The assessee was asked to furnish the segmental profit and segmental expenditure, as well as the policy for allocating different expenses to different business segments. He noted that certain expenses such as directors' salary and other expenses relating to office, common administrative expenses such as rent etc are not identified with either of these activities and thus not allocated. He noted that out of the total administrative expenses

of INR 239,00,000/- , INR 5,775,000 have been allocated to the market support service function. It was allocated in the ratio of number of employees engaged in the market support services to the total number of employees. However, no such allocation has been made out of the expenses of the finance division and expenses of the director's office including their salaries. He further raised query that why the cost relating to the finance division, administration and directors office was not allocated to the market support services while computing the net profit of the cost plus margin from these activities. Assessee also contested that , third party cost cannot be included in the cost base of the assessee, as it does not have any margin in absence of any value addition by assessee. After considering the reply furnished by the assessee, he reached at a conclusion that though assessee has used Transactional Net Margin Method to determine the arm's-length price of market support service fee income but the method adopted by the assessee to justify the arm's-length nature of the transaction is nothing but a Modified Cost Plus Method which is also the most suitable method to determine the arm's-length price in case of a service provider. Thereafter, he computed the expenses attributable to the market support service function and Airtime sale function by including the direct expenses and indirect common expenses. Such total expenses was worked out at INR 101978926/-. The total receipt of these services was INR 73780695/- and thus he found that assessee has incurred a loss of Rs 28198231/-. As according to him assessee has incurred a loss of Rs. 28198231 in the market support service function, this amount of loss was compared with the profit margin of the comparable companies engaged in

broadly similar functions for the purpose of determination of arm's-length price of market service fee. Thereafter after making a fresh search process, he identified seven comparable companies whose Arithmetic mean of net margin over cost was 7.63%. Thereafter, he took the total cost of market support service as computed by him at INR 101978926/- applied AM 7.63% over the cost of comparable companies thus such cost was Rs. 7780990/- and therefore the total support service fee that should have been received by the assessee was determined at INR 109759916/-. Accordingly, he proposed an adjustment of INR 35979221 because of ALP of International Transaction of market support services fee income. Accordingly he passed an order u/s 92CA (3) on 31/3/2004.

9. Consequently order u/s 143 (3) of the income tax act was passed on 4/2/2005, wherein the above adjustment was made along with the addition on account of the exchange rate variation of INR 7426280/-. Accordingly total income was computed at INR 12592119/-. Subsequently assessee preferred an application under section 154 of the income tax act before the learned transfer pricing officer wherein the above adjustment was reduced to INR 35271454/-.
10. Aggrieved with the order of the learned assessing officer, assessee preferred an appeal before the Commissioner Of Income Tax (Appeals) –XX, New Delhi. The learned CIT – A noted that the following 3 issues are required for adjudication:-
 - a. whether the third-party costs that are reimbursed by the associated enterprise to the appellant should form part of the cost base on which markup is to be applied

- b. what should be the basis of allocation of indirect expenses among the airtime sale segment and market support services segment
 - c. whether the interest expenses and exchange loss are to be considered as operating expenses
11. The learned CIT – A held that the learned Transfer Pricing Officer has incorrectly held that third-party expenses have to be included in the cost base of the appellant and appropriately markup. Based on this finding he computed that the direct cost of market support services is INR 16,900,000 and allocated indirect tax based on the payroll cost is Rs 12.12 Mn. . Therefore the total cost of market support service segment is Rs. 29,020,000. He applied the profit margin of 6.44% on such cost and therefore determined the arm’s-length price of the market support service segment at INR 30,880,000, whereas the revenue of the appellant from the above services was found to be Rs. 31,930,000/- . Therefore, he held that the international transaction of the appellant with respect to the provision of market support services complies with the arm’s-length standard under the Indian transfer pricing regulations.
12. The learned assessing officer aggrieved with the order of the learned CIT – A in deleting the addition of INR 35271454/- holding that assessee’s contention that it is only intermediary between the 3rd party and the associated enterprise, therefore there is no mark up required on this cots. Thus CIT A has not considered those cost in to cost base of the assessee. The contention of the TPO is that market support service function is performed in India as the assessee company is responsible for

discharging such functions as an independent organization and lot of effort is required to be put into by it for providing business promotion and research services. Therefore, it needs to be adequately compensated for such an effort. Therefore, such 3rd party cost cannot be ignored and excluded for the purpose of computation of arm's-length price of market support service fees.

13. The assessee has also filed cross objection, which is supportive in nature. However during the course of hearing assessee has raised an additional ground of cross objection as under:

That on the facts and circumstances of the case and in law, the order passed by TPO and, consequential order passed by the AO are not valid as the same have not been passed by the prescribed authority under the provisions of the income tax act 1961.

As the additional ground raised in cross objection is legal and goes to the root of the matter which is essential for the dissension of the substantial justice, same was requested for admission. He referred to the plethora of judicial precedent stating that legal ground can be raised at any point of time.

14. The Ld Dr vehemently opposed such additional ground stating that assessee has not raised such ground before the AO, CIT (A), Or TPO, therefore, same cannot be raised now.
15. We have carefully considered the rival contention. We find that the ground raised by the assessee in the cross objection is purely legal and goes to the root of the matter which does not require any further investigation into the facts of the case and further distension of the substantial justice, we admit the same.

16. Now, We first proceed to decide the cross objection raised by the assessee. The original ground raised in the cross objection is merely supportive in nature, no arguments were advanced by the assessee and therefore same is dismissed.
17. Coming to the additional ground, the assessee submitted that order passed u/s 92CA of the act was passed by The Additional Commissioner Of Income Tax. It is mainly contested that he is not the authorised officer to pass such an order. Assessee referred to the meaning of the "Transfer Pricing Officer" under explanation to section 92CA of the act , wherein it is mentioned that for the purpose of the above section the 'Transfer Pricing Officer' means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner , authorised by the board to perform all or any of the functions of an 'Assessing Officer' specified in section 92C and 92D in respect of any person or class of persons. Thus the assessee stated that only 3 income tax authorities namely Joint Commissioner, Deputy Commissioner Or Assistant Commissioner are duly authorised by the CBDT to functions as a transfer pricing officer. Therefore, it is submitted that the authority given by the statute to Joint Commissioner cannot be exercised by Additional Commissioner and therefore the order passed by The Additional Commissioner under section 92CA of the act is ultra virus, null and void. The assessee also relied upon the decision of the honourable Delhi High Court in CIT vs Pankaj Gupta 334 ITR 240 wherein it has been held that when the power is given to do a certain thing in a certain manner, the same must be done in that manner or not at all and that all other proceedings are necessarily forbidden. He further relied upon the decision of the honourable Delhi High Court in 52

