IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1817/Del./2015
(Assessment Year : 2010-11)

M/s. Lummus Technology Heat Transfer BV, 2nd Floor, Infinity Tower B, DLF Cyber City Phase – II, Sector 25A, Gurgaon – 122 002 (Haryana).	vs.	DCIT, Circle-Gurgaon, International Taxation, Gurgaon.

(PAN : AABCA9045K)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Vishal Kalra, Advocate
Ms. Surabhi Suri, Advocate
REVENUE BY : Shri Subha Kant Sahu, Senior DR

Date of Hearing : 15.10.2019
Date of Order : 28.11.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER

The Appellant, M/s. Lummus Technology Heat Transfer BV (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 28.01.2015 passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C (13) of the Act qua the assessment year 2010-11 on the grounds inter alia that:-

"1. That on the facts and circumstances of the case and in law, the AO has erred in completing the assessment of the Appellant under section 143(3) read with section 144C(13) of the Act, at an income of INR 2,74,96,515, in pursuance to the directions issued by the DRP, as against returned income of INR 92,81,393.

Transfer Pricing ("TP") Adjustment

2. That on the facts and circumstances of the case and in law, the AO / Transfer Pricing Officer (TPO") / DRP have erred in making an upward TP adjustment of INR 93,62,468, in respect of the transaction relating to provision of design and engineering, and supervision services to associated enterprises CAE"), alleging that the same were not at arm's length.

3. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("Rules") for determination of the arm's length price ("ALP") of provision of design and engineering, and supervision services.

4. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in rejecting / arbitrarily modifying the search process and filters adopted by the Appellant for the purpose of benchmarking its international transactions of provision of design and engineering, and supervision services to AEs.

5. That on the facts and circumstances of the case and in law, the AO, DRP , TPO erred in arbitrarily rejecting the comparable companies selected by the Appellant applying arbitrary' subjective search filters.

6. That on the facts and circumstances of the case and in law, the AO, DRP , TPO erred in arbitrarily rejecting the comparable company namely, Gherzi Eastern Limited, without appreciating that it passed all the search filters adopted by the TPO.

7. That on the facts and circumstances of the case and in law, the AO, DRP, TPO erred in selecting fresh comparable companies, on the basis of arbitrary search filters and incorrect appreciation of the functions, assets and risk ("FAR") profile of Appellant and the comparable companies.

8. That on the facts and circumstances of the case and in law, the AO, DRP, TPO erred in not providing appropriate economic adjustments on account of differences in idle capacity,

working capital and risk profile between the Appellant and the comparable companies.

9. That on the facts and circumstances of the. case and in law, the TPO erred in reducing the amount of foreign exchange gain from the operating income of the Appellant, for the purpose of computing the TP adjustment.

10. That on the facts and circumstances of the case and in law, the AO, DRP, TPO erred in ignoring the provisions of Rule 10B(4) of the Rules which allows use of multiple year data of comparable companies for the purpose of determination of the ALP.

11. That on the facts and circumstances of the case and in law, the AO, DRP, TPO erred in not allowing Appellant the benefit of 5 percent range as provided by the proviso of section 92C(2) of the Act.

Corporate Tax Adjustment

12. That on facts and circumstances of the case and in law, the AO , DRP have erred in making an adjustment of INR 76,33,390 to the income of the Appellant, in respect of the direct supplies' services by the head office to the Indian customers, on the premise that such direct supplies' services were made through the permanent establishment (''PE'') of the Appellant, being the branch office in India.

13. That on the facts and in the circumstances of the case and in law, the AO, DRP have erred in arbitrarily alleging that the PE of the Appellant was involved in negotiating and concluding contracts on behalf of the head office with the Indian customers in relation to the direct supplies'' services made by such head office.

14. That on the facts and in the circumstances of the case and in law, the AO / DRP have erred in applying an ad-hoc and arbitrary rate of 25 percent to determine gross profit from the direct sales / services in India by the head office and further erred in estimating, on an ad-hoc basis, 50 percent thereof, as attributable to the PE of the Appellant, on conjectures and surmises.

15. That on the facts and circumstances of the case and in law, the AO / DRP have erred in attributing further profits to the PE of the Appellant without appreciating that the subject transactions have been scrutinized by the TPO and no further profits could have been attributed.

16. That on the facts and circumstances of the case and in law, the AO / DRP have erred by completely misinterpreting the facts of the case and making assumptions in attributing further profits to the PE of the Appellant, being the branch office in India.

17. That on the facts and circumstances of the case and in law, the AO has erred in not giving credit of taxes amounting to INR 4,73,055, while computing the alleged tax payable by the Appellant.

18. Without prejudice to the above grounds, the AO has also erred in not giving credit of taxes amounting to INR 7,27,883 withheld on payments received by head office of the Appellant from the Indian customer.

19. That on the facts and circumstances of the case and in law, the AO has erred in applying tax rate of 10.5575 percent on the royalty / Fee for Technical Services ("FTS") income received by the head office of the Appellant instead of 10 percent tax rate prescribed under the India-Netherlands tax treaty for taxation of such income.

20. That on the facts and in the circumstances of the case and in law, the AO has erred in charging interest under sections 234B of the Act."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Lummus Technology Heat Transfer BV, the taxpayer is a company incorporated under the laws of Netherland. It has established Liaison Office in India in accordance with approval accorded by Reserve Bank of India (RBI) in June 1997. Thereafter, in June 1999, Liaison Office was converted into a Branch Office (Lummus-BO) at New Delhi after getting necessary approval from RBI to transfer the net assets and liabilities from the Liaison Office to the Branch Office. The taxpayer is engaged in provision of Design & Engineering services

to its Head Office (HO) and third party customers in India along with other supervisory support services to refinery, petrochemical and other process industries.

3. During the year under assessment, the taxpayer entered into international transactions with its Associated Enterprises (AE) as under :-

S.No.	***Nature of transaction***	***Method***	***Value of transaction***
1	***Supply of Equipment***	***TNMM***	***55,61,847/-***
2	***Providing design and engineering services***	***TNMM***	***10,88,12,276/-***
3	***Providing supervision services***	***TNMM***	***76,56,808/-***
4	***Cost Allocation of office rent***	***Cost to Cost recharge***	***8,44,800/-***
5	***Reimbursement of expenses paid***	***Reimbursement at cost***	***1,48,74,237/-***
6	***Reimbursement of expenses received***	***Reimbursement at cost***	***52,24,700/-***

4. The taxpayer in its TP analysis has benchmarked its international transactions qua supply of equipment, providing design and engineering services and providing supervision services together on combined transaction approach on the ground that provision of supervisory support services and supply of equipment is interlinked with the primary transaction of provision of design and engineering services. The taxpayer applied Transactional Net Margin Method (TNMM) with Operating Profit/Operating Cost (OP/OC) as Profit Level Indicator (PLI) as Most Appropriate

Method (MAM) and computed its margin at 46.54% on cost after claiming idle capacity adjustment whereas the average margin of comparable is 21.12% by using multiple year data and found its international transactions at arm's length.

5. Ld. Transfer Pricing Officer (TPO) denied the idle capacity adjustment of Rs.2,50,63,818/- i.e. 21.90% of the total cost of Rs.11,44,23,546/- claimed by the taxpayer on the ground that the taxpayer has failed to provide documentary evidence in respect of basis of cost allocation under each head i.e. personnel expenses, operating & other expenses, financial expenses and depreciation, finally selected 10 comparables with margin of 25.21% and proposed adjustment of RS.93,62,468/- to Arm's Length Price (ALP) of international transactions pertaining to provision of design & engineering services. Assessing Officer (AO)/DRP have confirmed the additions made by the TPO in draft orders and further made additions amounting to Rs.76,33,390/- by attributing profits of HO to BO from HO's direct transactions with Indian customers.

6. The taxpayer carried the matter before the ld. DRP by way of filing objections, who has confirmed the additions/disallowances made by the TPO/AO by dismissing the objections raised by the taxpayer. AO consequently passed assessment order and framed

assessment of the taxpayer at Rs.2,74,96,515/-. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUNDS NO.1 & 6

8. Ground No.1 being general in nature needs no specific adjudication. Ground No.6 being premature needs no specific findings.

GROUND NO.8

9. The aforesaid ground pertains to adjustment of Rs.93,62,468/- qua provision of services to its AE. However, the ld. AR for the taxpayer contended that first of all, issue as to denying the idle capacity adjustment by the AO/TPO/DRP is required to be addressed. The ld. AR for the taxpayer challenging the impugned order passed by the AO/TPO/DRP denying the idle capacity adjustment contended inter alia that in order to utilize the technology by Lummus BO in its day-to-day functioning, the personnel employed are given technical training which consumes larger number of man-hours and as such, the man-hours consumed

in training are idle hours which are not absorbed in any specific project; that the hours spent by employees on various jobs are recorded to raise the bill by the taxpayer to the customers accordingly, maintain efficiencies, attract employee performance and asset in taking measures to reduce cost and also enables taxpayer to analyse reasons for idle capacity; that issue of idle capacity also arises in cases where the taxpayer is not having sufficient number of projects to work for; that to establish comparability, the taxpayer excluded the cost of idle hours from its cost base in order to determine the true and fair profitability; that similar idle capacity adjustment has been granted by the Tribunal in ***taxpayer's own case for AYs 2008-09 and 2009-10*** and also relied upon the decision rendered by the Tribunal in ***Transwitch India Pvt. Ltd. vs. DCIT (2012) 53 SOT 151 (Delhi), SITEL India (P) Ltd. vs. ACIT (2013) 55 SOT 541 (Mumbai), DCIT vs. Panasonic AVC Network India Co. Ltd. (2014) 63 SOT 121 (Delhi), HCL Technologies BPO Services Ltd. vs. ACIT (2015) 69 SOT 571 (Delhi), Bechtel India (P) Ltd. vs. DCIT (2016) 66 taxmann.com 160 (Delhi), Ariston Thermo India Ltd. vs. DCIT (2014) 147 ITD 388 (Pune) and DCIT vs. Genesis Integrating Systems (India) (P) Ltd. (2016) 66 taxmann.com 20 (Bangalore)***.

10. However, on the other hand, ld. DR for the Revenue relied upon the orders of the lower Revenue authorities.

11. When we examine page 36 of the paper book, it shows that the taxpayer has given the complete calculation as to how the idle hours are calculated. Perusal of project-wise break-up of the actual hours at page 490 of the paper book shows that the taxpayer has explained as to how the working hours of the employees have been calculated.

12. However, ld. TPO denied the idle capacity adjustment claimed by the taxpayer by returning following findings :-

> ***"11. As per the details filed it is seen that you have claimed idle capacity adjustment of Rs.2,50,63,818, which has lead to OP/OC of 46.54%. However this claim cannot be allowed to you. It is not evident from notes on account filed along with audited P&L ale and balance sheet of the assessee and Form 3CD report of tax auditor that idle capacity adjustment is required. The tax auditor in his report also does not mention the requirement of this adjustment. You have also not shown that the comparables have idle cost and if so how it has affected their profitability.***
>
> ***12. Accordingly, the arm's length price of the international transaction related to provision of support services is proposed to be re-cast as below.***
>
> | | |
> |---|---|
> | ***Operating cost*** | ***Rs.11,15,85,601/-*** |
> | ***ALP at a margin of29.59%*** | ***Rs.14,46,03,780/-*** |
> | ***Price received*** | ***Rs.11,64,69,084/-*** |
> | ***Difference*** | ***Rs. 2,81,34,696/-*** |
>
> ***The above shortfall of Rs.2,81,34,696/- is being proposed as an adjustment to the price shown by the taxpayer in its books of account."***

13. Similarly, ld. DRP by following its own order in AY 2009-10 also denied the idle capacity adjustment by returning following findings :-

> ***"5.3 A similar issue arose in A.Y. 2009-10. In their order dated 26.11.13 for A.Y. 2009-10, the DRP have rejected the arguments of the assessee and observed as follows:***
>
> > ***"7.2 We have gone through the above contention of the taxpayer and facts evidences on record. As per Rule 10B(2) and 10B(3) of Income Tax Rules, 1962, Indian transfer pricing provisions prescribe only for "reasonable and accurate adjustment" and further adjustment to the margins of comparables can be made only if they enhance comparability. But at the same time the data for the same must be relevant reliable and robust. Idle Capacity as a general rule cannot be allowed unless the similar robust data for comparables is also available.***
> >
> > ***The revised OECD guidelines of 2010 has also stated in para 3.54 as under:-***
> >
> > > ***"Ensuring the needed level of transparency of comparability adjustments may depend upon the availability of an explanation of any adjustments performed the reasons for the adjustments being considered appropriate, how they were calculated how they changed the results for each comparable and how the adjustment improves comparability. Issues regarding documentation of comparability adjustments are discussed in Chapter V."***
> >
> > ***Even the various judicial decisions on the issue of adjustments and even OECD guidelines, impresses upon time and again that the adjustment should be "reasonable accurate adjustment".***
>
> ***Hence in view of the above, the TPO is right in not entertaining the claim of adjustment of idle capacity."***

14. Undisputedly, findings returned by the ld. TPO/DRP/AO in taxpayer's own case for preceding year have been set aside by the

coordinate Bench of the Tribunal in AY 2009-10 in ITA No.1047/Del/2014 by returning following findings :-

> ***"8. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that an identical issue having similar facts was a subject matter of adjudication in the preceding assessment year 2008-09 in ITA No. 6227/Del/2012 wherein vide order dated 21.02.2014, the issue has been decided in favour of the assessee and the relevant findings have been given in paras 4 & 5 which read as under:***
>
> ***"4. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case in the light of the applicable legal position.***
>
> ***5. Rule 10B(1)(e) of the Income Tax Rules, which deals with the Transactional Net Margin Method, provides requires that "the net profit margin realized by the enterprise (i.e. the assessee) from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base" is compared with " the net profit margin realized by the enterprise (i.e. the assessee) or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base" – of course, subject to comparability adjustments which could affect the amount of net profit margin in uncontrolled conditions. It is not at all necessary, as the authorities below seem to suggest, that such net profit computations, in the case of internal comparables (i.e. assessee's transactions with independent enterprise), are based on the audited books of accounts or the books of accounts regularly maintained by the assessee. In our considered view, all that is necessary for the purpose of computing arm's length price, under TNMM on the basis of internal comparables, is computation of net profit margin, subject to comparability adjustments affecting net profit margin of uncontrolled transactions, on the same parameters for the transactions with AEs as well as Non AEs, i.e. independent enterprises, and as long as the net profits earned from the controlled transactions are the same or higher than the net profits earned on uncontrolled transactions, no ALP adjustments are warranted. It is not at all necessary that such a computation should be based on segmental accounts in the books of accounts regularly maintained by the assessee and subjected to audit. We are, therefore, of the view that the authorities below were in error in rejecting the segmental results on the ground that the segmental accounts***

were not audited and that these segmental accounts were not maintained in the normal course of business. As regards vague generalizations by the TPO to the effect that these accounts are manipulated, that allocation basis of expenses is unfair and that these accounts conceal true profitability, we find that these observations are too sweeping and generalized the observations to have any merits. In any event, learned counsel for the assessee has painstakingly taken us through the segmental accounts, pointed out the basis of allocation of the expenses. We have noted that the allocation of expense is on the man hour basis, which is quite fair and reasonable, and that every person has to punch in hours on a specific project. We have also noted that all these details and expense allocation basis were also before the TPO and even then, no specific defects were pointed out by the TPO. Taking into account all these factors, as also entirety of the case, we are of the considered view that the TPO indeed erred in rejecting the segmental accounts and thus declining to accept the internal comparable. We are also of the view that the size of the uncontrolled transaction or transactions being smaller, by itself, does not make these transactions incomparable with the transactions in controlled conditions. Size of the comparable does matter in entity level comparison because scale of operations substantially vary and so does the underlying profitability factor, but in a transaction level comparison within the same entity, mere difference in size of the uncontrolled transactions does not render the transaction incomparable. If the size of uncontrolled transaction is too big, it may call for an adjustment for volume business. If the size of the uncontrolled transaction is too small, it may provoke an inquiry by the TPO to ensure that it is not a contrived transaction outside the normal course of business or with regard to other significant factors surrounding smallness of such transaction. However, in our considered view, in none of these cases, a comparable can be rejected on the basis of its size per se. In this view of the matter, the authorities below were clearly in error in rejecting the internal comparable, i.e. profitability of assessee's transactions with non AEs, on the ground that the volume of business with non AEs was too small vis-à-vis business with AEs. In view of these discussions, as also bearing in mind entirety of the case, the assessee was quite justified in adopting internal TNMM and comparing the profit earned on its transactions with AEs with profit earned with non AEs. Accordingly, the ALP adjustment of Rs 2,72,42,940 deserves to be deleted. We order so. The assessee gets the relief accordingly."

9. So, respectfully following the aforesaid referred to order dated 21.02.2014 for the assessment year 2008-09 in assessee's own case in ITA No. 6227/Del/2012, this issue is decided in favour of the assessee."

15. In view of what has been discussed above, we are of the considered view that idle capacity from the total expenditure incurred by the taxpayer while determining ALP is required to be excluded as has been held by the coordinate Bench of the Tribunal in ***Transwitch India Pvt. Ltd. vs. DCIT (2012) 53 SOT 151 (Delhi)*** and ***SITEL India (P) Ltd. vs. ACIT (2013) 55 SOT 541 (Mumbai).***

16. Since the taxpayer has come up with complete detail of idle hours of its work force in order to claim the idle capacity adjustment to be excluded from the total expenditure incurred while determining the ALP, as discussed in the preceding paras, but the same has not been examined by the ld. TPO/DRP, so we are of the considered view that the issue is required to be set aside to the ld. TPO to decide afresh after due verifications of the details given by the taxpayer qua idle capacity adjustments in the light of the decisions rendered by the coordinate Bench of the Tribunal in ***taxpayer's own case for AY 2008-09 and 2009-10*** and in view of the decision rendered by the coordinate Bench of the Tribunal in ***Transwitch India Pvt. Ltd. vs. DCIT (2012) 53 SOT 151 (Delhi)*** and ***SITEL India (P) Ltd. vs. ACIT (2013) 55 SOT 541 (Mumbai)***. So, ground no.8 is decided in favour of the taxpayer for statistical purposes.

GROUNDS NO.2, 3, 4, 5 & 7

17. Without prejudice, the taxpayer sought exclusion of six comparable companies viz. ***Engineers India Ltd., Rites Ltd., HSCC (India) Ltd., Mahindra Consulting Engineers Ltd., Tata Consulting Engineers Ltd. and Kitco Ltd.*** to benchmark the international transactions qua provision of design and engineering services along with supervisory support services and supply of equipment & material to AE. So, we would examine the suitability of all the aforesaid comparables vis-à-vis the taxpayer one by one as under.

ENGINEERS INDIA LTD. (EIL)

18. The taxpayer sought exclusion of EIL on the grounds inter alia that it is a Government of India owned company having 90.40% of total shareholding; that EIL is engaged in the business of consultancy and engineering products and turnkey projects with diversified area of production; that EIL is into extensive Research and Development (R&D) activities; that EIL has huge assets; that turnover of EIL is 150 times of the taxpayer and relied upon the decisions of ***PCIT vs. International SOS Services India (P.) Ltd. – SLP (Civil) Diary No.18255/2018 (SC) upholding the decision of Hon'ble Delhi High Court in ITA 454 of 2016, Hon'ble Delhi High Court in PCIT vs. Bechtel India Pvt. Ltd. in ITA 655/2016***

upholding the decision of the coordinate Bench of the Tribunal in ITA No.6779/Del/2015, Hon'ble Bombay High Court in CIT vs. Thyssen Krupp Industries India (P.) Ltd. (2016) 68 taxmann.com 248 (Bombay) upholding the decision of coordinate Bench of the Tribunal in (2013) 154 TTJ 689, Genzyme India (P.) Ltd. vs. ACIT (2018) 93 taxmann.com 222 (Delhi-Trib.), Eli Lily & Co. (India) Ltd. vs. ACIT ITA No.6819/Del/2014 (Delhi-Trib.), Boeing International Corporation India (P.) Ltd. vs. DCIT (2019) 101 taxmann.com 349 (Delhi-Trib.) and Bechtel India (P.) Ltd. vs. DCIT (2016) 66 taxmann.com 160 (Delhi-Trib.).

19. Ld. DR for the Revenue, on the other hand, relied upon the orders of the lower Revenue authorities below.

20. When we examine annual report of EIL, available at pages 706 to 865 of the paper book, relevant pages 717 to 724, it is proved on record that EIL is working in diversified areas eg. Petroleum refining, petrochemical projects, pipelines division, strategic storage services, metallurgy sector, infrastructure division, turnkey projects, engineering division, construction division, process design & development and heat & mass transfer. From pages 722 & 723 of the annual report paper book, it shows that EIL is into the extensive Research & Development activities and has also filed for one patent based on innovative work for the

Oxygen enriched Claus process and presented several papers in national and international conferences/seminar. Furthermore, detail of distribution of shareholding during the year under assessment of EIL given at page 747 of the annual report paper book shows that Government of India is having 90.401% of total shares and majority of the projects undertaken and completed by EIL were of public sector undertakings like Indian Oil Corporation Ltd., Oil and Natural Gas Corporation, etc. Furthermore, it has come on record that EIL is having huge net worth of assets to the tune of Rs.60 crore whereas the taxpayer is having routine assets worth Rs.17 lakhs in the form of furniture etc. Perusal of profit & loss account of EIL, available at page 743 of the annual report paper book, shows that EIL is having turnover of Rs.1993.80 crores as against Rs.13 crores turnover of the taxpayer.

21. Coordinate Bench of the Tribunal excluded EIL as a comparable vis-à-vis routine engineering design services provider in case of ***International SOS Service India P. Ltd. vs. DCIT (2016) 67 taxmann.com 73 (Delhi-Trib.)*** on the grounds inter alia that a 100% Government company cannot be selected as comparable and that company having no intangible assets cannot be a valid comparable vis-à-vis a company owning intangible assets in the form of technical know-how. Order of the coordinate

Bench of the Tribunal has been upheld by the ***Hon'ble Delhi High Court vide order dated 30.05.2017 passed in ITA 454/2016*** and SLP filed by the Revenue in the Hon'ble Supreme Court has also been dismissed.

22. EIL as a comparable has been ordered to be excluded by the coordinate Bench of the Tribunal in case of ***Thyssen Krupp Industries (P.) Ltd. vs. ACIT (2013) 25 ITR (T) 243 (Mumbai-Trib.)*** on the grounds that EIL is a Government company and most of its customers of the 'Turnkey Project division' are related parties, being other public sector undertakings, which is more than the filter of 25%. The decision of the Tribunal has been upheld by the Hon'ble Bombay High Court by returning following findings :-

> ***"Tribunal records the fact that the Engineering India is a Government company and its annual report indicates that a substantial part of revenue of a comparable in execution of turnkey projects arose out of executing projects of public sector undertakings. In the circumstances, the impugned order of the Tribunal holds that the Engineers could not be considered to be comparable as contracts between Public Sector undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it was not comparable. Moreover, from the annual report, it is clear that the revenue earned in executing turnkey project for other public sector undertakings was much more than the filter of 25 per cent, which has been applied by the TPO in his order under section 92CA(3), while taking TRF Ltd. as a comparable on the ground that its related party transaction was not in excess of 25 per cent of its total turnover. Thus, applying consistent filter of 25 per cent or less of related party transaction alone to be considered comparable, Engineers India Ltd. could not be considered to be comparable."***

23. Keeping in view the facts and circumstances of the case inter alia that EIL is into the area of diverse activities whereas the taxpayer is a routine engineering design services provider; that EIL is into extensive Research & Development activities as against no R&D activities of the taxpayer; and that EIL is having huge assets of Rs.60 crores as against Rs.17 lakhs of the taxpayer cannot be a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded from the final set of comparables.

RITES LTD. (RITES)

24. The taxpayer sought exclusion of Rites as a comparable vis-à-vis the taxpayer for benchmarking the international transaction on the grounds inter alia that Rites is into providing high-end technical services and having diverse nature of activities; that Rites is a Government of India wholly own company; that Rites is having huge asset base of Rs.163 crores and relied upon the decisions of ***PCIT vs. International SOS Services India (P.) Ltd. – SLP (Civil) Diary No.18255/2018 (SC) upholding the decision of Hon'ble Delhi High Court in ITA 454 of 2016, Hon'ble Delhi High Court in PCIT vs. Bechtel India Pvt. Ltd. in ITA 655/2016 upholding the decision of the coordinate Bench of the Tribunal in ITA No.6779/Del/2015, Hon'ble Bombay High Court in CIT vs. Thyssen Krupp Industries India (P.) Ltd. (2016) 68***

taxmann.com 248 (Bombay) upholding the decision of coordinate Bench of the Tribunal in (2013) 154 TTJ 689, Rolls Royce India (P) Ltd. vs. DCIT (2016) 176 TTJ 1 (Del – Trib.), M/s. Terex India Pvt. Ltd. vs. DCIT in ITA No.4791/Del/2015 order dated 30.05.2019 and ***Eli Lily & Co. (India) Ltd. vs. ACIT ITA No.6819/Del/2014 (Delhi-Trib.)***.

25. When we examine profit & loss account of Rites, available at page 890 of the paper book, it shows that Rites has income from various activities like consultancy fee, construction projects, export sales, inspection fees, lease services etc. Furthermore, perusal of annual report, available at pages 855 & 856 of the annual report paper book, shows that during the year under assessment, Rites was engaged in turnkey project of enhancement of coach production facilities for Rail Coach Factory, Kapurthala; General consultancy for DMRC, Airport Express Link; project management consultancy for laying water transmission line for Kolkata Municipal Corporation; Engineering and construction management for railway infrastructure, project report for diversion of railway, road transmission lines and water pipelines from fire and subsidence affected area; bridge/tunnel design and Geo-Tech investigations for new railway liens projects in J&K; and number of international assignments in export, lease and consultancy

services which include supply of train sets, diesel locomotives, machinery & parts, construction of maintenance facilities & training. It is also proved on record that Rites is possessing global and domestic experience in transportation and project management services and has signed biggest ever consultancy contract with Saudi Railway Company for operation and maintenance of railway network for Kingdom of Saudi Arabia. It is also proved on record that Rites is a wholly owned company of Government of India and is having huge asset base of Rs.163 crores, detailed at page 893 of the paper book, as against Rs.17 lakhs of the taxpayer.

26. So, bare perusal of functional profile and asset base and the fact that Rites is a wholly owned Government of India company, it cannot be a suitable comparable of Rites vis-à-vis the taxpayer.

27. Coordinate Bench of the Tribunal excluded EIL as a comparable vis-à-vis routine engineering design services provider in case of ***International SOS Service India P. Ltd. vs. DCIT (2016) 67 taxmann.com 73 (Delhi-Trib.)*** on the grounds inter alia that a 100% Government company cannot be selected as comparable and that company having no intangible assets cannot be a valid comparable vis-à-vis a company owning intangible assets in the form of technical know-how. Order of the coordinate Bench of the Tribunal has been upheld by the ***Hon'ble Delhi High***

Court vide order dated 30.05.2017 passed in ITA 454/2016 and SLP filed by the Revenue in the Hon'ble Supreme Court has also been dismissed.

28. Coordinate Bench of the Tribunal examined the suitability of a Government company vis-à-vis routine engineering design service provider in case of ***Thyssen Krupp Industries (P.) Ltd. vs. ACIT (2013) 25 ITR (T) 243 (Mumbai-Trib.)*** on the grounds that EIL is a Government company and most of its customers of the 'Turnkey Project division' are related parties, being other public sector undertakings.

29. Coordinate Bench of the Tribunal in the case of ***Rolls Royce India (P) Ltd.*** (supra) ordered to exclude Rites as a comparable vis-à-vis routine engineering design services by returning following findings :-

> ***"The said company is a Government of India enterprise and is a multidisciplinary consultancy organization in the fields of transport, infrastructure and related technologies. It provides a comprehensive array of services under a single roof and believes in transfer of technology to client organizations. In overseas projects,***

it actively pursues and develops cooperative links with local consultants/firms, as means of maximum utilization of local resources and as an effective instrument of sharing its expertise.

Thus, it is evident that RITES Ltd. is a primarily imparting high end technical services, which cannot be compared with low end marketing business support services rendered by assessee. [Para 32]"

30. So, in view of the matter, we are of the considered view that Rites being a wholly owned Government of India company into diverse activities having huge asset base and is into providing high end technical services and diverse nature of activities is not a suitable comparable vis-à-vis the taxpayer.

HSCC (INDIA) LTD. (HSCC)

33. The taxpayer sought inclusion of HSCC as a comparable on the grounds inter alia that it is into different nature of activities; that it is operating in single segment with no availability of segmental data; that it is a wholly owned Government company having huge asset base and relied upon the decisions of ***International SOS Service India P. Ltd., Thyssen Krupp***

Industries (P.) Ltd. (supra)***, DCIT vs. Anglo-Eastern Ship Management (India) Pvt. Ltd. ITA No.1053/Mum/2017 and DCIT vs. Terex India (P) Ltd. (2019) 71 ITR (T) 259 (Delhi-Trib.).***

34. Perusal of business profile of HSCC at page 931 of the annual report of paper book shows that HSCC was awarded the work of rendering consultancy services for design & engineering, project management and procurement of medical equipments, drugs & pharmaceuticals, etc. for various prestigious & challenging projects. Perusal of page 937 of the annual report of paper book shows that HSCC shows that HSCC's major on-going consultancy projects are qua architectural planning, design & project management services, procurement management services, studies and training services. Perusal of segmental reporting in terms of AS-17, available at page 975 of the paper book, shows that HSCC is confined only to consultancy in a single primary segment, whereas no segmental data is available to explain diversified categories of services being carried out by HSCC. Perusal of Schedule – 3 of fixed assets shows that HSCC is having asset base of Rs.6.32 crores as against Rs.17 lakhs of the taxpayer.

35. Coordinate Bench of the Tribunal excluded a Government company as a comparable vis-à-vis routine engineering design services provider in case of ***International SOS Service India P. Ltd. vs. DCIT (2016) 67 taxmann.com 73 (Delhi-Trib.)*** on the grounds inter alia that a 100% Government company cannot be selected as comparable and that company having no intangible assets cannot be a valid comparable vis-à-vis a company owning intangible assets in the form of technical know-how. Order of the coordinate Bench of the Tribunal has been upheld by the ***Hon'ble Delhi High Court vide order dated 30.05.2017 passed in ITA 454/2016*** and SLP filed by the Revenue in the Hon'ble Supreme Court has also been dismissed.

36. Coordinate Bench of the Tribunal in the case of ***DCIT vs. Terex India (P.) Ltd.*** (supra) examined suitability of a Government company as a comparable vis-à-vis routine engineering design services provider and ordered to exclude the same on the ground that it is a Government of India enterprises and major part of its business is from Government itself.

37. In view of the matter, we are of the considered view that HSCC being a wholly owned Government of India company

drawing most of its project from Government and its public sector undertakings and is into diversified nature of activities having asset base of Rs.6.32 crores as against Rs.17 lakhs of the taxpayer, it cannot be a suitable comparable vis-à-vis the taxpayer, hence ordered to exclude the same from the final set of comparables.

MAHINDRA CONSULTING ENGINEERS LTD. (MAHINDRA)

38. The taxpayer sought exclusion of Mahindra on the grounds inter alia that it is into diversified nature of activities of providing consultancy services in the area of infrastructure viz. special economic zones, water supply & sewerage, solid waste management, urban infrastructure, agri and horti infrastructure, social infrastructure, marine infrastructure, industrial infrastructure, renewable energy, sustainable studies, etc., as detailed in the annual report at page 979 of the paper book; that Mahindra has a single reportable segment i.e. income from consultancy services whereas no segmental financials are available qua diversified categories of services being performed by it as per detail of income & expenditure available at page 995 of the paper book and relied upon the decisions of ***Terex India (P.) Ltd. vs. DCIT in ITA***

No.4791/Del/2015 for AY 2010-11, DCIT vs. Terex India (P.) Ltd. (2019) 104 taxmann.com 281 (Delhi-Trib.) for AY 2011-12, Rampgreen Solutions (P.) Ltd. vs. CIT (2015) 377 ITR 533 (Delhi) and NCS Pearson India (P.) Ltd. vs. DCIT (2018) 91 taxmann.com 105 (Delhi-Trib.).

39. Coordinate Bench of the Tribunal in the case of ***DCIT vs. Terex India Pvt. Ltd. (2019) 104 taxmann.com 281 (Delhi-Trib.)*** ordered to exclude Mahindra as a comparable vis-à-vis a routine engineering design services provider on the ground that it is into variety of services out of which only one is engineering services and segmental information of same is not available.

40. Coordinate Bench of the Tribunal in ***M/s. Terex India Pvt. Ltd. for AY 2010-11 order dated 30.05.2019*** ordered to exclude Mahindra as a comparable by returning following findings :-

> ***"32. Perusal of functions of Mahindra, available at page 444 of the paper book, shows that it is engaged in providing consulting services in infrastructure sector in the area of Special Economic Zones, Water supply & sewerage, solid waste management, urban infrastructure, agri & horti infrastructure, social infrastructure, marine infrastructure, industrial infrastructure, renewable energy, sustainability studies, institutional strategies / planning studies, industrial plants and systems etc..***
>
> ***33. Coordinate Bench of the Tribunal examined the comparability of Mahindra vis-à-vis the taxpayer in taxpayer's own case for AY 2011-12 (supra) (though a different year but***

business model has not undergone any change), found the same to be not a suitable comparable on ground of non-availability of segmental information about engineering design services and on the ground that the company has recognised its revenue on percentage completion method. No doubt, a comparable cannot be excluded merely on the basis of different revenue accounting method which is recognised one but non-available of segmental information in the face of the fact that it is into diversified services as discussed above, we find it not a suitable comparable vis-à-vis taxpayer which is into providing routine low end engineering design services. Hence, we order to exclude Mahindra as a valid comparable."

41. In view of what has been discussed above, we are of the considered view that Mahindra being into diversified consultancy services with no segmental financials available to explain the diversified categories of its services is not a suitable comparable vis-à-vis the taxpayer who is a routine engineering design service provider, hence ordered to be excluded.

TATA CONSULTING ENGINEERS LTD. (TCEL)

42. The taxpayer sought to exclude TCEL as a comparable on the grounds inter alia that it is functionally dissimilar having huge asset base; that TCEL is having a single reportable segment i.e. income from engineering consultancy services with no bifurcation of diversified categories of services and relied upon the decision of ***Hon'ble Delhi High Court in PCIT vs. Bechtel India Pvt. Ltd. ITA 655/2019 (Delhi HC) upholding the decision of coordinate Bench of the Tribunal in ITA No.6779/Del/2015*** and ***decision of***

coordinate Bench of the Tribunal in DCIT vs. Terex India (P.) Ltd. (2019) 71 ITR (T) 259 (Delhi-Trib.).

43. Perusal of information contained in website extract, available at page 13, shows that TCEL is into providing entire gamut of project engineering from inception to project commissioning and turnkey design, supply and installation of engineered equipments, which covers engineering studies and design engineering services, project management consultancy and construction management services and Opex services. Information contained in the website extract also shows that TCEL is also into providing services in infrastructure, energy, process, project management consulting and advanced technologies.

44. Perusal of schedule forming part of the balance sheet at page 1013 shows that TCEL is having huge asset base of Rs.38 crores as against Rs.17 lakhs of the taxpayer. Furthermore, when we examine profit & loss account, available at page 1011 of the paper book, there is only single reportable segment i.e. income from engineering consultancy services without any bifurcation of diversified categories of services being provided by the company.

45. Coordinate Bench of the Tribunal in ***M/s. Terex India Private Ltd.*** (supra) has excluded the TCEL as comparable vis-à-

vis the routine engineering design services provider by returning following findings :-

> ***"40. Perusal of the annual report of TCE Consulting, available at pages 538 to 559 of the paper book, shows that it is into various other services apart from engineering services like providing services of designing, development of new product and Computer Aided Designing (CAD), but its segmental financials are not available.***
>
> ***41. Coordinate Bench of the Tribunal in taxpayer's own case for AY 2011-12 (supra) ordered to exclude TCE Consulting from final set of comparables on two grounds, viz., (i) it does not satisfy the upper turnover filter of Rs.200 crores; and (ii) that brand name of the company has enabled this company to capture major Government contracts and other high end customers.***
>
> ***42. So far as question of excluding this company on ground of upper turnover filter is concerned, this filter has not been applied by the taxpayer as well as TPO during the year under assessment. However, we are of the considered view that it is not a valid comparable on account of functional dissimilarity and non-availability of its segmental financials. Moreover, in 2009-10, TPO himself excluded TCE Consulting from final set of comparables on raising objections by the taxpayer and since then, taxpayer's business profile has not undergone any change.***
>
> ***43. Coordinate Bench of the Tribunal in case of Bechtel India Pvt. Ltd. vs. DCIT – 2015 (12) TMI 1560 – ITAT Delhi for AY 2010-11 has ordered to exclude TCE Consulting as a comparable vis-à-vis routine engineering design service provider by returning following findings :-***
>
> > ***"12.6 The Comparable Company is involved in activities beyond engineering design. It is engaged in activities that extend from concept to commissioning. Whereas the assessee provides services as a captive unit to its overseas AEs. The diversified functions of this comparable company include pre-project activities, procurement assistance, project management, commissioning and coordination, inspection, construction and supervision. Further, there is no segmental accounting in the annual report of the Company which provides profitability, for the engineering design segment. Hence the same cannot be accepted as a comparable."***
>
> ***44. In view of what has been discussed above, we are of the considered view that TCE Consulting having a big brand value***

and being into high end engineering consulting services with no financial segmental available is not a suitable comparable vis-à-vis taxpayer, hence ordered to be excluded."

46. So, in view of what has been discussed above, we are of the considered view that TCEL being into providing entire gamut of project engineering from inception to project engineering and turnkey design, supply and installation of engineered equipment, and is into providing services of engineering studies and design engineering services is having different functional profile vis-à-vis the taxpayer who is a routine engineering design services and moreover TCEL is having a single reportable segment showing income from engineering consultancy services and no bifurcation is available qua variety of services being provided by TCEL, hence not a suitable comparable vis-à-vis the taxpayer. So, we order to exclude the same from the final set of comparables.

KITCO LTD. (KITCO)

47. The taxpayer sought exclusion of Kitco on the grounds inter alia that it is a Government of India owned company; that it is into diversified nature of activities; that its financial segmental are not available and relied upon the decisions of PCIT vs. SOS Services India (P) Ltd., PCIT vs. Bechtel India Pvt. Ltd., CIT vs. Thyssen

Krupp Industries India (P.) Ltd. (supra) and Genzyme India (P) Ltd. vs. ACIT (2018) 93 taxmann.com 222 (Delhi-Trib.).

48. Ld. DR for the Revenue, on the other hand, relied upon the orders of the lower Revenue authorities.

49. Perusal of the annual report, available at pages 6 to 8, shows that Kitco is into diversified field of consultancy services eg. Management consultancy division, detailed engineering division, technical services division and project consultancy division. However, annual report at page 29 does not provide segmental financials concerning diversified category of services being provided by Kitco. Moreover, it is a Government of India company.

50. Coordinate Bench of the Tribunal excluded EIL as a comparable vis-à-vis routine engineering design services provider in case of ***International SOS Service India P. Ltd. vs. DCIT (2016) 67 taxmann.com 73 (Delhi-Trib.)*** on the grounds inter alia that a 100% Government company cannot be selected as comparable and that company having no intangible assets cannot be a valid comparable vis-à-vis a company owning intangible assets in the form of technical know-how. Order of the coordinate Bench of the Tribunal has been upheld by the ***Hon'ble Delhi High Court vide order dated 30.05.2017 passed in ITA 454/2016*** and

SLP filed by the Revenue in the Hon'ble Supreme Court has also been dismissed.

51. Coordinate Bench of the Tribunal in ***PCIT vs. Bechtel India Pvt. Ltd.*** (supra) excluded Kitco by relying upon the decision of ***Thyssen Krupp Industries India Pvt. Ltd. in ITA No.6460/Mum/2012*** by returning following findings :-

> ***"22. The profile of this company shows that it is a 100% Government owned undertaking rendering services primarily to Central/State Government undertaking and PSUs. Most of the clients or projects undertaken by this company are either for state government or government run institutions. Therefore, the majority revenue of this company comes from government /state or centre run projects and the company derives benefit out of its parental relation with the Government in getting contract and because of this, the profit margins of this company cannot be said to be indicative of a free market economy where the appellant company and others operate. For these reasons, this company was excluded by the Tribunal in assessee's own case in assessment year 2010-11 in ITA No. 1478/DEL/2015 wherein the Tribunal relied upon the findings of the coordinate bench in the case of ThyssenKrupp Industries India Private Limited ITA No. 6460/MUM/2012.***
>
> ***23. The relevant findings given in the case of ThyssenKrupp Industries India Private Limited and of the coordinate bench in assessee's own case read as under:***
>
> > ***"We find it as undisputed that Engineers India Limited is a Government company. It has several segments which also include 'Turnkey project' page 700 of the paper book is a copy of annual report of Engineers India Limited on turnkey project. It can be seen that the revenue has arisen from completing paraxylene plant of IOCL and further that company is engaged in execution of other unit of IOCL's Panipat Naphtha cracker project. In our considered opinion' this case should not have been included in the list of final comparables for two reasons. First reason is that profit motive is not a relevant consideration in case of Government undertakings. Many Government Undertakings even operate on losses in furtherance of the social obligations of the government. The second reason is that Engineers India Limited earned***

> ***income from turnkey project by successfully completing the project of IOCL and other Public Sector Undertakings. In that sense of the matter, the related party transactions are much more than the filter of 25%. We, therefore, order for the exclusion of this case from the list of comparables."***
>
> ***12.5 In the above ruling, the comparable M/s. Engineers India Limited was rejected primarily on the ground that it was working for government/public sector undertakings and since the company also being a government owned enterprise; the transactions tantamount to related party transactions. The same is true for the said comparable as Kitco Ltd., transactions are primarily with government owned enterprises. Applying the preposition laid down in the case of M/s ThyssenKrupp Industries India Private Limited (supra), we hold that Kitco Ltd., cannot be accepted as a comparable company. Hence the same is directed to be eliminated."***
>
> ***24. Respectfully following the findings of the coordinate bench [supra], we direct to exclude KITCO from the final set of comparables."***

52. So, in view of the matter, we are of the considered view that Kitco firstly being a Government of India undertaking rendering services to Central and State undertakings and PSUs and as such, substantial revenue of this company is from Government/State or centre run projects and it is into diversified activities of business qua which segmental financials are not available, is not a suitable comparable vis-à-vis the taxpayer which is a routine provider of design engineering services along with supervisory support services to its AE, hence ordered to be excluded.

GROUNDS NO.9 & 10

53. Grounds No.9 & 10 are dismissed having not been pressed during the course of arguments.

GROUND NO.11

54. Ground No.11 being consequential in nature needs no specific findings.

GROUNDS NO.12, 13, 14 & 16

55. AO/DRP following the earlier assessment year estimated the gross profit of such sales made by HO at 25% which comes to Rs.1,52,66,780/-. After considering the functions performed by the fixed place Permanent Establishment (PE)/Service PE/ Supervisory PE, 50% of the aforesaid profit is attributed to PE which comes to Rs.76,33,390/- on the grounds inter alia that BO was set up in India for the business activities of HO as the BO was involved in negotiations and other activities of HO and that expenses of BO did not commensurate with the scale of its turnover showing more work done than contended by the taxpayer and that the customers of BO and HO were common and presence of BO 's employees to provide services to HO's clients implying involvement of BO in activities of the HO.

56. Ld. AR for the taxpayer contended that the taxpayer has a BO in India and consequently income earned by it is taxed in India.

It is also contended by the ld. AR for the taxpayer that the transactions between HO and BO are subject to transfer pricing provisions and have been already benchmarked and the profit related to that part of the contract, which is directly carried out by the HO, shall only be taxable in Netherland and as such, no further income is liable to be attributable to the BO and also relied upon Article 7 of the Tax Treaty between India and Netherland.

57. The ld. AR for the taxpayer further contended that the AO has proceeded on the basis of assumption that BO performed all the activities detailed at page 13 of the order to facilitate HO whereas work orders entered into by the HO with Indian customers clearly stipulate the scale of work, amounts to be paid, liability and other terms and conditions. So, the above mentioned facilities are performed by the HO itself as a part of the contract for supplies/services and the BO was nowhere involved. Ld. AR for the taxpayer relied upon the decision of the coordinate Bench of the Tribunal in ***taxpayer's own case for AYs 206-07, 2008-09 and 2009-10.***

58. Identical issue has been decided by the coordinate Bench of the Tribunal in favour of the taxpayer by returning following findings :-

"4.3 We have considered the rival submissions and perused the relevant material on record. It can be seen from the Assessing Officer's final order passed u/s 144C(13) that the entire issue has been discussed in a solitary para No. 6 of around 10 lines at page 37 of the order. It has been concluded that the assessee must have received a sum equal to its declared receipts in respect of direct transactions between the HO and its Indian customers and the further presumption is that it is in nature of fees for technical services. We are unable to appreciate the logic of the AO in drawing inferences, one after me other and the conclusions reached in this regard. There is no material worth the name to suggest, even remotely, that the assessee was rendering services to its head office or the Indian clients in respect of direct transactions between them. There is absolutely no bedrock for such presumption. The learned DR was required to invite our attention towards any material indicating the assessee's involvement in the direct transactions between the head office and Indian customers. In the name of reply, he took us through certain portions of the draft assessment order in which there is a Lummus Technology Heat Transfer BV reference to certain invoices of the HO indicating the role of the assessee in such direct transactions. On a careful scrutiny of the dates of such invoices, it can be seen that they relate to the financial year 2004-05 relevant to the preceding assessment year 2005-06. A copy of the assessment order for the A.Y. 2005-06 has been placid on record. It can be seen from such order dated 17.12.2007, that no addition was made in respect of such presumptions of the Assessing Officer. It is further relevant to note that the assessee's accounts were examined by the TPO, who has not pointed out even a single rupee expense attributable to the direct transactions between HO and Indian customers. When this is the position obtaining in this case, we fail to comprehend as to how an income can be estimated in this regard. Such addition made by the Assessing Officer is, therefore, directed to be deleted. This ground is allowed."

59. It is further contended by the ld. AR for the taxpayer that AO has wrongly relied upon the order of Reserve Bank of India (RBI) dated 13.04.1999 because BO was granted specific approval by the RBI for performing certain activities which was restricted only to permit activities, and the income earned from such permitted activities has already been offered to tax in India.

60. No activities have been performed by the BO on behalf of the HO as presumed by the AO. Moreover, the taxpayer has specifically explained the functions performed and risk undertaken by the HO and BO in its TP study, relevant pages 558 to 590 of the paper book, showing activities of the BO being restricted to basic design and engineering services. Furthermore, HO was otherwise responsible for its own market development research and negotiation for contract.

61. So far as grounds taken by the AO qua the expenses attributed to expatriate Director stationed at Gurgaon, Shri Raj Thakral that he has played a major role in supervising market research to find out customers, procuring orders, contract negotiations, etc. It has come on record that there is no evidence on record brought forward by the AO to support his contention regarding doing aforesaid work by the Director in India in market research and related jobs. Merely because of the fact that expatriate Director was present in India, no nexus can be held to be established between HO and BO.

62. Ld. AR for the taxpayer drew our attention towards document qua contracts entered into between HO directly with Indian customers along with copy of contracts/purchase orders, available at pages 400 to 471 of the paper book wherein it is

nowhere mentioned that said expatriate employee is involved in negotiations or marketing. The name of Mr. Guido Herberghs of the HO, Netherland is mentioned in most of the work orders entered into by the HO with Indian clients who considers, discusses, negotiates and enters into contracts with the Indian clients only on behalf of the HO and there is no evidence whatsoever on the file to prove that there was nexus between HO and BO. Furthermore, AO proceeded to make an addition on this account also on the ground that BO has debited expenses amounting to RS.11.44 crores to its profit & loss account as against revenue of Rs.13.08 crores and the cost so incurred is not commensurate with the business turnover and as such, BO proved to have performed more than what has been claimed by it.

63. We are of the considered view that account detail of any such specific expense or revenue item, otherwise unreasonable or under-stated, has not been pointed out, and the entire decision has been made on the basis of assumptions. Moreover, even otherwise, reasonableness of the expenditure has to be considered with businessman's stand point and revenue officer cannot decide such issue while sitting on the businessman's arm chair. This proposition has been laid down by Hon'ble Supreme Court in ***CIT***

vs. Walchand and Co. (P) Ltd. (1967) 65 ITR 381 (SC) and Aluminium Corporation of India vs. CIT (1972) 86 ITR 1 (SC).

64. In view of what has been discussed above and following the order passed by the Tribunal in taxpayer's own case in 2006-07, 2008-09 & 2009-10, we are of the considered view that aforesaid addition made by the AO/DRP qua attribution of profits amounting to Rs.76,33,390/- to HO from direct supplies and services to customers in India to PE in India i.e. BO is not sustainable, hence ordered to be deleted.

GROUND NO.15

65. AO/DRP have further attributed profits to PE of the taxpayer ignoring the fact that the said transactions have already been considered by the TPO and no further profits could have been attributed.

66. Undisputedly, TPO in its TP analysis has considered all the transactions between BO and HO and after conducting FAR analysis the same has been compensated on arm's level basis. In these circumstances, no further attribution of profit to BO can be made.

67. Hon'ble Supreme Court in the case of DIT vs. Morgan Stanley and Co. Inc. (2007) 292 ITR 416 (SC) decided the issue by returning following findings :-

> ***"As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE."***

68. In view of the matter, we are of the considered view that when transaction between the HO and BO has otherwise been held at arm's length by taking into account the risk bearing functions, no further profit to the BO can be attributed. Consequently, ground no.15 is decided in favour of the taxpayer.

GROUNDS NO.17 & 18

69. The taxpayer challenged the action of the AO in not giving credit of taxes amounting to Rs.4,73,055/- while computing the alleged tax payable by the taxpayer and without prejudice to ground no.17 taxpayer contended that AO has erred in not giving credit of taxes of Rs.7,27,883/- withheld on payments held by HO from Indian customers. We are of the considered view that when the taxpayer claimed that they are entitled for credit of taxes, the matter is required to be set aside to the AO to verify if such taxes have been deposited by deducting the TDS and to provide the credit to the taxpayer under Rules.

GROUND NO.19

70. The ld. AR for the taxpayer contended that the AO has incorrectly applied surcharge and cess over the tax rate of 10% as per Double Tax Avoidance Agreement (DTAA) applied on the amount of income of HO and relied upon Article 2 of DTAA which is extracted for ready perusal as under :-

> ***"3. The existing taxes to which the Convention shall apply are in particular:***
>
> ***(b) in India:***
>
> ***- the income-tax including any surcharge thereon,***
> ***- the surtax,***
> ***- the wealth-tax.***
> ***(hereinafter referred to as "Indian tax'?***
>
> ***4. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the States shall notify to each other any substantial changes which have been made in their respective taxation laws."***

71. Under Article 2(3) of the DTAA, tax includes Income-tax and surcharge thereon and as such, surcharge is included in the income-tax and the tax rate of 10% for fee for technical services as prescribed in Article 12 is deemed to be included surcharge as cess is nothing but an additional surcharge, so only tax rate of 10% under DTAA is applicable. Ld. AR for the taxpayer relied upon the decision rendered by the coordinate Bench of the Tribunal in ***Soregam SA vs. DCIT (2019) 101 taxmann.com 94 (Delhi-Trib.)***

wherein the identical issue has been decided in favour of the taxpayer by holding that since education cess is a form of additional surcharge, education cess or any other surcharge cannot be applied additionally to increase the tax rate prescribed in the DTAA i.e. 10%. So, we direct the AO to apply tax rate of 10% in this case on royalty/FTS. Consequently, this issue is decided in favour of the taxpayer.

GROUND NO.20

72. AO has charged the interest u/s 234 B, which has been challenged by the taxpayer on the ground that this issue has been decided in favour of the taxpayer in numerous cases and more so, in ***taxpayer's own case for AY 2006-07***, this issue stands covered. Coordinate Bench of the Tribunal in ***taxpayer's own case for AY 2006-07*** decided the issue in controversy in favour of the taxpayer by returning following findings :-

> ***"5.2 Having heard the rival submissions and perused the relevant material on record in respect of this additional ground, we find that the issue of charging interest u/s 234B in the present case is ho more res integra in view of the judgment of the Hon'ble Bombay High Court in DIT (International Taxation) v. NGC Network Asia LLC [2009J 313 ITR 187, in which it has been held that when the duty is cast on the payer to deduct tax at source, on failure of the payer to do no interest can be charged from the payee assessee u/s 234B. The same view has been reiterated in DIT (IT) v.***

Krupp UOHE GmbH [2013J 40 taxmann.com 38 (Bom.). As the assessee before us is a non-resident, naturally any amount payable to it which is chargeable to tax under the Act, is otherwise liable for deduction of tax at source."

5.3 At this juncture, it is relevant to note that the Finance Act, 2012 has inserted a proviso, at the end of section 209(1) w.e.f. 1.4.2012 which provides that for computing liability for advance tax, income-tax calculated under clause (a) or (b) or (c) shall not, in each case, be reduced by the aforesaid amount of income-tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income, if the person responsible for deducting tax has paid or credited such income without deduction of tax or it has been received or debited by the person responsible for collecting tax without collection of such tax. The effect of this insertion is to nullify the mandate of the above judgments holding that no interest is chargeable if the income received by such assessee is otherwise liable for deduction of tax at source in the hands of the payer. The point worth noting in this regard is that the Finance Act, 2012 has inserted this proviso prospectively w.e.f. 1.4.2012. Even the Memorandum explaining the provisions of the Finance Bill, 2012 provides that: 'This amendment will take effect from 1st April, 2012 and would, accordingly, apply in relation to advance tax payable for the financial year 2012-13 and subsequent financial years'. It, therefore, becomes vivid that the insertion of the proviso to section 209(1) is prospective and the same cannot be applied retrospectively to the year under consideration."

73. Following the decision rendered by the coordinate Bench of the Tribunal in taxpayer's own case, we are of the considered view that interest u/s 234B of the Act as charged by AO/DRP is not sustainable because when duty is on the payer to deduct tax at

source, on failure of the payer to deduct the TDS no interest can be charged from the payee/taxpayer u/s 234B of the Act. Consequently, this ground is determined in favour of the taxpayer.

74. Resultantly, the appeal filed by the taxpayer is allowed for statistical purposes.

Order pronounced in open court on this 28th day of November, 2019.

Sd/-	**sd/-**
(N.K. BILLAIYA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 28th day of November, 2019
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.