IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad

Before Shri Laliet Kumar, Judicial Member
AND
Shri Laxmi Prasad Sahu, Accountant Member

Sl. No	ITA No	Assessment Year	Appellant / Assessee	Respon-dent
1	616/Hyd/2016	2011-12	Zuari Cement Limited, Kadapa. PAN No.AAACZ1270E	ACIT, Circle-1, Kadapa.
2	254/Hyd/2017	2012-13		
3	182/Hyd/2018	2013-14		
4	2169/Hyd/2018	2012-13		
5	66/Hyd/2019	2014-15		

Appellant by : Shri Deepak Chopra and Shri Nitin Narang, Advocates.

Respondent by : Shri Rajendra Kumar, CIT-DR

Date of Hearing : 21.04.2022

Date of Pronouncement : 27.06.2022

O R D E R

Per Laliet Kumar, J.M.

These are the set of five appeals arose against the separate assessment orders passed by Asst.Commissioner of Income Tax, Circle – 1, Kadapa – 1 under section 143(3) r.w.s. 144C and 92C(3) of the Income Tax Act, 1961 (hereinafter referred as "the Act") in pursuance to the directions of the Dispute Resolution Panel – "DRP", Bangalore-1's for the assessment years 2011-12, 2012-13, 2013-14, 2012-13 and 2014-15 on the following grounds :

1. That on the facts and in the circumstances of the case, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP')/Learned Assessing Officer ('Ld. AO') erred in making an addition of Rs. 5,06,29,319/- to the total income of the appellant on account of adjustment in the arm's length price ('ALP') of the International Transactions with its Associated Enterprises ('AEs').

2.(a) That on the facts and in the circumstances of the case, the Hon'ble DRP/Ld. AO erred in not accepting the transfer pricing analysis undertaken by the appellant, rejecting the Transactional Net Margin Method ('TNMM') analysis and applying the Comparable Uncontrolled Price ('CUP') Method as the Most Appropriate Method for determining the ALP without any cogent reasons.

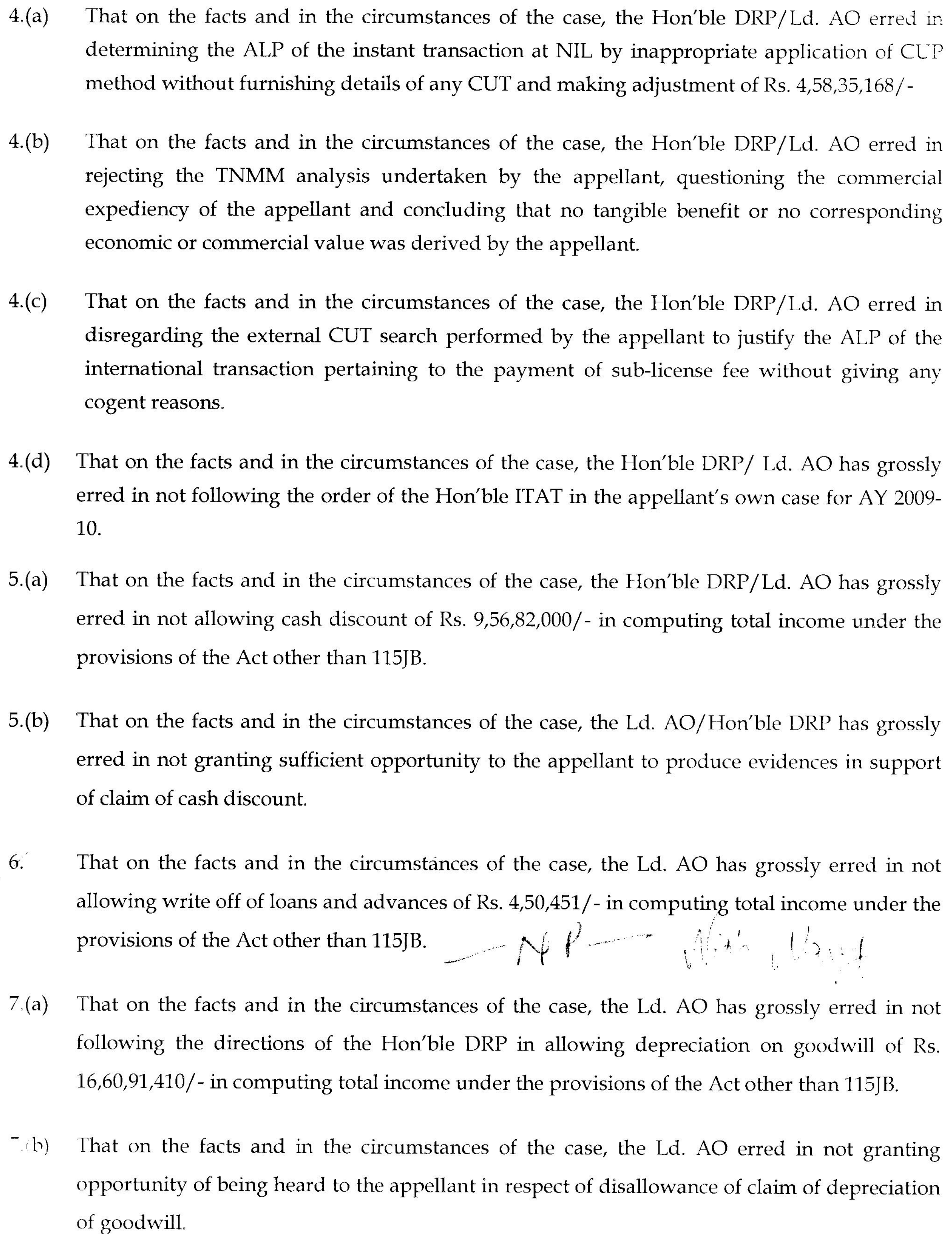
2.(b) That on the facts and in the circumstances of the case, the Hon'ble DRP/ Ld. AO has grossly erred in not following the order of the Hon'ble ITAT in the appellant's own case for AY 2009-10.

3.(a) That on the facts and in the circumstances of the case, the Hon'ble DRP/ Ld. AO erred in concluding that the ALP of the Technical Know-How and other related service fee is 0.77% of sales and thereby arriving at the transfer price adjustment amounting to a sum of Rs. 47,94,151/-.

3.(b) That on the facts and in the circumstances of the case, the Hon'ble DRP/ Ld. AO erred in rejecting the TNMM analysis undertaken by the appellant, questioning the commercial expediency of the appellant and failed to consider the tangible benefits derived by the appellant.

3.(c) That on the facts and in the circumstances of the case, the Hon'ble DRP/ Ld. AO erred in rejecting external Comparable Uncontrolled Transaction ('CUT') search performed by the appellant without giving any cogent reason.

3.(d) That on the facts and in the circumstances of the case, the Hon'ble DRP/ Ld. AO has grossly erred in not following the order of the Hon'ble ITAT in the appellant's own case for AY 2009-10.



4.(a) That on the facts and in the circumstances of the case, the Hon'ble DRP/Ld. AO erred in determining the ALP of the instant transaction at NIL by inappropriate application of CUP method without furnishing details of any CUT and making adjustment of Rs. 4,58,35,168/-

4.(b) That on the facts and in the circumstances of the case, the Hon'ble DRP/Ld. AO erred in rejecting the TNMM analysis undertaken by the appellant, questioning the commercial expediency of the appellant and concluding that no tangible benefit or no corresponding economic or commercial value was derived by the appellant.

4.(c) That on the facts and in the circumstances of the case, the Hon'ble DRP/Ld. AO erred in disregarding the external CUT search performed by the appellant to justify the ALP of the international transaction pertaining to the payment of sub-license fee without giving any cogent reasons.

4.(d) That on the facts and in the circumstances of the case, the Hon'ble DRP/ Ld. AO has grossly erred in not following the order of the Hon'ble ITAT in the appellant's own case for AY 2009-10.

5.(a) That on the facts and in the circumstances of the case, the Hon'ble DRP/Ld. AO has grossly erred in not allowing cash discount of Rs. 9,56,82,000/- in computing total income under the provisions of the Act other than 115JB.

5.(b) That on the facts and in the circumstances of the case, the Ld. AO/Hon'ble DRP has grossly erred in not granting sufficient opportunity to the appellant to produce evidences in support of claim of cash discount.

6. That on the facts and in the circumstances of the case, the Ld. AO has grossly erred in not allowing write off of loans and advances of Rs. 4,50,451/- in computing total income under the provisions of the Act other than 115JB.