taxmann.com 336, 17 taxmann.com 138 and the decision of the honourable Bombay High Court in 346 ITR 443. Therefore, he submitted that the Legislature in its wisdom has empowered only Assistant Commissioner, Deputy Commissioner And Joint Commissioner To discharge the functions of the Transfer Pricing Officer and therefore The Additional Commissioner is not permitted to discharge such functions since the such officer has not been included in the definition of the Transfer Pricing Officer u/s 92CA of Act. Therefore any order passed by Additional Commissioner u/s 92CA is ultra virus the provisions of the act and without jurisdiction and therefore void ab initio. Thus, he submitted that the transfer pricing order dated 30/11/2004 for assessment year 2002 – 03 u/s 92CA of the act passed by The Additional Commissioner Of Income Tax i.e. an authority, which is not expressly included by Legislature in the definition of the Transfer Pricing Officer is invalid.

18. Countering the submission of the learned authorised representative, the learned departmental representative referred to provision of explanation to section 92CA of the income tax act. He referred those authorities who are called Transfer Pricing Officer such as Joint Commissioner, Deputy Commissioner And Assistant Commissioner. He further referred the provisions of section 2 (28C) where the Joint Commissioner is defined. He submitted that Joint Commissioner means a person appointed to be Joint Commissioner Of Income Tax or an Additional Commissioner Of Income Tax under subsection (1) of section 117 of the act. Thus he submitted that there is no reason to interpret the explanation to section 92CA of the income tax act to exclude Additional Commissioner from the definition of Transfer Pricing

Officer. He further submitted that it is not the case of the learned authorised representative that The Additional Commissioner who passed order u/s 92CA (3) of the income tax act was not authorised by the central board of direct taxes. Thus, he submitted that the argument of the learned authorised representative does not find any merit. He submitted that the judicial precedent cited by the learned authorised representative does not apply to the facts of the case. He submitted that all those decisions are on the different facts that the jurisdiction has been exercised by the higher authorities other than the authorities which are authorised by the income tax act. He further submitted that in the decision of the honourable Delhi High Court in case of Mr Pankaj Gupta the issue was quite different as there was an issue of authorization by the central board of direct taxes.

19. We have carefully considered the rival contention. Admittedly according to the provisions of Explanation to section 92 CA of the act Transfer Pricing officer for the purposes of the section of 92 CA of the act is

‘Explanation.—For the purposes of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board¹⁷ to perform all or any of the functions of an Assessing Officer specified in [sections 92C](#) and [92D](#) in respect of any person or class of persons.]”

Provisions of section 2 (28C) of the Act defines the Joint Commissioner means a person appointed to be a Joint

Commissioner Of Income Tax Or An Additional Commissioner Of Income Tax under subsection (1) of section 117 of the income tax act. Further with retrospective effect from 01/06/1994 section 2 (1C) was inserted by finance act 2007 to define Additional Commissioner means a person appointed to be an Additional Commissioner Of Income Tax under subsection (1) of section 117 of the act . Further, it is not the case of the assessee that such Additional Commissioner of income tax, who passed an order u/s 92CA (3) of the income tax act, was not an authorised officer by the central board of direct taxes. Reliance placed by the learned authorised representative on the decision of the honourable Delhi High Court in 58 taxmann.com 336 decided the issue that Where re-assessment proceedings were initiated after expiry of four years from end of relevant years, sanction for issuance of notice for re-assessment proceedings was to be granted by Joint Commissioner and not by commissioner as per provisions of section 151(2) of the act. Therefore, in that case notice was to be issued by the joint Commissioner, which was issued by the Commissioner. Such is not the case before us. Therefore, the reliance on this decision does not help the case of the assessee. Further, the reliance placed by the assessee on the decision of the honourable Delhi High Court in 17 taxmann.com 138 (Delhi) also does not help the case of the assessee as in that case it was held that Where Assessing Officer instead of taking approval from Joint Commissioner as per provisions of section 151, obtained approval from Commissioner and issued notice under section 148, said notice was invalid. Reliance placed by the authorised representative on the case of CIT vs Pankaj Garg (2011) 334 ITR 240 (Delhi) wherein the issue was that the

second warrant of authorization in respect of the said locker was issued by the Additional Director, Income-tax (Investigation). The Additional Director does not find mention in the provisions of section 132(1). However, it was contended by the learned counsel for the revenue that the Additional Director would be covered in the expression 'Joint Director' in view of the provisions of section 2(28D) of the said Act. The court held that Even assuming that the expression 'Joint Director' as used in section 132(1) includes an Additional Director, such Additional Director or Joint Director would have to have initial empowerment by the Board to issue warrants of authorization in view of the provisions of section 132(1)(B). Therefore the only issue before the honourable Delhi High Court was whether the warrant issued by the additional director who was not empowered by the central board of direct taxes is a valid warrant or not. The honourable High Court held so only for the reason that there was no authorization by the board in favour of the additional director. Here it is not the case of the assessee that the additional Commissioner of income tax who passed the order of the transfer pricing under section 92CA (3) of the act was not authorised by the central board of direct taxes to perform all or any of the functions of an assessing officer specified u/s 92C of the Act. In view of this, the reliance on the above decision of the honourable Delhi High Court does not support the case of the assessee. Thus we hold that, the order passed by the additional Commissioner of income tax u/s 92CA (3) of the income tax act is appellate order passed by a transfer pricing officer in case of the assessee for assessment year 2002 – 03. In view of this, the additional ground raised by the assessee in the cross objection is dismissed.

