IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.As. No.3518/DEL/2017, 7896 & 7897/DEL/2018, 5203/Del/2019
Assessment Years: 2011-12, 2010-11, 2012-13, 2013-14

Danisco India P. Ltd.,	vs.	DCIT, Circle-7(1), New Delhi.
TAN/PAN: AAACD8906D		
(Appellant)		(Respondent)

I.T.As. No.7898 & 7899/DEL/2018, 6025/Del/2019
Assessment Years: 2010-11, 2012-13, 2013-14

ACIT, Circle-7(1), New Delhi.	vs.	Danisco India P. Ltd.,
TAN/PAN: AAACD8906D		
(Appellant)		(Respondent)

Appellant by:	Shri Harpreet Singh Ajmani, Adv. & Shri Rohan Khare, Adv.		
Respondent by:	Shri Dheeraj Jain, Sr.D.R.		
Date of hearing:	10	02	2021
Date of pronouncement:	05	05	2021

O R D E R

PER AMIT SHUKLA, JM:-

The aforesaid appeals have been filed by the assessee as well as Cross Appeals by the Revenue, against separate impugned orders dated 25.09.2018, 09.01.2017, 26.09.2018 and 17.04.2019 for the Assessment Years 2010-11, 2011-12, 2012-13 and 2013-14 respectively, passed ld. Commissioner

of Income Tax (Appeals)-XLIV. Since issues involved in all the appeals are common arising out of identical set of facts, therefore, same were heard together and are being disposed of by way of consolidated order.

2. We will first take up the Cross Appeals for the Assessment Year 2010-11. The assessee is mainly aggrieved by Transfer Pricing Adjustment on account of Intra Group Services (IGS) like Shared Support Services, Marketing and Sales Services, holding them to be in the nature of shareholder/stewardship activity of the AE on *ad hoc* basis, wherein Ld. CIT (A) has confirmed 30% on the cost of such services, whereas the Revenue has challenged deleting the 70% of the adjustment on same Intra Group Services as well as not upholding the CUP Method applied by the TPO.

3. In sums and substance the controversy is that, the appellant has availed management services from AE's which comprises of; (i) Technical Support and Assistance Services; (ii) Corporate Support Services; and (iii) Sales and Marketing Support Services, which assessee had received on cost to cost basis, which have been benchmarked by applying TNMM on entity level in trading and manufacturing segment. Whereas the TPO has benchmarked these Intra Group Services at 'Nil' by taking the CUP method as the most appropriate method whilst applying benefit test, he held that these are duplicate in nature and alternatively are in the nature of shareholder/ stewardship activity. Ld. CIT (A) has granted part relief; *firstly*,

he has deleted the Transfer Pricing Adjustment in respect of technical support and assistance services following the ITAT order for the Assessment Year 2007-08; and *secondly*, on adhoc basis he has confirmed the adjustment of 30% of the cost in respect to corporate support services and marketing and sale support services holding them to be in the nature of shareholder/stewardship activity and balance 70% stands allowed. Against this order, both the Revenue and assessee are in appeal.

4. At the outset, ld. counsel for the assessee submitted that this precise issue has been decided in favour of the assessee by the Tribunal in assessee's own case for the Assessment Year 2009-10 in ITA No.2846/Del/2016 vide order dated 07.10.2020.

5. On the other hand, ld. DR has strongly relied upon the order of the Assessing Officer and part of the ld. CIT (A) order and after referring to the relevant findings and observations given therein.

6. The facts in brief are that the assessee company is engaged in the business of manufacturing and trading of food ingredients and is closely held by Denisco A/S Denmark. In Form 3CEB, the assessee has disclosed Intra Group Services relating to IT services at Rs.69,84,388/- and Management Services at Rs.3,20,61,027/-, apart from other International Transactions. In response to the show cause notice on the issue of IGS by the TPO, the assessee company had described

the main services received from AEs, which it has paid service fee in the following manner:-

*"**A) IT Services**- During the year under consideration, Danisco India has made payment for the / IT allocation charges to its AE. Such payment was made on account of global agreement procured by the AE for the benefit of entire group and was mainly towards internet connectivity, standard operating system such as MS office and IT helpdesk. The detailed description of the services utilized by Danisco India in its operations and their benefit was explained as below:*

i. Internet charges: Danisco group companies have a global tie up with the internet service provider for obtaining internet services. Thus, all the internet services used by Danisco India are routed through Denmark. Your goodself would appreciate the fact that the Company during the year has not incurred any internet expenses which are normal to any other business.

ii. Support Fees: This covers incident handling, super user support and training, and minor changes to the MyBIS and CRM system.

iii. WAN site Fees: This fee covers the operation of Danisco's global wide area network;

iv. SAP support Fee: This includes the expenditure incurred handling, super user support and training, and minor changes to the SAP-template.

v. Licence Fee: This is the fee with respect to licenses for basic software such as MS office which are procured globally by the group companies;"

vi. Service Desk: These are the charges for internal IT service desk for resolution of IT related problems faced by the employees.

This can been seen from the details description of services that the payments were basically for IT related services that were procured by the Danisco group from the third party seivice providers and were allocated to all the group companies, including Danisco India and such services; tools are essential for operation of any business.

The payments for IT Services are essentially a cost reimbursement paid by the Company and not a payment for services to AE but to the external service providers. The copies of invoices substantiating the above mentioned fact has been already submitted vide submission dated 23.07.13for your kind consideration.

***B) Management Seivices**- As discussed above, DaniscoGroup has a shared service centres system which provides specific services to all group entities. Broadly speaking, the seivices may include but shall not be limited to:*

a) Corporate support services: Under the corporate service group, Danisco India receives following key services:

1) Global key account management, co-ordination and support AE of the Danisco group, due to its close proximity, provides services relating to maintaining relationship with Global key customers and providing timely support to Danisco India while dealing with these entities. Thus, Danisco India does not incur any separate costs relating to the client relationship activities and negotiations.