7.(a) That on the facts and in the circumstances of the case, the Ld. AO has grossly erred in not following the directions of the Hon'ble DRP in allowing depreciation on goodwill of Rs. 16,60,91,410/- in computing total income under the provisions of the Act other than 115JB.

7.(b) That on the facts and in the circumstances of the case, the Ld. AO erred in not granting opportunity of being heard to the appellant in respect of disallowance of claim of depreciation of goodwill.

8.(a) That on the facts and in the circumstances of the case, the Hon'ble DRP/Ld. AO erred in not allowing claim of additional depreciation amounting to Rs. 1,05,54,21,054/- on eligible plant and machinery amounting to Rs. 5,27,71,05,271/- installed and put to use on 30th & 31st of the immediately preceding previous year (i.e., AY 2010-11), additional depreciation on which has not been allowed in AY 2010-11 on the contention that the assets were not put to use in that year.

) That on the facts and in the circumstances of the case, the opening written down value of plant and machinery as on 01-04-2010 has been increased by Rs. 55,77,10,527/- on account of disallowance of additional depreciation in AY 2010-11 and hence, necessary directions may be given to the Ld. AO to grant claim of depreciation u/s 32 @15% amounting to Rs. 8,36,56,579/- in computing total income under the provisions of the Act other than 115JB for the instant year.

) That on the facts and in circumstances of the case, necessary directions may be given to the Ld. AO to grant balance additional depreciation @ 10% on eligible plant and machinery put to use for less than 180 days in AY 2010-11 in computing total income under the provisions of the Act other than 115JB.

9. That on the facts and in the circumstances of the case, the Hon'ble DRP was not justified and grossly erred in not assigning any reason for non consideration of additional grounds of objections raised before the Hon'ble DRP.

10. That on the facts and in the circumstances of the case, necessary directions may be given to the Ld. AO to allow claim of education cess of Rs. 35,60,447/- on Income Tax in computing total income under the provisions of the Act other than 115JB.

11. That on the facts and in the circumstances of the case, necessary directions may be given to the Ld. AO to allow deduction in respect of provision for obsolescence of stores and spares of Rs. 21,14,056/- debited to the Profit & Loss Account in computing total income under the provisions of the Act other than 115JB.

12. That on the facts and in the circumstances of the case, necessary directions may be given to the Ld. AO to allow deduction in respect of provision for site restoration fund of Rs. 1,16,39,802/- debited to the Profit & Loss Account in computing total income under the provisions of the Act other than 115JB.

13. That on the facts and in the circumstances of the case, necessary directions may be given to the Ld. AO to allow deduction in respect of community development expenses of Rs. 46,56,216/- debited to the Profit & Loss Account in computing total income under the provisions of the Act other than 115JB.

14. That on the facts and in the circumstances of the case, necessary directions may be given to the Ld. AO to allow deduction in respect of environment protection expenses of Rs. 32,78,989/- debited to the Profit & Loss Account in computing total income under the provisions of the Act other than 115JB.

15. That on the facts and in the circumstances of the case, necessary directions may be given to the Ld. AO to allow deduction in respect of giveaways of Rs. 26,38,597/- debited to the Profit & Loss Account in computing total income under the provisions of the Act other than 115JB.

16. That on the facts and in the circumstances of the case, deduction of provision for leave encashment of Rs. 2,12,77,309/- debited to the Profit & Loss Account be allowed in computing total income under the provisions of the Act other than 115JB.

17. That on the facts and in the circumstances of the case, dividend amounting to Rs. 77,47,499/- needs to be excluded in computing book profit under the provisions of Sec. 115JB of the Act.

3. That the appellant craves leave to add, amend, modify, rescind, supplement, or alter any of the grounds stated here-in-above, either before or at the time of hearing of this appeal.

2. Since the grounds raised in all the appeals are common, we divided the grounds as Transfer Pricing Grounds (hereinafter referred as "TPO") and non-TPO grounds. We are taking the appeal ITA **616/Hyd/2016 for A.Y. 2011-12** as lead case to decide the issue and the grounds which are forming part of subsequent assessment years will be specially dealt with.

GROUND NO.1

3. Ground No.1 being general in nature, needs no specific adjudication.

GROUND NOS. 2 TO 4(D)

4. Ground Nos.2 to 4(d) for the A.Y 2011-12 provides as under:

The ld.AR for the assessee has drawn our attention to the order passed by the TPO where the profile of the assessee was mentioned as under :

> *"Zuari Cements Ltd., is engaged in the business of production and sale of Portland cement which is used in commercial, industrial and residential construction activities. The company manufactures Blended Cement, Portland Cement and PRIMO concrete cements. The company was a JV between Zuari Industries Ltd. and ClimentFrancais SA and existed as JV until 31st May 2006. Pursuant to CF's acquisition of 50% stake held by ZIL, the company became a wholly owned subsidiary of CF, effective 31st May, 2006. The ultimate holding company is Itlacemntis p.a. During the year ended 31sst December 2007, pursuant to a scheme of amalgamation, Sri Vishnu Cement Ltd., was merged with ZCL with effect from 1st January, 2007.*

5. During the year under consideration, the assessee as per Form 3CEB entered into the following international transactions :

A.E.	Nature of transaction	Amount (Rs.)
ClimentFrancais SA	Technical knowhow and research and other service fees	9,33,62,564
ClimentFrancais SA	Sub-license fee for use of trademark	4,58,35,168
ItlacementiFabbricheRiuniteCementoSpA	Procurement service fee paid	83,85,700
Bravo Solutions SpA	Consultancy service fee paid	41,18,651
CTGA SpA	Consultancy service fee paid	35,64,89,956
ClimentFrancais SA	Reimbursement of expenses paid	51,31,684
Bravo Solutions SpA	Reimbursement of expenses paid	4,19,968
ClimentFrancais SA	Reimbursement of expenses received	8,72,891
ItlacementiFabbricheRiuniteCementoSpA	Reimbursement of expenses	1,45,77,299

	received	
CTGA SpA	Reimbursement of expenses received	2,44,32,293
		55,36,26,174

6. Though, the assessee had filed T.P. Study Report by benchmarking the international transactions using Transactional Net Margin Method (hereinafter referred as "TNMM") as most appropriate method and for that purpose has selected it as comparable. The assessee has worked out the PLI as 9.06% as against own margin of 11.89%. Therefore, the assessee has concluded that the international transactions of the assessee are at Arm's Length.

7. The learned TPO was not impressed with the T.P.Study carried out by the assessee on the basis of the TNMM as most appropriate method and therefore, the ld.TPO has reiterated T.P.Study on the ground that TNMM was not most appropriate method and had opted for Comparable Uncontrolled Price (hereinafter referred as "CUP") method as the most appropriate method for the purpose of benchmarking the international transactions. On the basis of the TPO order dt.29.01.2016, AO passed draft assessment order thereby proposed adjustment of Rs.55,20,26,837/- towards all the international transactions undertaken by the appellant.

8. Feeling aggrieved by the draft assessment order, the appellant / assessee preferred a petition before the DRP. DRP upheld the order passed by the TPO / Draft assessment order and hold that TNMM is the most appropriate method for the purpose of benchmarking of the international transactions. For the purpose of

completeness, we are hereby reproducing the finding given by the DRP on this aspect which reads as under :

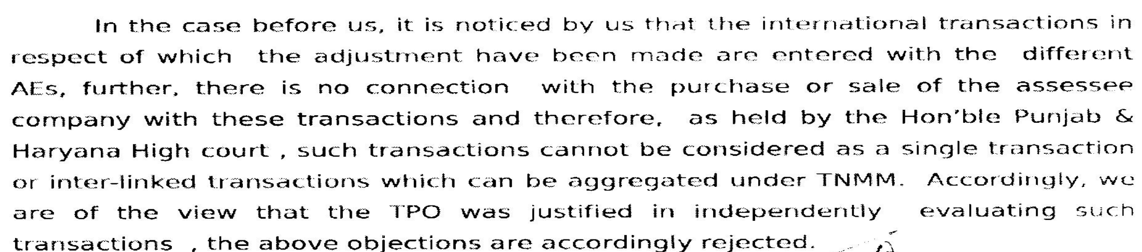
It is submitted that it has complied with the requirements of the Indian Transfer Pricing Regulations as embodied in the Act and the Rules and provided all the relevant documentation sought by learned TPO during the course of assessment proceedings. In the TP Documentation, the Assessee has undertaken detailed functional as well as economic analysis, accordingly demonstrated that the transactions with its AEs are at arm's length.

It is contended that the TPO was not justified in rejecting the aggregation approach under TNMM, to support the contention, in addition to the other judicial pronouncements, the assessee relied on the decision of the Hon'ble ITAT, Hyderabad in assessee's own case for the A.Y. 2009-10 in ITA No.471/Hyd/2014.

Having considered the submission, it is noticed by us that the Hon'ble ITAT in A.Y. 2009-10, even though observed against the approach of the TPO, however, has not finally decided the issue and set aside the file with the A.O. /TPO with the direction to reconsider the entire order and analyze in fresh , first by determining the most appropriate method and then analyzing the transactions under the provisions of TP. It is also noticed by us that the Hon'ble Punjab & Haryana High COurt, in ITA

Appeal No.182 of 2013 and 172 of 2013 in a recent decision in the case of M/s Knorr Bremse India Pvt Ltd in paragraph 44 in regard to applicability of TNMM vs CUP in respect of the various international transactions has held as under :-

> **"In the present case, all the items tabulated above were not provided by the same entity. They were provided by different entities. That these entities were all part of the same group is not determinative of the issue whether they were part of a single international transaction. Each party to the group is a separate legal entity. We do not rule out the possibility of there being a single international transaction where goods are sold and/or services are supplied by various entities within a group under a single transaction. That however, would depend upon the facts of each case. The onus would be on the assessee to establish that though the goods were supplied and/or the services were rendered by different legal entities they were part of an international transaction pursuant to an understanding between the various members of the group. This would be an issue of fact for the determination of the authorities under the Act."**



In the case before us, it is noticed by us that the international transactions in respect of which the adjustment have been made are entered with the different AEs, further, there is no connection with the purchase or sale of the assessee company with these transactions and therefore, as held by the Hon'ble Punjab & Haryana High court , such transactions cannot be considered as a single transaction or inter-linked transactions which can be aggregated under TNMM. Accordingly, we are of the view that the TPO was justified in independently evaluating such transactions , the above objections are accordingly rejected.

9. Feeling aggrieved, the assessee is before us for the grounds mentioned hereinabove.

10. At the outset, the ld.AR for the assessee has drawn our attention to the order passed by the Tribunal in the case of the assessee for A.Y. 2009-10 wherein the co-ordinate bench of the Tribunal considering the nature of the assessment had held as under :

> *"4. We next note with the able assistance coming from both the parties that the assessee's first and foremost argument in principle is qua aggregation of the foregoing transactions followed by adoption of the transactional net margin method (TNMM) as the most appropriate method "MAM"; which in turn, stands declined in the learned lower authorities' respective orders by taking comparable uncontrolled price "CUP" method. It further transpires from a perusal of the case file that neither of the foregoing twin issues require any detailed adjudication as well since we are dealing with consequential second round of remand proceedings wherein the learned co-ordinate bench's order dt.17.04.2015 in assessee's appeal itself had rejected the Revenue's corresponding arguments as under :*
>
> *" **Transfer Pricing Issues:***
>
> *7. Assessee being a wholly owned subsidiary of a foreign company, has various transactions with its AEs which were reported as the international transactions in 3CEB report. The TPO noted them in Page 2 of the order and after excluding non-operating items, both revenue and expenditure, arrived at (operating cost / operating revenues) at 27.12%, whereas (operating profits / operating cost) was arrived at 33.37%. <u>Assessee in its 3CEB report claimed Transaction Net Margin Method [TNMM] as the most appropriate method, analysed its transactions and compared two sets of comparable companies.</u> Under the first set of comparables as noted down by TPO in Page 4 of the order, it compared 11 companies which are in cement business whose average operating profit/operating cost was at 18.59% as against assessee's operating margin 29.36%. It also had another set of comparables wherein the Iaverage net margin on sale was at 21.67% as against assessee's margin of 29.36%. Assessee's TP study was rejected by TPO stating that just because the operating margin of the taxpayer is comparable with the operating margin of certain comparables, it cannot be said that all the transactions were transacted at Arm's Length. Relying on the principle of 'substance over form' as held by Hon'ble*

Supreme Court in the case of Union of India Vs. Gosalia Shipping P. Ltd., [113 ITR 307 (SC)], AO rejected the method of TNMM, consequently, the TP study conducted by the taxpayer. He also held that aggregation of transactions were not allowed and relied on the decisions of the co-ordinate bench in the case of Star India P. Ltd., Vs. ACIT [2008-TIOL-426-ITAT-MUM] and also UCB India Pvt. Ltd., [317 ITR 292 (AT) (Mum)], to come to a conclusion that any transaction that has bearing on profits can be analysed separately. Thereafter, he analysed various international transactions, mostly under the Comparable Uncontrolled Price (CUP) method for analyzing the arm's length nature of payments to its AEs. He further held that fees for technical know-how, fees for use of trade mark and fees for procurement etc., are a separate class of transactions, therefore, they have to be analysed separately, as each transaction has a bearing on profits. Accordingly, the transactions entered into by and between the taxpayer and its AEs are considered separately for the purpose of transfer pricing analysis. Ld.TPO noticed that assessee paid an amount of Rs.12,53,26,000/- to Ciments Francais S.A., as technical know-how and research and other service fee. This payment was paid on an agreement dt.02-08-2000 for getting technical know-how for a period of three calendar years from that effect date. As per renewal of clause at 12.2 it is mentioned that agreement was automatically be renewed subject to Government/Statutory approval for a period of one calendar year at a time in support of the transaction. Assessee has furnished a copy of agreement dt.06-06-2007 effective from 01-01-2007 for payment of royalty @ 2% on sales made to outside parties and 1% on sale to group companies. Even though assessee justified the payment, Ld.TPO however, considered that there is no addition of new technical know-how and compared with financial results of Sri Vishnu Cements Ltd., under the CUP method, to hold that there is no justification for payment of royalty. Accordingly he came to the conclusion that there is no need to pay any amount. Not only that, he also compared some external comparables and came to the conclusion that average pay out on account of technical services by those comparable companies was at 0.91% of net sales. Therefore, based on these two internal and external CUP analysis, TPO determined the payable royalty at 0.91% which comes to Rs.10.87 Crores. The additional amount of Rs.1,65,64,219/- was disallowed as an excess payment and was adjusted u/s.92CA.

8. Next item analysed by TPO was with reference to payment of Rs.6,26,62,000/- to Ciments Francais S.A., towards sub-license agreement. Ciments Francais S.A., an affiliated company of Italcementi Group is having sub-license agreement to use the trade mark. As per the agreement, royalty at 1% of net sales of licensed products has to be paid to Ciments Francais S.A., on quarterly basis. AO analysed the same under the CUP method and noticed that there is no need for paying any amount to Italcementi Group for use of trade mark as assessee's own trade mark of ZCL was well established. He analysed the evolution of ZCL brand equity and noticed that assessee itself had entered into an agreement with M/s. Jindal Vijayanagar Ltd., for a fixed license of Rs.1,00/- per metric tonne for

using the trade mark and accordingly, assessee has received amounts. Therefore, commercial exploitation of the trade mark aided by the marketing and advertising efforts of ZCL, resulted in creation of valuable intangible assets in India. Thereafter, analyzing the benefit test, the TPO came to the that new trade mark licensed to the tax payer does not have any value and therefore no license fee should be chargeable for its use. Thereafter, he has disallowed the entire amount of sub-license fee paid under the provisions of Section 92CA. Not only that he further analysed the cobranding of ZCL and 'Italcementi' Group and came to the conclusion that Italcementi Group got benefit by piggy riding on ZCL brand, which has tremendous value in the market and therefore, the same requires to be compensated at arm's length. He took the 10% of ALP expenses between 2001 and 2008 and arrived at the compensation payable to ZCL, for use of its trade mark at Rs.41,60,00,000/- and made the adjustment of the above in the impugned year.

9. In addition, TPO also analysed the payments from the intra group services of procurement fee of Rs.7,11,82,000/-. Considering that there is no need for any services, he disallowed the entire amount. Likewise, consultancy fees paid of Rs.38,10,000/- to Bravo Consultancy SPA and Rs.42,10,94,000/- to CTG SPA were also considered and disallowed the same reason and on the basis of the benefit test, in its entirety. Assessee's objections were rejected and the above amounts were disallowed. Another disallowance made by the AO was with reference to reimbursement of expenses under various heads totaling to Rs.51,72,995/-. Thus, in all, an amount of Rs.99,64,85,214/- was treated as adjustment u/s. 92CA. Assessee filed various objections before the DRP but more or less concurred with TPO vide its order dt.25- 11-2013. Assessee is aggrieved.