20. Accordingly, the CO of the assessee is dismissed.
21. Now we come to the appeal of the learned assessing officer. The one of the issue involved in the appeal of the revenue is that whether third-party cost should be included in the total cost of the assessee for providing marketing support services and therefore markup thereon should also be placed to determine the arm's-length price of the market support and services fee on by the assessee.
22. The learned departmental representative referred the paragraph number 5 of the order of the learned transfer-pricing officer wherein this issue was discussed. He submitted that the learned transfer pricing officer has held that the agreement entered between the assessee as well as the associated , it is apparent that assessee did not have any independent business interest in India. He further referred to para number 5.1 of the order wherein the learned transfer pricing officer has held that the assessee has claimed the deduction of all the expenses in the computation of the total income including the expenses not allocated to any income generating activity and therefore such expenses have been incurred by the assessee for the purpose of the business of the assessee. He further referred to paragraph number 5.3 of the order of the learned transfer pricing officer where the contention of the assessee has been considered that expenses not allocated by it to either of the business activity cannot be attributed either of the 2 business activity, cannot be held to be correct. Thus, it cannot be said that the expenditure which has not been allocated by the assessee to the market support services are not to be included in the cost base of the assessee is a correct facts. He further submitted that the

material and the cost incurred by the assessee which is said to be third-party cost is in fact (i) incurred by the assessee, (ii) routed through the profit and loss account, (iii) the invoices are in the name of the assessee, (iv) payment is made by the assessee, (v) service provider is identified by the assessee, (vi) price negotiation is also done by the assessee, (vii) the full risk and reward of such purchases and expenses rest on the assessee, therefore, such expenses cannot be held to be third-party cost incurred by the assessee as an agent of the associated enterprise. He submitted that the fact shows that these expenses are incurred by the assessee for the provision of the market support services and therefore should have been included in the cost base of the assessee for determining the arm's-length price of the international transaction. He further submitted that agreement between the assessee and associated enterprise is not available on record or neither filed before the learned transfer pricing officer or the learned CIT – A. He therefore submitted that the learned CIT – A could not have said that such cost is not the cost of market support services. He extensively referred to the remand report dated 24/11/2010 placed at page number 133 of the paper book, wherein during the course of appellate proceedings, the assessee has claimed that in respect of market support segment, there are third-party expenses with respect to distribution of digital satellite receivers and commission paid for selling them of Rs 11.86 millions cumulatively and further sales promotion marketing and other expenses of Rs 29,990,000. The assessee has contended before the learned CIT Appeal that these expenses have been in the nature of the pass-through expenses (non-value-added) and

should be considered for remuneration on cost to cost basis on which they have been actually reimbursed. Accordingly they are not part of operating expenses. He submitted that in para number 5.6 and 5.7 of the order of the learned transfer-pricing officer the above issue has been discussed at threadbare, for those reasons these expenses cannot be kept out of the cost basis. He further referred to the para number 2 of the remand report, wherein it has been stated that the appellant itself in the submission before the learned CIT appeal has contended that the expenses of distribution and commission is part of facilitation and coordination and in the same light it is contended that since these do not relate to the efforts of its employees the same are third-party expenses ought to be reimbursed on cost to cost basis. He submitted that these expenses relate to the coordination and facilitation activities. Hence they cannot be kept out of the cost base. Therefore he submitted that the cost pertaining to the promotion of the business of the overseas associated enterprise have to be reimbursed with appropriate mark up. He further referred to the annual accounts of the company and submitted that no amount has been certified by the auditors to be the 'cost to cost' reimbursement and purported to be kept out of the profit and loss account. He referred to schedule 10 of the profit and loss account , which shows that dealers commission of Rs 2130,000 and distribution expenses of INR 9,730,000 are part of operating expenses and therefore there remains no doubt that this would have to be considered as a part of cost base for transactional net margin method analysis of the margin of the assessee. He therefore submitted that the order of the learned CIT – A removing the above cost from the cost base

holding that it is a third-party cost is devoid of any merit. He further referred to the various bills produced by the assessee in the paper book to submit that these bills are in the name of the assessee and it cannot be said that these are reimbursed on cost-to-cost basis to the assessee.

23. Countering the argument of the learned departmental representative the learned authorised representative submitted as under:-

i. During Financial Years 2001-02, relevant to AY 2002-03, Assessee's function / role under the applicable agreement for provision of services, dated March 21, 2001, was as under:

"1) BWIPL ("BBC Worldwide (India) Private Limited") shall act as BBCW's (BBC Worldwide Limited) exclusive agent for marketing and distribution of the television channel BBC World to cable operators and, as and when approved by the Indian government, to any other broadcast distribution systems in India. BWIPL shall further carry out research in respect of the performance and viewership of BBC World in India and communicate the results of all such research to BBCW.

2) BBCW shall provide BWIPL from time to time with appropriate promotional material to assist BWIPL in carrying out its distribution and marketing activities.

3) In consideration for the provision of the above services by BWIPL, BBCW shall pay BWIPL such amount as shall be sufficient to cover the operating costs (including appropriate overhead) which shall be incurred by BWIPL in providing the above services, together with an additional payment of 10% of such costs. The level of such costs shall be agreed in advance by BBCW and BWIPL on an annual basis."

ii. From the aforesaid clauses of the agreement, it is apparent that the Assessee was acting as exclusive agent of its AE. Further, for services rendered under the agreement, the AE was obligated to pay operating costs (including appropriate overhead) along with

mark-up of 10%. It may be noted that the 'operating cost' referred to above is the cost of operation as an 'agent', i.e., intermediary (operating at low risk) and not as a full-fledged entrepreneur.

- iii. It is humbly submitted that 'operating cost' of low risk agent cannot be substituted by / comparable to 'operating cost' of a full-fledged entrepreneur which are themselves rendering marketing / advertisement services. Thus, scope of term 'operating cost' has to be restricted having regard to the function / role of Assessee.
- iv. Further, attention is invited to the order passed by TPO, under section 92CA(3) of the Act, wherein it has been *inter alia* observed:

"Market Support Services (MSS)

BWIPL has entered into an agreement with BBCW, i) to act as an exclusive agent for marketing and distribution of BBC World Channel in India ii) to carry out research in respect of the performance and viewership of BBC World channel in India and iii) to carry out distribution and marketing activities of BBCW with appropriate promotional material provided by BBCW from time to time. Broadly speaking, the primary objective of all such activities is to promote and enlarge the viewership of BBC World Channel in India. For such services, BWIPL charges BBCW, as per the terms of the agreement, on the basis of 'cost plus 10% markup' BWIPL does not assume any significant risk in this function apart from minor risk of fluctuation in exchange rate for its foreign exchange loans and dues."

[Refer internal page 2 of the TP Order]

- v. From the perusal of the aforesaid para of the transfer pricing order under section 92CA of the Act, it is apparent that the Assessee was primarily acting as "exclusive agent of its AE" and the Assessee was not assuming any significant risk for its function apart from risk of foreign exchange fluctuation.
- vi. Attention is also invite to the Remand report furnished by the TPO, dated November 24, 2010, before the CIT(A), wherein again it has been conceded, as under:

(ii) . However the assessee has contended that its main role in this year was to provide coordination and facilitation services to its AE.

~~This fact has not been disputed by the TPO and it is also to be made clear that the assessee has to be suitable compensated for such activities. There are detailed agreements with the AE and the same have been carefully considered by the TPO also~~

- vii. From the aforesaid observations / findings of the TPO, it is apparent that the Revenue had accepted that Assessee was acting as Low Risk (pure) Agent of its' AE during the previous year relevant to AY 2002-03.
- viii. Accordingly, expenditures incurred for and on behalf of the AE should not form part of 'operating cost' of Assessee, and consequently, mark-up could not be recovered on such pass through / third party costs / non-value added expenses, incurred by Assessee for and on behalf of the AE.
- ix. It is submitted that while performing its functions as exclusive agent for its AE, Assessee paid third party expenses on behalf of its AE for administrative convenience and such third party expenses had no cogent nexus with agency functions of Assessee. The functions of Assessee (*as an exclusive agent*) was to provide assistance to AE in execution of their decisions pertaining to incurrance of such pass through / third party costs. The same is evident from the nature of expenses. Sample copy of the invoices is placed in the Paper Book for AY 2002-03 at Page 107 to 132.
- x. It is submitted that, in relation to the aforesaid expenses the role of Assessee was to merely provide trifling co-ordination and facilitation to the AE. These expenses are mere out-of-pocket expenses incurred by Assessee in providing assistance to its AE.
- xi. Further, these third party expenses / pass through costs were paid to un-related parties and have no cogent nexus with the agency function / intermediary role which was performed by Assessee.
- xii. It is further submitted that such expenses were not incurred in the course of providing some value added services to the AE, in fact, by incurring such expenses Assessee had not performed any value added function relating to such costs / expenses.
- xiii. It is further submitted that Assessee neither had any control on the outcome of these pass through expenses / third party cost, nor had any obligation / risk towards the AE for such outcome, being pure agent acting on behalf of its AE. Further, Assessee had no control on budget relating to such expenses and it

did not even bear any risk in this regard.

- xiv. In view of aforesaid, it may be summarised that Assessee had not performed any value added function by paying for these expenses and, in any case, these transactions were entered into with third parties which were already at arm's length, i.e., profit attributable to such activities were already subject to tax in the hands of such third party. Therefore, such third party costs which are reimbursed by the AE to the Assessee (*without any value addition on the part of Assessee*) are actually "pass through" or "third party costs" or "non-value adding" cost and had been rightly excluded from the cost base.

24. We have carefully considered the rival contentions and perused the orders of the lower authorities. The only dispute in this ground of appeal of the revenue is that what should be the cost for working out PLI of the assessee for benchmarking international transactions. For market support services the assessee has applied transactional net margin method with operating profit/operating cost as the profit level indicator with respect to the market support services segment. The method has been accepted by the transfer-pricing officer and there is no dispute with respect to the comparables chosen by the appellant. The fact shows that for the purpose of working out the cost base for determination of the arm's-length price in case of marketing support services, expenses of INR 2 3691597/- on sales promotion and expense of INR 6 296509 on research are specifically incurred by the assessee for undertaking certain specific activities for the associated enterprise. Such expenses are taken as out-of-pocket expenses incurred by the assessee and therefore the contention of the assessee is that it does not warrant any mark up in the context of determination of arm's-length price. The learned transfer-pricing officer held that assessee is not acting merely as an agent or intermediary in

provision of such services for business promotion and research etc. According to the terms of the agreement assessee is responsible for conceptualization, planning and execution of the entire market support services and is not performing such services based on day-to-day instructions from associated enterprise. According to the learned transfer pricing officer, in other words, it can be said that soul of such function is present in India, as assessee is responsible for discharging its market support service function as an independent organization and a lot of effort is required to be put into it for providing business promotion and research services. Therefore it needs to be adequately compensated for such efforts. Therefore, the learned transfer-pricing officer held that such expenditure couldn't be excluded from the cost base while working out the profit level indicator in case of the assessee. The learned CIT – A held that these expenses are in the nature of pass through expenses as the appellant is just acting as a conduit between the associated enterprises and 3rd party vendor. The appellant is merely acting as an agent of the associated enterprise. Further the decision to incur these expenses has been taken by the associated enterprise and the entire budget with respect to these expenses controlled by the associated enterprise. Therefore, the learned CIT – A as per para number 20 of his order has held that the 3rd party cost incurred by the assessee do not represent any value-added activity carried out by the appellant as the appellant was engaged in rendering market support services to its associated enterprise in the capacity of an agent. He further held that the assessee operates as an agent of the associated enterprise and the relationship between the appellant and the 3rd party vendor does

not constitute a 'principal to principal' relationship. He further reaches at the conclusion that the decisions with respect to payment are to be made to the 3rd party vendor's by the associated enterprises. He further relied upon the para number 2.93 and para number 7.36 of the 2010 OECD Transfer Pricing Guidelines to support his decision wherein the pass through costs are excluded from the cost base. This was relied upon by the assessee before him. He further accepted the argument of the assessee that if third party costs are included as part of its cost base, it would be changing the characterization of the assessee as an entrepreneur and therefore, the 3rd party cost cannot be included in the cost base of the appellant. With respect to accounting of this 3rd party cost as income and expenditure of the assessee in the profit and loss account, he held that it cannot be treated as a governing law with respect to the treatment of expenses viz a viz the transfer pricing regulation. He further held that the arm's-length nature of the international transactions is not affected by the accounting treatment. He further relied upon the decision of the coordinate bench in case of Deputy Commissioner of income tax vs Cheil communications private limited [ITA number 712/del/2010], wherein it was held that markup is to be applied to the cost incurred by the assessee company in performing its agency function and not to the cost of rendering advertisement space on behalf of its associated enterprises. Therefore, he held that based on economic and commercial reality of the operations of the appellant, income towards agency functions performed by the appellant, the 3rd party costs are not relatable to the agency function and are liable to be excluded from the cost base. The

assessee has produced before us an agreement dated 21st of March 2001 entered into between BBC worldwide and BBC worldwide (India) private limited. According to that agreement, assessee shall act as BBC worldwide's exclusive agent for marketing and distribution of the televised Channel BBC world to cable operators and as and when approved by the Indian government to any other broadcast distribution system in India. The assessee shall further carry out research in respect of the performance and viewership of BBC world in India and communicate the results of all such research to BBC worldwide. The BBC worldwide shall provide assessee from time to time with appropriate promotional material to assist assessee in carrying out its distribution and marketing services. In consideration for the provision of the above services by assessee, **BBC worldwide shall pay assessee such amount as shall be sufficient to cover the 'operating costs' (including appropriate overhead) which shall be incurred by assessee in providing the above services, together with an additional payment of 10% of such cost. The level of such cost shall be agreed in advance by BBC worldwide and assessee on an annual basis.** The terms of this agreement shall commence on 01/04/2000 and shall continue until terminated by either party on not less than 6 months prior written notice to the other party. This fact is confirmed by assessee as well as BBC worldwide Ltd as per this agreement. On plain reading of this agreement, the consideration is required to be determined which shall be sufficient to cover the operating cost, (including appropriate overhead) which shall be incurred by the assessee in providing the above services. Such cost base needs to be agreed by the

assessee and AE in advance. Therefore, it is apparent that all expenditure incurred by the assessee for provision of the market support services to BBC worldwide shall form part of the cost base on which assessee is required to be remunerated. There is no definition of what is 'operating cost' in the agreement. No evidences were produced either before the lower authorities or before us to show how the operating cost is worked out and how both the parties have come to conclusion about the level of the operating cost of the assessee. Therefore, it is left between the parties to decide what could be the 'operating cost' on which the assessee should be remunerated and what is the meaning of the words '(including appropriate overhead)' for the purpose of remuneration. No such clarification was given by the assessee before any of the lower authorities or before us. The learned CIT – A neither verified it nor asked for it. Further, in the agreement or in any other correspondence between the associated enterprise and the assessee has been shown to us which even remotely suggest that these 3rd party costs have been incurred at the insistence of the associated enterprise and no risk is involved on assessee. Firstly, in the profit and loss account which is audited by the auditor of the company and approved by the shareholders and directors, there is no reference of any 3rd party cost incurred by the assessee on behalf of the associated enterprise. In fact, all the expenses are routed through the profit and loss account. Had this been the third party cost, which is not the liability of the assessee for making the payment, but of the associated enterprise, it should have been debited to the account of the associated enterprise and should not have been routed through the profit and loss account. The accounting treatment itself

shows that the expenses incurred by the assessee are its own expenditure. Therefore we do not find any reason to exclude them from the cost base on which the assessee needs to be remunerated. The learned CIT – A has rejected this saying that accounting treatment does not govern the transfer pricing analysis. In the case of U.P. State Industrial Development Corpn. [1997] 225 ITR 703/92 Taxman 45 (SC), Hon Supreme Court held that it is a well-accepted proposition that for the purposes of ascertaining profits and gains, the ordinary principles of commercial accounting should be applied, so long as they do not conflict with any express provision of the relevant statute. The said principle was again retreated by the Hon. Supreme Court in the case of Woodward Governor in [2009] 312 ITR 254/179 Taxman 326 (SC) , wherein it held that profits for income-tax purpose are to be computed in accordance with ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments. Thus, it can be said that accounting treatment of any transaction is relevant only to the extent they are not in conflict with the express provisions of the IT Act. The learned CIT did not show that how this accounting treatment is in conflict with the transfer pricing provisions. Unless the assessee establishes that, such accounting treatment in the books of accounts which is approved by the shareholders, auditors and directors of the company and found to be in accordance with the accounting standard issued by the Ministry of corporate affairs, read with the above guidance of the honourable Supreme Court, cannot be ignored as such. Further we have also looked at certain invoices which are said to be 3rd party invoices (3rd party cost incurred by the assessee)

which is not included in the cost base. One of such instances , the bill raised by Network Advertising Private Limited on the assessee on 16/11/2001, which is production charges at an exhibition to promote the brand BBC world of Rs. 490000/-. On the reading of the above bill , we do not find any reason to exclude it from the cost base of the assessee. Further, the reliance by the learned CIT – A, on para number 2.93 and para number 7.36 of the 2010 OECD transfer pricing guidelines, which is stated before him by the assessee, also clearly states that if assessee would like to get certain cost to be excluded from the cost base, it is for the assessee to show that only cost of the agency function is required to be included. Further, only such cost that can be excluded which would have been incurred directly by the associated enterprise had they been independent. Without recording such a finding of the fact, that these expenses are not the liability of the assessee to incur them for rendering the market support services, they cannot be excluded. It is for the assessee to establish that certain expenditure are required to be incurred by the associated enterprise but they did not incur them, directed the assessee to incur them on their behalf and would be reimbursed to the assessee without any further function and risk associated with incurring such expenditure. Even in this case the agreement between the assessee and the associated enterprise was not produced before the lower authorities. In absence of examination of such agreement with the actual conduct of the parties, it cannot be decided that what are the ‘operating costs’ incurred by the assessee for marketing support services functions, therefore, the order of the learned CIT – A cannot be sustained. Further, we do not find that on what

basis certain cost not allocated to the marketing support function of the assessee have been accepted by the learned CIT – A. No basis has been given for accepting the contention of the assessee by him. As the assessee has also produced the agreement between the associated enterprise and the assessee now (it was not before the learned assessing officer, the transfer pricing officer or before the learned CIT appeal) before us, there is no explanation with respect to what is the operating cost as well as what is the indirect overhead on which the assessee is required to be remunerated, the whole issue is required to be set aside to the file of the learned Assessing Officer/Transfer Pricing Officer with a direction to the assessee to produce all relevant agreement as well as to demonstrate the conduct of the assessee in accordance with those agreements , and to justify what the parties mean by the ‘operating cost’ and ‘indirect overhead’. Thereafter the learned transfer-pricing officer may determine the arm’s-length price of the market support service fee, which would have been charged by an independent party to the associated enterprise. Accordingly, we set aside this issue to the file of the learned transfer-pricing officer accordingly. Thus, ground number one of the appeal of the learned assessing officer challenging the order of the learned CIT – A, wherein it has been held that no mark up was required on 3rd party cost incurred by the taxpayer on account of sales promotion, marketing and other expenses and expenses incurred for distribution of the digital satellite receiver for which dealers/agents were engaged and also the commission paid to dealers and agents for selling such digital satellite receiver is allowed for statistical purposes as per above directions.

25. In the revised ground filed by the learned assessing officer , it has challenged that the whether the forex loss being a non-operating expenses or an operating expenditure (ground number 2) as well as the non-allocation of the certain indirect expenses (ground number 3), as they are related to the transfer pricing issues which has been decided by us by deciding the ground number 1 of the appeal of the learned assessing officer by setting aside it to the file of the learned transfer pricing officer, we also set aside this ground of appeal of the assessing officer to the file of the learned transfer pricing officer to re-determine the arm's-length price of the international transaction of the market support services functions.
26. Accordingly, appeal of the learned assessing officer is allowed with above direction for statistical purposes and cross objection filed by the assessee is dismissed.

Assessment Year 2003 – 04

ITA number 3007/del/2011 (by assessing officer)

Cross objection number 231/del/2011

27. The Revenue has raised the following grounds of appeal in ITA No. 3007/Del/2011 for the Assessment Year 2003-04:-
- “1. *The ld CIT(A) has erred on facts and in law in deleting addition of Rs. 1,45,68,882/- made on account of transfer pricing adjustment as:-*
- a. *The ld CIT(A) has erred in law in accepting the assessee's contention that it is only intermediary between third party and AE.*
 - b. *The soul of the market support services functions is present in India as the assessee company is responsible for discharging such functions as an independent organization and a lot of effect is required to be put into by it providing business promotion and research services and, therefore, it needs to be adequately compensated for such efforts. Therefore, such cost cannot be ignored and excluded for the*

purpose of computation of Arm's Length Price of Market support services fee."

28. The assessee has raised the following grounds of appeal in Cross objection No. 231/Del/2011 in ITA No. 3007/Del/2011 for the Assessment Year 2003-04:-
- "1. On the facts and circumstances of the case and in law, we wish to rely on the order dated March 29, 2011 issued under section 250 of the Income Tax Act, 1961 passed by Commissioner of Income-tax (Appeals)-XX, New Delhi and grounds of appeal filed in Form 35 before the Commissioner of Income-tax (Appeals)-XX, New Delhi."*
29. The assessee has also raised an additional ground of appeal in the cross objection filed stating that the order passed by the learned additional Commissioner of income tax (TPO) is not in accordance with the law and hence it is invalid. This ground of appeal in the cross objection is identical to the cross objection of the assessee for assessment year 2002 – 03 which has been dismissed by the assessee by giving reference. Therefore, for the same reasons, we dismiss the cross objection of the assessee.
30. Both the parties agreed that the grounds of appeal raised by the learned assessing officer are identical to the grounds of appeal raised by him for assessment year 2002 – 03. They submitted that their arguments also remains the same as there is no change in the facts and circumstances of the case for this year.
31. As we have already set aside the transfer pricing issue while deciding the appeal of the learned assessing officer for assessment year 2002 – 03, for the similar reasons , we also set aside appeal of the learned assessing officer back to the file of the learned transfer pricing officer to redetermine the arm's-length price of the international transaction in accordance with the direction contained therein.

32. In view of this, we dismiss the cross objection filed by the assessee and allow the appeal of the learned assessing officer for statistical purposes with the directions contained in the appeal of the learned assessing officer for assessment year 2002 – 03.

Assessment year 2005 – 06

ITA number 495/del/2012 (by the learned assessing officer)

Cross objection No. 52/Del/2012

33. The Revenue has raised the following grounds of appeal in ITA No. 495/Del/2012 the Assessment Year 2005-06:-

- “1. (a) *The ld CIT(A) has erred on facts and in law in deleting addition of Rs.1,48,26,190/- made on account of transfer pricing adjustment.*
- (b) *The ld CIT(A) has inter alia erred in law in accepting the assessee’s contention that it is only intermediary between third party and AE.*
- (c) *The ld CIT(A) inter alia erred in not appreciating that the soul of the Market Support Services functions is present in India as the assessee company is responsible for discharging such functions as an independent organization and a lot of effort is required to be put into by it for providing business promotion and research services and therefore, cannot be ignored and excluded for the purpose of computation of Arm’s Length Price of Market support service fee.”*

34. The assessee has raised the following grounds of appeal in cross objection No. 52/Del/2012 in ITA No. 495/Del/2012 the Assessment Year 2005-06:-

- “1. *On the facts and circumstances of the case and in law, we wish to rely on the order dated December 27, 2011 issued under section 250 of the Income Tax Act, 1961 passed by the ld Commissioner of Income-tax (Appeals)-XX (ld CIT(A), New Delhi and grounds of appeal filed in Form 35 before the ld Commissioner of Income-tax (Appeals)-XX, New Delhi*

2. *The ld CIT(A) erred in law and on facts by not taking into account the revised operating margin after incorporating provision written back as part of operating income, having upheld the said computation under paragraph 3.11 of his order.”*
35. The assessee has raised an additional ground of appeal in its cross objection stating that the order passed by the Additional Commissioner Of Income Tax (The Transfer Pricing Officer) is invalid as it was raised in assessment year 2002 – 03 in the cross objection filed by the assessee. We have already dealt with the above cross objection in deciding the cross objection of the assessee for assessment year 2002 – 03, and for the similar reasons, we also dismiss additional ground raised by the assessee for this year too.
36. With respect to ground number 1 in the cross objection which is general in supportive in nature, no arguments were advanced by either of the parties and therefore it is dismissed.
37. The ground number 2 in the cross objection is related to the transfer pricing issue with respect to the determination of the arm’s-length price of the market support service functions of the assessee which is also connected with the appeal of the learned assessing officer, therefore, same would be dealt with by dealing with the appeal of the learned assessing officer for this year.
38. Both the parties agreed that the grounds of appeal raised by the learned assessing officer are identical to the grounds of appeal raised by the for assessment year 2002 – 03. They submitted that their arguments also remain the same. As we have already set aside the transfer pricing issue while deciding the appeal of the learned assessing officer for assessment year 2002 – 03, for the similar reasons, we also set aside appeal of the learned assessing officer back to the file of the learned transfer pricing

officer to redetermine the arm's-length price of the international transaction in accordance with the direction contained therein.

39. In view of this we dismiss the cross objection filed by the assessee and allow the appeal of the learned assessing officer for statistical purposes with the directions contained in the appeal of the learned assessing officer for assessment year 2002 – 03.
40. For this year, the ITO Ward 2 (4), New Delhi passed draft assessment order dated 30/11/2009 u/s 143 read with section 144C of the act proposing an addition of Rs 22048880/- in pursuance of the direction of the learned dispute resolution panel where the transfer pricing adjustment suggested by the learned transfer pricing officer of Rs. 22048880/- was confirmed by the learned dispute resolution panel..
41. The Assessee has raised the following grounds of appeal in ITA No. 4304/Del/2010 the Assessment Year 2006-07:-

“The addition amounting to INR 2,20,48,880 undertaken by The Learned Income Tax Officer, Ward 2(4), New Delhi (“the Ld. AO”) vide final assessment order dated July 16, 2010 (received by the Appellant on July 21, 2010) passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (“the Act”) is not in accordance with the law and therefore not sustainable.

1. *The Dispute Resolution Panel, New Delhi (“the DRP”) erred in law and facts by summarily rejecting the Appellant's objections to the draft order dated November 30, 2009 passed by the Ld. AO under section 143(3) read with section 144C(1) of the Act. The DRP while issuing directions under section 144C(5) of the Act did not allow reasonable opportunity to the Appellant to fight the case on merits. The directions of the DRP are erroneous and perverse on facts.*

Transfer Pricing (“TP”) Adjustment - INR 2,20,48,880

2. *The addition of INR 2,20,48,880 recommended by the Learned Transfer Pricing Officer (“Ld. TPO”) and incorporated by the Ld. AO in the final assessment order dated July 16, 2010 is bad in law on the following grounds:*

- 2.1. *The Ld. AO has erred in law and on facts in concluding that the Appellant should also earn a mark-up on infrastructure and operational expenses and third-party marketing and research costs which have been reimbursed by the associated enterprises ("AEs") on cost- to-cost basis. While making these erroneous assertions, the Ld. AO has misconstrued the functional profile of the Appellant and has also disregarded the well established economic principle of excluding such non value added expenses from the cost base of the tested party; ^*
- 2.2. *The Ld. AO has erred in law and on facts in making modification to the set of comparable companies identified by the Appellant in relation to marketing & distribution support services segment by rejecting comparables on grounds of functional dissimilarity based on conjectures and surmises;*
- 2.3. *The Ld. AO has erred in law and on facts in selecting Maruti Insurance Brokers Limited as a comparable on an arbitrary basis and without assigning any cogent reason for its selection, disregarding the fact that the Appellant has rejected this company in the Transfer Pricing Documentation;*
- 2.4. *The Ld. AO has erred in law and on facts in computing erroneous arm's length margins in respect of comparables companies;*
- 2.5. *The Ld. AO has erred in law and on facts in computing erroneous profitability of the Appellant for analysis under the Transactional Net Margin Method ("TNMM") based on inaccurate characterisation of income and expenses into "operating" and "non-operating" categories;*
- 2.6. *The Ld. AO has erred in law and on facts in determining the arm's length price by relying upon data of the comparables for financial year 2005-06 only, disregarding the multiple year data approach followed by the Appellant. Further, the Ld. AO has erred in laws and on facts by relying upon updated data of the Comparables which was not available to the Appellant at the time of maintenance of Transfer Pricing Documentation within the time-frame mentioned in Rule 10D(4) of the Income Tax Rules;*
- 2.7. *The Ld. AO has erred in law and on facts by not allowing the benefit of (+/-) 5% range as provided in the proviso to Section 92C(2) of the Act while determining the arm's length price of the international transactions of the Appellant;*

2.8. *The Ld. AO has erred in law and on facts by not allowing the Appellant the adjustment for differences in the material items reported in the financial statements of the Appellant as compared to those of the comparable companies for analysis under the TNMM; and*

2.9. *The Ld. AO has erred in law and on facts in not allowing the Appellant the adjustments for differences in its risk profile vis-a-vis those of the comparable companies disregarding the fact that while the Appellant is a captive risk-free service provider, the Comparables are entrepreneurs assuming significant risks.”*

42. The learned dispute resolution panel accepted the detailed reasons given by the learned transfer pricing officer as to why assessee should also on a markup on infrastructure and operational expenses and third-party marketing and research costs which have been reimbursed by the associated enterprise on cost to cost basis. The learned dispute resolution panel also noted that there is nothing worth interfering in the order of the learned transfer pricing officer. Therefore the grievance of the assessee is that the learned dispute resolution panel did not allow reasonable opportunity to the appellant to fight the case on the merit. As these issues have been set aside by us to the file of the learned transfer pricing officer has per detailed reason given by us in our order for assessment year 2002 – 03 in the appeal of the learned assessing officer, in this appeal of the assessee agitating the same issue, we think it fit and just to set aside this issue also to the file of the learned transfer pricing officer to consider the submissions made by the assessee about third-party cost and other cost not includable in the cost base of the assessee. Therefore the ground number 2 of the appeal is set aside to the file of the learned transfer pricing officer with similar direction to the assessee and the learned transfer pricing officer as given by us in deciding the appeal for assessment year 2002 –

03. Accordingly, ground number 2 of the appeal is allowed with above direction.
43. Ground number 1 is general in nature and therefore same is dismissed.
44. Accordingly, ITA number 4304/del/2010 is allowed for statistical purposes.

AY 2007-08

ITA No 5556/Del/2014 (AO) & 5441/del/2014 (By Assessee)

45. The Revenue has raised the following grounds of appeal in ITA No. 5556/Del/2014 the Assessment Year 2007-08:-
- “1. *Whether on the facts and in the circumstances of the case, and in law, the Ld. CIT(A) was justified in considering the New Age Entertainment as a comparable without appreciating that no company can be taken as comparable whose detailed data is not available in public domain.*
2. *Whether on the facts and in the circumstances of the case, and in law, the Ld. CIT(A) has made the decision on reimbursement cost by plainly citing the previous year adjudication without appreciating the following grounds:*
- (i) *The tax auditor of the assessee has itself classified this expenditure as Operational Costs in notes to the account for the reason that these expenses are intrinsically linked to the running of business of the assessee of promoting the business of its overseas affiliate.*
- (ii) *There cannot be any reason to treat such expenses as non-operating in nature given that the entire revenues of the assessee are from the business of promoting, marketing and distribution of BBC Channel and Ad time of the AE.*
- (iii) *The assessee has rendered these services for the benefit of the AE Under Arm's Length circumstances any enterprise rendering such services solely for the benefit*

of the recipient would charge a sum on the expense incurred which would include an agreed mark-up.

- (iv) The assessee w.e.f. 2004-05 has maneuvered its financial ignoring past practice under a common agreement in such a manner that a part of the expenses were kept out of the cost base only to hide the obvious loss.*
- (v) Any agreement containing any kind of riders cannot be so sacrosanct so as to justify the Arm's Length nature of any international transaction. Hence just by entering into an agreement a transaction cannot escape the purview of scrutiny on the ground of law.”*

46. The Assessee has raised the following grounds of appeal in ITA No. 5441/Del/2014 the Assessment Year 2007-08:-

“Segmental Approach

- 1 On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding aggregation of the Marketing support function performed by the Appellant with the Distribution function and adoption of an entity wide profitability approach for benchmarking analysis; thereby implicitly confirming the findings of the Ld. Transfer Pricing Officer:*
 - 1.1 that the Marketing Support function and Distribution function performed by the Appellant are inter-dependent and inter-related and thus not separable;*
 - 1.2 that the segmental approach adopted by the Appellant should be rejected since no segmental accounts have been drawn in the audited financials of the Appellant for the year;*
 - 1.3 that no rational cost allocation methodology has been followed by the Appellant for allocating operating expenses, personnel expenses and depreciation;*
 - 1.4 that the Appellant should earn an arm's length profit mark-up on costs amounting to INR 68,866,543 incurred in the Distribution segment which is a purely domestic activity during the year;*
 - 1.5 that the Appellant has not submitted details with regard to the channel distribution income earned in foreign exchange.*
- 2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in erroneously stating that the*

Distribution segment did not exist in the original Transfer Pricing Documentation report and audited accounts of appellant for the year overlooking the facts that information with regard to the Distribution segment was presented by the Appellant on Page 36 of the said report and the audited accounts also separately recorded the channel distribution income in Schedule 9;

3. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in erroneously alleging that the Distribution segment was artificially created by the Appellant by entering into the agreement dated February 21, 2008 with retrospective effect from November 11, 2005 in order to show profitability at desired levels, without providing the Appellant an opportunity of rebutting such false allegations before passing the order;*

Operating Profit and Profit Level Indicator

4. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding inclusion in the cost base of the Appellant, Rs. 16,328,860 on account of costs incurred by the Appellant towards payments made to third party vendors for research and agency fees on behalf of its associated enterprise; which were reimbursed to the Appellant on a cost-to-cost basis and had no value added activity carried out by the Appellant;*
5. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in considering certain third party non value added costs (research and agency fees) incurred by the Appellant as costs intrinsically linked with the core areas of operations of the Appellant and in recommending that the Appellant should earn a mark-up on them, misconstruing its functional profile and disregarding the nature of these expenses;*
6. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in rejecting the documentary evidences duly submitted by the Appellant in the form of third party invoices, which clearly highlight the fact that services in relation to research and agency fees were actually rendered by third party vendors and that the Appellant was only acting as an agent in claiming reimbursements on such non-value added costs;*

Comparability Analysis

7. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in implicitly confirming the findings of the Ld. Transfer Pricing Officer on rejection of the comparable search conducted and documented by the Appellant in the Supplementary Transfer Pricing analysis based on unjustifiable contentions that the comparable companies have different financial year ending and operate in different geographies/ economies;*
8. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the arbitrary inclusion of 4 companies (Marketing Consultants & Agencies Ltd., Rockman Advertising and Marketing (India) Ltd., Goldmine Advertising Ltd., and Adbur Pvt. Ltd.) for arm's length price determination, disregarding the fact that the same were rejected by the Appellant in its Supplementary Transfer Pricing analysis on account of functional dissimilarity and insufficient financial information;*

Use of Multiple Year Data

9. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding determination of arm's length price by relying upon data of the selected comparable companies for financial year 2006-07 only, disregarding the multiple year data approach followed by the Appellant and the fact that updated data of these companies was not available to the Appellant at the time of maintenance of Transfer Pricing Documentation within the time-frame mentioned in Rule 10D(4) of the Income Tax Rules;*

Benefit (=/-)5% Range

10. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not allowing the benefit of (+/-) 5% range as provided in the proviso to Section 92C(2) of the Act for determination of the arm's length price of the international transactions of the Appellant.*

General

11. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding that brought forward losses and unabsorbed depreciation under Section 72 of the Act should be set-off against the taxable income of the Appellant determined after considering the transfer pricing adjustment;*

12. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding levy of interest under section 234D of the Act.”*
47. For assessment year 2007 – 08, the learned transfer pricing officer considered the reimbursement of INR 45,100,000 as part of the cost base of the assessee and therefore determined the profit level indicator of the assessee at (-) 13.98% whereas the PLI of the comparables was determined at 13.04% and thus worked out the adjustment of the arm’s-length price of the international transaction of marketing support services at INR 3 4069484/-. The assessment order was framed on 01/02/2011 wherein the above adjustment was incorporated and the total taxable income of the assessee was determined at INR 3 8587365/- against the returned income of INR 4 384850/-. The assessee challenged the order of the learned assessing officer before the learned CIT (A) –XX, New Delhi. He passed an order dated 31/7/2014 wherein as per para number 5.3 of his order he directed to exclude from the cost base, the cost to the extent which are directly relatable to the 3rd parties namely (1) advertisement and publicity, (2) business promotion and (3) participation in trade events only. He also excluded one comparable New Age entertainment from the comparability analyses. He confirmed all other adjustment is proposed by the learned transfer pricing officer incorporated by the learned assessing officer in assessment order. Therefore revenue aggrieved with the relief granted by the learned CIT – A to the assessee and assessee is aggrieved with the order so far as the transfer pricing adjustment confirmed by the learned CIT – A.

48. Both the parties confirmed that there is no change in the facts and circumstances, their arguments are same as compared in assessment year 2002 – 03. Therefore, as we have already set aside the issue of transfer pricing adjustment on account of the market support services to the file of the learned transfer pricing officer for assessment year 2002 – 03 and subsequent years which are pending in the impugned appeal, we also set aside the appeal of the learned assessing officer as well as of the assessee with similar directions.
49. In the result appeal of the assessee and the learned assessing officer are allowed for statistical purposes.
50. Accordingly, all 11 appeals involving the similar issue of the assessee are disposed of.

Order pronounced in the open court on 18/10/2019.

-Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:18/10/2019
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
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