

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
MS.KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA No.606/Mum/2020
(Assessment Year :2012-13)
ITA No.605/Mum/2020
(Assessment Year :2013-14)
&
IT(TP)A No.1254/Mum/2016
(Assessment Year :2011-12)**

M/s. Newedge Broker India Private Limited Peninsula Business Park Unit 1901, Tower A Ganpatrao Kadam Marg Lower Parel Mumbai – 400 013	Vs.	Deputy Commissioner of Income Tax Circle-4(2)(1) Aaykar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No.AACCN7443H		
(Appellant)	..	(Respondent)

Assessee by	Shri Niraj Sheth / Shri Sagar Shah
Revenue by	Shri Tejinder Pal Singh
Date of Hearing	01/04/2022
Date of Pronouncement	01/04/2022

आदेश / O R D E R

PER BENCH:

These appeals in ITA Nos.606/Mum/2020 & 605/Mum/2020 for A.Y.2012-13, 2013-2014 respectively arise out of the order by the Id. Commissioner of Income Tax (Appeals)-57, Mumbai in appeal No.CIT(A)-57/Arr.301/2019-20, CIT(A)-57/Arr.302/2019-20 dated 28/11/2019 (Id.

CIT(A) in short) against the order of assessment passed u/s.143(3), 143(3) r.w.s.144C of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/05/2016 & 09/02/2017 by the Id. Dy. Commissioner of Income Tax, Circle-4(2)(1), Mumbai (hereinafter referred to as Id. AO).

IT(TP)A No.1254/Mum/2016 (A.Y.2011-12)

This appeal in ITA No.1254/Mum/2016 for A.Y.2011-12 preferred by the order against the final assessment order passed by the Assessing Officer dated 31/12/2015 u/s.143(3) r.w.s. 144C of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 24/11/2015 for the A.Y.2011-12.

1.1. Identical issues are involved in all these appeals and hence, they are taken up together and disposed of by this common order for the sake of convenience.

1.2. With the consent of both the parties, the appeal for A.Y.2011-12 is taken as the lead case and the decision rendered thereon would apply with equal force for other two assessment years also except with variance in figures.

2. The only effective issue to be decided in this appeal for the A.Y.2011-12 is as to whether the Id.TPO was justified in making transfer pricing adjustment in the sum of Rs.4,86,97,220/- in respect of Intragroup services filed by the assessee from its AE in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. We find that the assessee is engaged in providing broking services for financial derivatives and cash equities to Foreign Institutional Investors (FIIs). During the year under consideration, Newedge India has entered into international transactions with its Associated Enterprises (AEs) namely Newedge Group S.A. Paris, Newedge Facilities Management inc, Newedge Group (Hong Kong Branch) and Societe Generale Bank, Mumbai Branch (hereafter referred to as " AEs". The assessee had international transactions with the following AEs during the year under consideration:-

- M/s. Newedge Group S.A. Paris
- M/s. Newedge Facilities Management inc.
- M/s. Newedge Group (Hong Kong Branch)
- M/s. Societe General Bank, Mumbai Branch

3.1. The list of international transactions carried out by the assessee with its Associated Enterprises (AEs) during the year under consideration are as follows:-

S.No.	Nature of Transaction	F.Y.2010-11 (Rs.)
1.	Provision of Booking Services	51,47,760
2.	Professional Fees-Regional Management	3,06,00,651
3.	Bank Charges	15,156
4.	Receipt of interest on fixed deposit	27,19,132
5.	Payment of Interest on Loan	3,68,653
6.	Insurance Cost allocation	(1,221)
7.	Software expenses allocation	15,41,547
8.	Professional fees-Global support services	59,89,703
9.	Professional Fees-Corporate Center Services	87,81,497

10.	Professional Fees-Data Processing, Technical Assistance and related services	17,83,822
11.	Issue of compulsorily and fully convertible preference shares	8,77,31,000

3.2. Out of the above, the international transactions in respect of intragroup services are reflected in Sr.No.2,7,8,9 & 10 above. It may be noted that the international transactions carried out in respect of other items were accepted to be at arm's length by the Id. TPO.

3.3. The Id. TPO proceeded to determine the arm's length price of the international transaction representing the payments made for the following services:-

- (i) Professional fees – Regional Management -Rs.3,06,00,651/-
- (ii) Software Expenses Allocation - Rs.15,41,547/-
- (iii) Professional Fees-Global Support Services - Rs.59,89,703/-
- (iv) Professional Fees- Corporate Centre Services-Rs.87,81,497/-
- (v) Professional Fees-Data Processing,
Technical Assistance and related services - Rs.17,83,822/-

3.4. **Professional Fees-Regional Management (Rs.3,06,00,651/-)**

3.4.1. During the year under consideration, the assessee has claimed that it has received management services from Newedge HK for which it has paid Rs.3,06,00,651/- to its AE, The assessee submitted that the services broadly include providing assistance in respect of the following areas: Regional E solutions; Regional IT; Regional Legal and compliance; Regional Risk and Credit & Regional Operational Risk Management; Regional Sales Facilitation Group; Regional Finance; Regional Internal

Audit; Regional HR Services; Regional Business Logistics; Regional Management services ;Regional Project Management; and Regional Communication.

3.4.2. It was submitted that, for providing these services, Newedge HK receives compensation from the assessee on cost plus 5% basis. The Assessee has selected Transactional Net Margin Method for benchmarking the international transaction. The Assessee in its transfer pricing study has undertaken a comparable search has been undertaken to determine the margin earned by independent comparable companies providing functionally similar services.

3.4.3. During the course of the hearing, the assessee was also asked to provide the single year updated cost plus mark-up working of the comparable companies selected by the assessee in its transfer pricing study report. The same was provided vide submission dated 13 November 2014 as Annexure 2, single year margin of the comparable companies worked out to 5.18% as against the mark-up earned by the AE of 5% and accordingly.

3.4.4 Further, during the course of hearing, the assessee was asked to submit the brief description of the services along with the proof for benefits availed by the assessee for which the above payment is made to the AE. In this relation, the assessee vide its submission dated 9 December 2014 has submitted the brief description of the above mentioned services and stated that the assessee has not only availed the aforesaid services but also benefited from said services. The assessee has provided some invoices and its cost allocation working for arriving at the figures reported in Form 3CEB.

3.4.5 All thy submissions of the assessee in this regard were duly considered and verified. However, on perusal of the same it is noticed that the assessee has not been able to conclusively prove that it has received benefits and that cost allocation done is correct Thus, the reply of assessee is not acceptable in this regard and hence rejected. In this regard, the ALP determined by the TPO is discussed in subsequent paragraph below.

3.5. Professional Fees - Globai Support Services Value-Rs.59,89,703/- ; Professional Fees-Corporate Centre Services .Value-Rs.87,81,497/-

3.5.1. The assessee submitted that it leverages on the wide scope of services rendered by overseas AE i.e. Newedge Paris to be available to the group members, in particular, IT, administrative, technical, financial and commercial services, legal and compliance, human resources etc. The assessee contended that cost of providing these services is initially borne by Newedge Paris and that such costs are subsequently allocated to all the group entities availing such services using an appropriate allocation key. As a part of the Newedge Group, assessee claims to have received a host of benefits from availment of such services for which it has been charged the operating cost of the concerned department. The assessee further claims that each department's costs are allocated to all the group companies, including assessee, on basis ot appropriate allocation keys. The assessee attempted to give detailed description of services received by the assessee along with the appropriate allocation key vide Annexure 5

of its submission dated 9 December 2014, The assessee further stated that the services are in the nature of:

- IT Global Support & OPS: As per assessee, the services under this category broadly pertains to global IT security, global IT finance & business management and executive management for global data management technologies. The assessee claimed that the cost under this category has been allocated on the basis of Net Banking Income/ revenue ("NBI") and headcount.
- Risks (Systems): As per assessee's claim, the services under this category broadly pertains to conception and upgrading of the systems designed to calculate the risks associated with the clients positions, conception and design of quantitative models of risk measurement on the instruments traded, permanent: updating of the market data feeding the risks models, computation of the parameters (VaRand Stress) required to cross-margin client (Hedge Funds and Professional Trading Groups) on deposits and margin calls. The assessee claimed that cost -- under this category has been allocated on the basis of NBI.
- E-solutions: As per assessee, the services under this category broadly pertains to 24 hours global support by staff operating 24x6 with coordination between regions to provide seamless support to clients globally for trading on any of the 46- over markets, in particular, trade mitigation, functional application support and monitoring, and testing for all global electronic trading systems. The assessee claimed that cost under this category has been allocated on the basis of NBI and headcount.

- Finance (Information Systems): As per assesses (he services under this category broadly pertains to 24-hour global support to accounting and treasury users on systems, including daily administration of systems and ad hoc solution development designing, building, and supporting daily general ledger interfaces for regional needs as well as global GL reporting, designing, building, and supporting global data mart for all accounting transactions - Build and enforce global standards on all systems and internal development in partnership with global IT, etc The assessee claimed that cost under this category has been allocated on the basis of NBI and local expenses.

- Sales Facilitation Group (SFG): As per assesses, the services under this category broadly pertains to coordinating global sales counterparty risk requests, setting the global policies for documentation and account openings and ensuring adherence to the global standards, tracking and reporting of global cross selling initiatives and non-cross sell synergies, coordinating and overseeing payout standards as well as intercompany charges, etc. The assessee claimed that cost under this category has been allocated on the basis of NBI.

Corporate Centre Service

- Management: As per assessee, the services pertaining to strategic steering of the business at group level and entity level representation with head office regulators and local regulators, strategic arbitrage on provision of funding of the business activities, regulatory capital and .4M& strategic relationship with fund providers (investors, banks, clients), overall marketing of fhe group's and the entities' business and road shows are included under this category. The assessee claimed that the charges

under this category have been allocated using NBI as appropriate allocation key.

- **Audit:** As per assessee, the services included under this category are definition of audit policies, methodologies and professional training of internal auditors, ratification of Internal Audit methodological principles of the Service, beneficiaries in compliance with local regulations, definition of the ongoing methodological training of Internal Audit staff; incorporation of one or several members of the Internal Audit unit in Group, Internal Audit missions covering a given entity's area, or appointment of one or more Group Internal Audit officers to participate in missions carried out by a local Internal Audit unit, etc. The assessee claimed that cost under this category has been allocated on the basis of NBI and local expenses.
- **Finance:** As per assessee, the services pertaining to strategic planning for and financing of the Service Beneficiaries' activities, in the context of such arrangements for the Group as a whole, Supervision and monitoring of regulatory ratios and reporting to regulators. Tax assistance, Assistance in accounting and financial control, Assistance in making contacts with local banks, Assistance in insurance management, including appropriate Group insurance arrangements, etc.. are included in Finance, The assessee claimed that cost under this category has been allocated on the basis of NBI and local expenses.
- **Communication:** As per assessee, it includes developing strategic communication, brand development and advertising policy, external communications and press relations, internal communications, Assisting in the development of strategic communications plans for the service beneficiary, developing methods, standards and quality requirements for

a good execution of services rendered to the clients, coordination with the other entities of the Newedge Group, The assessee claimed that each entity is charged on the basis of NBL

- **Human Resources:** As per assessee, the services pertains to definition of Group-wide human resources policies and standards, organising and recruiting managers, learning and developing (training of managers and personnel), compensation and benefits (assistance in the remuneration system). Labour relations and group social policy and assistance in the management of employees' careers are included in Human resources. The assessee claimed that each entity is charged on the basis of headcount
- **Integration:** As per assessee, the services under this category pertains to organization of, support and assistance to the integration effort of the legacy businesses, steering of the Service Beneficiaries' integration teams across functions and regions, assistance to Service Beneficiaries senior managers and Newedge staff to deal with integration projects, monitoring of the integration efforts outsourced to external consultants, design and implementation of the "Roadmap" program: monitoring and supervision of all individual local and functional plans, design and follow up of time tables for the investments, the harmonization of the organization, processes and tools etc. The assessee claimed that cost under this category has been allocated on, the basis of NBI and local expenses.
- **Legal & Compliance:** As per assessee, the services under this category pertains to defining legal policy and standards for the Group entities, implementation of information systems to centralise the data required for the valuation of counterparty, market country and operational risks, preparation of risk management accounts and risk indicators,

coordinating Risk Representatives, monitoring of operational risks and implementation of ultimate level accounting controls. The assessee claimed that cost under this category has been allocated on the basis of NBI.

- IT: As per assessee, the services under this category pertains to Strategic steering of IT infrastructure and services at Group level and entity level, strategic steering computer engineering and technology, strategic steering of telecommunications resources, development monitoring and coordination of IT projects. The assessee claimed that cost under this category has been allocated on the basis of NB1 and headcount.

- Risks: As per assessee, the services under tills category broadly pertains to conception and upgrading of the systems designed to calculate the risks associated with the clients positions, conception and design of quantitative models of risk measurement on the instruments traded, permanent updating of the market data feeding the risks models, computation of the parameters (VaR and Stress) required to cross-margin clients (Hedge Funds and Professional Trading Groups) on deposits and margin calls. The assessee claimed that cost under this category has been allocated on the basis of NBI.

3.5.1. Further, during the course of assessment, the assessee was asked to submit the brief description of the services along with the proof for benefits availed by the assessee for which the above payment is made to the AE. In this relation, the assessee has submitted the brief description of the above mentioned services as mentioned above and stated that the assessee has not only availed the aforesaid services but also benefited

from said services. Also, the assessee claimed that all the allocations above are based on the actual cost incurred by AEs and does not include any mark-up thereon. The assessee has provided few invoices and cost allocation working for arriving at the figures reported in Form 3CEB vide Annexure 6 of submission dated 09/12/2014.

3.5.2. The Id. TPO observed that all the submissions of the assessee in this regard were duly considered and verified. However, he concluded that the assessee has not been able to conclusively prove that it has received benefits and that cost allocation done is correct. Thus, the reply of assessee is not acceptable in this regard and hence rejected. In this regard, the ALP determined by the Id. TPO is discussed in subsequent paragraph below.

3.6. Software Expenses Allocation Value – Rs. 15,41,547/-

The Transfer Pricing study report of the assessee stated that during the year. Newedge HK and Newedge Facilities Management Inc. ("Newedge US") has allocated software and other related cost to the Assessee. The assessee claimed that the software cost pertains to Citrix server enterprise edition licenses; customization charges for GL application; installation charges of Sun System; maintenance charges for Sun System; professional fees, installation and project setup cost for NSE FNO & Equity; etc. The assessee further claimed that the costs 'incurred by the AEs and allocated to group entities are the actual expenses charged by third parties from whom the services have been received by the AEs, The assessee also claimed that these costs are allocated by the AEs to the Newedge group companies without any mark-up and the costs are either directly allocated or are based on appropriate allocation key such as number of users/ headcount etc.

3.6.1. Further, during the course of hearing, the assessee was asked to submit the brief description of the services along with the proof for benefits availed by the assessee for which the above payment is made to the AE. In this relation, the Assessee has submitted the brief description of the above mentioned services as mentioned above and stated that the assessee has not only availed the aforesaid services but also from said services. The assessee has provided some invoices and its cost allocation working for arriving at the figures reported in Form 3CEB. Also, the assessee claimed that all the allocations above are based on the actual cost incurred by AEs and does not include any mark-up thereon.

3.6.2. The Id. TPO observed that all the submissions of the assessee in this regard were duly considered and verified. However, on perusal of the same it is noticed that the assessee has not been able to conclusively prove that it has received benefits and that cost allocation done is correct. Thus, the reply of assessee is not acceptable in this regard and hence rejected.

3.7. Professional Fees-Data Processing Technical Assistance and related services-Rs.17,83,822/-

The assessee submitted that it receives services in the nature of data processing technical assistance and related services from its AE, Newedge Facilities Management Inc. (hereinafter referred to as "Newedge US") which it claims that it provides a broad range of common global services to its group entities. The assessee contended that the cost incurred in provision of such services is initially borne by Newedge US and is subsequently allocated to each entity that receives benefit there from, on

the basis of appropriate allocation keys. Further, the assessee submitted that Newedge India also benefits from such common services and shares the cost of such services. The services include GMI Service, Dataport, Lotus Notes, Global Websites, and Global Network Services, Wan/ Telecommunication Management Services, Anti - Money Laundering, Fimastar, Yolus, Access control, Pulse, Risk systems, methodology and data, Parser, Technical assistance for small projects/activities and acting as a paying agent for several key global expenditures. The assessee also claimed that these costs are allocated by the AEs to the Newedge group companies without any mark-up and the costs are either directly allocated or are based on appropriate allocation key such as number of users/ headcount etc.

3.7.1. Further, during the course of hearing, the assessee was asked to submit the brief occupation of the services along with the proof for benefits availed by the assessee for which the above payment is made to the AE. In this relation, the assessee has submitted the general description of the above mentioned services as mentioned above and stated that the assessee has not only availed the aforesaid services but also benefited from said services. Also, the assessee claimed that all the allocations above are based on the actual cost incurred by AHs and does not include any mark-up thereon.

3.7.2. The Id. TPO observed that all the submissions of the assessee in this regard were duly considered and verified. However, on perusal of the same it is noticed that the assessee has not been able to conclusively prove that it has received benefits and that cost allocation done is correct. Thus, the reply of assessee is not acceptable in this regard and hence rejected.

3.8. The Id. TPO in para 6.5.2 concluded that payment for intragroup services including management fees will be treated at arm's length only when it is proved substantially by the tax payer that such services were actually received and further when proved that such received services have benefitted it. The Id. TPO concluded that this aspect was not established by the assessee and accordingly proceeded to determine the arm's length price of intragroup services international transaction at Rs. 'Nil' and made an upward adjustment of Rs.4,86,97,220/- in the order passed u/s.92CA(3) of the Act dated 13/01/2015. It is pertinent to note that while determining the ALP of the aforesaid international transaction at Rs. 'Nil', the Id. TPO did not follow any of the prescribed methods prescribed in Rule 10B of the Income Tax Rules. This action of the Id. TPO was upheld by the Id. DRP. Strangely, the Id.DRP in para 3.4 of its directions mentioned that the assessee company had not carried out any benchmarking analysis in the TP study report regarding the aforesaid services. This fact is factually incorrect as is evident from the TP study report and as per the order of the Id. TPO, the assessee had indeed carried out benchmarking analysis by comparing comparable companies by using Transactional Net Margin Method (TNMM) and we further find that the Id. DRP in para 3.6 of its directions had resorted to adopt Comparable Uncontrolled Price (CUP) as the Most Appropriate Method (MAM) for benchmarking the aforesaid services. Having stated so, the Id. DRP had not taken any pains to bring the comparable companies to conclude as to how the assessee's payment for intragroup services was found to be at Rs. 'Nil' using CUP method.

3.9. We find from Form 3CEB vide its Annexures in pages 31-36 of the paper book wherein the assessee clearly stated the list of services availed

from the respective AEs and the payments made thereon together with the prescribed method adopted by the assessee by the assessee to justify the same to be at arm's length price. Moreover, in the TP study report, the assessee had clearly mentioned its profile wherein it has been categorically stated that it is a broker member of BSE and NSE and had employed 15 staff only for carrying out its activities in India. This itself goes to prove that assessee company requires lot of support services from its AEs to smoothly carry on the business in India. The list of intragroup services and the basis for benchmarking carried out by the assessee in the TP study report together with the benefits received thereon are listed out in pages 68-83 of the paper book filed before us. As stated by the Id. TPO in his order, the single year updated data of the comparable companies were also provided by the assessee during the course of TP assessment vide letter dated 13/11/2014. Further, vide letter dated 09/12/2014, the assessee gave complete description of services received along with the cost allocation mechanism and sample invoices raised by the AEs on the company for rendering intragroup services in detail by way of Annexure-5 & 6 to the said letter. These are enclosed in pages 240-258 of the paper book. We also find from pages 249 of the paper book, the assessee has furnished in detail the cost allocation working mentioning the name of the concerned AE, the description of services rendered the amount incurred thereon and how the same has been allocated on the assessee. It is not in dispute that all those costs were allocated to the assessee without any mark-up by the AEs. We further find that the sample invoices were also enclosed in page 252 and allocation keys were explained in page 253 of the paper book. We further find from pages 257 & 258, sample invoice and cost allocation made without mark-up by the AEs for rendering intragroup services to the assessee. Further, we find from pages 265 till pages 505 of the paper

book filed, the third party invoices of AEs which is charged on assessee at cost. This also conclusively briefs that there is no mark-up charged by the AE while allocating the cost on assessee. Further from pages 506 to 556 of the paper book, we find the invoices raised for data processing, technical assistance and related services for each month. The entire evidences for rendering the services by the AE to assessee are enclosed from pages 580-911 of the paper book in the form of various e-mail correspondences. This fact is also acknowledged by the Id. DRP in page 6 para 3.7 of its directions. From the perusal of the e-mail correspondences we find that it is in fact the assessee which has asked its AEs for rendering those services in order to smoothly carry out its business operations in India and to be in tandem with the globally accepted policies, uniform accounting policies, uniform HR policy etc. While this is so, we are unable to comprehend ourselves to accept the observations made by the Id. DRP that assessee had not asked for these services to be rendered by the AE. Hence we hold that the Id. TPO was accordingly not justified in determining the ALP of those transactions at Rs.'Nil'. From the description of various services rendered by the AEs to the assessee, we find that these services are required for running the day to day business of the assessee and survival of the assessee company in India. Pursuant to rendering of these services alone, the assessee is able to earn income in India, given the fact that assessee has only 15 staff in its rolls in India. We find that the Id. DRP having stated that CUP is the Most Appropriate Method to be adopted in this case did not bother to bring in comparable instances to determine the ALP using CUP whereas the assessee has adopted TNMM as the Most Appropriate Method and had benchmarked the same by bringing in the comparable companies and had benchmarked the same. No error was found in the said method by either of the lower authorities. Either way when the Revenue seeks to disturb the Most

Appropriate Method adopted by the assessee, it is incumbent on the part of the Revenue to adopt any of the other prescribed methods in the statute i.e. Rule 10B of the Rules. Without resorting to any of the methods for the purpose of determining the ALP of international transaction, the ld. TPO erred in determining the ALP of intragroup services at Rs.'Nil'. This issue is fully settled by the Co-ordinate Bench decision of this Tribunal in the case of Lintas India Pvt Ltd., vs. DCIT reported in 107 taxmann.com 426. The operative portion of the said judgement is as under:-

"8. We have heard the rival submissions and perused the materials available on record. It would be pertinent to address the preliminary issue raised by the ld. AR before us that the ld. TPO had failed to apply any method while determining the ALP at nil for GIS services; for determining the ALP of payment made towards MSF services by accepting 20% thereon on adhoc basis and accepting 50% for MNC services on adhoc basis thereon. We find that provisions of Section 92C(1) of the Act mandates adoption of one of the prescribed method mentioned therein for determining the ALP of international transactions. It is not in dispute that the disallowances/adjustments made by the ld. TPO to ALP were made without following any of the prescribed methods as per law.

8.1 We hold that once a reference is received by the ld. TPO u/s. 92CA(1) of the Act from the ld. AO, the ld. TPO is required to determine the ALP of the international transaction as per the provisions contained in Section 92C and 92CA of the Act read with relevant rules thereon. From the conjoint reading of the relevant sections and the relevant rules, we find that the duty of the ld. TPO is restricted only to the determination of the arm's length price of an international transaction between two related parties by applying any of the methods prescribed u/s.92C of the Act read with rule 10B of the rules. Thus, there is no provision made in the statute empowering ld. TPO for determining the ALP on a particular international transaction on an estimation basis/adhoc basis.

8.2 We find that the Hon'ble Jurisdictional High Court in the case of CIT v. Johnson & Johnson Ltd. [\[2017\] 80 taxmann.com 337](#) wherein it was held as under:—

"4. Regarding question (D) :

(a) The respondent assessee paid to its Associated Enterprises (AE), technical know how royalty of 2%. The Transfer Pricing Officer (TPO) by order dated 24th March, 2005 restricted the technical know how royalty paid by the respondent assessee to its AE at 1% instead of 2%, as claimed. In terms of the determination dated 24th March, 2005 of the TPO on the above issue amongst others, an assessment order dated 28th March, 2005 for the subject Assessment Year was passed by Assessing Officer under

Section 143(3) of the Act.

- (b) *Being aggrieved with the order dated 28th March, 2005 of the Assessing Officer, the respondent assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 22nd March, 2007, the appeal of the respondent assessee on the issue of royalty payable on technical know how, allowed the appeal. It inter alia held that restricting the royalty paid on account of technical know how to 1% was arbitrary and adhoc. Inasmuch as, there were no reasons justifying the restriction of the technical know how royalty paid by the respondent assessee to its AE at 1%. Moreover, it also records the fact that the TPO did not determine the ALP of the technical know how royalty by adopting any of the methods prescribed under Section 92C of the Act.*
- (c) *Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. By the impugned order dated 20th August, 2013 the Tribunal dismissed the Revenue's appeal inter alia upholding the order of the CIT(A).*
- (d) *We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in Section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical know how has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know how royalty by the TPO was adhoc and arbitrary as held by the CIT(A) and the Tribunal.*
- (e) *In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained."*

8.3 *Respectfully following the aforesaid decision of Hon'ble Jurisdictional High Court, we have no hesitation in directing the ld. TPO to delete adjustment made to ALP in respect of aforesaid three services viz., GIS services (Rs. 62,95,226/-), MSF Services (Rs. 7,88,90,157/-) and MNC Services (Rs. 19,29,008/-). Accordingly, grounds raised by the assessee are allowed on this technical aspect and grounds raised by the revenue are dismissed on this technical aspect."*

3.10. In this decision, the Tribunal had relied on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Johnson & Johnson Ltd., reported in 80 taxmann.com 337. We further find that the

Co-ordinate Bench of the Pune Tribunal in the case of Emerson Climate Technologies (India) Ltd., vs. Dy. Commissioner of Income Tax reported in 90 taxmann.com 125 (Pune Tribunal) had observed as under:-

“20. Another aspect of the issue which needs to be kept in mind is the developing scenario of carrying on the business in the country. The said business is carried on by the entities which have presence outside India and have certain standards, which are attached to its brand name. In order to maintain its brand value, arrangements are made with different entities across the globe by holding companies, so that different entities operating in different parts of the world adhere to specific rules and regulations while carrying on business under the said brand. The assessee is 100% subsidiary of Copeland Corporation, which admittedly, has presence in various Countries. The assessee has placed on record that besides the assessee entering into agreement with Emerson HK, Emerson TH, various entities of other countries had entered into such agreements. The terms of the agreement are similar for providing services, wherein a particular formula is designed by the person providing the services i.e. the basis for remuneration is the cost incurred by way of man hours charged to the entity with mark up of 5.8%. Such method of charging and remunerating was identical in the case of all the entities which were availing the services from Copeland Corporation through Emerson HK and Emerson TH. The assessee had also furnished on record the basis for charging cost by the two entities from the assessee. No doubt, the complete details of operations of the said concerns worldwide had not been filed, but that had no relevance to the activities or services availed by the assessee. There is no merit in the order of TPO in rejecting the segmental details of AEs filed by the assessee vis-à-vis services availed by it. What is to be considered in the hands of assessee is the services it had availed from Emerson HK and Emerson TH and not the whole activities undertaken by the said two concerns worldwide. The assessee had put on record that not only the assessee but many other concerns were availing same services from the two entities and even the basis for remuneration to the said concerns was the same in respect of all the countries. In such circumstances, there is no merit in the order of TPO in holding that as to whether the said concerns have given services or whether they are qualified to give the services and the cost incurred by AEs. First of all, this is outside the domain of TPO. Under the Transfer Pricing Regulations what the TPO has to determine is whether the services which have been provided by associated enterprises are at arm's length price. Accordingly, we find no merit in this part of the order of TPO.”

3.11. In view of the aforesaid elaborate observations in the facts of the instant case and respectfully following the aforesaid judicial precedents, we hold that the Revenue is not justified in determining the ALP of

intragroup services at Rs.Nil. Accordingly, the transfer pricing adjustment made thereon are hereby directed to be deleted.

3.12. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed.

4. The ground No.3 raised by the assessee is with regard to initiation of penalty proceedings u/s.271(1)(c), 271AA and Section 271G of the Act. It would be premature for adjudication at this stage and hence, dismissed.

5. The decision rendered for A.Y.2011-12 shall apply mutatis mutandis for A.Y.2012-13 and 2013-14 in view of identical facts except with variance in figures.

6. In the result, all the appeals of the assessee are partly allowed.

Order pronounced in open Court on 01/04/2022

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 01/04/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai