IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)

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

(THROUGH VIDEO CONFERENCE)

ITA No.5598/Del./2010
(ASSESSMENT YEAR : 2006-07)

M/s. Expeditors International (India) Pvt. Ltd., 6, CSC, Ground Floor, Sector C – 8, Vasant Kunj, New Delhi – 110070. **(PAN : AAACE1795K)**	vs.	DCIT, Circle 11(1), New Delhi.

ITA No.16/Del./2021
(ASSESSMENT YEAR : 2007-08)

M/s. Expeditors International (India) Pvt. Ltd., Room 7B, 1st Floor, Import Building No.3, International Cargo Terminal, Indra Gandhi International Airport, New Delhi – 110 037. **(PAN : AAACE1795K)**	vs.	DCIT, Circle 7(1), New Delhi.

ITA No.2639/Del./2012
(ASSESSMENT YEAR : 2007-08)

DCIT, Circle 11(1), New Delhi.	vs.	M/s. Expeditors International (India) Pvt. Ltd., 6, CSC, Ground Floor, Sector C – 8, Vasant Kunj, New Delhi – 110070. **(PAN : AAACE1795K)**

CO No.260/Del/2012
(in ITA No.2639/Del./2012)
(ASSESSMENT YEAR : 2007-08)

M/s. Expeditors International (India) Pvt. Ltd., 6, CSC, Ground Floor, Sector C – 8, Vasant Kunj, New Delhi – 110070. **(PAN : AAACE1795K)**	vs.	DCIT, Circle 11(1), New Delhi.

ITA No.2231/Del./2014
(ASSESSMENT YEAR : 2008-09)

DCIT, Circle 11(1), New Delhi.	vs.	M/s. Expeditors International (India) Pvt. Ltd., 6, CSC, Ground Floor, Sector C – 8, Vasant Kunj, New Delhi – 110070. **(PAN : AAACE1795K)**

ITA No.1854/Del./2014
(ASSESSMENT YEAR : 2008-09)

M/s. Expeditors International (India) Pvt. Ltd., 6, CSC, Ground Floor, Sector C – 8, Vasant Kunj, New Delhi – 110070. **(PAN : AAACE1795K)**	vs.	DCIT, Circle 11(1), New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Deepak Chopra, Advocate
Shri Harpreet S. Ajmani, Advocate
Shri Rohan Khare, Advocate
REVENUE BY : Shri Shashi Bhushan Shukla, CIT DR

Date of Hearing : 09.06.2021
Date of Order : 30.06.2021

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Aforesaid appeals filed by Expeditors International (India) Pvt. Ltd. (hereinafter referred to as 'the taxpayer'), appeals filed by the DCIT, Circle 11 (1), New Delhi (hereinafter referred to as the 'Revenue') and cross appeal/cross objections filed thereto

bearing identical grounds are being disposed off by way of composite order to avoid the repetition of discussion.

2. Appellant, Expeditors International (India) Pvt. Ltd., the taxpayer' by filing the present appeal sought to set aside the impugned order dated 30.09.2010 passed by the Assessing Officer (AO) in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2006-07 on the grounds inter alia that :-

> **"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law and void ab-initio.**
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> **2. That on facts and circumstances of the case and in law, the reference made by the Ld. AO suffers. from jurisdictional error as the Ld. AO did not record any reasons in the draft assessment order based on which he reached the conclusion that it was "expedient and necessary" to refer the matter to the Ld. Transfer Pricing Officer ("TPO") for computation of the arm's length price, as is required under section 92CA(I) of the Income Tax Act, 1961 ("Act").**
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> **3. That on facts and circumstances of the case and in law, the Ld. AO erred in making an addition of Rs. 18,11,13,059/- to the returned income of the Appellant by re-computing the arm's length price of the international transactions under section 92 of the Act.**
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> **4. That on the facts and in the circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Ld. Dispute Resolution Panel ("DRP") erred on facts and in law in determining the arm's length price of the international transaction of royalty of the Appellant by :**

(a) by not considering and thereby arbitrarily rejecting the Transactional Net Margin Method analysis adopted by the Appellant and by re-computing the arm's length price without using any of the methods specified in Rule 10B of the Income Tax Rules, 1962;

(b) by not correctly appreciating the special characteristics of the business and functional and risk profile of the Appellant and its relationship with its various Associated Enterprises;

(c) based on conjectures and surmises, treating the royalty payment to the US based holding company as unjustified, without considering the evidence of benefits derived by the Appellant from the services availed by it in lieu of the royalty;

(d) by not appreciating that the royalty payment was to the US based holding company and not a part of the other international logistics transactions with other Associated Enterprises and

(e) by not appreciating that the entire transaction of royalty payment has been verified and permitted by the Reserve Bank of India and the Foreign Investment Promotion Board and hence is a payment for a bonofide transaction.

5 The adverse findings given t I the Ld. TPO/ upheld by the Ld. DRP are contrary to the evidence on record and their conclusions are based on surmises.

6 That on the facts and circumstances of the case and in law, the Ld. DRP has erred in stating that the appellant failed to controvert the findings of the Ld. TPO and the Ld. AO, when in fact the I J. DRP has not duly considered the submissions made by the appellant in this regard.

7 That on the facts and in the circumstances of the case and in law, the Ld. AO/Ld. DRP erred in disallowing the

Global Account Management ("GAM") charges of Rs.7,921,416 paid by the Appellant to its US based holding company u/s 40(a)(iii) of the Act.

8 That on the facts and in the circumstances of the case and in law, the Ld. AO/Ld. DRP erred in disallowing the VSAT uplinking charges of Rs. 3,418,286 paid by the Appellant to its US based holding company u/s 40(a)(i) of the Act.

9. That on the facts and in the circumstances of the case and in law, the Ld. AO/Ld. DRP erred in allowing depreciation on UPS and printers @15% instead of 60%, as UPS and printers are integrated in to the computer system.

10 On the facts and circumstances of the case, the Ld. DRP has erred in not examining the validity of initiation of penalty proceedings u/s 271(1)(c).”

3. Appellant, Expeditors International (India) Pvt. Ltd. the taxpayer by filing the present appeal sought to set aside the impugned order dated 28.03.2012 passed by the ld. CIT (Appeals)-XX, New Delhi qua the assessment year 2007-08 on the ground that :-

“1. That on the facts and circumstances of the case and in law, the Assessing Officer ought to have considered that the education cess paid on the income tax was an allowable deduction for computing total income given the fact that the same was not hit by the provisions of section 40(a}(ii) of the Act.”

4. Appellant, DCIT, Circle 11 (1), New Delhi, the Revenue by filing the present appeal sought to set aside the impugned order

dated 28.03.2012 passed by the ld. CIT (Appeals)-XX, New Delhi qua the assessment year 2007-08 on the grounds inter alia that :-

> **"1. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.21,33,75,753/- made on account of arm's length price.**
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> **2. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.1,59,89,104/- made on account of non deduction of .TDS on Global Account Management and lease line expenses."**

5. The Objector, Expeditors International (India) Pvt. Ltd., by filing the present cross objections challenged impugned order dated 28.03.2012 passed by the ld. CIT (Appeals)-XX, New Delhi qua the assessment year 2007-08 on the ground that :-

> **"That on the facts and in the circumstances of the case, the Ld.TPO erred in coming to the conclusion that the Arm' price of the royalty payable by the assessee to its associate enterprise is 'Nil'. Purportedly applying 'CUP' method in utter disregard of the statutory provisions of Rule (1) 10B of the I.T Rules, 1962 read with section 92C of the Act"**

6. Appellant, DCIT, Circle 11 (1), New Delhi, the Revenue by filing the present appeal sought to set aside the impugned order dated 23.01.2014 passed by the ld. CIT (Appeals)-XX, New Delhi qua the assessment year 2008-09 on the grounds inter alia that :-

> **"1. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.20,38,24,930/- made on account of Arm's Length Price.**

2. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.87,18,175/- made on account of non deduction of TDS on account of payment made towards Global Account Management charges."

7. Appellant, Expeditors International (India) Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 23.01.2014 passed by the ld. CIT (Appeals)-XX, New Delhi qua the assessment year 2008-09 on the grounds inter alia that :-

"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld CIT(A) is bad in law and void ab-initio.

2. Disallowance of lease line connectivity charges (VSAT uplinking charges) amounting to Rs.25,50,215/- paid by the appellant.

2.1 That on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in not providing an adequate opportunity to the appellant of being heard and explained before treating the lease line charges as royalty liable to tax, thereby violating the principles of natural justice.

2.2 (a) Without prejudice to the above, that on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in treating the lease line connectivity charges (VSAT uplinking charges) amounting to Rs 25,50,215/- as royalty in view of Explanation 6 to Section 9(l)(vi) of the Income Tax Act, 1961 ("the Act") without providing any reasons and without appreciating that the amendments in the Act cannot be read into the Indo-US DTAA.

2.2 (b) That on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in treating the payment of lease

line connectivity charges as liable for tax and therefore disallowing the expense u/s 40(a)(i) of the Income-tax Act, 1961('Act').

3. That on the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in not considering the provisions of Article 12 (3) of India-USA Double Taxation Avoidance Agreement ("The Treaty") in accordance with section 90 of the Act.

4 On the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in upholding the levy of interest u/s 234B of the Act made by the AO.

5. General

a. The above grounds of appeal are all independent and without prejudice to one another.

b. The appellant craves leave to supplement, to cancel, to amend, to add and/or otherwise to alter/modify any or all the ground(s) of appeal stated herein above on or before its hearing before your honour."

8. Briefly stated the facts necessary for adjudication of the grounds raised in all the aforesaid appeals/cross objections, taken from ITA No.5598/Del/2010 for Assessment Year 2006-07 are : the taxpayer is into providing logistic services in the Indian region involving the transportation of consignments from the consignee (or Indian ports/airports) to the Indian Ports/airports (or consignee), while another Group member typically handles the other end of the consignment in their respective region. The logistic services provided consisted of packaging, loading/unloading, trucking,

containerization, custom clearance and other cargo handling activities besides moving the goods via air/sea. The taxpayer is also registered with the International Air Transport Association (IATA) having operations in four cities, namely, Delhi, Mumbai, Bangalore & Chennai apart from 16 satellite offices in India. Pursuant to the reference made by the AO under section 92CA(3) of the Act, ld. TPO benchmarked the international transactions at Rs.18,11,13,059/-, Rs.21,33,75,753/- & Rs.20,38,24,930/- for Assessment Years 2006-07, 2007-08 & 2008-09 respectively and consequently directed the AO to enhance the income of the taxpayer. AO, apart from making addition on account of Arm's Length Price (ALP) adjustment proposed by the ld. TPO, also proceeded to make addition on account of global account management & lease line expenses to the tune of Rs.1,13,39,702/-, Rs.1,59,89,104/- & Rs.87,18,175/- for Assessment Years 2006-07, 2007-08 & 2008-09 respectively and also made addition on account of depreciation of computers for AY 2006-07.

8.1 The taxpayer also by raising additional ground sought claim of education cess as an allowable deduction. Consequently, AO assessed total income of the taxpayer at Rs.36,88,93,100/-,

Rs.55,24,85,671/- & Rs.49,19,15,805/- for Assessment Years 2006-07, 2007-08 & 2008-09 respectively.

9. The taxpayer carried the matter before the ld. DRP by way of filing objections for AY 2006-07 which have not been accepted and upheld the order passed by TPO. The taxpayer in AYs 2007-08 & 2008-09 carried the matter before the ld. CIT (A) by filing the appeals which have been partly allowed. Feeling aggrieved, the taxpayer as well as the Revenue have come up before the Tribunal by way of filing appeals/cross objections.

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

GROUNDS NO.1 & 2 OF
ITA NO.5598/DEL/2010 (AY 2006-07)
FILED BY THE TAXPAYER

GROUND NO.1 & 5 OF
ITA NO.1854/DEL/2014 (AY 2008-09)
FILED BY THE TAXPAYER

11. Grounds No.1 & 2 of ITA No.5598/Del/2010 for Assessment Year 2006-07 and Grounds No.1 & 5 of ITA No.1854/Del/2014 for Assessment Year 2008-09 need no findings

being general in nature and having not been pressed by the ld. AR for the taxpayer.

GROUNDS NO.3 to 6 OF
ITA NO.5598/DEL/2010 (AY 2006-07)
FILED BY THE TAXPAYER

GROUND NO.1 OF
ITA NO.2639/DEL/2012 (AY 2007-08)
FILED BY THE REVENUE

GROUND NO.1 OF
CO NO.260/DEL/2012 (AY 2007-08)
FILED BY THE TAXPAYER

GROUND NO.1 OF
ITA NO.2231/DEL/2014 (AY 2008-09)
FILED BY THE REVENUE

12. Undisputedly, the taxpayer made payment of Rs.18,11,13,059/-, Rs.21,33,75,753/- & Rs.20,38,24,930/- for Assessment Years 2006-07, 2007-08 & 2008-09 respectively on account of royalty to the Associated Enterprises (AE). Perusal of the order passed by the ld. TPO shows that he has proceeded to hold that payment on account of royalty to the AE was for incidental benefit and not for intra group services and since no intra group services were found to exist and as such, the arrangements were not subjected to ALP, hence Arms Length Price (ALP) of the

services has been held to be nil. Ld. TPO has arrived at aforesaid findings by applying the benefit test on the ground that once the Revenue was split in terms of the profit split method, there was no justification for making any additional payment on account of royalty.

13. In AY 2006-07, ld. DRP upheld the findings returned by ld. TPO who has treated the transaction on account of royalty at nil. However, in AYs 2007-08 & 2008-09, ld. CIT (A) in appeals preferred by the taxpayer reversed the findings returned by ld. TPO by following the decision rendered by the **coordinate Bench of the Tribunal in taxpayer's own case for AY 2005-06 vide order dated 17.12.2020 in ITA No.2128/Del/2011**.

14. Ld. AR for the taxpayer challenging the impugned findings returned by the AO/DRP in AY 2006-07 contended that this issue is no longer res integra as the same has already been decided in favour of the taxpayer by the **coordinate Bench of the Tribunal in taxpayer's own case for AY 2005-06** (supra), whereby the Tribunal upheld the benchmarking of international transaction by applying Transactional Net Margin Method (TNMM) in its TP study. Ld. counsel for the taxpayer further contended that the

Tribunal has also rejected the observation made by the TPO that, *"once the revenue was split in terms of profit split method, there was no justification for making any additional payment on account of royalty"*.

15. On the other hand, ld. DR for the Revenue by relying upon the order passed by the TPO/DRP in AY 2006-07 contended that since no evidence has been brought on record by the taxpayer to render the alleged services in lieu of cost recharge or reimbursement were actually required and drew our attention towards para 6.3 (a), available at page 349 of the paper book volume 2 of AY 2006-07. He has further contended that since there is no evidence on record for rendition of services as alleged by the taxpayer, ld.TPO/DRP in AY 2006-07 has rightly determined the ALP of international transactions at nil. Ld. DR for the Revenue further contended that ld. CIT (A)s have erred in deleting the addition made by the ld. TPO in AYs 2007-08 & 2008-09.

16. We have perused the order passed by the **coordinate Bench of the Tribunal in taxpayer's own case for AY 2005-06** (supra) in the light of the facts and circumstances of the cases at hand,

which goes to prove that facts and the grounds raised by the taxpayer as well as the Revenue in their respective appeals are identical to the facts of **taxpayer's own case decided in AY 2005-06** (supra) and since then the taxpayer has not undergone any change in the business model. Coordinate Bench of the Tribunal in **taxpayer's own case for AY 2005-06** (supra) has upheld the findings returned by the ld. CIT (A) that TPO/DRP was not justified in making addition by returning following findings :-

> **"9. TPO noted that Assessee had paid royalty of Rs.13,59,65,489 to Expeditors International of Washington Inc. It was stated by the assessee that it was in the nature of technical knowhow from its associated enterprise and has helped the assessee in generating good business and turnover. The justification made by the assessee for the royalty payment was not found acceptable to TPO. TPO noted that when the revenue from logistics services was split on the basis of FAR analysis then no further payment of royalty was required to be made by the Assessee. TPO also concluded that with the payment of royalty, the profitability of the assessee has reduced in comparison to its peer group companies. The TPO thus held the ALP of the international transaction on account of royalty payment to be Nil and accordingly the income of the assessee was enhanced by Rs.13,59,65,489/-.**
>
> **10. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). The CIT(A) after considering the submissions of the assessee deleted the addition by observing as under:**
>
> > **"I have considered the above submissions made by the Appellant with regard to the payment for royalty. During the year, Expeditors India has provided/received logistics services to Group Companies as well as independent agents. The pricing basis in both cases has remained the same. Also, from the Form 3CEB, it is evident that during the year. Expediters India rendered/received these logistics services to/from more than 100 entities. However,**

the services, for which the royalty was paid, were only received from the US parent company. This fact has not been disputed by the TPO. He has also not disputed that the logistics services transactions was with multiple group entities. He has also not disputed that the 50/50 gross profit spilt was an arm's length remuneration for the logistics services.

In the TP Order, on page 6, the TPO has mentioned that "when the revenue was split on the basis of FAR analysis, then no further payment would have been made by the assesses. Therefore, I am holding that ALP of royalty payment as nil" The TPO has not elaborated on this statement and has not brought forth any analysis or basis for arriving at the conclusions in the order.

Consequently, 1 do not find any evidence/analysis to hold that the arm's length price for the royalty transaction stands subsumed by the gross profit split on revenue received from logistics services on a predetermined basis. Based on the submissions and the facts presented by the Appellant, I am of the view that the services received by the Appellant from the Parent company in lieu of royalty are not covered within the revenue split for the logistics services with multiple group companies.

I have been through all the submissions made by the Appellant as well as the TP Order in detail. The TPO has not provided any analysis or evidence in support of his finding that no material benefit has been received by the Appellant. The TPO has not analyzed the operations and the financials of the Appellant to substantiate his conclusion that the Appellant's business can be managed and operated in exclusion of the various technical, operating and strategic services extended by the US Parent or to show that this expense was not in the nature of expenditure entitled to be treated as business expenditure.

The TPO has not disputed the business model of the Appellant. The TPO has also not controverted that this same arrangement was being followed by the Appellant since FY 2001, under a specific approval from RBI. The TPO has also not discussed that the same arrangement, under the same business model, had been found to be on an arm s length basis for last year by the TPO.

Further, the TPO has not provided any evidence to support his following reasoning:

"I have not come across any company which was paying royalty relating to know how and using the same business model The payment made by the Appellant had reduced the profitability of the company in comparison to its peer group companies".

The Appellant, on the other hand, has provided detailed submissions (including evidence) on the benefits and the need of the royalty expense in the global logistics business operations. The Appellant has supported these with detailed documentary evidence, including evidence of similar payments made by other industry players.

A supplementary TNMM analysis carried out by the Appellant at my behest to check the impact of royalty payment on the Appellant's profit margin vis-a-vis that of independent comparable companies also shows that the ratio of operating profit to costs and sales of the Appellant is comparable to that of uncontrolled entities.

I have been through the material placed on record and given the global nature of the logistics business of the Appellant, I agree with the beneficial nature of the services received.

Based on the discussion hereinabove, it is fair to conclude that there is no meaningful analysis/evidence provided by the TPO to hold that the entire royalty payment should be reduced to zero. The Appellant has been able to demonstrate that the technical, operations and strategic services received by the Appellant in lieu of royalty payment have a direct business nexus and no independent company will provide such services free of charge. The benefits derived by the Appellant from the technical, operations and strategic services availed are critical to the smooth functioning of its business. The adequacy or quantum of the royalty payment from arm's length perspective stands justified by the supplementary TNMM analysis carried out which shows that comparable uncontrolled entities' profit margins are comparable to that of the Appellant. It is also evident from the order of the TPO, that he has not followed the statutory principles to determine the arm's length price. The order does not

contain any analysis on the FAR, tested party selection or methods selected.

In view of the foregoing, I uphold the arm's length nature of the royalty payment made by Expeditors India to Expeditors International Inc. This issue is decided in favour the Appellant. The addition made by the AO on this account, is accordingly, deleted."

11. Aggrieved by the order of CIT(A), Revenue is now before us.

12. Revenue is aggrieved by the deletion of addition made by the AO and in the additional ground the grievance of the Revenue is that the Transfer Pricing documentation and other additional evidences filed before the CIT(A) by assessee were never referred to AO/ TPO which is a violation of provision of Rule 46A of the I.T. Rules, 1962.

13. Before us, Learned DR submitted that CIT(A) while deciding the issue has considered the supplementary TNMM analysis submitted by the Assessee to him and that CIT(A) decided the issue in favour of the Assessee by relying on the supplementary TNMM analysis submitted by the Assessee. He further submitted that the aforesaid supplementary analysis was in the nature of additional evidence and as per the provisions of Rule 46A of the I.T. Rules, the CIT(A) should have confronted the same to the AO/TPO. He further submitted that supplementary TNMM was analysis by the assessee at the behest of CIT(A) to check the impact of royalty payment on assessee's profit margin vis-à-vis that of independent comparable companies. He submitted that not giving a chance to AO/TPO to confront with the material placed before CIT(A) as an additional evidence was in violation of Rule 46A of the I.T. Rules. He therefore, submitted that the matter be decided in favour of the Revenue or in the alternate matter be remitted back to AO/ TPO so that the additional evidence submitted before CIT(A) can be commented upon by Revenue.

14. Ld AR on the other hand submitted that Royalty payment has been made pursuant to the agreement which was entered into between the parties in F.Y. 2001, the agreement has been approved by Reserve Bank of India (RBI) and the payment of royalty has been accepted by the Revenue in all the earlier years and no adjustment has been made to the ALP transaction on account of royalty. He further submitted that CIT(A) apart from the supplementary TNMM analysis had considered various other

factors to delete the addition and thus there was no violation of Rule 46A. He thus supported the order of CIT(A).

15. With respect to additional ground raised by the Revenue, he submitted that the Co-ordinate Bench of Tribunal vide interim order dated 26.07.2018 in ITA No.2128/Del/2011 had held the additional ground to be not admissible and against the order of Tribunal, Revenue had carried the matter before Hon'ble Delhi High Court. The Hon'ble High Court in order dated 04.12.2019 in ITA No.88/2019 declined to interfere with the order of Tribunal which according to Ld. AR would mean that the order of Tribunal on that ground has attained finality.

16. We have heard the rival submissions and perused all the materials available on record. The grievance of the Revenue is that CIT(A) has decided the issue in favour of the assessee by considering the supplementary TNMM analysis and other documents filed before her and those documents were not made available to AO and secondly on merits, the order of TPO should have been upheld by CIT(A).

17. We find that CIT(A) while deciding the issue in favour of the assessee has given a finding that assessee had received the services received from its US parent company to whom the royalty was paid by the assessee. She has further given a finding that the TPO's conclusion that "when the Revenue was split on the basis of FAR analysis, then no further payment would have been made by the assessee. Therefore, I am holding that ALP of royalty payment as nil" was without any basis or analysis on record. She has further given a finding that no evidence or analysis was made by TPO to hold that the arm's length price for royalty transaction stands subsumed by the gross profit split on revenue received from logistics services on a predetermined basis. She has further given a finding that TPO has not providing any analysis or evidence to support his findings that no material benefit has been received by the assessee and no evidence has been brought on record to demonstrate that assessee's business could be managed and operated by exclusion of various technical, operating and strategic services extended by the AE to the assessee. She has further noted that assessee was following the same business model, the royalty paid since 2001 has been found to be on an arm's length basis and no adjustments were made in the past by TPO. It is a fact that CIT(A) has also considered the supplementary TNMM analysis to check the impact of royalty payment on assessee's profit margin that of independent comparable companies to come to a conclusion that the ratio of

operating profit to cost at sales of the assessee is comparable to that of uncontrolled entities but we are of the view that her decision to grant relief is not based solely on the aforesaid supplementary analysis furnished by the assessee at the behest of CIT(A). We find that CIT(A) has taken into consideration various other factors (which are extracted herein above) to come to the conclusion that the AO/TPO was not justified in making the addition. Considering the totality of aforesaid facts, we are of the view that as far as merits of the deletion of addition is concerned, no fallacy in the findings of CIT(A) has been pointed by the Revenue. Even on the issue of alleged violation of provisions of Rule 46A of I.T. Rules, we are of the view that deletion of addition was not based solely on the basis of the alleged additional evidence filed by the assessee but various other material factors as noted in the order. We find no reason to interfere in the order of CIT(A) and thus the grounds of Revenue are dismissed."

17. So far as contention raised by the ld. DR for the Revenue based upon the findings returned by the ld. TPO/DRP in Assessment Year 2006-07 that no evidence has been brought on record by the taxpayer to prove rendition of services is concerned, it is factually incorrect because ld. AR for the taxpayer drew our attention towards pages 202 to 208 of the paper book volume 2 of AY 2006-07, which is a letter dated July 2, 2009 addressed to ld. TPO containing the desired evidence. Furthermore, when we examine letter dated 04.09.2009 issued by the ld. TPO to the taxpayer, available at page 210 of the paper book volume 2 of AY 2006-07, it goes to specifically prove that the ld. TPO has entirely based his queries/benchmarking of international transactions by

relying upon his own order for AY 2005-06. In response to this letter dated 04.09.2009, the taxpayer has explained all the facts vide its letter dated September 22, 2009, available at pages 211 to 227 of paper book volume 2 of AY 2006-07. So, the findings returned by TPO/DRP and the consequent contention raised by the ld. DR for the Revenue that no evidence has been brought on record by the taxpayer to prove the rendition of services, is not tenable.

18. Furthermore, when we peruse page 411 of the paper book volume 3 of AY 2006-07 which is part of the submissions made by the taxpayer before the ld. DRP, it has come on record that all the services and activities rendered by the taxpayer have been duly explained. So, the contention raised by the ld. DR for the Revenue is not sustainable.

19. When we peruse the orders passed by the ld. CIT (A) for AYs 2007-08 & 2008-09 particularly paras 4.5 to 4.10 of AY 2007-08, it is proved on record that ld. CIT (A) by analyzing the entire evidence brought on record by the taxpayer, by following the order passed by his predecessor in AY 2005-06 which has further been upheld by the Tribunal, has deleted the impugned addition.

20. So, following the order passed by the coordinate Bench of the Tribunal in **taxpayer's own case for AY 2005-06** (supra), we are of the considered view that ld. TPO/DRP have erred in treating the value of the transaction at nil by ignoring the entire evidence brought on record by the taxpayer without making any analysis or bringing on record evidence to support their findings that no material benefit has been received by the taxpayer and order is also not supported with any evidence to prove that taxpayer's business could be managed and operated by exclusion of various technical operating and strategic services extended by the AE to the taxpayer. So, in these circumstances, addition made by the TPO and confirmed by the ld. DRP for AY 2006-07 is ordered to be deleted.

21. At the same time, we are of the considered view that ld. CIT(A) in AYs 2007-08 & 2008-09 by following the order passed by his predecessor in AY 2005-06 which has been upheld by the coordinate Bench of the Tribunal has thrashed the facts and law applicable thereto by examining the entire evidence on record deleted the addition. So, finding no illegally or perversity in the order passed by the ld. CIT (A), ground no.1 of ITA

No.2639/Del/2012 for AY 2007-08 & ground no.1 of ITA No.2231/Del/2014 for AY 2008-09 in appeals filed by the Revenue are hereby determined against the Revenue. Grounds No.3 to 6 of ITA No.5598/Del/2010 for AY 2006-07 filed by the taxpayer are determined in favour of the taxpayer. Consequently, cross objection no.1 of CO No.260/Del/2012 for AY 2007-08 filed by the taxpayer supporting the order passed by the ld. CIT (A) is also allowed.

GROUNDS NO.7 & 8 OF
ITA NO.5598/DEL/2010 (AY 2006-07)
FILED BY THE TAXPAYER

GROUND NO.2 OF
ITA NO.2639/DEL/2012 (AY 2007-08)
FILED BY THE REVENUE

GROUND NO.2 OF
ITA NO.2231/DEL/2014 (AY 2008-09)
FILED BY THE REVENUE

GROUNDS NO.2 & 3 OF
ITA NO.1854/DEL/2014 (AY 2008-09)
FILED BY THE TAXPAYER

22. AO noticed that the taxpayer has paid an amount of Rs.1,13,39,702/-, Rs.1,59,89,104/- & Rs.87,18,175/- for Assessment Years 2006-07, 2007-08 & 2008-09 respectively to M/s. Expeditors International of Washington Inc. in foreign

currency on account of global account management expenses & lease line expenses (VSAT expenses). AOs in all the three assessment years by following the order passed by their predecessors in AYs 2001-02 & 2003-04 treated the same in the nature of consultancy charges/technical fee having been remitted out of India without deducting tax on source and thereby made disallowance of Rs.1,13,39,702/-, Rs.1,59,89,104/- & Rs.87,18,175/- for Assessment Years 2006-07, 2007-08 & 2008-09 respectively. Disallowance made by the AO for AY 2006-07 has been confirmed by the ld. DRP on the ground that Revenue's SLP was pending before the Hon'ble Supreme Court.

22.1 However, in AYs 2007-08 & 2008-09, ld. CIT (A) by following the order passed by the Tribunal and confirmed by Hon'ble Delhi High Court for AYs 2001-02 & 2003-04 in taxpayer's own case deleted the addition on account of global account management expenses & lease line expenses.

23. Except for the fact that Revenue has challenged the order passed by Hon'ble Delhi High Court in favour of the taxpayer by way of SLP before Hon'ble Supreme Court, the ld. DR for the Revenue has nothing to say on this issue. We are of the considered

view that merely because of the fact that decision rendered by Hon'ble High Court has been pending adjudication before Hon'ble Supreme Court by way of SLP, the order passed by Hon'ble High Court confirming the order of the Tribunal cannot be ignored.

24. Coordinate Bench of the Tribunal in **taxpayer's own case for AY 2005-06** (supra) upheld the order passed by the ld. CIT (A) by following the order passed by the coordinate Bench of the Tribunal confirmed by Hon'ble Delhi High Court by returning following findings :-

> ***"23. We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present ground is with respect to disallowance of GAM expenses by invoking the provision of Section 40(a) of the Act. We find that CIT(A) while deciding the issue in assessee's favour has given a finding that the payments made by the assessee as GAM charges cannot be treated as payment of salary to non-resident but were in the nature of reimbursement of expenses and therefore assessee was not required to deduct TDS on such payments. We further find that in A.Y. 2001-02 & 2004-05 identical issue arose in assessee's own case and the issue was decided in assessee's favour by the Co-ordinate Bench of Tribunal and the order of the Tribunal has been upheld by the Hon'ble Delhi High Court. Before us, no distinguishing feature in the facts of the case in the year under consideration and that of A.Y. 2001-02 & 2004-05 has been pointed out by the Revenue. Further no fallacy in the findings has been pointed out by the Revenue before us. Revenue has also not placed any material on record to demonstrate that the order of the Tribunal in assessee's own case in earlier years has been set aside/overruled or stayed by higher judicial forum. In such a situation, we find no reason to interfere in the order of CIT(A). Thus the ground of appeal of the Revenue is dismissed.***
>
> ***…….***

> ***28. We have heard the rival submissions and perused all the materials available on record. The issue in the present ground is with respect to the disallowance of VSAT expenses by invoking the provision of section 40(a) of the Act. We find that identical issue arose in assessee's own case in A.Y. 2001-02 & 2004-05 wherein the issue was decided in favour of the assessee by the Co-ordinate Bench of Tribunal. We further find that the order of Tribunal in favour of the assessee was upheld by the Hon'ble Delhi High Court. Before us, no distinguishing feature in the facts of the case and that of A.Y. 2001-02 & 2004-05 has been pointed out by the Revenue. Further no fallacy in the findings of CIT(A) has been pointed before us by the Revenue. Revenue has also not placed any material on record to demonstrate that the order of the Tribunal in assessee's own case in earlier years has been set aside/overruled or stayed by higher judicial forum. In such a situation, we find no reason to interfere in the order of CIT(A). Thus the ground of appeal of the Revenue is dismissed."***

25. So, following the order passed by the coordinate Bench of the Tribunal in **taxpayer's own case for AY 2005-06** (supra) and by following the order passed by the **coordinate Bench of the Tribunal in AYs 2001-02 & 2003-04 confirmed by Hon'ble Delhi High Court,** we are of the considered view that the amount paid by the taxpayer to M/s. Expeditors International of Washington Inc. on account of global account management expenses cannot be treated as payment of salary to non-resident but it was in the nature of reimbursement of expenses which cannot be subjected to deduction for TDS, provision u/s 40(a) of the Act being not applicable.

25.1 Likewise, we are of the considered view that amount of expenses incurred by the taxpayer on account of VSAT charges cannot be treated as charges for consultancy or technical services and as such, cannot be subjected to deduction of tax under section 40(a) of the Act. Consequently, order passed by the AO/DRP in AY 2006-07 is not sustainable, hence ordered to be set aside and addition made on account of global account management charges and VSAT charges are ordered to be deleted.

25.2 At the same time, we find no illegality or perversity in the order passed by the ld. CIT (A) in AYs 2007-08 & 2008-09 and thereby upheld the impugned order challenged by the Revenue. So, grounds no.7 & 8 of ITA No.5598/Del/2010 for AY 2006-07 filed by the taxpayer are determined in favour of the taxpayer. Ground No.2 of ITA No.2639/Del/2012 for AY 2007-08 & Ground No.2 of ITA No.2231/Del/2014 for AY 2008-09 filed by the Revenue are determined against the Revenue.

26. Without prejudice, the taxpayer has challenged the order passed by the ld. CIT (A) that he has erred in disallowing the lease line uplinking Charges (VSAT charges) amounting to Rs.25,50,215/- as royalty in view of the Explanation 6 to section

9(1)(vi) without appreciating the fact that amendment in the Act cannot be read into Indo US DTAA.

27. Ld. CIT (A) by invoking the Explanation 6 to section 9(1)(vi) confirmed the addition of Rs.25,50,215/- u/s 40(a) of the Act on account of VSAT charges simply on the ground that, *"the assessee did not furnish any explanation as to why VSAT uplinking charges should not be treated as royalty"*.

28. In view of the decision rendered by Hon'ble Supreme Court in case of **Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (2021) 432 ITR 472 (SC)** wherein it is held that unilateral amendment as made in the domestic law cannot be read into Treaty. Hon'ble Apex Court decided that Explanation 6 to section 9(1)(vi) is not applicable to the facts and circumstances of the case. It is also brought on record by the taxpayer that in AYs 2010-11 & 2012-13 in taxpayer's own case, the ld. CIT (A) has deleted this addition by following the decision rendered by **Hon'ble Delhi High Court in DIT vs. Infrasoft Ltd. (2013) 220 taxman 273 (Del.)** by applying the same principle enunciated by **Hon'ble Apex Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT** (supra) that a unilateral amendment in Act cannot be

read in as DTAA. Consequently, addition of Rs.25,50,215/- made by the AO and confirmed by the ld. CIT (A) in AY 2008-09 is ordered to be deleted and grounds no.2 & 3 of ITA No.1854/Del/2014 for AY 2008-09 filed by the taxpayer are determined in its favour.

GROUND NO.9 OF
ITA NO.5598/DEL/2010 (AY 2006-07)
FILED BY THE TAXPAYER

29. AO has allowed depreciation on computer accessories @15% as against 60% claimed by the taxpayer by disallowing the excess depreciation claimed by the taxpayer on UPS, printer, etc. This issue is also no longer res integra because in **taxpayer's own case for AY 2005-06** (supra) it has been decided in favour of the taxpayer by returning following findings :-

> ***"39. We have heard the rival submissions and perused all the materials available on record. The issue in the present ground is with respect to deleting the addition of Rs.3,32,634/- on account of excess claim of depreciation on computer accessories. We find that identical issue of excess claim of depreciation arose in assessee's own case in A.Y. 2001-02, 2003-04 & 2004-05, wherein the Co-ordinate Bench of Tribunal has decided the issue in favour of the assessee. Before us, no distinguishing features in the facts of the case and that of the earlier years has been pointed out by the Revenue. Revenue has also not placed any material on record to demonstrate that the order of the tribunal in assessee's own case in earlier years has been set aside/overruled or stayed by higher judicial forum. In such a situation, we find no reason***

to interfere in the order of CIT(A). Thus the ground of appeal of the Revenue is dismissed."

30. Since facts of the case at hand are identical to AYs 2001-02, 2003-04 & 2004-05 and following the order passed by the coordinate Bench of the Tribunal in **taxpayer's own case for AY 2005-06** (supra), we are of the considered view that taxpayer is entitled for depreciation @ 60% because computers cannot be run without its accessories i.e. UPS, printer, etc.. Consequently, ground no.9 of ITA No.5598/Del/2010 for AY 2006-07 filed by the taxpayer is determined in its favour.

GROUND NO.10 OF
ITA NO.5598/DEL/2010 (AY 2006-07)
FILED BY THE TAXPAYER

31. Ground No.10 of ITA No.5598/Del/2010 for ay 2006-07 filed by the taxpayer being consequential in nature needs no specific findings.

GROUND NO.4 OF
ITA NO.1854/DEL/2014 (AY 2008-09)
FILED BY THE TAXPAYER

32. Ground No.4 of ITA No.1854/Del/2014 for AY 2008-09 qua levy of interest u/s of the Act need no specific finding being consequential in nature.

ADDITIONAL GROUND NO.11 OF ITA NO.5598/DEL/2010 (AY 2006-07) FILED BY THE TAXPAYER

GROUND NO.1 OF ITA NO.16/DEL/2021 FILED BY THE TAXPAYER

ADDITIONAL GROUND NO.6 OF ITA NO.1854/DEL/2014 (AY 2008-09) FILED BY THE TAXPAYER

33. By moving a separate application, the taxpayer sought to raise additional ground no.11 & ground no.6 in ITA Nos.5598/Del/2010 & 1854/Del/2014 for AYs 2006-07 & 2008-09 respectively on the ground that the same go to the root of the case which are as under :-

> **"ADDITIONAL GROUND NO.11 OF ITA NO.5598/DEL/2010 (AY 2006-07)**
>
> **11. That on the facts and circumstances of the case and in law, the Assessing Officer ought to have considered that the education cess paid on the income tax was an allowable deduction for computing total income given the fact that the same was not hit by the provisions of section 40(a)(ii) of the Income-tax Act, 1961."**
>
> **"ADDITIONAL GROUND NO.6 OF ITA NO.1854/DEL/2014 (AY 2008-09)**
>
> **6. That on the facts and circumstances of the case and in law, the Assessing Officer ought to have considered that the education cess (EC) and Secondary and Higher Education Cess (SHEC) paid on the income tax was an allowable deduction for computing total income given the fact that the same was not hit**

by the provisions of section 40(a)(ii) of the Income-tax Act, 1961."

34. Keeping in view the fact that the additional ground sought to be raised by the taxpayer, which is a legal ground and can be raised at any stage of the proceedings and is otherwise necessary for complete adjudication of the controversy at hand, the application for additional ground is hereby allowed.

35. The taxpayer challenged the findings of the AO in not considering the Education Cess (EC) and Secondary & Higher Education Cess (SHEC) paid on income-tax as allowable deduction for computing the total income by ignoring the fact that the same was not hit by the provisions of section 40(a)(ii) of the Act and relied upon the judgment passed by **Hon'ble Bombay High Court in case of Sesa Goa Ltd. vs. JCIT 117 taxman.com 96 (Bombay)**.

35.1 Hon'ble High Court in **Sesa Goa Ltd.** case (supra) held that education cess or any other cess is not included in clause (ii) of section 40(a) of the Act so there is no prohibition in claiming deduction of such amounts while computing the income of the assessee under the head 'profits & gains of business or profession'.

Operative part of the aforesaid decision rendered by Hon'ble Bombay High Court is extracted for ready perusal as under :-

> ***"27. The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression "cess" ought not to be read or included in the expression "any rate or tax levied" as appearing in section 40(a)(ii) of the IT Act.***
>
> ***28. In the Income-tax Act, 1922, section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression "cess" is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income-tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression "cess" and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, "cess" and consequently, "cess" whenever paid in relation to business, is allowable as deductable expenditure."***

36. Coordinate Bench of the Tribunal in case of **Sicpa India Private Ltd. vs. Addl.CIT in ITA Nos.704/Kol/2015, 1586/Kol/2016 & 7048/Kol/2017** also decided the identical issue by holding that education cess on income-tax, dividend distribution tax and fringe benefit tax is not a disallowable expenditure under section 40(a)(ii) of the Act having been expressly excluded from section 40(a)(ii) of the Act.

37. So, following the decision rendered by **Hon'ble Bombay High Court in case of Sesa Goa Ltd.** (supra) and order passed by

the coordinate Bench of the Tribunal in case of **Sicpa India Pvt. Ltd.** (supra), we are of the considered view that education cess and secondary & higher education cess is an allowable deduction being not hit by the provisions of section 40(a)(ii) of the Act. We direct the AO accordingly. Consequently, additional ground no.11 of ITA No.5598/Del/2010 for AY 2006-07, ground no.1 of ITA No.16/Del/2021 & additional ground no.6 of ITA No.1854/Del/2014 for AY 2008-09 filed by the taxpayer are determined in favour of the taxpayer.

38. To sum up : ITA No.5598/Del/2010, ITA No.16/Del/2021, CO No.260/Del/2012 & ITA No.1854/Del/2014 for AYs 2006-07, 2007-08, 2007-08 & 2008-09 respectively filed by the taxpayer are allowed and ITA Nos.2639/Del/2012 & 2231/Del/2014 for AYs 2007-08 & 2008-09 filed by the Revenue are dismissed.

Order pronounced in open court on this 30th day of June, 2021.

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

Dated the 30th day of June, 2021
TS

Copy forwarded to:

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

AR, ITAT
NEW DELHI.