IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT BEENA PILLAI, JUDICIAL MEMBER

Appeal No.	Appellant	Respondent	Assessment Year
IT(TP)A No. 2333/Bang/2016	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J	The Deputy Commissioner of Income Tax, Circle 11 (5), Bangalore.	2009-10
ITA No. 2260/Bang/2016	The Assistant Commissioner of Income-tax, Circle – 4 (1) (1), Bangalore.	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J	2011-12
C.O. No. 20/Bang/2020 (in ITA No. 2260/Bang/2016)	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J	The Assistant Commissioner of Income-tax, Circle – 4 (1) (1), Bangalore.	
ITA No. 2334/Bang/2016	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J	The Deputy Commissioner of Income Tax, Circle 11 (5), Bangalore.	2011-12
ITA No. 2473/Bang/2017	The Deputy Commissioner of Income-tax, Circle – 4 (1) (1), Bangalore.	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J	2012-13
ITA No. 2826/Bang/2017	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL	The Deputy Commissioner of Income-tax, Circle – 4 (1) (1), Bangalore.	2012-13

	Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J		
C.O. No. 25/Bang/2018 (in ITA No. 2473/Bang/2017)	M/s. Lifestyle International Pvt. Ltd., No. 77, Town Centre, Building No. 3, West Wing, Off HAL Airport Road, Yamlur P.O., Bangalore – 560 037. PAN: AAACL2937J	The Deputy Commissioner of Income-tax, Circle – 4 (1) (1), Bangalore.	2012-13

Assessee by	**:**	**Shri K.R. Vasudevan, Advocate**
Revenue by	**:**	**Shri Devarathnakumar .K, CIT (DR)**

Date of Hearing :	**14.07.2021**
Date of Pronouncement :	**11.10.2021**

ORDER

PER BENCH

Present cross appeals appeal has been filed by assesee as well as revenue's for assessment years under consideration.

2. The Ld.AR submitted that most of the grounds for years under consideration stands covered by order passed in assesee's own case by coordinate bench of this *Tribunal* for assessment year 2008-09 and 2010-11. We are therefore disposing of all these appeals by way of common order.

Brief facts of the case are as under:

3. The assesee is a private limited company engaged in the business of retail trade of apparels and accessories, toys baby basics, footwear, leather products, furniture and household, and other accessories. It has been submitted that assesee operates stores across India under the brand name "lifestyle" and "Max".

Assessment year 2009-10

4. For year under consideration assesee filed and return of income on 30/09/2009 declaring total income of 'NIL". The return was selected for scrutiny and notice under section 143(2) of the Act was issued, in response to which representatives of assessee appeared before the Ld.AO and filed requisite details as called for. As there were international transactions between assessee and the AE's the case was referred to transfer pricing officer.

4.1 The Ld.TPO on receipt of reference observed that, assessee is in retailing business and has stores across India at Chennai, Hyderabad, Bangalore, Gurgaon, Mumbai and other cities. In addition to garments, assessee also deals in footwear, leather articles, furniture, household items and cosmetics. It was observed by the Ld.TPO, that assessee entered into following international transaction during the year under consideration:

Sl. No.	Type of transaction	Amount (Rs)
1	Import of traded goods	21,14,53,768/-
2	Payment of Consultancy Fee	4,68,66,897/-

4.2 The Ld.TPO observed that assessee paid Rs.4,68,66,897/- towards intra group services in the nature of consultancy charges to its associated enterprises being, RNA and Home Centre LLC. Assessee was asked to furnish the arms length nature of the transaction in the light of actual requirement of services, proof of request made and services actually rendered, benefit analysis etc.

4.3 The Ld.TPO after considering submissions by assessee, was of the view that, payment towards intragroup services would be treated at arms length only when it is proved substantially by assessee that such services were actually received, and further if proved that by the assessee that such services have benefited. The Ld.TPO rejected the aggregation of international transaction, since he was of the view that, the services rendered by assessee were not intrinsically related to each other. The Ld.TPO observed that assessee could not submit any evidence showing that services were actually required and rendered by the AE's. He applied CUP and computed ALP to be 'nil'. The Ld.TPO proposed adjustment to be ₹ 4,68,66,897/- in respect of international transaction.

4.4 The Ld.AO while passing final assessment order, held Rs.4,68,66,897/- to be excessive under section 40A(2) of the Act. The Ld.AO observed that assessee capatalised payment made to Home Center LLC and consequent depreciation amounting to Rs.17,11,500/- was claimed. He also observed that professional fees of Rs.40,79,397/- was paid to RNA. The Ld.AO thus disallowed total of Rs.57,90,897/- by invoking provisions of section 40A(2)/37 of the Act.

4.5 The Ld.AO further observed that assessee debited Rs.16,47,303/- as premium on forward contract in P &L account. Assessee was called to explain the claim. After going through the submission by assessee, the Ld.AO observed as under:

> "*The company has involved itself in forward contracts of currencies on imports of trade merchandises and repayment of working capital*

loans. This is speculation loss, as it is a transaction which has been settled otherwise than by actual delivery of the goods in which the assessee company is trading. This transaction does not fall into any of the exclusive provisos mentioned u/s 43(5). Although the basic thing on which the forward contract has been entered into is trading merchandise and working loan but the settlement is happening on currency. Therefore the amount of Rs. 16,47,303/- is treated as speculative loss u/s 43(5) r.w.s 73."

4.6 Based on above, the Ld.AO passed assessment order under section 143(3) read with 144C(3) of the Act on 29/04/2013 making addition of Rs.74,38,200/- along with the adjustment proposed by the Ld.TPO.

4.7 On an appeal before the Ld.CIT(A), all other additions were deleted except for the Transfer Pricing adjustment proposed in respect of payments made to Home Centre LLC and RNA, towards consultancy.

Aggrieved by the addition made by Ld.CIT(A), assesee in appeal before us.

IT(TP)A No. 2333/Bang/2016 (Assessee Appeal)

5. Only issue argued by the Ld.AR for year under consideration arises out of following grounds:

"*2. The learned AO/ learned TPO/ learned CIT(A) erred in not appreciating the fact that an amount of Rs. 40,79,397 and Rs. 4,27,87,500 paid to its AEs, RNA Resource Group and Home Centre LLC, respectively, were on account of professional/ consultancy services which were received with corresponding tangible benefits.*

6. The learned AO/ learned TPO/ learned CIT(A) erred in not appreciating that the ALP for the payment made for professional/ consultancy services cannot be treated as 'NIL' while carrying out benchmarking analysis.

7. The learned AO/ learned TPO/ learned CIT(A) failed to examine the evidences for substantiating the claim that services were actually received by the Appellant.

8. The learned AO/ learned TPO/ learned CIT(A) erred in not acknowledging that the documentary evidences in the form of agreements, email correspondences and other supporting documents itself proves the necessity, reasonability and the corresponding tangible benefits accruing from the service received from its AE."

5.1 The Ld.AR submitted that **Ground no.1** is general in nature and therefore do not require any adjudication.

5.2 He submitted that the above grounds, relates to one issue, and that all other grounds are in support of the same. We are therefore restricting to the above reproduced grounds.

5.3 Brief facts are as under: Assessee during the year under consideration made following payments to RNA resources Ltd and Home Centre LLC:

Associated Enterprise	Particulars	Transaction
RNA Resources Group Ltd	Import of treated goods	21,14,53,768
	Professional services	14,79,397
Home Centre LLC	Professional services	4,27,87,500

5.4 The Ld.TPO proposed adjustment amounting to ₹ 4,68,66,897/- towards the professional services paid by assessee to RNA Resources Group Ltd., and Home Centre LLC

it was submitted by assessee that, the payment made to Home Centre LLC was towards consultancy of setting up of new stores and that the expenditure was capitalised in the books of account

forming part of leasehold improvements. It was also submitted that, assessee claimed depreciation on it. It was submitted that the services were necessary for the business operation of assessee

5.5 In respect of payments to RNA Resource Group Ltd, assessee submitted that, it was towards existing stores and that was claimed as revenue expenses.

5.6 The Ld.TPO held that, assessee could have received services from any other service providers, had it not been provided by the AE's. The Ld.AO thus considered the arms length to be at 'nil'.

5.7 The Ld.AR submitted that, the payments made to Home Centre LLC towards consultancy, was for setting up of new retail stores at various places in India. He also submitted that the same was capitalised in the books of account and depreciation was claimed on the same.

5.8 He then submitted that, payments made to RNA were towards existing stores, which was claimed as revenue expenses during the year under consideration.

5.9 The Ld.AR submitted that, this issue stands squarely covered by order dated 19/04/2021 passed by coordinate bench of this *Tribunal* for assessment in *2008-09 and 2010-11* in *ITA No. 2258/B/2016*. The Ld.AR relied on the arguments referred to therein as the facts are identical for year under consideration.

5.10. On the contrary, the Ld.DR submitted that, coordinate bench of this *Tribunal* in immediately preceding and succeeding assessment year recorded that the Ld.TPO considered same

transaction to be at arms length, whereas in the present facts Ld.TPO observed that assessee did not substantiate the services received and the benefit derived from such services. It is also observed by the Ld.TPO that from services rendered, no benefit was drawn by the assessee. It is also submitted that, the transfer pricing officer computed the ALP at "nil", and disallowed the expenses incurred towards alleged payments by assessee to the associated enterprises.

6. We have perused submissions advanced by both sides in light of records placed before us.

6.1 From the transfer pricing study, we note that, assessee aggregated the professional/consultancy services with the main business activity under TNMM. Admittedly, such expenses are incurred by assessee on year to year basis and that it is similar with the payments made in the preceding as well as succeeding assessment years. The succeeding and preceding assessment year, the Ld.TPO concluded that no adjustment is required under section 92CA of the act as the transaction was at ALP. However, the Ld.AO while passing assessment order disallowed the expenses under section 40A (2)/37 on the ground that they are excessive unreasonable and unrelated, which was deleted by the Ld.CIT(A).

6.2 It is a case of assessee that there is no distinguishing fact for year under consideration vis-à-vis assessment years 2008-09 and 2010-11, wherein identical international transaction was found to be at arms length.

6.3 It is argued by the Ld.DR that there was no need for assessee to incur these expenses as assessee could have carried out necessary services with any other person other than AE. The argument of the Ld.DR that facts in present case are different in present year as compared to assessment years 2008-09 & 2010-11 cannot be accepted. This *Tribunal* in preceding and subsequent years considered a situation where, the Ld.TPO held the international transaction to be at arms length. Whereas, in the present year, the Ld.TPO is disputing the rendition of services and the benefit that is alledged to be received by assessee.

6.4 Coordinate bench of this *Tribunal* decided the issue for *assessment a 2008-09 and 2010-11 (supra)* by observing as under:

> "*4. The assessee has made payment to its group / associate enterprises, namely, RNA Resources Group Limited (RNA) as aprofessional fees. For the assessment year 2008-2009, the amount paid was to the tune of Rs.76,66,432. For the assessment year 2010-2011 the amount paid as professional fees for stores set up (post set up) was Rs.63,09,804. The professional fees, it is claimed is in the nature of consultancy and were towards setting up of new stores and running the same after its set up. It is also stated that professional fees paid for setting up stores were capitalized in the books of account of the assessee and depreciation was claimed accordingly. As regards professional fees for post set up of stores (for running the store by RNA), the same is claimed by the assessee as revenue expenditure. For rendering of professional services, a consultancy agreement was executed between the assessee and RNA on 15.12.2004.*
>
> *4.1 The Assessing Officer for assessment years 2008-2009 and 2010-2011 disallowed the professional fees paid by the assessee to RNA by stating following reasons:-*
> *(i) The payments made to RNA were unreasonable and excessive and without legitimate need of business.*
> *(ii) The assessee has full-fledged management team with expertise needed to execute such operations and there was no such necessity to procure services of RNA.*

(iii) According to AO, the employee cost incurred and legal and professional charges paid during the year added to its overall conclusion of it being unreasonable and excessive.
(iv) Alternatively, for disallowance under section 37 of the Act, the AO concluded the payments to be not incurred exclusively for the purpose of business.

4.2 Aggrieved, the assessee preferred an appeal to the first appellate authority. The CIT(A) after analyzing the facts and legal position, directed the A.O. to delete the aforesaid disallowance. The findings of the CIT(A) is briefly summarized as follows:-

(i) The CIT(A) accepted the judicial precedents quoted by the assessee and stated that there cannot be unwarranted deviation when the international transactions are declared at arm's length price.

(ii) The AO has erroneously disallowed the aforesaid expense under section 40A(2) of the I.T.Act, without specifying what is excess or unreasonable in the payments made. The AO failed to bring on record fair market value analysis for making such disallowance.

(iii) In the context of section 37 of the I.T.Act, the AO had not explained as to how and why the aforesaid expense is not wholly and exclusively incurred for business purpose.

(iv) The aforesaid expense is a capital expenditure of the assessee and therefore, to this extent, the section 40A(2) of the Act / section 37 of the Act itself cannot be made applicable.

4.3Aggrieved by the order of the CIT(A), the Revenue has filed this appeal before the Tribunal. The learned Departmental Representative relied on two orders of the Bangalore Benches of the Tribunal in the case of (i) DRHL India Services (P.) Ltd. [2019] 102 taxmann.com 334 (Bang.Trib.), and (ii) Gemplus India (P.) Ltd. [2010] 3 taxmann.com 755 (Bang.Trib.), and contended that since evidence filed by the assessee did not substantiate the nature of services rendered by the holding company / associate enterprises, disallowance u/s 40A(2) / 37 of the I.T.Act is correct.

4.4 The learned AR, on the other hand, submitted a brief written submission essentially reiterating the submissions made before the Income Tax Authorities. The AR also filed a paper book comprising of judicial pronouncements, which were cited before the CIT(A). Apart from the judicial pronouncements cited before the CIT(A), the learned

AR also relied on the orders of the Bangalore Benches of the Tribunal in the case of (i) Manipal Health Systems Private Limited [ITA No.1667 and 1668/Bang/2016 – order dated 27.06.2018] and (ii)Cisco Systems Capital India Private Limited [IT(TP)A No.1558/Bang/ 2012 – order dated 19.09.2014], for the proposition that onus is on the A.O. to bring on record comparable cases to prove that payment made by the assessee is in excess of fair market value and provisions of section 40A(2) of the I.T.Act are not automatic. It was further stated by the learned AR that since in the facts of this case, the A.O. has not proved that the expenditure incurred is in excess of fair market value, provisions of section 40A(2) of the I.T.Act does not have application.

4.5 We have heard rival submissions and perused the material on record. In the instant case, the admitted facts are RNA is an associate enterprise of the assessee and professional fees paid by the assessee to RNA was considered by the assessee as an international transaction in its transfer pricing study and also disclosed in Form 3CEB. During the course of assessment proceedings for assessment years 2008-2009 and 2010-2011, the A.O. referred the said international transaction to the TPO for determining the arms length price. The TPO by orders for the assessment years 2008-2009 and 2010-2011, came to the conclusion that no adjustment is required as the impugned transaction is at arms length. The Assessing Officer has not relied on the order of the TPO and has gone ahead by disallowing the professional fees paid u/s 40A(2) of the I.T.Act. In the case of Oracle India Pvt. Ltd. v. ACIT reported in 337 ITR (AT) 103 (Del.), the Delhi Benches of the Tribunal has held that the Assessing Officer is required to compute the total income of the assessee in regard to the arms length price determined by the TPO. It was concluded by the Delhi Tribunal that when payments are already been accepted at arms length by the TPO, then there was no justification on the part of the A.O. to hold that the expenditure is unreasonable and invoke the provisions of section 40A(2) of the I.T.Act. Similar view has been held by the Bangalore Benches of the Tribunal in the case of Herbalife International India (P) Ltd. v. ACIT reported in (2016) 65 taxmann.com 143 (Bang.Trib.). The relevant finding of the Tribunal in this regard, reads as follow:-

> *"10.4 We have considered the rival submissions as well as the relevant material on record. This transaction of payment of administrative service fee has been declared by the assessee as international transaction and is also subjected to TP provisions of sec.92CA, however, the AO made an alternative addition by invoking the provisions of sec.40A(2) of the Act. The AO allowed only 2% of the turnover amounting to Rs.1,02,62,530/- and the balance of Rs.4,81,97,802/- has been disallowed under section 40A(2) of the Act. There is no dispute that the transaction has been*

reported by the assessee as international transaction which was also accepted by the AO and the TPO as an international transaction. Thus, once a particular transaction is admitted as international transaction then the same falls in the ambit of the provisions of X chapter of the Act which are specific provisions to deal with such transactions between the assessee and its AE. Therefore, once the transaction is undisputedly subject matter of Chapter X of the IT Act, then the other general provisions of the Act cannot be applied simultaneously. The AO, having considered the transaction being international transaction and making a reference to the TPO for determination of the ALP cannot go back to the provisions of sec.40A(2) for determining the reasonableness of the price paid by the assessee. Our attention was invited by the learned authorised representative of the assessee that for the assessment year 2001-02 to 2002-03 the payment in question was subjected to MAP and only 25% is charged to tax. Therefore, it was accepted by the department that the services were rendered by the AE to the assessee in India. We further note that the AO has not conducted any inquiry or investigation to find out the excessiveness of the payment made by the assessee to its AE."

4.5.1 Moreover, the AO has not compared the reasonableness of payment with respect to fair market value of services provided by RNA vis-à-vis outside parties. The Hon'ble Delhi High Court in the case of CIT v. Nestle India Ltd. reported in [2011] 11 taxmann.com 106 (Delhi) had held that "once the assessee has discharged initial onus, the burden would be shifted to the Revenue to show that the expense was unreasonable and excessive having regard to the legitimate needs of business based on material or evidence on record and that the assessee had made less than ordinary profits". The Bangalore Benches of the Tribunal in the case of Manipal Health Systems Private Limited (supra) had held that "onus is on the A.O. to bring on record comparable cases to prove that payment made by the assessee is in excess of fair market value and the provisions of section 40A(2) of the I.T.Act are not automatic". The relevant finding of the Tribunal reads as follow:-

"10. On perusal of the record, we also find that AO was not consistent in restricting the disallowances during the assessment year 2009-10 to 2011-12. In assessment year 2009-10, 2010-11 he made a disallowance of 33% of the total claim and in the impugned assessment year he made a disallowance of 50% without assigning any reasons. Whereas the assessee has placed substantial material on record to establish that various services were rendered by MEMGIIPL. We have also carefully perused the judgment referred to by the assessee and we find that it has been repeatedly held

through various judicial pronouncements that the onus is on the AO to bring on record the comparable cases to prove that payment made by the assessee is in excess of fair market value and hence the same in his opinion is found to be excessive or unreasonable. It was also held that provisions of section 40A(2) are not automatic and can be called into play only if the AO establishes that expenditure incurred is in fact in excess of fair market value. In the case of CIT v. Modi Revlon (Pvt.) Ltd. (supra), the Hon'ble Delhi High Court has held that in order to determine whether the payment is not sustainable, the AO has to first return a finding that payment made is excessive, under section 40A(2) of the Act. If it is found to be so, that AO has to determine what constitutes the fair market value of the services rendered and disallow the difference between what is claimed and what is such value determined fair market value. In the case of the DCIT Vs. Institute of planning and Management Pvt. Ltd., (supra) it was held that if incurring of expenses had not been doubted, there should be some evidence on the basis of which action of the AO would be held to be justified to show that expenses are unreasonable or excessive. In the case of DCIT Vs. Microtex Separators Ltd., (supra) the jurisdictional High Court has held that so long as there is no intention to evade tax and so long as the commission is not shocking, the said commission has to be accepted particularly in the light of the wordings of the section 40A(2) of the Act."

4.5.2 In view of the aforesaid reasoning, we are of the view that the A.O. has erred in invoking the provisions of section 40A(2) of the I.T.Act to disallow the claim of expense as excessive and not legitimate to the business needs, especially in view of the fact that the TPO, in its transfer pricing orders for assessment years 2008-2009 and 2010-2011, had held the impugned transaction at arms length.

4.5.3 The A.O. has also disallowed the said expenditure u/s 37 of the I.T.Act considering that it is not incurred wholly and exclusively for the purpose of business or profession. The Assessing Officer has disallowance u/s 37 of the I.T.Act without stating the reason as to why the expenditure is considered to be not incurred wholly and exclusively for the purpose of business. As per section 37 of the I.T.Act, expenditure laid out and expended wholly and exclusively for the purpose of business or profession shall be allowed as deduction while computing the business income. To qualify as a business expenditure, the following the conditions are to be satisfied :-

(i) expenditure must be revenue in nature;

(ii) expenditure should not be in the nature of capital expenditure or transfer expense;
(iii) expenditure should not be in the nature of fine or penalty;
(iv) expenditure should be expended wholly and exclusively for the purpose of business.

4.5.4 The assessee had entered into consultancy agreement dated 15.12.2004. The relevant clauses of the consultancy agreement are extracted in the assessment order and hence, the same is not reproduced. On perusal of the relevant clauses of the consultancy agreement, it is seen that clauses (a) to (f) are with regard to setting up of stores and necessary inputs to be given with regard to the same by RNA. Clauses (g) to (l) are with regard to running of the stores subsequent to the setting up by the RNA and providing inputs to the assessee for the same. Broadly, the services of RNA to assessee includes the following:-

(i) Advising on choosing locations;
(ii) Evaluating and advising on the technical and commercial aspects like profitability, return on investments etc.
(iii) Advising on the ambience, designing and set up of showrooms, display of hardware and products etc.
(iv) Sharing of knowledge on global trends, advices on sourcing of the products from global markets, advising on way to increase footfalls and other similar services.

4.5.5 RNA has rich experience in setting up, running of stores and other related matters. It is providing such inputs to the other group concerns world over. The A.O. has nowhere doubted the genuineness of the agreement, the retention of services as well as the fact of actual payment of professional fees. The A.O. has disallowed the payment merely because he considered that there was no necessity of incurring such expenses by stating that the assessee had full-fledged management team and well-equipped resources. The A.O. cannot take a place of the management of the company and decide from its own point of view, whether an expense has to be incurred or not. Merely because there is expert management and team and resources, it cannot be contended that the expenditure was not at all required. The Hon'ble Delhi High Court in the case of CIT v. Dalmia Cement (P.) Ltd. reported in [2002] 254 ITR 377 (Delhi) had held that "the jurisdiction of the revenue is confined to deciding reality of the expenditure, namely, whether the amount claimed as deduction was factually expended or laid down and whether it was wholly and exclusively for the purpose of the business. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was nexus between the expenditure and the

purpose of business, the revenue cannot justifiably claim to put itself in the armchair of a businessman or in the position of the board of directors and assume the said role to decide how much is a reasonable expenditure having regard to the circumstances of the case.....it is settled position in law that no businessman can be compelled to maximise his profits".

4.5.6 The above judgment of the Hon'ble Delhi High Court was confirmed by the Hon'ble Apex Court in the case reported in [2007] 288 ITR 1 (SC).

4.5.7 For the aforesaid reasoning and the judgments relied on, we are of the view that the A.O. is not correct in disallowing the expenditure also u/s 37 of the I.T.Act.

4.5.8 Now coming to the decision relied on by the learned DR, we are of the view that the above orders of Bangalore Bench of ITAT are distinguishable on facts. In the cases cited by the learned DR, the TPO had made adjustment to the arms length price, whereas, in the instant case, the TPO has accepted the international transaction at arms length and no adjustment was made. Therefore, the case laws cited by the learned DR has no application to the facts of the instant case. Hence, ground Nos. 2 and 3 of the Revenue are rejected."

6.5 This *Tribunal* dismissed Revenues appeal for assessment year 2008-09 and 2010-11 as the Ld.TPO therein accepted payments to be at arms length.

In the present facts of the case, the Ld.TPO held the ALP to be 'nil' for following reasons:

- payment for intragroup services could be treated at arms length only when it is proved substantially by the assesee that such services were actually received and further providing that such received services have benefited assesee.
- Nothing significant services were rendered by the associated enterprise which commensurate the payment of consultancy charges.

6.6 Before us, the Ld.AR submitted that, the consultancy agreement, specifies the scope of services rendered, which forms part of submissions before the Ld.CIT(A). Further, he submitted that, it is the same agreement and, services rendered by associated enterprises were same for year under consideration as well as assessment year 2008-09 and 2010-11. He submitted that assessee filed all relevant evidences/ documentation which could establish the necessity of services to be rendered by the associated enterprises. He referred to page 97-99 of paper book and page 81 to 88 of paper book wherein various submissions were made and advanced by assist. He also referred to page 135 to 237 of paper book wherein the rendition of services have been evidenced, which were not considered.

6.7 We note that the authorities below has not doubted the agreement for year under consideration. The reason for treating the ALP to be 'nil' was that, assessee did not prove substantially that services actually received. There are substantial evidences to prove necessity of services by the associated enterprises.

6.8 The Ld.AO/TPO has not considered the voluminous evidences filed by assessee. Further the Ld.TPO erred in holding the ALP to be 'nil' which is against OECD guidelines as well as Income tax Rules for computing arms length price of international transaction.

6.9 The Ld.TPO determined ALP at NIL by applying CUP, *vis-à-vis*, ALP determined by assessee at aggregate level by using TNMM. Ld.TPO held that, as there is no benefit from services rendered by

AE's, he determined ALP of international transaction at Nil, without carrying out any FAR analysis of intra-group services. This approach of Ld.TPO is not acceptable, as it is necessary to determine ALP of such transaction as per law. Further these services are more or less intangible in nature as the AE's are helping assessee to set up, run the store's and other related matters as per the company standards. In our view the Ld.TPO ignored the evidences filed by assessee. The Ld.TPO cannot consider ALP at 'NIL' and value of transaction has to be computed as per law.

Hon'ble Delhi High Court in case of *Cushman Wakefield Limited* reported in *46 taxmann.com 317* held that:

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/ 13 taxmann.com 82 (Mum.):

> *"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take*

benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

6.10. We therefore remand this issue back to the Ld.TPO/AO. The Ld.TPO to consider all the evidences filed by assessee in the light of observations by the Ld.TPO in preceding and subsequent assessment years. The Ld.TPO/AO shall analyses issue in the light of observations by coordinate bench of this *Tribunal* in *assessee's own case for assessment year 2008-09 and 2010-11 (supra)* and compute the ALP of international transactions with AE's in accordance with law.

Needless to say that proper opportunity of being almost wanted to assess in accordance with law.

According with this ground raised by assessee stands allowed for statistical purposes.

The result appeal filed by assist in for assessment year 2009-10 stands allowed for statistical purposes.

Assessment year 2011-12

ITA No.2334/B/2016(Assessee Appeal)

7. Only issue that has been raised by assessee in this appeal falls out of the following ground:

> I"*1. The learned Commissioner of Income-tax (Appeals) ["the learned CIT(A)"] has erred in upholding disallowance to the extent of 50% of payment made to Home Centre LLC ["AE"] amounting to Rs. 2,987,738 in an ad-hoc manner without providing any comparable price and any basis for estimating the expense to be excessive and unreasonable.*
>
> *2. The learned CIT(A) has erred in contending that the aforesaid payments were unreasonable and excessive and without legitimate need of business without appreciating the fact that the Appellant has duly submitted the necessity as well as reasonability of such payments.*
>
> *3. The learned CIT(A) erred in not appreciating that, the professional/ consultancy services are aggregated with the main business activity of the Appellant under Transactional Net Margin Method ["TNMM"] and are tested by transfer pricing analysis and hence disallowance under section 40A(2) of the Act is bad in law.*
>
> *4. The learned CIT(A) erred in disregarding the documentary evidences in the form of agreements, email correspondences and other supporting documents which proves the necessity, reasonability and the corresponding tangible benefits accruing from the service received from its AE.*"

7.1 Ground No.I: All the sub grounds relates to the disallowance made by the Ld.AO u/s.40A(2) in respect of payment made to Home center LLC towards consultance/professional fees.

It is noted that this ground is identical to the ground discussed hereinabove in assessee's appeal for assessment year 2009-10. The Ld.AR brought to our notice the observation by the Ld.CIT(A) that, the disallowance under section 40A(2) should be based on well-informed, reasoned and fair working and not only on market rate/benefit test but even the compatibility test. However the Ld.CIT(A) restricted the disallowance to 50% of the expenses on ad hoc basis.

7.2 The Ld.AR relied on observations of coordinate bench of this *Tribunal* in *assessee's own case for assessment year 2008-09 and 2010-11 (supra).*

Whereas the Ld.DR relied on arguments recorded hereinabove in identical ground for assessment year 2009-10.

7.3 We have perused submissions advanced by both sides in light of records placed before us.

7.4 It is noted that for year under consideration the Ld.AO invoked provisions of section 40(A)(2) disallowed the entire expenses. We note that on one hand the Ld.CIT(A) is observing the casual manner in which the disallowance is made, and on the other hand he is confirming disallowance to the extent of 50% on adhoc basis.

We are not in agreement with such ways of the Ld.CIT(A) and the Ld.TPO.

7.5 We have remanded identical issue to the Ld.TPO/AO while considering assessee's appeal for assessment year 2009-10. The facts for year under consideration is same and the issue of

disallowance being identical, we remand this issue to the Ld.TPO/AO. The Ld.TPO/AO shall verify the details *mutatis mutandis* as observed by us for assessment year 2009-10.

Accordingly, this ground raised by assessee stands allowed for statistical purposes.

8. Ground No.II: Assessee alleges against disallowance made towards purchases that were considered to be bogus.

8.1 During the year under consideration, the assessee claimed purchases made from Mahavir Corporation in its return of income amounting to ₹ 3,52,654/-. Ld.AO observe that the purchases made were certain consumables like chairs, tables, promotional items, TV sets etc., for Mumbai and Pune store's. The Ld.AO disallowed the expenses based on information received from the Maharashtra VAT department regarding non genuine/bogus bills being issued by a person under the name and style Mahavir Corporation.

Aggrieved by the addition made, assessee preferred appeal before the Ld.CIT(A).

9. The Ld.CIT(A) upheld the disallowance by observing as under:

> "*7.3. The observations findings of the AO are based on formal communication received from the VAT department of state of Maharashtra. The seller namely M/s Mahavir Corporation has clearly admitted to having indulged in large-scale sales, without-actual delivery of goods. The Assessee, has accepted that, certain transactions have been entered with the above said party in a bona-fide belief that, the PAN/TAN particulars were genuine. It is clear that, the supplier of goods to the appellant has resorted to certain tax-fraud.*
>
> *The Assessee's plea to the extent that, it may not have been aware of the seller's antecedents is acceptable, as it would not be possible to verify each supplier, when large-scale purchases are involved. However, at the same time it is incumbent upon the assessee to*

undertake due-diligence withregard to basic verification of its trading partners. Once it has been held that, sales in the hands of supplier e.g. M/s Mahavir Corporation are bogus, it is only logical to hold that, commensurate purchases made by the Appellant, to that extent are either non-verifiable or tax-defaulted. In the facts and circumstances of the present case, it is held that, even if, the Appellant entered into purchase transactions with M/s Mahavir Corporation, in a bona-fide manner, as part of its routine-purchase activity, what has been held as bogus sale in the case of M/s Mahavir Corporation has to be also treated as bogus purchases in the hands of the Assessee. The appellant has produced certain documents relating to invoices payment details before the AO. However, the proof of physical delivery including transportation receipts, have not been produced even during the current appeal proceedings. In these facts and circumstances, the disallowance of Rs. 3,52,654/- is upheld. The Assessee's grounds of appeal are accordingly dismissed."

Aggrieved by the disallowance assessee is in appeal before us.

10. The Ld.AR submitted that, the purchases made by assessee were genuine and that they have physically received the goods from Mahavir Corporation. The Ld.AR submitted that, tax invoices were received by assessee for which payments were made. It is also submitted that, the purchases made by assessee from Mahavir Corporation was genuine and on bonafide belief.

10.1 On the contrary the Ld.DR relied on observations of the Ld.CIT(A).

10.2 We have perused submissions advanced by both sides in light of records placed before us.

10.3 We note that the Ld.CIT(A) accepted the transaction undertaken by assessee to be under bona fide belief. However, the Ld.CIT(A) upheld the addition only for the reason that the proof of physical delivery including transportation receipt were not produced by assessee. It is also a admitted position that assessee could not

have undertake any basic verification of its trading partner before entering into a transaction. Merely because Maharashtra bat department has identified Mahavira Corporation to be issuing non-genuine/bogus bills, the present transaction cannot be doubted.

It is not the case of revenue that the goods were not received by assessee and that payments were not made by assessee on such purchases. There is nothing to corroborate the information received from Maharashtra VAT department. Under such circumstances the purchases made by assessee cannot be treated to be bogus on surprises.

10.4 We therefore direct the Ld.AO to delete the addition in the hand of assessee.

Accordingly this ground raised by assessee stands allowed.

ITA No.2260/B/2016(Revenue Appeal)

Grounds alleged by Revenue are as under:

> "*1. The Order of the Ld. CIT (A), in so far as it is prejudicial to the interest of the Revenue, is opposed to law and the fact and circumstances of the case.*
>
> *2. On facts of the case, whether the Ld. CIT (A) is right in deleting the impugned disallowance of professional fee of Rs. 29,87,738/- being 50% of the total disallowance of Rs. 59,75,476/- without any justification.*
>
> *3. On facts of the case, whether the Ld. CIT (A) is right in deleting the disallowance made of premium on forward cover u/s 43(5) treating it as speculative loss which is capital in nature and allowing the appeal of the assessee.*
>
> *4. On facts of the case, whether the Ld. CIT (A) is right in allowing the appeal of the assessee on the issues of belated payment s made towards PF/ESI despite the fact that these payments were made beyond the due date specified by the respective Act / Laws. This was*

misconstrued as the said payments e=were made within the due dates of 139(1) and hence allowable.

5. On facts of the case, whether the Ld. CIT (A) is right in allowing the appeal of the assessee despite the fact that the issue of fresh claims for relief / allowances was not taken up in the original return of income. Further, the assessee had not availed the revising option of return of income, though there was ample time to do so.

6. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT (A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

7. The appellant craves leave to add, alter, amend and / or delete any of the grounds that may be urged."

11. The Revenue is in appeal for assessment year 2011-12, on issues that were allowed by the Ld.CIT(A).

11.1 Ground No.2 of Revenue appeal is challenging 50% addition deleted by the Ld.CIT(A) in addition made under section 40A(2).

As we have remitted the identical issue in assessee's appeal, for assessment year 2011-12 with necessary direction. The Ld.TPO/AO shall verify the entire issue in light of evidences filed in accordance with law. Ld.TPO/AO shall verify the details *mutatis mutandis* as observed by us for assessment year 2009-10.

Accordingly, this ground raised by revenue stands allowed for statistical purposes.

12. Ground no.3 in revenue appeal is challenging the addition deleted under section 43(5) r.w.section 73 of the Act.

12.1 It is submitted that assessee imported certain trade merchandise from parties located outside India and the payments were to be made to in foreign currencies on specified dates in

future. Assessees in order to secure itself from adverse foreign exchange fluctuation bound the currency hedging contract with state Bank of India and Indian overseas Bank as per, FEMA guidelines. During the year assessee incurred expenses of premium on forward cover amounting to Rs.99,55,691/.

12.2 The Ld.AO disallowed the same under section 43(5) of the Act read with 73 of the Act, by stating that it is a speculation transaction, and that it doesn't fall within any of the exclusions under section 43(5) of the Act.

Aggrieved by the order of Ld.AO, assessee preferred appeal before the Ld.CIT(A).

The Ld.CIT(A) deleted the disallowance by observing as under:

> "*6.3. The observations / findings of the AO and submissions of the Appellant have been carefully perused. The judicial position on the issue at hand has been analysed. The primary argument of the AO is that, the since the final settlement of the forward contracts, happened on currency, even though admittedly on trading items and working loan, the same had to be deemed as speculative. The Assessee on the other hand, has contended that, the transactions under reference, fall 'abinitio' out of the ambit of speculative-character, as per law and as held by several courts, in identical facts & circumstances.*
>
> *-The Appellant has contended that, the impugned forward-contracts were entered to hedge the import payments & working capital loans, in the attempt to secure from foreign exchange risk, which is found to be in the course of its routine business activity.*
>
> *-The consideration being paid to the Bank is typically in the nature of Bank-charges, which therefore essentially assume a revenue-character, in the present-circumstances.*
>
> *The Assessee has disputed the AO's stand that, the present transactions would fall under the 'speculative' definition in terms of section 43(5) of the I.T. Act. It is pointed out that, out of the conditionalities specified in section 43(5) for a transaction to be considered speculative, several of these are not met in the present*

case. It is submitted that, a forex-cover being in nature of a contract for sale, thus the first characteristic as per section 43(5) is met in the present situation. It is contended that, the impugned purchases should be of shares /stocks or commodity, to constitute a speculative transactions as per section 43(5). Since, in the present case, forex-cover is not a contract for purchase of shares / stock or commodity, but towards foreign currency, the definition u/s 43(5) would not apply to the present case.

- In respect of the definition I meaning of commodity and in respect of the legality of AO's action, the Appellant has placed reliance on several judicial precedents which are found to be in favour of the Assessee's stand.

These include: The Delhi Bench of ITAT in the case of Munjal Showa Ltd Vs DCIT; Hon'ble Calcutta High Court in the case of CIT Vs Britannia Industries Ltd; Hon'ble Supreme Court in the case of ACIT Vs EleconEngg. Co. Ltd; Hon'ble Gujarat High Court in the case of CIT Vs Friends and Friends Shipping (P) Ltd; Hon'ble Bombay High Court in the case of CIT Vs BadridasGauridu (P) Ltd.

In background of the above detailed discussion, facts & circumstances of the present case and judicial position on the subject, the AO's action of disallowing Rs. 95,55,691/- on account of premium on forward-cover, cannot be upheld. The said disallowance is accordingly directed to be deleted."

Aggrieved by the order of Ld.CIT(A) revenue is in appeal before us.

12.3 It is submitted that identical issue is decided by coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 and 2010-11 by observing as under:

"*5.5 We have heard rival submissions and perused the material on record. The forward contracts were entered into mainly to hedge the import payments and working capital loans repayment which is in the ordinary course of trade or business of the assessee. The hedging contracts are in the nature of foreign exchange contract to purchase foreign exchange on a specified future date at a predetermined date. The bankers levied premium for entering into such forward contract. These are in the nature of actual charges levied by the bankers. It is nothing but bank charges which is purely revenue in nature. The said expenditure is incurred to secure the assessee's business from foreign exchange fluctuation risk. In case the assessee would not have taken*

the forward contract to cover itself from fluctuation risk, it can lead to making higher payment of imports and incurring huge losses, which could result in lesser profit. The Hon'ble Calcutta High Court in the case of CIT v. Britannia Industries Ltd. reported in [2015] 376 ITR 299 (Calcutta) had held that "consideration paid by the assessee to the authorized dealer of foreign exchange, which is the bank in this case, in order to obtain protection from fluctuation of foreign exchange rates is a revenue expenditure".

5.6As per section 43(5) of the I.T.Act, speculative transaction means a transaction in which the contract for purchase or sale of any commodity including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. The definition also provides for certain exceptions. A speculative transaction is characterized by four features, namely -

(i) it is a contract for purchase or sale;
(ii) The purchase or sale should be of a share, stock or commodity;
(iii) There should be periodical or ultimate settlement of the contract;
(iv) Settlement to be otherwise than by actual delivery or transfer.

5.7 In order to attract the definition of a speculative transaction, all the characteristics mentioned in the said definition is required to be satisfied. Definition of a speculative transaction vis-a-vis forward cover are as follows:-

(i)A forex cover is a contract for purchase or sale and thus the first characteristic as per section 43(5) is satisfied. The third and fourth characteristic of periodic and ultimate settlement and settlement other than by actual delivery would be satisfied in a forex cover transaction.

(ii) The second characteristic is that the purchase should be of a share, or stock or commodity. A forex cover is not a contract for the purchase of a share or a stock. In a forex cover, the purchase or sale is towards foreign currency. Therefore it has to be seen whether foreign currency can be equated with the term "commodity" such that its purchase or sale triggers the definition of a speculative transaction under the Act.

5.8 The term "commodity" has not been defined under the Income Tax Act Black's Law Dictionary (8th Edition) defines the term "commodity" as an article of trade or commerce; the term embraces only tangible goods, such as products or merchandise, as

distinguished from services; an economic good, especially a raw material or an agricultural product.

5.9 The other definitions include:

(i) Articles of commerce
(ii) Anything movable which is bought and sold
(iii) A raw material that can be sold
(iv) An article of trade or commerce, especially an agricultural or mining product that can be processed and resold
(v) Reasonably homogenous good or material bought and sold freely as an article of commerce. Commodities include agricultural products, fuels, metals, etc., and are traded in bulk on a commodity exchange or on spot market.

5.10 The Delhi Bench of ITAT in the case of Munjal Showa Ltd. v. DCIT, has held as under:

"Foreign currency or any currency is neither commodity nor shares. The Sale of Goods Act specifically excludes cash from the definition of goods. Besides, no person other than authorised dealers and money changers are allowed in India to trade in foreign currency, much less speculate. S. 8 of the Foreign Exchange Regulations Act, 1973, provides that except with prior general or special permission of the RBI, no person other than an authorised dealer shall purchase, acquire, borrow or sell foreign currency. In fact, prior to the LERMS, residents in India were not even permitted to cancel forward contracts. The presumption of any speculative transaction is, therefore, directly rebutted in view of the legal impossibility and in view of the fact that foreign currency was neither commodity nor shares. "

5.11 Based on the above, foreign currency does not fall within the purview of the term "commodity" and hence this characteristic of a speculative transaction is not satisfied. Since, the definition of speculative transaction itself is not applicable to the assessee's case as all the conditions were not satisfied, treating the transaction as speculative in nature is not sustainable in law. Therefore, we hold that the CIT(A) is correct in deleting the disallowance of premium on forward contract and no interference is called for. It is ordered accordingly."

12.4 Admittedly, this is a recurring issue and facts have not been disputed by the revenue for year under consideration. Further nothing contradictory is placed on record by the revenue, to deviate form the above view. Respectfully following the same, we do not find

any infirmity in the view taken by the Ld.CIT(A), and the same is upheld.

Accordingly this ground raised by revenue stands dismissed.

13. Ground no. 4 in Revenue's appeal is regarding claims not made in the returns but allowed by Ld.CIT(A).

13.1 The Ld.AO observed that assessee remitted for employees contribution to provident fund and employees State insurance amounting to ₹ 8,85,369/- after the date. He thus disallowed the expenses under section 43B of the Act.

Aggrieved by the disallowance, assessee preferred appeal before the Ld.CIT(A).

13.2 The Ld.CIT(A) observed that though the remittance were delayed, the same was paid within due date mentioned under section 139 of the Act. The Ld.CIT(A) deleted the disallowance made by the Ld.AO.

Aggrieved by the view taken by the Ld.CIT(A) revenues in appeal for us now.

14. The Ld.DR pleased reliance on orders passed by the Ld.AO.

14.1 The Ld.AR submitted that on the *Hon'ble Karnataka High Court* in case of *Sabri Enterprises and Ors.* reported in *298 ITR 141* and *Essea Teraoka(P.) Ltd* reported in *(2014) 43 taxman.com 33* has held that contributions made by assessee to provident fund and employees State insurance are allowable deductions to assessee even though it is not made in the stipulated period as contemplated under the provisions of section 36(1)(va) of the act, but the same

has been paid on or before the due date for punishing the return of income as per section 139(1) of the Act.

14.2 We have produced submissions advanced sides in light of records placed before us.

Hon'ble Karnataka High Court in case of *Essea Teraok (supra)* held as under:

> *"19. From bare perusal of sub-para (1) of paragraph 30, it is clear that the word contribution is used not only to mean contribution of the employer but also contribution to be made on behalf of the member employed by the employer directly.*
>
> *20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provide d in sub- para(1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and de posit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word contribution' used in Clause (b) of Section 43-B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-section(1) of Section 139 of the IT Act is made, the employer is entitled for deduction".*

14.3 The law stood during the relevant were under consideration, Respectfully following decision of *Hon'ble, Karnataka High Court*, we do not find any infirmity in the view taken by the Ld.CIT(A) and the same is upheld.

Accordingly this ground respectively stands dismissed.

15. Ground No.5 is regarding claims not made in the return allowed by the Ld.CIT(A)

It is a case of revenue that the Ld.CIT(A) considered certain issues which were not part of the original return filed processing or any revised return that was filed during assessment proceedings.

The Ld.AO submitted that assess had taken assets on finances and capitalized the same in the books of account following Accounting Standard 9 on leases. It is submitted that assessee added back interest and depreciation expenses to profit and loss account and actual rentals accrued/paid were claimed as deduction.

Another issue considered by the Ld.CIT(A) was the employee stock option plan(ESOP) expenses.

15.1 It is submitted that assessee had allotted 50,000 shares to its employees during the year under consideration on exercising/vesting of rights by the said employees in the scheme of ESOP. It was submitted that as per Accounting Standard 15, assessee is required to create provision in this regard and that expenses will be allowed only when the rights are exercised/vested and shares are allotted to the employees.

15.2 It has been submitted that assessee added that provisions created during the year under consideration, however inadvertently missed to claim the actual expenses incurred on allotment of shares in its return of income, which assessee was eligible for deduction.

15.3 The Ld.AO rejected the claim of assessee on the ground that these claims are to be made by way of revised return of income.

On an appeal before the Ld.CIT(A), it was held that any claim based on the return can be claimes at appellate stage even in the absence of revised return. The Ld.CIT(A) placed reliance on judicial precedents in support of this view.

15.4 Aggrieved by the order of Ld.CIT(A) revenues in appeal before us now. The Ld.AR submitted that during the course of assessment proceedings they were these expenses were missed out while preparation and filing the return of income. It was submitted that *Hon'ble Supreme Court* in case of *Goetz India Ltd* reported in *284 ITR 323* held that, as an officer may not provide for fresh claims or may not provide for additional ground of relief during assessment proceedings, however the appellate authority may consider the fresh claim made by assessee before it.

16. On the contrary, the Ld.DR submitted that, no fresh cream can be considered unless they are part of the usual return filed versus the revised return. It has been submitted by the Ld.DR that the claims considered and allowed by the Ld.CIT(A) has not been part of the returns filed and, accordingly deserves to be dismissed.

16.1 We have perused submissions advanced of both sides in the light of records placed before us.

16.2 The restriction of considering fresh claim except by way of filing a revised return is cast only on and assessing officer. However there is no such embargo to consider the claim made by the assessee for the first time before the appellate authorities. We note that the Ld.CIT(A) directed the Ld.AO to consider the claim of assesssee which is in accordance with the ratio laid down by *Hon'ble Supreme Court* in case of *Goetz India Ltd (supra)*. Similar is the view by various other decisions of H*on'ble Supreme Court* and

High Courts. We therefore do not find any infirmity in the decision of the Ld.CIT(A).

16.3 We direct the Ld.AO to consider the claim of process in accordance with law by granting proper opportunity of being heard.

Accordingly this ground raised by revenue stands dismissed.

CO No. 20/B/2020(By assessee)

17. Assessee has filed this cross objection in support of CIT(A)'s decision in respect of 50% addition deleted under section 40A(2). As we have remanded entire issue to the Ld.TPO, the cross objection filed by assessee does not survive.

Accordingly cross objection dismissed as infructuous.

Assessment Year 2012-13

ITA No. 2826/B/2017(assessee Appeal)

18. Only issue that has been raised by assessee in this appeal falls out of the following ground:

> "*1. The Hon'ble Commissioner of Income-tax (Appeals) ["the Hon'ble CIT(A)"] has erred in upholding disallowance to the extent of 500/0 of payment made to Home Centre LLC ["AE"] amounting to Rs. 2,987,738 in an ad-hoc manner without providing any comparable price and any basis for estimating the expense to be excessive and unreasonable.*"

18.1 It is noted that all these grounds are relating to the same issue. It is also submitted that identical ground is discussed hereinabove in assessee's appeal for assessment year 2009-10 & 2011-12 hereinabove.

18.2 The Ld.AR submitted that for this year Ld.CIT(A) observed that, the disallowance under section 40A(2) should be based on

well-informed, reasoned and fed working and not only on market rate/benefit test but even the compatibility test.

18.3 He thus submitted that even after such observations the Ld.CIT(A) restricted the disallowance to 50% of the expenses on ad hoc basis. The Ld.AR relied on observations of coordinate bench of this *Tribunal* in *assessee's own case for assessment year 2008-09 and 2010-11 (supra)*.

18.4 Whereas the Ld.DR relied on arguments recorded hereinabove in identical ground for assessment year 2009-10.

18.5 We have perused submissions advanced by both sides in light of records placed before us.

18.6 It is noted that for your under consideration the Ld.AO removed provisions of section 40(A)(2) and also has held the ALP of the transaction to be at 'nil'. We note that on one hand the Ld.CIT(A) is observing the casual manner in which ALP of the transaction is considered to be at nil by the Ld.TPO, and on the other hand he is confirming disallowance to the extent of 50% on adhock basis.

18.7 We are not in agreement with both these ways of the Ld.CIT(A) and the Ld.TPO.

18.8 We have remanded the issue to the Ld.TPO/AO for assessment year 2009-10 & 2011-12. The facts for year under consideration is same and the issue of disallowance being identical, we remand this issue to the Ld.TPO/AO. The Ld.TPO/AO shall

verify the details *mutatis mutandis* as observed by us for assessment year 2009-10.

Accordingly, this ground raised by assessee stands allowed for statistical purposes.

ITA No.2473/B/2017(Revenue Appeal)

19. Ground No.1 is general in nature and therefore do not require any adjudication.

20. Ground No.2 of Revenue appeal is challenging 50% addition deleted by the Ld.CIT(A) in addition made under section 40A(2).

20.1 As we have remitted the issue in assessee's appeal, with necessaty direction, this issue also stands remanded to the Ld.TPO. The Ld.TPO shall verify the entire issue in light of evidences filed in accordance with law. Ld.TPO shall verify the details *mutatis mutandis* as observed by us for assessment year 2009-10 & 2011-12 hereinabove.

Accordingly, this ground raised by revenue stands allowed for statistical purposes.

21. Ground no.3 in revenue appeal is challenging the addition deleted under section 43(5) r.w. section 73 of the Act.

21.1 We have considered identical issues for AY 2011-12 hereinabove in revenue appeal. The observations therein are applicable *mutatis mutandis*.

Accordingly, this ground raised by revenue stands dismissed.

22. Ground No.4 is regarding claims not made in the return allowed by the Ld.CIT(A)

22.1 We have remanded identical issue to the Ld.AO by upholding the view taken by the Ld.CIT(A) regarding similar claim for assessment year 2011-12 herein above. Applying the same decision *mutatis mutandis*, we direct the Ld.AO to consider the claim of assessing in accordance with law by granting proper opportunity of hearing.

Accordingly this ground raised by revenue stands partly allowed.

CO No. 20/B/2020(By assessee)

23. Assessee has filed this cross objection in support of CIT(A)'s decision in respect of 50% addition deleted under section 40A(2). As we have remanded entire issue to the Ld.TPO, the cross objection filed by assessee does not survive.

Accordingly cross objection stands dismissed as infructuous.

In the results appeal filed by assessee for assessment year 2009-10 2011-12 and the 2012-13 stands allowed, cross objection filed by assessee for assessment year 2011-12 and 2012-13 stands dismissed as infructuous and appeals filed by revenue for assessment year 2011-12 and 2012-13 stands partly allowed.

Order pronounced in open court on 11th October, 2021.

Sd/-	Sd/-
(CHANDRA POOJARI)	**(BEENA PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 11th October, 2021.
/MS/

Copy to

1. The Appellant
2. The Respondent
3. CIT(A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore