IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.1744/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

MTU India Private Limited, 159/1, Tathawade, Pune-Mumbai Highway, Pune – 411033 PAN : AABCD2233N	Vs.	DCIT, Circle-14, Pune
Appellant		Respondent

Assessee by	Shri Arvind Sondhe
Revenue by	Shri T. Vijaya Bhaskar Reddy
Date of hearing	18-02-2020
Date of pronouncement	20-02-2020

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee emanates from the final assessment order dated 04-10-2019 passed by the Assessing Officer (AO) u/s.143(3) r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter called 'the Act') in relation to the assessment year 2015-16.

2. Succinctly, the factual panorama of the case is that the assessee is a wholly owned Indian subsidiary of MTU Asia Pte Ltd. The assessee has been engaged in the business of

marketing and distribution of diesel engines and spare parts including the associated equipments; overhauling and repairing of diesel engines; and earning commission income on sale of spare parts, associated equipments and engines of overseas MTU entities to customers in India. The assessee filed its return declaring total income of Rs.8,67,98,180/-. Such a return was accompanied by report in Form no. 3CEB detailing certain international transactions classified under two business segments, namely, Engine sale, Spares sale and After-sale service (ESAS) and Engineering & Research Centre (EARC). The Assessing Officer (AO) made reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. The TPO recommended transfer pricing adjustment in both the segments leading to the making of the additions by the AO. Aggrieved thereby, the assessee is in appeal before the Tribunal.

A. ENGINE SALE, SPARE SALES & AFTER-SALE SERVICE (ESAS)

3. We first espouse the ESAS business segment. The assessee, *inter alia,* reported international transactions of

`Import of engines for trading' with transacted value of Rs.25.11 crore; `Import of spares and components for trading' at Rs.29.70 crore; `Sale of spares' at Rs.7.52 crore; `Receipt of commission on sales' at Rs.12.22 crore; `Service income – Defence' at Rs.22.76 lakh; `Payment for training received' at Rs.6.71 lakh; `Service income - Warranty and after-sales services' at Rs.3.42 crore; and `Payment of IT maintenance charges' at Rs.1.52 crore. The TPO observed that the assessee had aggregated the above eight transactions relating to Indenting, Trading and Service segments under a common ESAS segment for benchmarking, which he did not approve. He segregated revenue under ESAS business segment into three segments, namely, Indenting, Service and Trading. Applying the same method for determining the ALP as was applied by the assessee, namely, the Transactional Net Margin Method (TNMM), the TPO worked out the Profit Level Indicator (PLI) under the Indenting segment at 53.07%; Service segment at 58.34%; and Trading segment at (-)7.84%. While making this calculation, he allocated common expenses on the basis of different keys. Some of the expenses were allocated on the

basis of turnover while others in the ratio of certain percentage to Indenting, Service and Trading, varying with the nature of expenditure. He did not dispute the ALP in the Indenting and Service segments. For the Trading segment, he shortlisted certain comparables with their weighted Operating Profit (OP) / Operating Revenue (OR) in the dataset of seven companies starting with (-)1.01% and ending with 5.87%. 35th percentile of the dataset was found at 1.55% and 65th percentile at 5.50%. Since the assessee's margin from trading segment at (-)7.84% did not fall within the arm's length range, the TPO adopted median from the dataset at 1.71%. Considering such median at 1.71% as the ALP, he TPO proposed transfer pricing adjustment in the Trading segment under ESAS at Rs.6,83,69,844/-. The AO passed the draft order accordingly. It is a matter of record that thereafter the TPO passed rectification order u/s.92CA(5) on 11.6.2019 recalculating median at 3.75% and the resultant transfer pricing adjustment at Rs.8,29,68,375/. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP). The AO in the final assessment order

made the transfer pricing addition to the above extent, against which the assessee has approached the Tribunal.