2) Regional management, co-ordination and support

Under this activity, day-to-day management of the Danisco group entities are taken place locally. However, from a regional perspective, area heads of the respective group entity's report to individuals overseas for getting guidance and advice with respect to routine and complex functions performed by them. The foreign offices provide support on a weekly basis. This included strategic and technical decisions such as benchmarking of salaries and new projects undertaken etc.

3) Global communications

Danisco entities (including Danisco India) receive international support for both external and internal communication. One of the roles of the Global Communications team is to ensure the value of the brand is upheld through consistent communication. Danisco India also gets benefit with respect to their internal communication. For example, the intranet is managed globally and Danisco India is able to obtain information from the internal databases. Danisco lndia doesn't have any individuals that are dedicated to providing these services.

4) Global finance support and financial business controlling

There are very limited people in Danisco India, who make up the Finance team. Therefore, Danisco India requires significant amounts of assistance from other Group entities. In' particular, there are no specialist finance team members who can advise in the area of mergers and acquisition or treasury or financial implication due to change in business line etc. Therefore, Danisco India receives support from the global Corporate Finance Team.

5) Corporate tax advice and Legal service

Corporate tax support is provided globally. Further, legal support is also rendered from overseas. All legal contracts are prepared through Danisco A/S. These contracts range from lease contract with customers to new business acquisition contracts.

6) Corporate human resources advice and service

There are two systems that were developed by global human resources ("HR") called "Dialogue" and "Spirit". These programme support and assist all Group entities with staff performance and appraisal. Danisco India makes use of these applications to assist with staff development and support and do not incur any separate costs.

b) Sales and Marketing - Marketing concepts and strategies are developed by AEs. Danisco entities including Danisco India make use of adverts created by AEs and adjust them to suit the requirements for the local market Sales assistance is provided by global experts who form part of a global sales team.

c) Technical Assistance and Support - Technical Service Request ("TSR") Team provides ongoing technical support. Team members travel to various Danisco entities to assist them with new product development. Requests for technical assistance are logged on a system designed by the TSR team.

Due to the highly specialised nature of the industry, technical experts are required to focus on narrow specialisation lines. Therefore, it is not feasible for the Danisco India to employ individuals dealing with each area of specialisation. Furthermore, the individuals in Danisco India have local expertise while clients also require global expertise.

4: Contemporaneous documentary evidence to show that these services have actually been received by the Assessee Company.

The details of the services received supported by the contemporaneous documentary evidence are as follows:-

These documentary evidences are contemporaneous and demonstrate that these services have actually been received by the company, justify the need for the receipt of such services for which payment has been made. These documents include email correspondences to place on records the evidence as to when and how these services were requisitioned from the AEs.

Accordingly, the company, vide this submission, is lacing, for your perusal and consideration, multiple documentary evidence on sample basis to explain in granular detail, the services rendered by the AE.

Should your goodself require, the company would be pleased to place on record further evidences of the benefits received with regard to the costs allocated by the AE the provision of intra-group services to the Company.

7. In the TPO's order, assessee's replies and the evidences filed have been discussed in detail. However, in sums and substance TPO's findings and observations have been summed up by him in the following manner:

- *In this case, the taxpayer has failed to substantiate that services have actually been rendered to it and benefit has actually been derived by it on the basis of documentary evidence. In support of its contention, the taxpayer has merely furnished copies certain mails exchanged between the*

personnel of the Group. None of the above reproduced e-mail exchanges between the employees establish the requirement/specific need of the taxpayer for their services, the benefit which has accrued to the taxpayer, or that an independent party would have been willing to pay another independent party for the services purported to be received by the taxpayer.

- *The services received are incidental being in nature of long association.*

- *It is evident from facts stated above that the taxpayer did not file any evidence to support a claim that these services were actually provided to the taxpayer at its request to meet the specific need of the taxpayer and that certain tangible and concrete benefits have actually accrued to the taxpayer.*

- *Under uncontrolled circumstances any independent enterprise having skilled and sufficiently trained manpower would not have been willing to pay any third party to do so. In my opinion, services which are incidental or mere duplicity do not fall in the category of intra group services.*

- *However, without prejudice to the above discussion, it may not be impossible, however, for a group member to benefit incidentally from services being provided to one or more fellow affiliates. For example in this case, the taxpayer might be benefited from services rendered by AE in general to its other AEs. However, such incidental benefits do not give rise to Intra Group Services and cannot be regarded as giving rise to arrangement subject to arm's length pricing as stipulated in OECD TP guidelines paragraph 7.13 under Chapter VII. These findings lead to an irresistible conclusion that payments for*

liaison services allegedly provided by the AEs are not at arm's length price.

- *Moreover, it is seen from the details contained in the transfer pricing report of the taxpayer submitted under Rule 10D that the taxpayer had not conducted FAR analysis in regards to these alleged services and had failed to justify the functions performed by the AE for these payments. This is probably a reason that the receipt of alleged services have not been benchmarked under any of the five method prescribed under the Act in the Transfer Pricing report.*

- *Furthermore, the taxpayer has at the time of requisitioning the so called services, not carried out any cost-benefit analysis at its end. No independent party would agree to incur expenditure without independently ascertaining the value of the goods/services intended to be availed, in the market and that too at the best negotiated prices. No such effort has been demonstrated to be made at the end of the taxpayer, which weighs heavily against the normal practices of business prudence."*

8. Accordingly, TPO held that payments aggregating to Rs.3,90,45,415/- to its AE for Intra Group Services has to be taken at 'Nil' on application of CUP method, as no uncontrolled enterprises would have paid any amount for services it did not tantamount to IGS with demonstrable benefits.

9. Before the ld. CIT(A), the assessee in so far as payment of allocation of IT charges to its AE, pointed out that this

precise issue has been decided in favour of the assessee by the order of the Tribunal in case of the assessee itself in Assessment Year 2007-08 in ITA No.2444/Del/2012 order dated 17.08.2015. Ld. CIT (A) held that, since material facts of the issue involved is same in the present year also and accordingly respectfully following the decision of the Tribunal the IT charges have been deleted by her. For the sake of ready reference the ITAT order which has been incorporated in the ld. CIT (A) in the impugned order appellate order is reproduced herein:

"9.5 The issue regarding payment for allocation of IT charges to its AEs has been decided in favour of the appellant by the order of the Hon'ble Income Tax Appellate Tribunal, Delhi Bench in the case of the appellant itself for AY 2007 - 08 in ITA No. 2444/Del/2012 dated 17/08/2015 where it has been held as follows: -

"3. The facts in brief are that the assessee is a private limited company registered in India and is a wholly owned subsidiary of Danisco A/S, Denmark. The assessee was incorporated on 21.1.1991 for manufacturing and marketing of food and non-food ingredients. M/s. Denisco India is primarily engaged in manufacturing of artificial flavors, food and non-food ingredients and trading of ingredients.

4. During the year, the assessee hadfollowing international transactions with its associated enterprises:

S. No.	*Description of the*	*Amount in (INR)*	*Method transactions.*
1.	*Purchase of raw material*	*10,268,532*	*TNMM*
2.	*Purchase of finished goods*	*92,455,394*	*TNMM*
3.	*Commission received*	*20,437,822*	*TNMM*
4.	*Allocation of Information Technology (IT) Cost*	*6,162,862*	*TNMM*
5.	*Reimbursement of expenses*	*57,416*	*TNMM*

Total 129,382,036/-

5. The TPO discussed the business profile of the assessee in para No. 5. Functions, assets and risks were analysised in paragraph Nos. 6 and transfer pricing approach of the assessee in paragraph No. 7 of his order. The assessee had used TNMM (Transactional Net Margin Method) at the entity level aggregating all the transactions. The assessee had used six comparables who were in the similar line of business in India. The mean OP/sales of the comparables worked out at 0.68% as against -0.03 % of the assessee. As the assessee was within plus minus 5% of the arm's length price (ALP), the assessee claimed that its international transaction is at arm's length. The TPO did not agree with the assessee and decided to benchmark the international transaction individually as against the aggregate approach of the assessee.

6. The assessee has paid Rs.61,62,872 towards allocation of information technology cost. The TPO issued show-cause notice to the assessee asking it to justify the payments made in this regard. The TPO was not satisfied with the cause shown by the assessee and came to the conclusion that no services actually had been received as no evidence had been filed in support. He observed further that no cost sheets or corroborative agreements have been provided to demonstrate that these services were actually received by the assessee. He held further that if the services had been rendered at all, those may be termed as ancillary services. No independent party would pay anything for such services under uncontrolled circumstances. The TPO thus held the payment ofRs.6J, 62,872 is nothing but a device of profit shifting and arm's length price of this transaction shall be determined at nil under CUP Method. The TPO added the payment made by the assessee to its AE to the arm's length price charged by the assessee. The Learned C1T(Appeals) has, however, deleted this disallowance against which the Revenue is in appeal before us.

7. In support of the issue, the learned Senior DR has basically placed reliance on the order of the TPO with this contention that the decision of the IT AT in the case of Dresser Rand India Pvt. Ltd. - ITA No. 8753/Mum/2010 followed by the Learned

CIT(Appeals) is not applicable in the case of the assessee. He also cited the following decisions:

1. Deloitte Consulting India Pvt. Ltd. - ITA Nos.579, 1272, 1273/Mum/2011 & 3910, 391l/Mum/2011;

2. Gemplus India Pvt. - ITA No. 352/Bang./2009;

3. Knorr-Bremse India Pvt. Ltd. -ITA No. 5097/Del/2011; &

4. Petro Araldite Pvt. Ltd. - ITA No. 6217/Mum/2012.

8. The Learned AR on the other hand tried to justify the First Appellate Order on the issue. He submitted that necessaiy cost to run the business has not been disputed by the TPO. He referred Page Nos. 199 to 226 of the paper book i.e. the copies of invoices raised by the A.E. for IT Cost providingspecific nature of expenses in each of the invoices. The assessee had also, provided the break up of IT expenses during the year made available at page No. 232 of the paper book. He submitted further that the expenses claimed on account of allocation of information technology (IT) cost was reasonable looking to the turnover of the assessee. The Learned AR contended that such costs are basic operational requirement for the day to day operations and if there were no global requirement, then assessee would have to procure on its own. Accordingly, on an arm's length basis, it would not be feasible to expect any independent company to provide such services on a free of cost basis as has been contemplated by the learned TPO in his order. Such payments were made on account of global agreement procured by the A.E. for the benefit of entire group and were mainly towards internet connectivity, standard operating system such as MS Office, software support and IT Helpdesk. The costs had been allocated without any markup based on the number of head counts using specific IT Services. He referred page Nos. 227 to 232 of the paper book i.e. copy of the relevant extracts of the submissions before the learned TPO and giving the detailed description of the services utilized by the assessee in its operations and their benefit was explained. He submitted that these services are utilized by the assessee in its operations and are critical for its efficient functioning. No third party wouldprovide these services free of charge. Arm's length price of

such services, by no stretch of imagination, can be determined to be nil. The Learned AR pointed out that in its own case of the assessee in assessment year 2006-07, the learned TPO has held the payment of IT Cost of Rs.40,16,126 at arm's length and not drawn any adverse inference on this issue. He submitted that there is no change in the facts and circumstances of the case during the year and thus the Rule of Consistency should be applied. He contended that if TNMM is held as the most appropriate method, it is not permissible to single out certain costs for the sake of separate Benchmarking analysis. He submitted that in the present case, there is no dispute that TNMM is the most appropriate method for all other transactions. Considering that I. T. costs form a part of the cost base in calculation of the PLI (OP/TC), it would not be appropriate to benchmark such costs separately under another method. The Learned AR contended that the learned TPO while applying CUP method has not mentioned the search process undertaken or methodology adopted in order to determine the ALP of the aforesaid international transactions, nor arrived at a comparable uncontrolled price. The learned TPO has not followed any of the three steps for application of CUP method as mentioned in Rule 10B(l)(a) of the Income-tax Rides, 1962. The expenses incurred by the asses see, including expenses for I.T. costs have formed a part of the cost base of the assessee. He placed reliance on the following decisions:

i) Dresser Rand India Pvt. Ltd. - ITA No.8753/Mum/2010;

ii) AWB India Pvt. Ltd. -ITANo. 4454/Del/2011;

iii) Ericson India Pvt. Ltd. - 1TA No. 5141/Del/2011; &

iv) McCann Erickson India Pvt. Ltd. - ITA No. 5871/Del/2011.

9. Having gone through the orders of the authorities below, we find that there are some undisputed facts and that no such payment in question i.e. information technology cost was made to any other party and in the assessment year 2006-07, the learned TPO in the case of assessee itself under almost similar facts had held the payment of IT Cost of Rs.40,16,126 at arm's length price and had not drawn any adverse inference on this issue. The claimed expenditure stated to have been incurred on

internet charges, support fees, WAN site fees, SAP support fee, license fee and service desk. The detailed description of the services utilized by the assessee in its operation and their benefit explained by the assessee are being reproduced hereunder:

"i. Internet charges: Danisco group companies have a global tie up with the internet service providers for obtaining internet services.

Thus, all the internet services used by Danisco India are routed through Denmark. Your Honours would appreciate the fact that the company during the year has not incurred any internet expenses which are normal to any other business.

ii. Support Fees: This covers incident handling, user support and training, day to day operational support to all the user for application such as Lotus notes (for email & same time communication), MYB1S (used for reporting of all the business data such as sales finance, Inventory), CRM (Customer relationship Management used for maintaining all the customer records, sales histoiy & opportunity, Pricing etc.), GCMS (Global Complaint Management System for analysis of customer complaints based on which correction action taken) and various knowledge data base required for business, iii. WAN site Fees: This fee covers the operation of Danisco's global wide area network which allows Danisco India to communicate and exchange information using the global network.

iv. SAP Support Fee: This includes the expenditure incurred handling, user support and training and minor changes to the SAP template. This also includes all the support for company Business process software based on SAP platform and the technical support for local ERP system (Navision).

v. License Fee: This is the fee with respect to licenses for software such as Lotus notes, Adobe, Windows Operating system, all server Application, Navision Software License, Pricing system software, SAP Software, BMC remedy (problem reporting software), and Antiviruses which are procured globally by the group companies; vi. Service Desk: These are the charges for internet IT service desk for resolution of IT related problems

faced by the employees. They are first level of support for all Danisco India IT related problems."

10. Considering the above submissions, the Learned CIT(Appeals) has given following finding on the issue in para No.5.13 of the First Appellate Order: "5.131 do not see any merit in going into the ratio of the international cases quoted by the TPO as well as the guidelines issued by the OECD because the issue involved is of facts - whether the appellant has received the service or not. In the absence of any payment towards any other entity for the license fee for software used and for networking charges, it is obvious that the appellant has received these services from the related parties. The invoices produced before the TPO clearly mentions the purpose for which these payments were made. The allocation key being the number of users for allocating these expenses, I find that it is a reasonable allocation key in such circumstances. Appellant has stated that there are no written agreements between AEs on the issue of cost sharing in no way comes in the way of appreciating the fact that these IT related charges were shared between the AEs. Therefore, following the ratio of Dresser- Rand India Pvt. Ltd. (supra), I hold that the appellant has received these services and the allocation key for apportioning the cost is areasonable one. 1 direct the TPO/A.O to delete the addition made in this regard."

11. It is not the case of the Revenue that the above claimed services are not required to the nature of business of the assessee, nor is it the case of Revenue that the claimed payment for such services was made by the assessee to any other entity. The learned TPO has not drawn any adverse inference on the claim of the assessee that based on the benchmarking analysis undertaken, the mark-up earned by the assessee is at arm's length. The Learned CIT(Appeals) has rightly followed the decision of Mumbai Bench of the ITAT in the case of Dresses Rand India (Pvt.) Ltd. (supra) holding that while evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Under these circumstances, we are of the view that

the Learned CIT(Appeals) has keeping in mind the preponderance of the probability to run the business of assessee has rightly accepted the claimed expenditure on the nature of the services required to run the business of the assessee with the direction to the Assessing Officer to allow the same. The Hon'ble jurisdictional High Court of Delhi in the case of Hive Communication Pvt. Ltd. (ITA No. 306/2011followed by the Delhi Benches of the ITAT in the case of McCann Ericson India Pvt. Ltd. (supra) has held that the legitimate business needs of the company must be judged from the view point of the company itself and must be viewed from the point of a prudent businessman. It was held that it is not for the Assessing Officer to dictate what the business needs of the company could be. It is the businessman who can only judge the legitimacy of the business need of the company from the point of a view of a prudent businessman. The term "benefit" to a company in relation to its business has a very wide connotation. It was further held that it is not feasible to evaluate the price of each service in financial term in isolated and stand alone manner for each such service or part of the service and hence TNMM at entity is acceptable. The First Appellate Order on the issue is well supported by the decisions cited by the Learned AR and hence we are not inclined to interfere therewith. The same is upheld. The ground is accordingly rejected.

12. In result, the appeal is dismissed. ''

9.6 The material facts of the case are the same in the instant year also. In accordance with the principle of consistency, the doctrine of judicial discipline and respectfully following the order of the Hon'ble Income Tax Appellate Tribunal in the case of the appellant itself for AY 2007-08 in ITA No. 2444/Del/2012 dated 17/08/2015, the addition made by the AO/TPO on account of IT charges is deleted.

9. As regards the management services, the same was broadly categorized by the assessee in the following way:

(i) Shared Support (Rs. 235.48 lakhs): The appellant has stated that it receives services in the form of assistance, advice and guidance from divisional and regional management on routine and complex functions performed by key account managers which maintained relationship with global key customers and provide timely support to the appellant while dealing with these entities. It received services in the field of global finance in the areas of accounting, financial analysis, developing finance manuals, corporate tax legal, HR etc.

(ii) Sales and Marketing (Rs. 11.65 lakhs): The appellant stated that the marketing concepts and sales strategies were developed by the AEs and that the entities of the group including the appellant make use of the advertisements created by the AEs and change them to suit the requirements for the local market. Sales assistance is provided by global experts who form part of the global sales team.

(iii) Technical Assistance and Support (Rs. 73.48 lakhs): The appellant has stated that the Technical Service Request team provides ongoing technical support and that the team members travelled to various entities of the group to assess them with new product development. It was also stated that request for technical assistance while logging on to system designed by the TSR team.

10. Also before the ld. CIT(A), it was specifically pointed out that the assessee has specifically filed various evidences to rebut the observation of the TPO which has been incorporated and discussed in the order in detail, for instance; *firstly*, there is no duplicative services which has been referred and

incorporated at pages 15 and 16 of the ld. CIT(A) order; *secondly*, additional evidences were filed to show actual rendition of services which too has been referred to in the order; *thirdly*, cost benefit analysis of technical support services has been dealt and referred at page 43 of the order; *fourthly*, cost benefit analysis of marketing and sale support services has been dealt at page 46 of the order; and *lastly*, cost benefits analysis of corporate support services it has been referred at page 50 of the order. After discussing all the evidences filed, Ld. CIT (A) also forwarded these details and evidences to the Assessing Officer/TPO for the remand report by the Ld. CIT (A). In response, remand report was submitted by the Assessing Officer/TPO.

11. In so far as technical support services are concerned, the ld. CIT(A) has categorically held in paragraph 9.18, that the evidences clearly shows that technical support services are not duplicative in nature and are also not in the nature of shareholder/stewardship activities. However, regarding management services though ld. CIT (A) has incorporated all the evidences relating to receipt of marketing sale support services, Shared Support Services, but on adhoc basis has confirmed 30% of cost incurred by the appellant under these heads after observing and holding as under:

> *"9.21 Perusal of the above, shows that number of services pertained to the development of 'Danisco Spirit 2009 among the employees of the group and also for the development of action plans on global / regional / local level for the development of*

Financial Support Services Management. The above expenditure would lead to development of common culture among all the persons working in Danisco Entities across the globe. Further, the development and implementation of FSS across the entities in the group would lead to consolidation of data which can be used by the group for supply chain management as well as for strategic purpose. Such benefits are only incidental but form part of shareholder / stewardship activity. It is also seen that Marketing and Sales Services also need to the adoption of similar strategies across various entities of the group, Such activities are in the nature of monitoring the affairs of the subsidiary to protect the interest of holding company as a shareholder. The activity of monitoring or ensuring the affairs of the subsidiary in accordance with the economic commercial interest of the holding company would not qualify the test of economic or commercial value for the subsidiary. It is also seen that the cost are allocated by the AE on the basis of revenue which would lead to a certain amount of estimation in the allocation of cost to the appellant. It is also seen that the appellant has not furnished any certificate regarding an independent evaluation of the allocation of cost by the AE. It is also noticed that there is no information on record whether any cost considered in the nature of shareholder / stewardship activity were allocated to the appellant or not. However, it is also seen that the appellant also derives benefit from the same. It is also seen that the appellant has deducted income tax and service tax and tax on payments made to the AE and that if the cost of the services are taken into consideration while determining the net profit margin of the two segments, then the margin of both the segments are at arm's length.

9.22 In view of the above, taking into consideration the facts and the circumstances of the case and the fact that only sample data has been submitted by the appellant, or sum equivalent to 30% of the cost incurred by the appellant on Shared Support Services and Marketing and Sales Services are held to be in the nature of shareholder / stewardship activity of the AE on estimate basis and are disallowed. The AO/TPO is directed to determine the transfer pricing adjustment accordingly.

12. After considering relevant material placed on record and the relevant findings given in the impugned orders, we find that, in so far as receipt of Technical Support Services, the assessee had adduced various supportive evidences including additional evidences which has been taken note by the ld. CIT (A) and there was categorical finding that Technical Support Services were neither duplicative in nature nor in the nature of shareholder/stewardship activities. Thus, the allegations of the Assessing Officer/TPO stands negated on the face of material placed on record. Apart from that, this precise issue also stands covered by the judgment of the Tribunal in assessee's own case for Assessment Year 2007-08, which has been duly noted by the ld. CIT (A) as incorporated above. Thus, order of Ld. CIT (A) on this score is confirmed and adjustment on receipt of Technical Support Services is deleted.

13. Now in so far as the Shared Support Services and other part of Management Services are concerned, again the assessee has placed voluminous evidences with regard to

Market Sales Support Services wherein it has highlighted kinds of services received; how the services has been received; benefits derived from such services; and cost benefit analysis, etc. All these evidences have neither been rebutted nor any contrary facts and material has been brought on record. Thus, in the wake of these evidences the allegations made by the TPO have no legs to stand. Ld. CIT (A) has though appreciated all the evidences, but purely on adhoc basis has confirmed 30% of the cost incurred in Shared Support Services and Marketing and Sales Services holding to be in the nature of shareholder/stewardship activities. First of all, none of these evidences actually goes to show that these activities are in the nature of shareholder/steward activities and secondly, specific cost benefit analysis vis-à-vis the nature of service provided has been given. Thus, on these facts, the adhoc disallowance made by the ld. CIT (A) cannot be held. Moreover, the Tribunal precisely on similar facts has deleted such adjustment after observing and holding as under:-

> *"18. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the upward adjustment made on account of payment made for management services availed by the assessee. The assessee claimed that as it was part of an international group and in order to maintain international standards, certain Intra Group Services were availed by it out of common pool, wherein specialized services were provided by selected entities. The Ld.AR for the assessee has drawn our attention to the details of*

the services availed under the head "administrative services", sales support service and technical services & support, in this regard. It is the case of the assessee that the payment has been made on cost to cost basis for availment of such services. Further, the cost has been allocated out of the total cost incurred by AEs applying suitable allocation key. The assessee had filed evidences in support before the lower authorities in this regard and even before us, which are pointed to in paras above.

19. The first issue which has been raised before us is that where the services have been availed by it and they are connected to the main activities, then whether availment of services is to be benchmarked on standalone basis and not aggregated with the other international transactions undertaken by the assessee? The second issue which is arising before us is against the jurisdiction of the TPO for benchmarking the international transaction to determine the benefit derived by the assessee out of services availed and whether or not the assessee has availed the said services.

20. The assessee company was subsidiary of Danisco A/s Denmark, which were holding 99.99 % shares of assessee as on 31.03.2009. The Danisco group was one of the world's leading producers of food ingredients, enzymes and biobased solutions. It developed and produced functional ingredients primarily for the food and beverage industries and also for some non-food sectors. The group had presence in 47 countries. It was actively engaged in research and development and held more than 7,854 active patents and patent applications.

As per assessee, the group supplied food ingredients to virtually all industries operating within the food industry like:-

** Bakery*

** Beverages*

** Confectionary*

** Dairy*

** Frozen desserts*

** Fruits preparations*

** Fats and Oils*

** Processed meats and seafood*

** Soups & sauces*

21. The assessee was engaged in two segments wherein first is trading and second is manufacturing. The assessee has availed management support services from its AEs, which were reimbursed on cost to cost basis. The Assessing Officer/ TPO had made adjustment on account of availment of IT services which has been deleted by the CIT(A) and the appeal of the Revenue dismissed for low tax effect. As far as availment of management services were concerned, the case of the assessee was that the entities of Danisco group had the expertise available within the group and the cost of availment of such services were allocated to the entities on cost to cost basis applying suitable allocation key. The services were rendered pursuant to the arrangement between the assessees and its AEs through common pool. The case of the assessee before us is that the services were actually rendered and there was no duplication of services. The CIT(A) in Assessment Year 2010-11 after going through list of services availed by the assessee in three segments i.e. Admin segment, technical support services and sales support services, has given a finding that no adjustment needs to be made with regard to the same. The basis of the disallowance made in the hands of

the assessee is that no services have been actually rendered and the second contrary aspect is that there is duplication of services. The Assessing Officer/TPO cannot sit in judgment over the manner in which business have to be carried on by the businessman. The domain of the TPO is limited to check whether services have been availed. The assessee referred to the evidences filed in this regard to availment of services. The cost allocation sheet for availment of admin services is placed at pages 136 to 137 of the Paperbook. Out of the total cost of Danisco Group of amount in DKK 423165, assessee's share is at DKK 1111. The details of technical support services and its availment are placed at pages 138 to 141 of the Paperbook alongwith supports at pages 142 to 153 of the Paperbook. Similarly the assessee has furnished the details with regard to the sales and support services availed which are tabulated at pages 154 & 155 of the Paperbook alongwith support at pages 166 to 220 of the Paperbook. Further the corporate services availed by the assessee are tabulated at pages 222 to 226 of the Paperbook alongwith supports at pages 227 to 360 of the Paperbook. In the present set of facts, the assessee has filed extensive evidences with regard to availment of services and it is not the jurisdiction of the TPO to question whether such availment of services is to be made by the assessee for better management of its business. The assessee company is part of an international group and to maintain its international standards such availment of services from the group entities, in order to maintain international standards for carrying on its business, is a business decision and such decision of the businessman cannot be questioned. The Assessing Officer/TPO

also cannot sit in judgement as to what benefits are derived by the assessee from availment of such services."

14. Apart from that Tribunal has heavily relied upon the judgment of Pune Bench decision in the case of **Emerson Climate Technologies (India) Ltd. vs DCIT (supra)** and came to the following conclusion.

23. In the present set of facts where the assessee was availing specialized services which were provided by the AEs from common pool and the evidences in this regard have been filed by the assessee and where the services were charged on cost to cost basis, there is no merit in the order of the Assessing Officer in questioning the availment of services and the benefit derived by the assessee. It may be pointed out that the Assessing Officer in the alternate held that there was duplication of services. The CIT(A) in the final analysis held it to be shareholder activity. All the above said observations of the authorities below, establish the availment of services. We have also perused the data of evidences filed by the assessee to establish its case of availment of services; under law the benefit, if any, arises to the assessee or not cannot be questioned. Hence, the payment made by the assessee being cost to cost reimbursement of the services availed from common pool is duly allowable as a business expenditure in the hands of the assessee. The TPO has exceeded his jurisdiction in holding the value of the said international transaction at NIL. The Hon'ble Delhi High Court in CIT v. EKL Appliances Ltd. (supra) had held that benchmarking of cost to cost reimbursement of expenses was not within the jurisdiction of the TPO while computing the arm's length price of the international transaction u/s 92CA of the Act. In such facts, we

direct the Assessing Officer/TPO to allow the claim of the assessee in entirety. The Ground of appeal Nos. 1 & 2 are allowed. The Ground of appeal Nos. 3 & 4 being alternative are dismissed. The Ground of appeal No.5 being premature is dismissed.

15. Since there is no material change in facts and same issue is permeating in this year also, therefore, following the aforesaid decision and also in the wake of the evidences furnished by the assessee before the authorities below, such an adjustment cannot be upheld and is directed to be deleted. In the result, the appeal of the assessee is allowed.

16. In so far as grounds raised by the Revenue is concerned, the same cannot be held for the reason that the ld. CIT(A) after appreciating all the evidences filed and after considering the cost benefit analysis of Intra Group Services has deleted the addition. Accordingly, the ground raised on this score by the Revenue is also dismissed.

17. In so far as the issue, whether CUP method is to be applied to benchmark the Intra Group Services as most appropriate method, the same has not been answered by the ld. CIT(A). Since, we have already held above that the payment of Intra Group Services cannot be taken at 'Nil' and no adjustment is called for, therefore, this ground has become purely academic.

18. In the result, the appeal of the assessee is allowed and the Revenue is dismissed.

19. In so far as the appeal for the Assessment Year 2011-12 in ITA No.3518/Del/2017 is concerned, exactly similar issues have been raised, i.e., availing of services under Management Services and bench marking approach whereby the TPO has benchmarked these services under CUP method while applying the benefit test and held that these are duplicate in nature and alternatively to be in the nature of shareholder / stewardship activities. Ld. CIT (A) has followed the appellate order for Assessment Year 2009-10 which has now been settled by the Hon'ble Tribunal. Accordingly, our finding given above will apply mutatis mutandis for this year also.

20. In the result, the appeal for the Assessment Year 2011-12 is allowed.

21. Likewise, in the appeal for the Assessment Year 2012-13, the similar issue is permeating with regard to the IGS which is similar to Assessment Years 2009-10 to 2011-12. Accordingly, our finding given above will apply *mutatis mutandis* in this year also. The Revenue's appeal for Assessment Year 2012-13 in ITA No.7899/Del/2018 is exactly same and hence the same is also dismissed.

22. In Assessment Year 2013-14 one of the issues involved is exactly the same, that is, availing of services from AE under the Management Services and the ld. CIT (A) has followed the earlier year's orders. Thus, in view of our detailed finding given in detail in Assessment Year 2010-11, this issue is decided in favour of the assessee.

23. Another issue raised in assessee's appeal is interest levied at Rs.1,16,451/- on delay deposit of TDS u/s.201(1A) on making payment of TDS in respect to transaction with third parties. The assessee's contention has been that amount paid to the vendors was reflected under P&L account and also allowed as a deduction and the payment of TDS including interest on delayed payment of TDS does not represent tax on the income of the assessee albeit is a tax of the third party which has been paid by the assessee. Ld. CIT (A) has disallowed the claim of deduction of Rs.1,16,451/- u/s. 201(1A) by holding the same is penal in nature.

24. Ld. Counsel before us has relied upon the decision of Hon'ble Delhi High Court in the case of **CIT vs. American Express Bank Ltd. (2012) 18 Taxman. Com 21;** and **CIT vs. Premnath Motors Pvt. Ltd. (2002) 120 Taxman 544** wherein it was held that interest levied u/s.201(1A) is not penal but compensatory in nature. However, ld. counsel fairly pointed out that Hon'ble Madras High Court in the case of **CIT vs. Chennai Properties and Investment Ltd. (1999) 105 Tqaxman 346** had decided the similar issue against the assessee which has been followed by Delhi ITAT in the case of **DLF Ltd. vs. Additional CIT (2019) 106 Taxman 294**.

25. On the other hand, ld. CIT-DR relied upon the order of the CIT (A).

26. The facts in brief are that the assessee after deducting the TDS with respect to payment made to the third party has

deposited the same belatedly. The interest of Rs.1,16,451/- was debited in the P&L account and was claimed as business deduction which has been disallowed. The ratio of the judgment of Hon'ble Delhi High Court in the case of **CIT vs. American Express Bank Ltd. (**supra), as relied upon by the Ld. Counsel will not apply on facts of the assessee's case, because, in that case, assessee in a bona fide manner had not deducted the tax in respect of reimbursement made to its employees because as per the assessee no tax was to be deducted. The Assessing Officer had treated the assessee in default u/s. 201(1A) and levied the tax upon it and also levied the interest u/s. 201(1A) the Tribunal gave a finding of fact that the assessee was under a *bona fide* belief that the reimbursement of expense was not taxable in the hands of the employees, and therefore, it had good and sufficient reason not to deduct tax at source. Accordingly, interest levied was deleted. The Hon'ble High Court on these facts had observed and held as under:

> *"9. While we are not inclined to disturb the finding of the Income Tax Appellate Tribunal that the assessee had acted in a bona fide manner, we do not agree with the conclusion of the Income Tax Appellate Tribunal that the assessee cannot be regarded as being as an "assessee in default" in respect of the short deduction. It is important to remember that the question of "good and sufficient reasons" only arises when one considers the proviso to Section 201(1) of the said Act. That proviso has been specifically introduced to negate the possibility of imposition of penalty under Section 221 if the Assessing Officer is satisfied that the person liable had good and sufficient reasons to not deduct and pay the tax in question. Thus, the*

proviso is to be applied only to the question of penalty. It would not absolve the assessee insofar as his being considered as an assessee in default for the purposes of Section 201(1) of the said Act. Therefore, this finding of the Tribunal is set aside. Consequently, question no.1 is decided in favour of the Revenue and against the assessee.

10. Insofar as the second question is concerned i.e., with regard to the interest payable under Section 201(1A) of the said Act, that is a mandatory provision, as already held by a Division Bench of this Court in the case of CIT v. ITC Limited. [IT Appeal No.475 of 2010, dated 11.05.2011]. The said Division Bench observed as under:-

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However, levy of interest under section 201(1A) is neither treated as penalty nor has the said provision been included in Section 273B to make 'reasonableness of the cause' for the failure to deduct a relevant consideration. Section 201(1A) makes the payment of simple interest mandatory. The payment of interest under that provision is not penal. There is, therefore, no question of waiver of such interest on the basis that the default was not intentional or on any other basis. (See Bennet Coleman & Co. Ltd. v. V.P. Damle, Third ITO, [1986] 157 ITR 812 (Bom.) and CIT v. Prem Nath Motors (P.). Ltd., [2002] 120 Taxman 584 (Delhi)."

27. In this case, the issue is entirely different. Here the assessee has claimed deduction of interest on delayed payment of TDS as business expenditure, which otherwise was the statutory duty of the assessee to deduct and deposit the same within time., It was claimed in the P&L account on the ground that it is a business expenditure, because it is a tax deducted on behalf of third party. This precise issue has

been dealt by the Hon'ble Madras High Court in the case of **Chennai Properties and Investment Ltd. (surpa)** wherein Hon'ble High court had observed and held as under:

"The liability for deduction of tax arises by reason of the provisions of the Act. Under section 201, the consequence of failure to comply with the same renders that person liable to be deemed as an assessee in default with all the consequences attached thereto. The liability to pay interest on the amount not deducted or deducted, but not paid is directly related to the failure to deduct or remit the amount. The amount required to be deducted is the amount payable as income-tax. The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid but not paid within time. The principal amount here would be the income-tax and the interest payable for delayed payment is the consequence of failure to pay the tax and in the circumstances, is in the nature of a penalty though not described as such in section 201(1A). The fact that the income-tax required to be remitted is not income-tax payable by the assessee but is ultimately for the benefit of and to the credit of the recipient of the income on which that tax is payable, does not in any manner alter the character of the payment, namely, its character as income-tax. The interest paid under section 201(1A), therefore, would not assume the character of business expenditure and could not be regarded as a compensatory payment.

Income-tax is not allowable as business expenditure. The amount deducted as tax is not an item of expenditure. The amount not deducted and remitted has the character of tax and has to be remitted to the State and cannot be utilised by the assessee for its own business. The Supreme Court in the case of Bharat Commerce & Industries Ltd. v. CIT [1998] 230 ITR 733/ 98 Taxman 151rejected the argument that retention of money payable to the State as tax or income-tax would augment the capital of the assessee and the

expenditure incurred, namely, interest paid for the period of such retention, would assume the character of business expenditure. It held that an assessee could not possibly claim that it was borrowing from the State the amounts payable by it as income-tax, and utilising the same as capitalization in its business, to contend that the interest paid for the period of delay in payment of tax amounted to a business expenditure. Therefore, the interest paid under section 201(1A) could not be allowed as business deduction."

This judgment has been followed by this Tribunal in the case of **DLF Ltd. (supra)**. Accordingly, respectfully following the same this issue is decided in favour of the assessee.

28. Revenue's appeal for the Assessment Year 2013-14 challenged the deletion of Transfer Pricing Adjustment in respect of technical support services and restricting the adjustment to 30% of the cost in respect to sales and marketing support services and corporate support services. This issue has also been dealt by us in the earlier year wherein entire adjustment has been deleted. Therefore, this ground of the Revenue is dismissed.

29. The another issue raised by the Revenue is with regard to treating the sales tax subsidy receipt by the assessee as capital receipt instead of revenue receipt. The brief facts qua the issue are that the Appellant set up a new industrial unit in Gurgaon and commenced its commercial production on January, 2000. In terms of Haryana General Sales Tax Rules, 1975, High Level Committee granted exemption from payment of sales tax based on fixed capital investment by the Appellant. The said approval was granted for a period of 11

years viz. 20.08.2003 to 19.08.2014. During the relevant period the Appellant has retained sales tax of INR 48,45,551 and shown in the P&L account as sales tax subsidy. It is highlighted that the claim of the Appellant has been consistently allowed in earlier years. The Assessing Officer disallowed the claim of the Appellant whilst holding that the sales tax subsidy is in the nature of revenue receipt.

30. Before us, ld. counsel has pointed out that this issue is covered in favour of the assessee in their context of Haryana Sales Subsidy in the following judgment.

1. Industries Ltd., (2013) 218 Taxman 135 (Gujarat) [CLC PB - Page 420-425]
2. CIT v Birla VXL Ltd., (2013) 215 Taxman 117 (Gujarat) [CLC PB - Page 426-432]
3. Johnson Matthey India Pvt. Ltd. v DCIT, ITA No. 1817/Del/2014 and others, Order dated 16.03.2018 (ITAT Delhi) [CLC PB - Page 573-639] [Relevant - Para 14 at Page 591]
4. Pepsi CO India Holdings Pvt. Ltd. v ACIT, ITA No. 1334/Chandi/2010 and others, Order dated 19.11.2018, ITAT Delhi [CLC PB - Page 433-572]

31. On the other hand, ld. DR has strongly relied upon the order of the Assessing Officer who has treated the same to be revenue receipt holding that the amount credited in the sales tax account of Rs.48,45551/- which has been retained by the

assessee towards sales tax and the revenue receipt has been added.

32. Ld. CIT (A) after considering the facts and the Rule 28C Haryana General Sales Tax Rules, which provides for treating the sales tax to be a capital subsidy and also relying upon the judgment of Hon'ble Supreme Court in the case of **Ponni Sugars and Chemicals Ltd. (2008) 306 ITR 392,** held that sales tax subsidy receipt was a capital receipt. Ld. CIT (A) has also taken note of CBDT Circular No. 19 of 2015 dated 27.11.2015 wherein it has been stated that as per clause xviii of Section 2(24) of the Act, any assistance in the form of subsidy shall be chargeable to tax only after 01.04.2016.

33. Admittedly, the assessee had set up the new unit in Gurgaon Haryana which commenced its commercial production on 07.01.2000 it had receipt entitlement certificate as per Rule 28 of Haryana General Sales Tax Rules for availing concession in the form of payment of sales tax based on fixed assessment made by the company. It was purely towards capital outlay of an industrial unit. It was specifically to be treated as capital receipt the primary object and intend for granting concession was industrial development of the stay and employment generation who are entitled to the sales tax concession. The quantum of benefit was depending upon fixed capital assessment in setting up the new industrial unit or in the existing industrial unit. These facts are completely undisputed. The principle laid

down by the Hon'ble Supreme Court in the Ponni Sugar and Chemicals Ltd., which has been incorporated *extenso* by the ld. CIT (A) is squarely applicable. Apart from that, as referred by the ld. counsel exactly in the context of Haryana Sales Tax Subsidy various judgments have come treating it to be capital receipt. Accordingly, this ground raised by the Revenue is also dismissed.

Order pronounced in the Open Court on 5th May, 2021

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
[ACCOUNTANT MEMBER]	**JUDICIAL MEMBER**

DATED: 05/05/2021

PKK: