IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A No.2634/Bang/2017
Assessment year : 2013-14

Parexel International Clinical Research Private Limited, CoWrks, RMZ Ecoworld, Ground Floor, Bay Area – Adj. to Building 6A, Outer Ring Road, Devarabeesanahalli Village, Bangalore – 560 034. **PAN: AADCP 9318C**	Vs.	The Deputy Commissioner of Income Tax, Circle 5(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Danesh Bafna, CA
Respondent by	:	Shri Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	15.09.2021
Date of Pronouncement	:	07.10.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is against the order of the AO dated 26.9.2017 passed u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 ["the Act"].

2. The first issue for consideration is with regard to TP adjustment towards location savings at Rs.21,69,17,701.

"All of the grounds and/or sub-grounds of appeal mentioned herein are independent and without prejudice to one another.

1. On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel (`DRP') erred in upholding the action of the Deputy Commissioner of Income-tax 5(1)(2) (`Ld. AO') /Additional Commissioner of Income-tax, Transfer Pricing - 2(2) (Ld. TPO) in making an adjustment of Rs. 21,69,17,701 on allocation of alleged location savings with respect to provision of facilitation and co-ordination services provided by the Appellant to the Associated Enterprises (`AE') for performing clinical trials in India.

2. On the facts and in the circumstances of the case and in law, the Ld. AO /TPO erred in treating the alleged location savings to the Appellant as an international transaction as per Section 92B of the Act.

3. Without prejudice to Ground No. 2, the Ld. AO /TPO erred in not following any of the method prescribed by the Act under Section 92C(1).

4. On the facts and in the circumstances of the case and in law, the Ld. AO /TPO and the Hon'ble DRP erred in presuming that location savings advantage accrues to the Appellant. In doing so Ld. AO /TPO:

a) disregarded the fact that the clinical trials are undertaken in India as per the instructions of the Sponsor and in line with the Indian regulatory requirement;

b) disregarded the fact that, the Appellant as well as the AEs operated in a perfectly competitive market and the services of the Appellant do not confer any unique competitive advantage to the AEs, that (i) would not be available to the AEs from other potential service providers in India; or (ii) would not be equally available to the competitors of the AEs;

c) did not consider the fact that, whether the concept of location savings is applicable in a particular case has to be determined based on economic principles i.e. whether a low cost service providers actually confers a unique competitive advantage to its customer;

d) disregarded the fact that, the Appellant does not own any intangible asset, i.e. in as much the advantage (if any) is available

to the Appellant the advantage is also available to third parties competing in the market; and

e) did not consider the fact that given the large number of service providers in India providing similar services, under arm's-length conditions, the Appellant would not be able to earn an additional return on account of location savings, as it would be make the Appellant uncompetitive.

5. Without prejudice to Ground No. 4, the Ld. AO /TPO and the Hon'ble DRP erred in disregarding the fact that, location savings, if at all, is already embedded in the margin of the comparable companies considered for benchmarking the transaction for provisions of facilitation and coordination services for clinical trials which was held to be at arm's length.

6. Without prejudice to the Ground Nos. 4 & 5, even if adjustment on account of location savings is to be upheld, the Ld. TPO/ AO and the Hon'ble DRP, while computing the adjustment on account of locations savings, erred in:

a) relying on unverified information / web article from the public domain to compute the lo cation savings;

b) not using contemporaneous data as required under Rule 10B of the Income-tax Rule, 1962 (`Rules') to determine the amount of adjustment;

c) computing the adjustment on the full value of cost savings and not appreciating the fact that the adjustment, if any to be computed only with regard additional profit, if at all, earned by the AE;

d) erroneously considering pass through costs while computing the adjustment;

e) incorrectly using Profit Split Method for determining quantum of adjustment on account of location savings; and

f) attributing location savings in the ratio of 50:5o between the Appellant and the AEs by disregarding their functional and risk profiles."

3. In the TP order for the current year i.e. AY 2013-14, relying on the TP order for AY 2011-12, the TPO alleged that conducting the clinical trial in India by the AEs through the assessee resulted in location savings for the AEs since the regulatory and compliance cost as well as investigatory costs were significantly lower in India as compared to developed countries where AEs were located. Resultantly, the cost savings that accrue to the AE ought to be shared with the assessee in India.

4. To make the adjustment, the TPO relied upon a random non-contemporaneous article titled 'Clinical Trial Magnifier Vol. 1:6 Jun 2008' published on the website www.clinicaltrialmagnifier.com and computed location savings amounting to Rs. 29,11,647 per clinical trial. The TPO then multiplied the said alleged savings per clinical trial by the total number of clinical trials undertaken in India i.e. 149. Accordingly, the TPO arrived at a total cost savings of Rs. 43,38,35,403 (Rs. 29,11,647*149). The said purported savings were split in the ratio of 50:50 between the AE and the assessee and thereby, TPO proposed an adjustment of Rs. 21,69,17,701 on account of alleged location savings.

5. Aggrieved, the assessee filed objections before the DRP. The DRP vide order dated 18.09.2017 upheld the adjustments proposed by the TPO. Against this, the assessee is in appeal before us.

6. After hearing both the parties, we are of the opinion that similar issue came up for consideration before this Tribunal in the assessee's own case for AYs 2011-12 to 2012-13 in IT(TP)A No.254/Bang/2016 & 292/Bang/2017 dated 16.6.2017 wherein it was held as under:

> "8. We have considered the rival submissions as well as the relevant material on record. The TPO proceeded to make assessment on the basis of location saving available to the assessee being doing its research and trial activity in India in

comparison to US. There is no dispute that location saving is one of the primary factors of all cross border trade which includes exports and imports of articles, goods and services. Low cost of the location includes benefit in respect of low cost labour, low cost of raw-material, low fuel cost as well as location advantage being near to raw material and other supplies apart from the comparable infrastructure cost and available facilities. Though the low cost of regulatory and other compliance are also relevant factor adding to the location saving however the location savings and conditions are available to all parties irrespective the transaction is between the related party or unrelated party. Therefore if the comparable uncontrolled price is available then the location saving or condition cannot be itself the basis for determination of ALP and consequential adjustment. It can be a relevant factor for conducting a proper enquiry for determination of arm's length price of the international transactions. Further the location saving and advantage are universally accepted in cross border trade so far as the transactions are not entered into solely for the purpose of avoiding tax and particularly the transactions between the related party with motive to shift the benefit of location saving and advantage to the counter part where either there is no tax or very low tax is attracted. Therefore the concept of Base Erosion and Profit Shifting (BEPS) is relevant only in respect of the transactions which are entered into with the sole purpose of avoidance of tax and treaty shopping. To deal with such transactions between related parties the transfer pricing provisions has been introduced in the statute and are applied for determination of ALP. Therefore the location savings and advantages are very much relevant in the cross border transaction but for limited purpose of carrying out exercise of examination and investigation of the transaction and not as a basis for determining the ALP and consequently adjustment. We find that the Mumbai Bench of the Tribunal in the case of Watson Pharma (P.) Ltd. (supra) has dealt with this aspect and held that when the local comparables are available then instead of going to the location saving as a basis of adjustment, the TNMM shall be preferred. Similar view was taken by the Tribunal in the case of Syngenta India Ltd. (supra) in paras 17 to 20 as under:

'17. We have heard the rival submissions and perused the relevant finding given in the impugned orders qua the issue of Transfer Pricing adjustment on account of locational savings. The TPO noted that, one unit of the assessee is captive manufacturer which is producing agro chemicals for sale to the world market by a Singapore based entity. Due to unique location of operating in India, the assessee company is able to generate cost savings on one or many of the factors of production for which assessee should have been compensated with a better price. He has also referred to Draft UN Model and India's stand about the location advantage vis-a-vis the labour cost and other factors of production and, therefore, assessee should have received compensation for it from the AE. From the reading of the order of the TPO as well as the order of the DRP, we are at the outset, unable to apprehend as to under which existing Transfer Pricing provisions enunciated in our Income-tax Act or the Income-tax Rules, such a transaction has been reckoned as separate international transaction which warrants separate benchmarking especially when the overall profit margin of the entire transaction with the AE under the TNMM vis-a-vis the comparables has been accepted. No provision or precedence has been referred by the Revenue authorities, whether our existing Transfer Pricing provisions suggest any such kind of an adjustment or is there any settled judicial principle that location costs requires to be adjusted while measuring the allocation of the profits of the Group entities/associated enterprises operating in. different tax jurisdiction and such a location cost advantages needs to be factored in while determining the Arm's Length Price. The locational savings alludes to a concept of a location specific advantage with reference to specific market features and/or factors of production that enables MNE to achieve improved financial outcome from the provision of the same product or services relative to alternative locations, that is, the places where costs are lower than the location where the activities were Initially performed or carried out. The features and factors include labourers/skilled labourers, incentives, market advantage, infrastructure and other factors of costs savings. The location saving arise from the cost saving due to differences in the costs of operations, between high cost and low cost tax jurisdictions. Earlier this concept was recognized under OECD Transfer Pricing Guidelines,

wherein in Chapter 9 dealing with "Business Restructuring", this concept has been discussed in the following manner:—

> "9.148 Location savings can be derived by an MNE group that relocates some of its activities to a place where costs (such as labour costs, real estate costs, etc.) are lower than in the location where the activities were initially performed, account being taken of the possible costs involved in the relocation (such as termination costs for the existing operation, possibly higher infrastructure costs in the new location, possibly higher transportation costs if the new operation is more distant from the market, training costs of local employees, etc.). Where a business strategy aimed at deriving location savings is put forward as a business reason for restructuring, the discussion at paragraphs 1.59- 1.63 is relevant;
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> 9.149 Where significant location savings are derived further to a business restructuring, the question arises of whether and if so how the location savings should he shared among the parties. The response should obviously depend on what independent patties would have agreed in similar circumstances. The conditions that would be agreed between independent parties would normally depend on the functions, assets and risks of each party and on their respective bargaining powers;
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> 9.150 Take the example of an enterprise that designs, manufactures and sells brand name clothes. Assume that the manufacturing process is basic and .that the brand name is famous and represents a highly valuable intangible. Assume that the enterprise is established in Country A where the labour costs are high and that it decides to close down its manufacturing activities in Country A and to relocate them in an affiliate company in Country B where labour costs are significantly lower. The enterprise in Country A retains the rights on the brand name and continues designing the clothes. Further to this restructuring, the clothes will be

manufactured by the affiliate in Country B under a contract manufacturing arrangement. The arrangement does not involve the use of any significant intangible owned by or licensed to the affiliate or the assumption of any significant risks by the affiliate in Country B. Once manufactured by the affiliate in Country B, the clothes will be sold to the enterprise in Country A which will on-sell them to third party customers. Assume that this restructuring makes it possible for the group formed by the enterprise in Country A and its affiliate in Country B to derive significant location savings. The question arises whether the location savings should be attributed to the enterprise in Country A, or its affiliate in Country B, or both (and if so in what proportions);

9.151 in such an example, given that the relocated activity is a highly competitive one, it is likely that the enterprise in Country A has the option realistically available to it to use either the affiliate in Country B or a third party manufacturer. As a consequence, it should be possible to find comparables data to determine the conditions in which a third party would be willing at arm's length to manufacture the clothes for the enterprise. In such a situation, a contract manufacturer at arm's length would generally be attributed very little, if any, part of the location savings. Doing otherwise would put the associated manufacturer in a situation different from the situation of an independent manufacturer, and would he contrary to the arm's length principle;

9.152 As another example assume now that an enterprise in Country X provides highly specialized engineering services to independent clients. The enterprise is very well known for its high quality standard. It charges a fee to its independent clients based on a fixed hourly rate that compares with the hourly rate charged by competitors for similar services in the same market. Suppose that the wages for qualified engineers in Country X are high. The

enterprise subsequently opens a subsidiary in Country Y where it hires equally qualified engineers for substantially lower wages, and sub-contracts a large part of its engineering work to its subsidiary in Country Y, thus deriving significant location savings for the group formed by the enterprise and its subsidiary. Clients continue to deal directly with the enterprise in Country X and are not necessarily aware of the sub-contracting arrangement. For some period of time, the well known enterprise in Country X can continue to charge its services at the original hourly rate despite the significantly reduced engineer costs. After a certain period of time, however, it is forced due to competitive pressures to decrease its hourly rate and pass on part of the location savings to its clients. In this case also, the question arises of which party/ies within the MNE group should be attributed the location savings at arm's length: the subsidiary in Country Y, the enterprise in Country X, or both (and if so in what proportions); and

9.153 In this example, it might be that there is a high demand for the type of engineering services in question and the subsidiary in Country Y is the only one able to provide them with the required quality standard, so that the enterprise in Country X does not have many other options available to it than to use this service provider. It might be that the subsidiary in Country Y has developed a valuable intangible corresponding to its technical, know-how. Such an intangible would need to be taken into account in the determination of the arm's length remuneration for the sub-contracted services. In appropriate circumstances (e.g. if' there are significant unique contributions such as intangibles used by both the enterprise in Country X and its subsidiary in Country Y), the use of a transactional profit split method may be considered".

Thus, under OECD, the locational saving costs has been recognized only when there is either reallocation of activities or business restructuring

> whereby MNE Group, Multinational Enterprises reallocates some activities or business to a place where costs are lower than the location where such activities or business was initially performed. Whether under various circumstances, locational savings may arise or not and whether under the TP analysis such an adjustment can be made has been elaborately dealt in the examples explained in para 9.150 to 9.153.

18. The key factor which is required to looked into while considering the location cost advantage to an entity working in low cost jurisdiction is that, whether there are suitable local comparable data to determine the conditions in which third party would be carrying out such an activity which would be the measure of Arm's Length and if on such comparability analysis the price received or charged is comparable then no attribution on account of locational savings can be made. If comparable data are available where transaction is being tested or where the tested party is located, then the benefits of location savings can be said to have been captured in the ALP which has been determined. Now, in the OECD/G-20 "Based Erosion & Profit Shifting Project" (BEPS), New Guidelines on the concept of locational savings have been illustrated under "Action 8". These guidelines recommend that, while determining how the locational savings are to be shared between two or more Associated Enterprises then at the threshold it is necessary to consider, firstly, whether location savings exists; secondly, the amount of any net location savings; thirdly, the extent to which locational savings are either retained by a Member or Members of the MNE Group or are passed on to independent customers or suppliers; and lastly, where locational savings are not fully passed on to independent customers or suppliers, the manner in which independent enterprises operating under the similar circumstances would allocate any retained net location savings. Guidelines further states that, suitable comparability adjustment is to be made to account for location savings advantage giving rise to location savings, when function analysis shows that location savings are not passed on to customers or suppliers and there is no local market comparables then, adjustment can be made based on

analysis of all the relevant facts and circumstances including functions performed, risk assumed and assets used of the relevant associated enterprises. However, before that, if reliable local market comparables are available which can be used to identify Arm's Length Prices, then specific Comparability adjustment or location savings may not be required at all. The guidelines, however, does not prescribe any formula or basis for adjustment. The India Chapter on latest 2016 Draft on OECD/G-20 BEPS, which highlights the view of the Indian Tax Administration accept that, where comparable uncontrolled transactions are available, then the comparability analysis and benchmarking by using the results/profit margin of such local comparable companies will determine the ALP of a transaction with a related party in a low cost jurisdiction. If good local comparables are available then the benefits of locational savings can be said to have been captured in the ALP so determined. However, if good local parties are not available, or whether the overseas AE is chosen as a tested party, then the problem of capturing the benefit of location savings would remain an issue for determination the ALP. The Indian Chapter has also aligns with the position advocated by BEPS 'Action 8' Report. However under the BEPS also such an adjustment is not required to be made separately if reliable local market comparables are available. In case, reliable local market comparables are not present, then various aspects have been highlighted for making the adjustment. But, whether such an Action Plan as enunciated in the BEPS Guidelines has been captured in our present TP provision? Till now, at least nothing has been brought on record before us, that the Action Plan as enunciated in the BEPS has been captured in our current TP laws/provisions. Therefore, the manner in which the TPO or DRP have made the adjustment is not at all justified sans any specific provision or guidelines.

19. Here in this case, the entire transaction between assessee and the AE have been analyzed under TNMM and the assessee's profit margin vis-a-vis the comparables have not only be accepted at Arm's Length Price, albeit its margin has been found to be higher than the average profit margin of the comparables. In that situation, any kind of return or advantage on account of location savings, already stands embedded/captured in the

operating margin of the Arm's Length Price determined vis-a-vis the comparability of the operating margins of the comparable companies. The TPO or the DRP have not carried, out any comparability analysis with an uncontrolled transaction to show that such a factor materially affects the price/profit margin of the transaction. Such a comparability analysis with the uncontrolled transaction is sine quanon for the determination of Arm's Length Price by choosing any of the prescribed method. If such an exercise has not been carried out, then such kind of TP adjustment should not be permitted to be made. If the revenue's case is that, though not canvassed before us, such an adjustment is being made under Rule 10B(3) to eliminate the material effect of a difference between the transactions which is being compared, then the onus is heavily, upon the revenue to bring on record that, due to location savings, the comparability with the local comparables has failed to yield the Arm's Length results. The TPO has made the adjustment by comparing the cost per employee globally with cost of per employee in India. The method by which TPO has made the adjustment lacks merits because comparison of the employees of the AE working in the economic conditions at the location of the AE are completely different and cannot be benchmark factor at the outset. Here the tested party is SIL, i.e. assessee, which operates in a perfectly competitive market and in such a market; a manufacturer will have to pass on any location specific advantages to the customers to remain competitive. Otherwise it would not be able to earn more than what the third party comparable companies, in same geographical location, performing similar functions and assuming similar risk, would earn. In a nutshell, comparison of the transactions with an uncontrolled transaction is the key factor and primary requirement under our Transfer Pricing Laws before resorting to any kind of adjustment of the ALP. It is also not clear whether the TPO has treated the location saving as an independent international transaction or it is just an adjustment on the determination of profit of the assessee. If it is an independent international transaction, then it needs to be benchmarked with uncontrolled transaction by carrying out comparability analysis under prescribed methods. On the other hand, if it is an adjustment on the profit of the assessee, then the TPO has to demonstrate that firstly, the

> profit margin of the assessee, under TNMM is incapable of determining the Arm's Length Prices and in the case of the assessee there are no independent local comparables in India to carry out the comparability analysis for determining of the ALP. Such an arbitrary adhocism for making such huge adjustment in the profit sans any Transfer Pricing analysis under the prescribed provisions cannot be sustained. Hon'ble Delhi High Court in Li and Fung India (P.) Ltd (supra) too has observed that. " Tax authorities should base their conclusions on specific facts and not on vague generalities, such as "significant risks", "functional risks", "enterprise risk" etc. without any material on record to establish such findings. If such findings are warranted, they should be supported by demonstrable reason, based on objective facts and the relative evaluation of their weight and significance". Thus, the Transfer Pricing adjustment cannot be on vague generalities. Accordingly, the adjustment made on account of location saving' for sums amounting to Rs.54,69,43,636/- is directed to be deleted.
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> 20. In view of our finding, the other pleas and arguments raised by the parties before us regarding powers of the TPO at the time of reference and recording of satisfaction by AO before reference, etc. (as discussed by us in foregoing paragraphs) are not being dealt upon and as they have become pure academic in view our finding given above.'

9. Having concurred with the view of the earlier decisions of this Tribunal, we find that the orders of the TPO and DRP are not sustainable as suffer from serious defect of considering the location saving as basis of adjustment. Further we find that the computation of the location saving by the TPO is purely based on some articles and not on the basis of actual cost in the US in comparison to India. Therefore the price/cost as computed by the TPO is not based on actual data but on presumption of accepting the article on the subject as the comparable cost. Since the functional comparability of the companies selected by the assessee has not been examined by the TPO as well as no steps were taken to find out the other comparables of the assessee for determination of ALP therefore, the issue of determination of ALP and consequential adjustment, if any, is required to be examined and adjudication afresh at the level of TPO/A.O.

> Needless to say that the assessee is receiving its price in foreign currency therefore the comparable uncontrolled price shall also have at least 75% of their revenue in foreign currency otherwise the price received from domestic market may not be acceptable when the assessee is receiving its 100% revenue in foreign exchange. Accordingly, the matter is set aside to the record of the TPO/A.O. for adjudication of the same afresh in the light of our above observations."

7. In view of the above order of the Tribunal for AY 2011-12 & 2012-13 in assessee's own case, taking a consistent view, we are inclined to set aside the orders of lower authorities and remit the issue to the TPO/AO for fresh adjudication with similar directions as in the above referred order of the Tribunal.

8. Grounds 7 to 8 by the assessee are as follows:-

> "7. On the facts and circumstances of the case and in law, the Ld. Hon'ble DRP erred in upholding the action of the Ld. AO /TPO in making an adjustment of Rs. 5,45,30,838 on account of recovery of expenses (investigator's fee) from AE. In doing so, the Ld. TPO / Ld. AO erred in:
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> a) disregarding the fact that the Appellant merely acts as a coordinator and facilitator for the performance of clinical trials and that the reimbursement of investigator fees do not represent any functions performed so as to consider it for profitability purposes;
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> b) disregarding the fact that the payments made to the investigators by the Appellant are charged by AE on an as-is basis to the Sponsor, which are reimbursed subsequently; and
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> c) disregarding the fact that there is no profit element in the hands of AE in relation to such recoveries.
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> 8. Without prejudice to the Ground No. 7, even if adjustment on account of recovery of expenses from AEs is to be upheld, the Ld. TPO erred in incorrectly applying a mark-up of 15.27% on such investigator fees recovered."

9. The TPO observed that in the TP study there is an International Transaction under the head "recovery of expenses" amounting to Rs. 35,10,71,928. During the hearing, in reply to the query, the assessee stated that this is the money paid to the various doctors who conduct the Clinical trial in India for PICLPV. The TPO noted that the investigators' payments was reimbursed with a markup and it was part of the total clinical services receipts. Interestingly, in the relevant assessment year it is shown under the head 'recovery of expenses' and that too without any mark up. The TPO issued a show cause notice dated 16.09.2016 and the figure of 15.27% was arrived at on the basis of the assessee's own admission of its profit percentage being at 15.27

10. The TPO after examining all the submissions made by the taxpayer was of the view that the assessee's arguments are bereft of logic and proper evidences to back its claim. He observed that the whole Clinical trial hinges on the commitment and knowledge level of these investigators concerned. Without the right set of Investigators, no Clinical trial would achieve its objectives. Clinical trial is a very risky endeavor as it involves experimentation of unknown chemicals on the human body. Hence the investigator administering the clinical trial become the most important person in safeguarding the patient. Hence the Investigator needs to possess certain skill set, should have immense patience (as Clinical trials last for years together) and complete focus and dedication on the job. Any slip from his side will not only affect the life and limb of the patient but will harm the reputation of Parexel India and the Group as a whole. Hence, the selection of investigators is very important and this is the job of the Taxpayer. This is a very important job and cannot be done routinely. The taxpayer invests considerable time and resources on this. The same was recognized by the AE. The AE was not only reimbursing the investigator's costs but, considering the investment of time and resources involved and the importance of finding the right person for the job, was also providing a markup on these costs till the previous assessment year. Infact, in the previous assessment year, the investigators costs was part of the Clinical trial services receipts. The situation remains the same in

this assessment year also. If there was any change, it would have been brought out by the taxpayer in the submissions made or in the TP study. Infact, there is no mention of the change in position adopted in the TP report.

11. As far as the argument of the taxpayer that pass-through is the norm in the Parexel Group and hence Parexel India should not be treated separately, the TPO holds it wrong. The taxpayer has not brought out the difference in environment, if any, between the earlier assessment year and this assessment year. There has been no policy change at the Global level also. Hence the arguments of the taxpayer cannot be accepted and were rejected.

12. Further the TPO observed that the case laws cited have different facts and those are not of the jurisdictional courts. It is also very clear from the functional analysis of the taxpayer that it is performing agency function and for performing this function any independent entity would have definitely added a markup apart from recovering the costs. The taxpayer is using its resources for considerable time to find the investigators. The taxpayer pays salaries to these employees and other benefits and perks. When the resources of the taxpayer is being deployed for a considerable period of time, then an independent entity would definitely add a markup on the costs incurred. This is what the taxpayer was doing till last year and again as mentioned earlier, there is no change in the situation for the taxpayer to change his model. Hence it is concluded that the taxpayer doesn't fall in the category it is claiming to be in as per the OECD guideline quoted by him. Hence it is rejected. Considering all the facts and circumstances of the case, the TPO has decided the ALP of the 'recovery of expenses' of the Investigators fees to be at Cost plus markup of 15.27% as follows:-

Issue	ALP as determined by taxpayer	ALP as per TPO
Recovery of expenses	35,71,10,928	41,16,141,766

13. The DRP concurred with the findings of the TPO. Against this, the assessee is in appeal before us.

14. In this case, the contention of the AR is that the assessee entered into agreement with Parexel International GmbH, Germany, under which assessee merely acted as Coordinator and facilitator with no risk in rendering such services and the entire risk relating to such activity is borne by Parexel International GmbH, Germany group and third party investigator and this is cost to cost reimbursement by Parexel GmbH Germany and there is no question of any mark up towards ALP as done by the TPO.

15. Further in terms of clause 4.3 of the addendum to the agreement with AEs, pass through cost is defined as expenses which are ultimately payable by the Sponsor on a cost-to-cost basis as follows:-

> "4.3. Pass through cost, for the purposes of section 4.1.2 and section 4.2, shall mean costs including but not limited to investigators fee, drug charges, laboratory fees, legal & professional charges, translation cost, related travel & conveyance expenses, and any other expenses incurred by the PICRPL (**Appellant**) which are ultimately payable by the Sponsor on a cost to cost basis to PIC (**AE**) or any other contracting affiliate. The Parties agree that PICRPL will not load any margin on the recharge of such pass through cost. PICRPL shall maintain complete, accurate and up-to-date accounting records relating to such 'Pass through Costs' which cart be produced to PIC."
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> (emphasis supplied)

Accordingly, in the case of the assessee, pass through costs are those costs which are incurred on behalf of third parties i.e. Sponsors, and which are subsequently reimbursed by the AEs on a cost-to-cost basis. The assessee, while acting as an intermediary, makes payment to Investigators for undertaking the clinical trial activity as contracted to them. These payments made by the assessee are subsequently recovered from Parexel Group in accordance with the service agreement between the assessee and Parexel Group.

16. As per the Consolidated Financial Statement (`CFS') of the Group filed with the US regulatory authorities relevant for the current year, Parexel Group routinely subcontracts clinical trials to independent physician investigators on behalf of Sponsors. The related investigator fees are not reflected in the revenue or costs in the CFS of Parexel group, because these fees are reimbursed by the Sponsors on a "pass through basis," without risk or reward to Parexel Group. The relevant extract of the CFS of the AE (Form 10K) is reproduced hereinbelow:-

> "Reimbursement Revenue & Investigator Fees
>
> On the other hand, the Reimbursable out-of-pocket expenses are reflected in our Consolidated Statements of Income under "Reimbursable expenses," as we are the primary obligor for these expenses despite being reimbursed by our clients. In add …..
>
> physician investigators in connection with clinical trials. The related investigator fees are not reflected in o…
>
> Reimbursable out-of-pocket expenses, or Direct costs, because these fees are reimbursed by the clients on a…
>
> The amounts of these investigator fees were $421.2 million, $250.8 million, and $185.5 million for the …..".

17. It was submitted in light of the above, it can be clearly concluded that the payments received by the assessee are purely reimbursements for the expenses incurred on behalf of a third party and therefore, are a pass-through cost for the Group. Profit margin can be determined only vis-à-vis the value-added activities undertaken:

18. In order to appreciate the above proposition, it was submitted it will be very important to first understand the general clinical trial process, explained herein below:

- A clinical trial is required for testing the efficacy and safety of a pharmaceutical product developed by a pharmaceutical company.
- The pharmaceutical company ('Sponsor'), who intends to undertake the clinical trial, enters into a clinical trial agreement with the Parexel Group (AEs) or a similar vendor.

- A clinical trial typically entails undertaking the following phases/ steps:
  - **Preparation of study protocol**: A 'study protocol' is a document which defines the medical issues sought to be examined and the statistical tests that are to be conducted; the processes and parameters which are to be considered for conducting the clinical trial.
  - **Pre-clinical trials**: Pre-Clinical trials are test tube and animal studies conducted to establish the relative toxicity of the drug.
  - **Phase I clinical trials**: Phase I trials consist of testing the basic safety with approximately 20 to 80 human subjects, usually healthy volunteers.
  - **Phase II clinical trials**: Phase II consists of trials to test the basic efficacy (effectiveness) and dose-range test, sometimes with 100 to 200 patients afflicted with a specific disease or condition.
  - **Phase III clinical trials**: Phase III trials include larger scale clinical trials conducted on patients afflicted by a target disease to test the safety and efficacy of the drugs.
  - **FDA review**: After the successful completion of the above stages, the FDA scrutinizes data from all phases of development to confirm that the sponsor has complied with regulations and the drug or biologic is safe and effective for the specific use under study.
  - **Post-marketing surveillance and Phase IV study**: Federal regulation requires sponsor to collect and periodically report to the FDA additional safety and efficacy data on the drug.

- The AE, depending upon the requirements of the Sponsor outsources certain part!, of the assignment to its various affiliates. In case a trial is required to be undertaken in India, Parexel India will be given the assignment of coordinating and facilitating the clinical trial in India.

19. It was submitted that the entire aforesaid process of conducting the clinical trial is undertaken by the Sponsor and the Parexel Group while Parexel India only arranges tor such clinical trial activity to be undertaken. The responsibility undertaken by each of the participant is detailed hereinunder:-

Type of Functions	Comment
Drug development	Sponsor performs this function
Study Protocol design for Clinical Trials	Sponsor / Parexel Group perform this function
Pre-Clinical Trials	Sponsor performs this function
Phase-I Clinical trials in human beings	Sponsor / Parexel Group perform this function
Phases II & III	
- Assistance in site feasibility	Parexel Group prepares plan for feasibility study. The Appellant caries out feasibility study based on parameters set by the Parexel Group for India related trials
- Details for site feasibility	Parexel Group provides methodology and parameters for feasibility study. The Appellant prepares the feasibility study based on certain factors for India related trials.
- Appointment of investigators	Parexel Group provides investigation brochure and Protocol and the Appellant selects Investigators based on set parameters.
- Obtaining Regulatory approvals for undertaking clinical trials	Parexel Group obtains FDA and other regulatory body approvals outside India The Appellant obtains regulatory approval within India as the per requirement of Indian Regulations
Site visit in India and data collection	The Appellant does site visit of the investigation sites in India only to collect the data and information
Filing for Drug Approval	Sponsor performs this function
Post market surveillance	Parexel Group performs this function

20. The ld. AR submitted It is very clear from the above table that he entire risk of conducting the clinical trial and its success/ failure lies with the Sponsor/ AEs and the assessee is insulated, in the sense that, irrespective of the success / failure of the trial, the assessee will be remunerated at a cost plus 15% mark-up. It will be necessary to appreciate that a clinical trial

activity is a complex process involving huge costs and which runs over several years. Irrespective of such huge risks involved in the entire process, the assessee operates in a risk-free environment.

21. Based on the aforesaid transaction flow and functional analysis, the assessee submitted the FAR of the assessee vis-à-vis the 'Investigators'.

Functions undertaken by Parexel India and Investigator:

22. It was submitted as seen from the above, the role of Parexel Group and Parexel India is to facilitate the end customer (i.e. the Sponsor) to undertake the clinical trials in line with the protocols and parameters set forth by the Sponsor. The actual clinical trials are undertaken by the investigators such as hospitals, physicians etc. Investigators undertake clinical trial activity, seek for requisite approvals from Ethic committee of their respective hospitals, enroll patients for the clinical trial, ensure that health of the volunteer patients is in accordance with the regulatory framework and then conduct clinical trials on them. Investigators takes the responsibilities that the Case Report Forms (CRFs) submitted to Parexel India is true, correct and accurately reflect the result of the study. These Investigators actually perform the clinical trial and assume the risk of the trial being conducted as per set protocols. Parexel India only undertakes co-ordination activities in this regard and there is no value addition by Parexel India.

23. While the assessee enters into an agreement with the Investigator, it so enters on behalf of and as an agent of the Sponsor.

<u>Assets of Parexel India and Investigator</u>

24. It was submitted that the assessee neither has the capability nor is authorized to perform clinical trials on its own. The assessee's

infrastructure is only in the form of furniture, vehicle, office equipment and computers (as is evident from the financial statements) which are used for general administration and it is not sufficient for carrying out the whole clinical trial on its own.

25. The following routine assets are owned by the assessee for the year ended 31 March 2013:

Type of Fixed Assets	***Gross Block (In Rs.)***
Leasehold Improvements	10,67,136
Computers	2,02,40,994
Furniture & Fittings	4,20,834
Office Equipment	98,82,913
Software	12,72,069
Total	3,28,83,946

26. It was submitted that, on the other hand, all trial Investigators should possess appropriate qualifications, training and experience and should have access to such investigational and treatment facilities as are relevant to the proposed trial protocol as per Drugs and Cosmetics (IInd Amendment) Rules, 2005 - Schedule Y: Requirements And Guidelines For Permission to Import And / Or Manufacture Of New Drugs For Sale Or To Undertake Clinical Trials.

Risks undertaken by Parexel India and the Investigator

27. It was submitted it is also pertinent to note that these Investigators actually perform the clinical trial and assume the risk of the trial being conducted as per set protocols. It is the Investigator who is responsible for trial-related decisions. In fact, Schedule Y of the Drugs and Cosmetics (IInd Amendment) Rules, 2005 which is the key document that governs clinical research in India, provides that the "Investigator shall be

responsible" for the conduct of the entire clinical trial activity. The relevant extract of the >aid rule is reproduced below:

> "The Investigator(s) shall be responsible for the conduct of the trial according In the protocol .and the GCP Guidelines and also for compliance as per the undertaking g is in Appendix VII. Standard operating procedures are required to be documented by the Investigators for the tasks performed by them. During and following a subject's participation in a trial, the investigator should ensure that adequate medical care is provided to the participant for any adverse events. Investigator(s) shall report all serious and unexpected adverse events to the Sponsor within 24 hours and to the Ethics Committee that accorded approval to the study protocol within 7 working days qt. their occurrence"

28. As opposed to the unlimited liability/ risks faced by the Investigators, the assessee merely provides support services to its AEs and operates in a 'risk insulated environment and is remunerated on cost plus basis.

29. Clause 5.1 of the agreement entered into with the AE provides that Parexel India will be indemnified fully against any liability arising on account of performance of services. The same is reproduced hereinbelow:-

> "PIC (**AE**) hereby irrecoverably undertakes to indemnify PISPL (**Appellant**) against any liability incurred by PISPL in any way arising out of the or in connection with the performance of the services hereunder. The clinical trials are herein, including immaterial assets arisen herein in connection with the services in the Agreement. -.hall remain the sole property of PIC"
>
> (emphasis supplied)

30. Accordingly, Parexel India is indemnified from any liability by the Parexel Group which occurs during the process of clinical trials. It will be relevant to note that the risks associated with service failures including non-performance to generally accepted regulatory standards is very high in any clinical trial activity. Any error/ mistake could result into regulatory non

approvals, product recalls and even possible injuries/ could be fatal to end users. Parexel Group is responsible for a ty claims arising during the claims and any claims liability insurance expenses accrue to the Parexel Group.

31. Accordingly, it was submitted that the entire risk relating to the said activity is borne by Parexel Group and the third-party Investigator. Entire risk of initiating the clinical trial, obtaining regulatory approval from FDA, failure / success of such reversals is borne by the AE/ Sponsors, whereas the entire risk of conducting the clinical trial as per the set protocols on the Investigator. Rather, a negligible amount insurance expenses incurred by the assessee during the current year of Rs. 23,611. (for the year ended 31 March 2013(Pg.13 of the PB) indicates it does not carry any substantial risk.

32. In view of the above, the assessee submitted that it neither undertakes any functions nor assets nor any risks vis-à-vis the provision of clinical trial activity. It merely coordinates and facilitates the provision of clinical trial services to the Sponsors. Therefore, the profit margin of the services rendered by Parexel India should be determined taking into consideration only the cost incurred by the assessee for value added functions i.e., its own internal costs. Doing otherwise would result into a fallacy where the Appellant is being expected to earn a mark-up on costs incurred on behalf of third parties.

33. It was further submitted that it is an accepted principle that service providers need not apply a mark-up on pass through expenses which are recharged to third parties. This principle is fully supported by the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration (OECD Guidelines) which provide that:-

> "When an associated enterprise is acting only as an agent or intermediary in the provision of services, it is important in applying the cost-plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves. In such a case, it may not be appropriate to determine arm's length pricing as a mark-up on the cost of the services but rather un the costs of the agency function itself or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than would be appropriate for the performance of the services themselves. For example, an associated enterprise may incur the costs of renting advertising space on behalf of group members, costs that the group members would have incurred directly had they been independent. In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function."
>
> (emphasis supplied)

34. In the present case, according to the ld. AR, the assessee acts only as an intermediary and enters into agreements with the Investigators on behalf of the Sponsors and incurs passthrough costs in the nature of investigator fee and other expenses on behalf of the Sponsors. In fact, the TPO at para 7.6.3 of his order, after examining the functional analysis has categorically observed that the assessee is performing agency function as follows:-

> "It is also very clear from the functional analysis of the taxpayer that it is performing agency function and for performing this function any independent entity would have definitely added a markup apart from the recovering the costs"

35. To support the case of the assessee, reliance is placed on the decision of the Delhi Tribunal in *Cheil Communications India Pvt. Ltd. vs. DCIT [ITA No. 712/De1/2010]*, wherein the Tribunal agreed that mark-up is to be applied on the cost incurred by the assessee in performing the

agency functions and not on its gross spends. The Tribunal endorsed the OECD view that while applying TNMM, the cost to be considered is should be the costs incurred in relation to the value added activity i.e. only the cost relating to agency function. The relevant portion of the order is reproduced below:-

> " It is, thus, clear that the assessee has not assumed any risk on account 61 non-payment by its customers or associated enterprises. As per ITS 2009 Transfer Pricing Guidelines accepted by the OECD, when an AEs is acting only as an agent or intermediary in the provision of service, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves, and, in such a case, it may be not appropriate to determine ALP as a mark-up on the cost of services but rather on the cost of agency function itself, or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than that would be appropriate for the performance of the services themselves. In these type of cases, it will be appropriate to pass on the cost of rendering advertising space, to the credit recipient without a mark-up and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function. In the light of ITS 2009 Transfer Pricing Guidelines, it would be clear that a mark-up is to be applied to the cost incurred bp the assessee company in performing its agency function and not to the cost of rendering advertising space on behalf of its AEs. Further, the method adopted by the assessee while submitting transfer pricing study based on net revenue has been accepted by the Department in earlier year and, therefore, there is no reason to depart from that stand already accepted by the Department in earlier year."

36. It was submitted that a similar view has also been upheld by the Mumbai Tribunal in FedEx Express Transportation and Supply Chain Services India Private Limited (Merged Federal Express India Private Limited) vs. DCIT [TS-423-ITAT-2014(Mum)-TP], wherein it was held as under:-

> "The Assessee's role was confined to making of the payments and to get the entire re-imbursements of the costs. It is the Jeena company who had charged for its service, and the Assessee has merely pass through such cost. In other words, Assessee has merely done co-ordinating services, rather than providing full fledged services The department's allegations that it was monitoring Jeena's activity does not per se lead to any inference that the Assessee was performing these services directly. All the activities and services have been rendered by Jeena who had received the payment as per their invoice. Under such a situation, it cannot be held that mark up of 9% should be applied on such costs incurred by the Jeena for bench marking the arms length price of the Assessee vis-a-vis the transactions with AE. The net profit margin realized from the AE is to be computed only with reference to the cost incurred directly by the Assessee itself and its profit margin cannot be imputed on the cost incurred by the third party or unrelated parties so as to compute the net profit margin of the Assessee with the transactions with the AE. The reason being, no direct cost of Assessee is involved and Assessee has not undertaken any FAR i.e. performed any direct functions, deployed any or undertaken any assets risks. In our opinion, the payment made by the Assessee to the third part it for and on behalf of the AE which has been reimbursed by AE, cannot be included in the total costs of the Assessee for the purpose of determining the profit margin."

37. Further, in the case of *Ness Technologies (India) Private Ltd. vs. DCIT (ITA No. 696/Mum/2016 and IT(TP)A No. loo6/Mum/2016)* the Mumbai Tribunal has held that if the recovery of expenses did not involve any element of profit or mark-up in the hands of the AE, the mark-up on the recovery by the Assessee was not warranted. The relevant portion of the order is reproduced below:-

> "13.3 All this material clearly brings out a pertinent feature tint in the entire transaction involving payment of expenditure by the assessee, its recovery from the associated enterprises which-in turn recovers it from the end clients there is no involvement of any profit-element in the hands of the associated enterprises. Therefore. it would be wrong on the part of the income tax

> authorities to take a position and infer notionally about recovery of mark-up or profit element in *the hands of assessee.*

38. *The jurisdictional Tribunal in Tesco Hindustan Service Centre Pvt Ltd vs. DCIT (IT(TP)A No.1317/Bang/2010)* has held that when a taxpayer acts solely as an agent for a group company it would be not be appropriate to charge mark-up on the cost of services acquired from an arms' length party. The relevant portion of the order is reproduced below:-

> "35. We have considered the rival submissions. As observed in the OECD commentaries referred to in the Circular of the Canada Customs and Revenue Agency, it is important to distinguish between the situation of a taxpayer who renders services for the other members of a group; and a taxpayer who acts solely as an agent on behalf of the group to acquire services from an arm's length party. In the latter situation, the arm's length compensation would be limited to rewarding the agency role. In such a case, it would not be appropriate to determine an arm's length charge by referring to a mark-up on the cost of the services acquired from an arm's length party. Whether a taxpayer is providing a service or merely acting as an agent on behalf of the group is a question of fact."

39. In view of the above facts, analysis of the functions, assets and risks of the assessee and extracts of the OECD guidelines and Tribunal rulings, the assessee summarises its arguments as to why mark-up is not required to be charged on the investigator cost as follows:-

a. The role of the assessee is mere facilitation and coordination of clinical trials (without any value addition) for which is receives a mark-up from its AEs whereas the actual clinical trials are undertaken by the investigators.

b. The assessee neither has the capability nor the assets to undertake the clinical trials whereas the investigators are experts in the fields who own the laboratory and other assets relevant for undertaking the clinical trial.

c. The entire risk with respect to the clinical trials is borne by the investigator whereas the assessee operated in a risk free environment.

d. The investigator costs are incurred on behalf of third parties and are subsequently reimbursed by AEs.

e. The OECD TP Guidelines prescribes that while applying TNMM, only the cost incurred in relation to the "value added activity" should be considered for calculating the PLI for benchmarking the transaction.

Rebuttal to the allegations of the TPO and Departmental Representative

40. The TPO at para no. 7.6.3 of the transfer pricing order has alleged that the assessee is deploying considerable resources and time to in finding and appointing investigators and therefore. should have charged a mark-up on the costs incurred. In rebuttal, it is the submission of the assessee that it receives a mark-up of 15% all of its costs that are incurred to find and appoint investigators and also to perform other coordination and facilitation activities. All of such value-added costs (salary costs etc.) form a pint of its "Operating costs" in terms of the agreement entered into by the assessee with its AEs as under:-

> "4.1. In consideration of PICRPL's performance of Services under this Agreement, PIC agrees to pay PICRPL, on a monthly basis, an amount comprising of
>
> …..
>
> 4.2. Operating Expenses, for the purposes of section 4.1.1, shall mean and refer to the operating cost of PICRPL in respect of PICRPL's activities of coordination and facilitation of clinical trials, including, but not limited to personnel costs, general and administration expenses, depreciation and amortization based on the financial statements of PICRPL. For avoidance of doubt, Operating Expenses shall not include any financing costs, extraordinary expenses, prior period cost, capital expenses and pass through cost."

41. Therefore, the allegation of the TPO that the assessee has not charged mark-up on such costs is completely baseless.

42. The TPO at para no. 7.6.2 has concluded that the assessee has been charging a mark-up on the investigator costs upto the preceding years and accordingly, a mark-up ought to be imputed in the current year as well.

43. It is submitted that just because the assessee was receiving a mark-up on the pass-through costs until the preceding year, it cannot be a basis to impute a mark-up in the current year as well. Adjustments are to be made based on transfer pricing principles and in the present case, no third party would have paid a mark-up on the costs, which are not incurred by the assessee to provide its intermediary functions. The assessee should not be expected to earn a margin based on the classification of costs as "internal" or "external' costs, but rather on a comparability including functional analysis (Para 2.93 of the OECD TP Guidelines).

44. In this regard, reliance is placed on the decision of the Hon'ble Mumbai Tribunal in the case of Dresser-Rand India (P) Ltd vs. Ad (11 CIT (2011) 13 taxmann.com 82 wherein it was held that the fact that the AE may have given some service on a gratuitous basis in the earlier period does not mean that it should continue to do so. Likewise, in the present case the fact that the AEs reimbursed the pass-through costs alongwith the mark-up in the preceding years does not lead to a conclusion that a mark-up should be charged in the current year also. Further, Article 265 of the Constitution of India provides that 'no tax shall be levied or collected except by the authority of law'. Accordingly, in the absence of any value-added function/FAR undertaken by the assessee qua the investigator functions, it should not be expected to earn a mark-up on the same, more so when the Parexel Group is not earning a mark-up on such costs.

45. During the course of the hearing, attention was drawn by the ld. DR to the service agreement entered into between the assessee and its AEs,

to contend that the assessee ought to have charged a mark-up of 18% on the investigator costs and that as per the said agreement, the assessee would not be an agent for its AEs. As against this, it was submitted on behalf of the assessee that the assessee had entered into an addendum to the service agreement with its AEs w.e.f. 1 April 2012 (relevant to AY 2013-14) wherein the mark-up was revised from 18% to 15% on operating costs.

46. In so far as the other argument of the Ld. DR is concerned, qua the provision of services stated in the agreement i.e., coordination and facilitation services, it was submitted that clearly the assessee does not act as an agent for the AE. But, qua the appointment of Investigators and incurring related costs, the assessee has entered into such agreement "on behalf of the Sponsor" and is not responsible for their performance.

47. In view of the above discussions it was prayed that the transfer pricing adjustments on account of Location Savings amounting to Rs. 21,69,17,701 and Imputation of mark-up on pass through costs amounting to Rs. 5.45,30,838 be deleted. It is further the humble prayer that in case it is held that the investigator fees and other incidental costs are to be considered as a part of the operating expenses and operating revenue for benchmarking the transaction relating to provision of coordination and facilitation services (pursuant to set-aside as per the earlier years orders), there ought not to be a separate adjustment by way of imputation of mark-up on investigator and incidental costs as the same would result into double adjustment. A direction in this regard was also prayed for.

48. On the other hand, the ld. DR drew our attention to the following facts recorded by the Tribunal in IT(TP)A No.254/Bang/2016 & 292/Bang/2017 for the AYs 2011-12 & 2012-13 as under :-

"4. The assessee is a subsidiary of Parexel International Holdings BV, Netherlands. The assessee company is registered as clinical research agency and is engaged in providing clinical research services in India. The group and parent company of assessee are also clinical research organizations based in USA & UK respectively and are assigned the work of conducting clinical trials by sponsoring pharmaceutical companies. The Associated Enterprise (AE) in turn, have outsourced the work of clinical trial and research services in India to the assessee. The assessee has been compensated at cost plus 15% mark up charges for the work and services done on behalf of the AE. The financials of the assessee are reproduced by the TPO as under:

Operating Income	Rs.48,65,36,020
Operating expenditure	Rs.40,72,77,408
Operating profit	Rs. 7,92,58,612
OP/OC	19.46%

49. Further he drew our attention to the clauses 4 to 4.4 of the Contractual Clinical Services Agreement dated 24.4.2006 as follows:-

"CONSIDERATION

4.1 In consideration of the PISPL's performance of Services under this Agreement, PIC agrees to pay PISPL, on a monthly basis, a fee comprising of total operating cost incurred by PISPL as increased by 18% mark up on such operating cost.

4.2 Total operating cost as specified in clause 4.1 of the agreement shall include but not limited the following cost and expense that are necessary to carry out the services:

- Personal Cost
- Investigator fees
- Laboratory and Pharma fees
- Regulatory and Ethical Committee fees
- Rent

- Travel Expenses
- Depreciation and amortizations
- Utilities
- All other general and administrative expenses,
- Any other expenses incurred to provide the services

4.3 These terms are based on the parties' initial determination of an amount equal to Arm's Length compensation that are adequate to compensate for the functions performed, assets employed and risks assumed by the PISPL and will be determined by PIC and PISPL in accordance with arm's length standards. The fees shall be communicated between the parties in writing and such written communication shall be considered as an addendum to this Agreement. Any taxes leviable in India on the above fee shall be borne by PIC. Further, PIC may withhold taxes to the extent it is required to do so as applicable in its jurisdiction.

4.4 PIC shall pay the remuneration on the basis of the invoices duly issued by PISPL within 10 (ten) days after the end of each month. PISPL shall maintain true and accurate books of accounts and records reflecting the services and cost incurred in connection therewith. PIC may from time to time request for the detailed break up cost incurred and PISPL agrees to provide details as and when requested for."

50. We have considered the rival submissions. In this case, the assessee coordinated between the individual investigator and Paraxel International GmbH Germany. The contention of the assessee is that assessee has not undertaken any risk and all risk was taken over by Paraxel International GmbH Germany and relied on the Addendum dated 19.9.2007. However, the fact is that the assessee acted as coordinator and facilitator in selecting the investigator so as to conduct clinical trial. Selection of the investigator demonstrates that clinical trial is important task in the whole work undertaken by the assessee. The assessee invested considerable time and resources in this. The plea of assessee is that assessee has not received any amount as fee for doing this coordinator and facilitator job. In our opinion, this is an inter-group services provided

by the assessee to its parent company and assessee must charge some fee as it would have, had the services been provided to a third party. The contention of the ld. AR is that remuneration for these services has already been included in the provision of clinical trial services and no separate fee is charged for coordinating and facilitating with the investigators. As per OECD guidelines, this is an intra-group services provided by the assessee to its parent company for which the assessee is entitled to remuneration. The parent company derived economic or commercial benefit from the services offered by the assessee company for which the assessee has to be suitably remunerated. More so, the assessee would not have rendered this kind of services to unrelated party.

51. The assessee relied on the Addendum to Contract Clinical Trial Services Agreement. We have gone through the same. Vide this Addendum, the following clauses were replaced in Clause 4 (Consideration) :-

> "4.1. In consideration of PICRPL's performance of Services under this Agreement, PIC agrees to pay PICRPL, on a monthly basis, an amount comprising of
>
> > 4.1.1. Service income which shall be Operating Expenses incurred by PICRPL as increased by 15% mark-up on such Operating Expenses for each year of this Agreement; and
> >
> > 4.1.2. Pass through cost (as defined below) incurred during each year of the Agreement.
>
> 4.2. Operating Expenses, for the purposes of section 4.1.1, shall mean and refer to the operating cost of PICRPL in respect of PICRPL's activities of coordination and facilitation of clinical trials, including, but not limited to personnel costs, general and administration expenses, depreciation and amortization based on the financial statements of PICRPL. For avoidance of doubt, Operating Expenses shall not include any financing costs,

extraordinary expenses, prior period cost, capital expenses and pass through cost.

4.3. Pass through cost, for the purposes of section 4.1.2 and section 4.2, shall mean costs including but not limited to investigators fee, drug charges, laboratory fees, legal & professional charges, translation cost, related travel & conveyance expenses, and any other expenses incurred by the PICRPL which are ultimately payable by the Sponsor on a cost to cost basis to PIC or any other contracting affiliate. The Parties agree that PICRPL will not load any margin on the recharge of such pass through cost. PICRPL shall maintain complete, accurate and up-to date accounting records relating to such 'Pass through Costs' which can be produced to PIC.

4.4. These terms are based on the parties determination of an amount equal to Arm's Length compensation that are adequate to compensate for the functions performed, assets employed and risks assumed by PICRPL and will be determined by PIC and PICRPL in accordance with arm's length standards. Any changes to the fees shall be communicated between the parties in writing and such written communication shall be considered as addendum to this agreement. Any taxes leviable in India on the above fees shall be borne by PIC. Further, PIC may withhold taxes to the extent required to do so as applicable in its jurisdiction.

4.5 Sponsor, for the purposes of section 4.3, shall mean and refer to a customer / 'company who have entered into a contract with PIC for the provision of Clinical Services.

4.6. Investigator, for the purposes of section 4.3, shall mean and refer to a physician, medical doctor, medical consultant, or a hospital, which has entered into an investigation contract with PICRPL and/or Sponsor to administer pharmaceutical drugs for the purposes of clinical research trials.

4.7. PIC shall pay the remuneration on the basis of invoices duly issued by PICRPL within 3o (thirty) days

after the end of the month. PICRPL shall maintain true and accurate books of accounts and records reflecting the services and cost incurred in connection therewith. PIC may from time to time request for the detailed breakup of cost incurred and PICRPL agrees to provide details as and when requested.

4.8. PIC agrees to make payment within 6o days from the date of receipt of invoice from PICRPL. PIC further agrees to pay advance against services to PICRPL upon PICRPL's request.

4.9. PICRPL shall raise invoice in US Dollar or any other mutually agreeable currency and shall be settled by PIC in the same currency.

All other provisions of the agreement shall continue to be the same."

52. Thus, new word 'pass through cost' was introduced to show the amount incurred by the assessee to be reimbursed by the parent company and called the investigation fees as part of pass through cost. The ld. AR argued that there is no investigation fees payable to assessee for the work done on behalf of parent company. In our opinion, the Addendum is w.e.f. 1.4.2012 wherein no date of execution is mentioned therein. The Addendum was solely made with an intention to evade payment of taxes and this is only a self-serving document by the assessee with the sole intention to evade taxes. Since both the parties were in a position to enter into this agreement being inter-related companies, that agreement cannot be given any credence which is a non-genuine and make believe story and it cannot be recognized as a true agreement and no benefit can be given on the basis of this agreement. Therefore, the lower authorities are justified in not giving any credence to this Addendum entered into by the assessee on the basis of which assessee has claimed that assessee is not entitled to receive any consideration for facilitating investigations. Further, it is to be noted that in the earlier years, investigator payments were

reimbursed to the assessee with a mark-up. However, for the assessment year under consideration, it was treated as pass through cost under the head 'recovery of expenses' and there was no mark-up paid to the assessee. The assessee failed to explain why in this assessment year there was no mark-up on the investigator payments. The assessee only relied on the Addendum filed by the assessee, wherein it was mentioned that it was only pass through costs. As discussed earlier, this Addendum is only a make believe story and the AO has right to go beyond this document to find out the real intention of the parties. We observe that the real intention to this Addendum is different from what it appears *ex facie*. Hence, we have to proceed on the basis of the professed intention and the AO is justified in finding out the real intention of the parties by ignoring the apparent and the conceded intention was to evade the tax liability. The lower authorities merely removed the facade to expose the real intention of the parties cleverly cloaked and discovered the real intention was to evade the taxes and Addendum cannot be given effect and the overall arrangement made by the assessee was to evade the taxes. We are well aware that all commercial arrangements and documents or transactions have to be given effect even though they result in avoidance of tax liability, provided that they are genuine, bonafide and not colourable transaction.

53. In the present case, in the immediate earlier AY 2012-13, the assessee has shown investigator payment with mark-up and in this year on the basis of Addendum entered by the parties as discussed earlier, made the investigator payment as 'pass through costs' and claimed as reimbursement without any profit element, which is against the agreed norms in the earlier years which cannot be effected and accepted as genuine agreement. Accordingly, we are of the opinion that this intra-group services rendered by the assessee to the parent company cannot be considered as reimbursement of expenses or pass through costs. It is

separate services in itself for which the assessee needs to determine the ALP which the assessee failed to do so. The assessee has provided services for which the TPO is justified in marking up the services so as to make TP adjustment. The various case laws relied on by the ld. AR are different on its own facts, which cannot be applied to the facts of the present case. Hence the TPO/AO correctly ascertained the ALP of this transaction and made adjustment on this count. The same is sustained. This ground of the assessee is dismissed.

54. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 7th day of October, 2021.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 7th October, 2021.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.