4. We have heard both the sides and gone through the relevant material on record. The assessee under the ESAS business segment has raised multi-fold grievances, which primarily needs adjudication on three broader issues:-

I. Splitting of ESAS segment into three segments, namely, Sales, Trading and Service

II. Most appropriate method- Whether TNMM or RPM?

III. Calculation of PLI and T.P. adjustment

<u>I. Splitting of ESAS segment into three segments, namely, Sales, Trading and Service</u>

5. The assessee covered first eight international transactions under the overall ESAS segment, namely, Receipt of commission; Service income –Defence; Import of engine for trading; Import of spares and components for trading; Sale of spares; Payment for training received; Service income - Warranty and after-sales services; and Payment of IT maintenance charges. As the name of the ESAS business segment suggests, it comprises of three sets of transactions,

namely, Engine Sales (Indenting or commission); Spares sales (Trading); and After-sales service (Service). Whereas the first two transactions relate to Indenting activity; next three transactions relate to Trading activity; next two transactions relate to Service activity; and the last transaction is payment of IT maintenance charges which is in the nature of expenditure. The assessee aggregated all the above referred eight transactions under ESAS segment and applied the TNMM as the most appropriate method for demonstrating that all these transactions were at ALP on aggregate basis. The TPO did not accept such aggregation. He segregated the transactions under ESAS into the three segments, viz., Indenting, Trading and Service. Acknowledging the TNMM as the most appropriate method, he worked out their PLIs at page 13 of his order and accepted the transactions in respect of Indenting and Service segments at ALP. Entire dispute rotates around the determination of the ALP in respect of the Trading segment.

6. The assessee has pleaded before the Tribunal that splitting of the ESAS into three segments by the TPO was unwarranted. In support of such a contention, the ld. AR stated that up to the

Assessment year 2013-14, the TPO accepted the aggregation of Indenting, Trading and Services under the ESAS segment. It was for the A.Y. 2014-15 that the TPO bifurcated the ESAS segment into two parts, namely, Indenting as first part and Trading & Service as a combined second part. It was for the year under consideration that the TPO bifurcated ESAS segment into three segments, namely, Indenting, Trading and Service. The ld. AR candidly admitted that the bifurcation of ESAS into two segments in the proceedings for the immediately preceding year, that is, assessment year 2014-15, has been finally accepted by the assessee. In view of this factual backdrop, the ld. AR canvassed a view that no segregation of ESAS segment into three segments was called for.

7. The first question which looms large before us is to determine if the TPO was correct in segregating the ESAS segment into three segments, namely, Indenting, Trading and Service. Section 92(1) of the Act provides that any income arising from *'an international transaction'* shall be computed having regard to the arm's length price. Section 92C(1) provides for the computation of the ALP and mandates to

follow one of the prescribed methods as the most appropriate method, which, *inter alia,* include the TNM method, as has been applied by the assessee on aggregate basis and the TPO on segregate basis. The term *'transaction'* has been defined in section 92F(v) to include an arrangement or understanding or action in concert, whether or not such arrangement etc. is reduced in writing or is intended to be enforceable by legal proceeding. The mechanism for determination of the ALP under the TNMM has been provided in Rule 10B(1)(e) of the Income-tax Rules, 1962. The term *'transaction'* has been defined in Rule 10A(d) as including *'a number of closely linked transactions'*. Whereas the definition of the term `transaction' in section 92F(v) is meant for identifying a transaction, the definition of the term `transaction' in rule 10A(d) is meant for determining the ALP of international transaction under the relevant rules. In the present context, we are concerned only with the definition of `transaction' as given in rule 10A(d). It, therefore, boils down that in so far as the determination of the ALP under the machinery of computation under the methods as given in Rule 10B is concerned, the term 'transaction' also

includes a plural of transactions. However, the caveat is that in order to be covered within the term *'transaction'* under Rule 10A(d), it is *sine qua non* that such number of transactions must be *closely linked*. If they are not closely linked, then there can be no aggregation for the purpose of determination of the ALP under the IT Rules.

8. In one sense, closely linked transactions mean similar or alike transactions of purchase or sale etc. of goods or services. To put it simply, if there are several international transactions of, say, purchase of similar goods or goods with minor variations, then instead of finding the ALP of such international transactions separately, if these are combined and benchmarked in an aggregate manner, it satisfies the prescription of closely linked transactions.

9. The moot question is whether the instant transactions of Indenting, Trading and Service can be construed as '*closely linked transactions'*? In the Indenting segment, the nature of activity carried out by the assessee is to procure orders for its parent company situated abroad towards sale of diesel engines and spare parts in India. The ld. AR contended that during the

year under consideration, the assessee did Indenting only for sale of diesel engines and not for spare parts. On a further query, the ld. AR explained that the Sale of diesel engines resulting into Indenting commission to the assessee can be bifurcated into three Applications, namely, Marine Applications (whose customers are Indian Navy and Coast Guard); Power Generation Applications (whose customers are Airports, Hotels, Hospitals and IT companies) and Construction & Industrial Applications (whose customers are Mining-Coal, Oil & Gas and Rail). He further submitted that albeit exact figures of sales made through the assessee of Marine, Power Generation and Construction and Industrial Applications were not available but roughly these were equal. Thus it is seen that the activity of the assessee under this segment is confined to securing orders from Indian customers for supply of diesel engines by its parent company abroad. Nature of activity of the assessee under Trading segment mainly comprises of Sale of spare parts and under the Service segment, it encompasses servicing the diesel engines, either during or after warranty. Whereas the Indenting activity has to be necessarily carried out in India before making

sales by the parent AE, the Trading and Service activities of the assessee take place post the sale of diesel engines by the parent company of the assessee to customers in India. Obviously, there is no connection whatsoever between the Indenting activity on one hand, which is a pre-sale event and Trading and Service activities on the other, which are post-sale events.

10. The assessee in its T.P. Study report has noted that: `Currently, Marketing Support team comprises of 8-10 members who are mainly located at Delhi, Kolkata and Pune. The role of Marketing Support team is to assist AEs in exploring the new business opportunities in India and co-ordination required for selling diesel engines directly to the India customers for Marine, Mining and Construction and Power Generation application.' It has further been noted that: `For providing marketing support services, MTU India is remunerated with commission which ranges from 2 to 10% on the value of sales. These rates have been prescribed under the `Sales Representative' agreement'. Thus it is vivid that not only risks and rewards under the Indenting activity have absolutely

no relation with the activities of Trading and Service, even the kind of effort required and the nature of expenses incurred for such an activity are also miles apart. By no stretch of imagination, the Indenting activity can be considered as a 'closely linked transaction' with the Trading and Service activities.

11. At this juncture, it is pertinent to note that in the FAR (Functions, assets and risks) analysis, the assessee itself analysed Import of Spares and Engines, Sale of spares and provision of warranty services together on page 10 and Commission separately on page 12 of its T.P. Study report.

12. In view of the foregoing *raison d'etre*, we are satisfied that the segment of Indenting (pre-sale activity) is not closed linked with Trading and Service (post-sale activities) activities and hence cannot be aggregated.

13. Now we turn to examine as to whether the Trading and Service segments need to be benchmarked in an aggregate or segregate manner. Without prejudice to the aggregation of all the three segments under the ESAS segment, the instant claim

of the assessee is that Trading and Service segments should be segregated.

14. Under the ESAS business segment, the assessee aggregated revenue from sale of spare parts and service income apart from Indenting, which we have dealt with hereinabove by holding that the Indenting needs to be segregated. In the Trading segment, the assessee sold spare parts during the year and earned revenue. In the Service segment, the assessee earned revenue from servicing of the diesel engines supplied by its AEs. The Service segment includes carrying out service to the diesel engines sold by its parent AE in India during warranty and post warranty periods. For servicing of engines during warranty period, the assessee raised bills on its AEs and for the servicing of diesel engines post warranty period, the assessee raised bills directly to the customers in India. A case has been set out on behalf of the assessee that the diesel engines supplied by the AEs to customers in India are of a complex nature and that all the customers have to necessarily approach the assessee for carrying out repairs. Since servicing is not possible without spare parts and the service can be done exclusively by the

assessee, it was contended that sale of spares parts has to be aggregated with Service. Since such a contention did not emanate from the orders of the authorities below, the Bench directed the ld. AR to substantiate the same by correlating the details of service income with trading of spare parts on case-to-case basis for ascertaining if the transaction of trading of spare parts was an integral part of the transaction of servicing in such a way that they are so closely linked so that one cannot survive without the other. On the next date of hearing, the assessee filed a Chart giving bifurcation of revenue from sale and service, copy on pages 33 and 34 of the paper book, with total revenue from sale of spare parts at Rs.71.56 crore and Service at Rs.7.21 crore. This chart contains an alphabetic list of Parties with the value of total revenue from sale or Service for the year *de hors* any linkage with sale of spares on transaction-to-transaction basis, as was required. Apart from Party name and Revenue type etc., there is a last column of `Customer Type' in this Chart. A glance at this Column divulges that the assessee made sales of spares not only to `Direct Customers', such as, ABG Shipyard Ltd. and Adani Hazira Port Pvt. Ltd. etc. but also to

`Dealers', such as, Apollo Generators Pvt. Ltd., Apollo Power Systems Pvt. Ltd., Astha Sterling Crane Pvt. Ltd., Dynatron Services, Ravi Diesel Pvt. Ltd., Sterling and Wilson, and Sterling Generators Pvt. Ltd. Out of total sales revenue of Rs.71.56 crore, the assessee made sales of spare parts to its seven Dealers at Rs.50.00 crore and to Direct customers at Rs.21.56 crore. On a further query, it transpired that apart from the assessee, the parent company has at least seven more Dealers in India, who cater to the requirements of sale of spare parts and service of diesel engines supplied to the Indian customers. The ld. AR admitted that the employees of other seven dealers were rather imparted training by the assessee for carrying out repair job to the diesel engines. On an overall analysis of the pattern of revenue earned by the assessee from trading of spare parts and the information transpiring from the column `Customer type' in the Chart supplied by the assessee, it is manifestly borne out that the assessee's earlier contention that all the customers of diesel engines in India have to necessarily approach the assessee for carrying out repairs and the integrated and stitched sale of spare parts, is not correct.

The ld. AR candidly admitted that there are several transactions of sale of spare parts by the assessee, which are not coupled with rendition of service. Another significant factor which has came to light during the course of hearing is that the assessee was supplying the spares not only to the Direct customers but also to the Dealers, seven in number. Such dealers also sell spare parts purchased, *inter alia,* from the assessee and serve the diesel engines sold by the parent company of the assessee in India in the same way as the assessee is doing, barring the cases of very complex nature of repair, which is exclusively done by the assessee. The position which, ergo, emerges is that the customers who purchase diesel engines from the assessee's parent company are at liberty to have their service requirements met either from the assessee directly or from any other sources including seven Dealers in India, who, in turn, are fully equipped to service the diesel engines by utilizing spare parts from their own separate inventories. There may be certain cases in which the customers in India have an understanding with the parent company to have the service requirements met from the assessee, but this position is not prevalent across the

board. There is no material on record to demonstrate that all the customers in India are obliged to get their diesel engines repaired from the assessee only, nor there can be any such material because there is network of at least seven Dealers in India, who also cater to the service and spare part needs of the customers of the parent company in India. In this scenario, the situations are of the assessee making

i. exclusive sale of spare parts to customers independent of service;
ii. exclusive sale of spares to dealers, who will in turn use the same in their business and earn their own profits;
iii. service to customers with the use of spares; and
iv. exclusive service to customers without any use of spares.

15. We have noted above that the assessee made exclusive sale of spare parts to the Dealers to the tune of Rs.50.00 crore out of total sale of spares of Rs.71.56 crore. Thus about 70% of total sales of spare parts of the assessee has no connection whatsoever with service as the same has been made directly to dealers. In addition, the assessee has also made exclusive sale of spare parts to Direct customers, whose figure is stated to be

not available. This analysis leaves no room for doubt that sale of service parts is, by and large, independent of service.

16. Two separate international transactions, in the present context, can be termed as closely linked and capable of aggregation only when they are either valued together or valued separately but so inextricably linked with each other that one cannot exist without the other, which is, unfortunately, not the case before us. The situation would have been different warranting aggregation if the entire sale of spare parts by the assessee had been dependent on its own servicing so as to make Trading and Service as one inter-woven transaction.

17. The ld. AR advocated for aggregation of all the three segments on the premise that entire business of the assessee rotates around sale of diesel engines. Unless sale of engines is made, he said, there can be no question of sale of spare parts or servicing. It was due to such a common link of Indenting, Trading and Service that the ESAS business segment should not be segregated.

18. In our considered opinion, this argument is devoid of any force in the context of transfer pricing regime, wherein each international transaction of an assessee is to be benchmarked separately unless two or more international transactions are closely linked to each other. If the argument of the ld. AR is taken to a logical conclusion, then all the international transactions of an assessee would require aggregation in as much as they cumulatively lead to one aim of carrying on the business and earning profit. But for transaction of purchase of raw material, there can be no sale; but for acquisition of technical know-how, there can be no manufacturing; but for availing administrative, financial and marketing services, there can be no production or sale; so on and so forth. The scenario as presented by the ld. AR before us, if accepted, would lead to complete bypassing of the transfer pricing provisions because of cross-subsidizations etc., which is impermissible. As the law requires benchmarking of each transaction separately, unless closely linked, we are unable to accord our imprimatur to the contention of the ld. AR.

19. We are reminded of a judgment of the Hon'ble Delhi High court in *Magneti Marelli Powertrain India Pvt. Ltd. vs. DCIT (2016) 389 ITR 469 (Delhi)* in which the assessee entered into agreement with its A.E. for acquiring technology required for the purpose of manufacturing. It applied the TNMM to benchmark its international transactions of import of raw materials, sub-assemblies and components, payment of technical assistance fees, payment of royalty, payment of software and purchase of fixed assets. All these were categorized under one broad head, that is, "Manufacturing of automotive components" and shown to be at ALP. The TPO rejected the assessee's entity level approach applied to benchmark the international transactions including Technical assistance fees and proceeded to determine the ALP of the Technical assistance fees separately. The Tribunal approved the TPO's stand on segregation of payment of Technical assistance fee. The Hon'ble Delhi High Court admitted the question in this regard - `Whether the Income Tax Appellate Tribunal was right in holding that royalty and technical assistance fee did not form part of a composite transaction and have to be treated as two

separate transactions for the purpose of benchmarking and computing arms length price?' Answering the question against the assessee, the Hon'ble High Court countenanced the view of the Tribunal that aggregation of the transaction of payment of Technical fees with other international transactions under the common TNMM, was not correct. Restoring the matter to the TPO/AO, it held that the TNMM should be separately applied for determining the ALP of the international transaction of payment of Technical fee. The SLP filed against this judgment has since been dismissed vide *DCIT vs. Magneti Marelli Powertain India (P) Ltd. (2018) 252 Taxman 385 (SC).*

20. In a nutshell, we hold that the authorities below were justified in segregating Indenting, Trading and Service under the main ESAS segment.

II. Most appropriate method- Whether TNMM or RPM?

21. The assessee applied the TNMM on the aggregated transactions under the ESAS business segment. When the TPO ventured to segregate the transaction of Trading of spare parts from the others and continued to apply the TNMM, the assessee

requested the TPO to apply the Resale Price Method (RPM) as the most appropriate method. The TPO did not accede to the same and proceeded to benchmark it on the basis of the TNMM, which was accorded approval by the DRP as well. The assessee is aggrieved by the decision of the authorities below in this regard.

22. We have heard the rival submissions and gone through the relevant material on record. It is noticed that the subject matter of controversy is the segregated international transaction of Trading in spare parts. In other words, the spare parts as purchased from the AEs were sold as such by the assessee. Under such circumstances, a question arises as to whether in the case of resale of spare parts without any value addition carried out by the assessee, the most appropriate method should be RPM or TNMM? In our opinion, the RPM is a method which exclusively deals with a situation of the assessee purchasing goods and then selling the same as such. The entire mechanism provided in Rule 10B(1)(b), dealing with the determination of the ALP under the RPM, is founded on the premise that the property purchased from an AE is resold. The Hon'ble

jurisdictional High court in *CIT Vs. L'oreal India (P) Ltd. (2015) 276 CTR 484 (Bom.)* has held that the RPM is the most appropriate method when goods purchased from an AE are resold as such without any further processing.

23. It is noticed that when the assessee put forth the contention before the TPO for using the RPM as the most appropriate method for benchmarking the Trading of spare parts segment, the TPO rejected the same by observing that: "for use of RPM, it is a precondition that the goods sold by the assessee and comparable companies are same or nearby similar'. Thereafter, he observed that the assessee: `is engaged in trading of diesel engines, spare parts and associated equipments while comparables used by the assessee are into trading of different commodities like auto parts etc.' Rejecting the assessee's contention for the application of the RPM as the most appropriate method, the TPO held that: `when no near similar comparables are available, and use of Gross profit margin which does not account for direct expenses as per method used by the assessee, RPM cannot be accepted and TNMM is proposed to be applied which accepts broader

similarity in overall functions of assessee and comparables and no exact product similarity is required'. *Ex consequenti*, it was on the basis of the comparables in the Trading of different commodities like auto parts etc. that the TPO proceeded to apply the TNMM and determined the ALP of the assessee's Trading segment under ESAS. In our humble opinion, the view canvassed by the TPO of accepting dissimilar companies as comparable under the TNMM and not under the RPM, does not sound logical. Selection of companies as comparables cannot differ with the method adopted. Comparables have to be selected on the basis of similarity irrespective of the method - be it the RPM or the TNMM. The Hon'ble Delhi High court in *Rampgreen Solutions Pvt. Ltd. Vs. CIT (2015) 377 ITR 533 (Delhi)* has laid down to this extent.

24. In hue of above discussion, it is held that the TPO was not justified in applying the TNMM by considering functionally dissimilar companies as comparables and not accepting the RPM as the most appropriate method with correct comparables. The ld. AR stated that the assessee can provide correct comparables engaged in trading of diesel engine spare parts. In

these circumstances, we direct to determine the ALP of the segment of Trading of spare parts afresh under the RPM with correct comparables.

III. Calculation of PLI and T.P. adjustment

25. The TPO computed the transfer pricing adjustment by considering operating revenue of Trading segment at Rs.71.56 crore and operating costs at Rs.77.17 crore with the PLI [OP/OR] of the assessee at (-)7.84%. In the rectification order, he determined median of the dataset of comparables at 3.75% and thus proposed transfer pricing adjustment accordingly.

26. The ld. AR has raised two-folded contents in this regard. Firstly, it was submitted that the TPO computed the operating costs at Rs.77.17 crore by using *ad hoc* allocation keys ranging from the Turnover ratio to certain percentage of marketing, service of trading segments. Our attention was drawn towards a chart showing that the allocation keys adopted for the instant year are at much variance with those used for the preceding year.

27. We find from the allocation of expenses made by the TPO that he allocated to the Trading segment 50% of Employees cost; 70% of Job work charges and Travelling expenses; 60% of Advertising; and in the turnover ratio for other expenses. Such allocation of expenses is an arbitrary exercise, which cannot be approved. It is accordingly directed that the allocation of expenses to the three segments should be done on some logical and rational basis. Expenses which can be directly linked to one or more segments, should be allocated accordingly without resorting to any *ad hoc* allocation key.

28. The second contention of the assessee is that the TPO carried out transfer pricing adjustment not only in respect of transactions with AE but also non-AEs in the Trading segment.

29. In our considered, this issue is no more *res integra* in view of the judgment of Hon'ble jurisdictional High court in *CIT Vs. Phoenix Mecano (India) Pvt. Ltd. (2019) 414 ITR 704 (Bom.),* wherein it has been held that the transfer pricing adjustment made at entity level should be restricted to the international transactions only. It is pertinent to mention that the Department's SLP against this judgment has since been

dismissed by the Hon'ble Supreme Court in *CIT Vs. Phoenix Mecano (India) Pvt. Ltd. (2018) 402 ITR 32 (St.).* Similar view has been taken by the Hon'ble Bombay High Court in *CIT Vs. Thyssen Krupp Industries Pvt. Ltd. (2016) 381 ITR 413 (Bom.)* and *CIT Vs. Tara Jewels Exports (P). Ltd. (2010) 381 ITR 404 (Bom.)*. We, therefore, direct to restrict the transfer pricing addition in the Trading segment only in respect of transactions with AEs.

30. To sum up, we set-aside the transfer pricing addition of Rs.8.29 crore made in the international transaction of Trading of spare parts under the ESAS business segment and remit the matter to the file of AO/TPO for a fresh determination of the ALP in terms of the discussion made *supra* in this order. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh determination.

B. ENGINEERING & RESEARCH CENTRE (EARC)

31. The next issue in dispute is in respect of transfer pricing addition of Rs.90,35,530/- made in the EARC business segment.

32. Facts apropos this issue are that the TPO proposed transfer pricing adjustment of Rs.90.35 lakh in this segment. The assessee contended before the DRP that Risk adjustment ought to have been granted because the assessee, as a captive service provider, was remunerated on cost plus markup for the provision of services under this segment. The DRP did not accept the claim of the assessee by observing that it was not a risk free entity and further there was considerable difference between risks borne by a cost-protected entity like the assessee and normal entrepreneur. It further held that until and unless the risk difference results in deflation or inflation of financial results of comparable companies, there can be no general rule of Risk adjustment.

33. Having heard both the sides and gone through the relevant material on record, it is observed that there is no dispute in the computation of ALP under EARC business segment except for grant of risk adjustment. Such an argument was taken up before the DRP for the first time and the TPO had no occasion to examine the assessee's claim in this regard. Under the given circumstances, we set-aside the impugned order on this issue

and send the matter back to the AO/TPO for examining, if any, risk adjustment can be granted in the facts and circumstances of the instant case. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

34. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 20th February, 2020.

Sd/-	Sd/-
(S.S. VISWANETHRA RAVI)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 20th February, 2020
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr. CIT -5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
   "**सी**" / DR 'C', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

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

		Date	
1.	Draft dictated on	18-02-2020	Sr.PS
2.	Draft placed before author	20-02-2020	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*