10. Assessee's objections are multi-fold. Ground No.1 & 2 are general in nature. Ground No.3 & 4, is the method adopted by the TPO and Ground No.5 to 12 are on various disallowances made by the TPO out of various payments made to AE. Each ground has sub grounds which are more or less in the form of submissions.

11. Ld.AR submitted that TPO erred in rejecting the transfer pricing documentation as well as TNMM as most appropriate method. It was the objection that there is no publicly available information on prices charged in independent transactions which are similar or identical in nature that reflects the characteristics of the services provided by the AEs to the assessee. It was further submitted that neither assessee nor AEs provide similar services under comparable circumstances to any independent third party. Therefore, application of CUP method is not tenable and given the facts of the case will not give reliable results. Assessee relied on the orders of the ITAT in Air Liqauide Engineering India Pvt. Ltd., in ITA No.1040/H/2011 and Lumax Industries in ITA No.7408 and 7641/Mum/2010. With reference to the T.P. adjustment of Rs.1,65,64,219/- relating to fee paid for technical services, it was contended that SVCL i.e., Sri Vishnu Cements Ltd., was a subsidiary of assessee, as a part of BIFR package from FY.2002-03. Before that, it was

independent sick company and having acquired by the company, being sick, no royalty was charged to SVCL during the period 2002-03 to 2006-07 w.e.f. January 2007. The said SVCL was merged with assesseecompany under the order of Hon'ble High Court of AP. Therefore, comparing with costs occurred about three years prior to the impugned period, was also not correct. Further, it was contended that TPO has taken a wrong information and ignored certain data in between which comparing annual earnings as can be seen from the table itself extracted in the order. Since TPO has not based his ultimate decision of SVCL, Ld.Counsel also referred to the three companies taken as external comparables, in arriving at 0.91% of royalty rate. It was submitted that the technical fee paid included in their annual report is not the royalty on sales, but expenses like royalty on lime stone, other fees paid to Government authorities which cannot be considered as royalty payment on sales. He referred to the order of the TPO and balance sheet of various companies to submit that the basis itself is not correct. With reference to sub-license fee of Rs.6,26,62,000/-, it was submitted that this agreement was entered in the year 2007 and objected to the method adopted by the TPO stating that the transaction is inextricably linked with the manufacturing operation, thereby aggregation of transaction with application of TNMM as a MAM cannot be ignored. It was further contended that there were no cogent reasons as to why CUP should be adopted and both TPO and DRP erred in determining the ALP at NIL. It was the submission that use of trade mark is a business decision and there are benefits to assessee for use of Italcementi Group trade mark and demonstrated by the support of growth in sales volume over a five year period and increase in customer base in the five years and furnished the copies of evidences furnished to the TPO, in support of the submissions. It was further submitted that a publicly available information analysis was undertaken by assessee on the rate of royalty being charged by licensor to a licensee and that analysis came to the range of 1.93%. Therefore, the payment made by ZCL @ 1% on sale was to be considered as arm's length and TPO's determination at NIL cannot be supported, in view of the decision of the Hon'ble High Court of Delhi in the case of CIT Vs. EKL Appliances Ltd.,

11.1 Coming to the alleged transfer of economic value of Zuari trade mark to Italcementi Group trade mark, it was contended that there was no migration of economic value as the Zuari brand was owned by the company and is being used in all the sales. It was further contended that AE has not used 'Zuari' brand anywhere in the world for its operations to get any benefit as alleged by the TPO. Further, it was contended that Italcementi Group trade mark was being used from AY.2006-07 onwards and therefore, AO was wrong in taking the market expenses after that period also. With reference to the incorrect methodology for valuation of Zuari trade mark, it was further contended that transfer of trade mark will not happen year after year and TPO/ DRP has made a similar approach in AY.2008-09 and made the adjustment of Rs.31.74 Crores and in AY.2009-10, the adjustment was Rs.41.60 Crores. Therefore, the action of the TPO/DRP is irrational on the reason that proposing the transfer pricing

adjustment for transfer of Zuari trade mark year after has no basis, without appreciating the fact that the transfer can take place only once. With reference to the consultancy fees for manufacturing a new plant, first objection was that the amount was not claimed as expenditure in the P&L A/c and was capitalized. While supporting the payment by way of services being provided by the AE in procuring the equipment for the new plant and also the necessity for taking various procurement services for a fee, it was the submission that TPO erred in ignoring the evidences and determining the ALP at NIL. Likewise, payment of consultancy fee to Bravo Consultancy SPA for use of 'easy supply' portal and the evidences furnished in this regard were totally ignored and wrongly determined the ALP at NIL. Likewise, the Ld.Counsel made detailed submissions on reimbursement of expenses and other various disallowances made by the TPO. Detailed submissions were filed issue- wise.

12. Ld.DR further referred to various observations of the TPO and findings of the DRP to submit that the adjustments made are warranted on the facts of the cases. He supported the orders of the TPO/DRP.

13. We have considered the issue and pursued the evidences on record, including the documents placed on the Paper Books. We are of the opinion that the approach of the TPO is not correct. Even though the payments made by assessee to the AEs are just a fraction of the total turnover of assessee, these transactions are invariably inter-linked to the manufacturing and trading of cement by the assessee-company. Therefore, the approach of the TPO in considering the CUP method for analyzing independent transactions is not fully justifiable. Apart from that, the methodology used in various analysis is also faulty. As far as the royalty payment on sales is concerned, as rightly pointed out by the Ld.Counsel, there are no comparable companies which are offering similar services. The TPO's comparison on transactions of assessee subsidiary company much prior to the year under consideration cannot be justified. Therefore, on that basis itself, the comparison cannot be considered as an internal CUP. Moreover, the need for not charging royalty from SVCL was also explained as the subsidiary company was a sick company and in the process of reviving the company, assessee has not charged any royalty to its subsidiary company. Therefore, on FAR analysis, SVSL's past record with that of present transactions of assessee-company is not correct. Then, coming to external comparables, we were surprised to note that the TPO considered the technical fee payments without analyzing the nature of the payments. In some cases, it is royalty for acquiring the lime stone from Govt., which is not a 'royalty' for getting the technology from foreign AE. There is foreign exchange expenditure also considered as 'technical know-how fee'. A detailed objections of the assessee were not even considered or discussed either by the TPO or by the DRP. Therefore, on the basis of an external CUP ALP of 0.91% itself is not correct. Therefore, the entire exercise undertaken by the TPO on this issue is erroneous and cannot be justified.

14. Leave alone that amount, even the sub license fee for the use of trade mark is also faulty. Under the guise of TPO provisions, the TPO cannot determine the ALP at NIL as held by the Hon'ble Delhi High Court in the case of CIT Vs. EKL Applicances Ltd., (supra). Therefore, rejecting the entire payment without there being any analysis on the CUP method cannot be accepted. In the guise of analyzing the transactions in the CUP method, the TPO has not brought any evidence on record to reject the 1% payment made to Italcementi Group. Moreover, while determining the price at NIL on the issue, the TPO surprisingly holds that assessee has transferred its 'Zuari Brand' to 'Italcementi Group'. We are unable to understand this logic. Italcementi Group never obtained, acquired or used Zuari Brand anywhere in the world, so that this cannot be considered for Transfer Pricing analysis. It is the Italcementi Group brand which is used by assessee-company. The TPO's analysis of AMP expenses are also not correct. Even though Italcementi Group was being used from earlier years, AMP expenses of current year also included in this, which is not correct. Moreover, Italcementi Group itself is a 50% shareholder in the assessee-company from the beginning. Therefore, it cannot be stated that 'Zuari Cements' is exclusive brand owner of the Birla Group in exclusion of Italcementi Group. The entire approach by the TPO is biased and cannot be justified on the facts of the case. Therefore, we are not in a position to uphold any of the contentions raised by TPO in his order. Likewise, the disallowance of various service fees including reimbursements made by assessee to AE. Since we do not find any valid reason for TPO to disallow these expenditures, we have no other go than to set aside the entire order of the TPO which is based on wrong presumptions and propositions. DRP unfortunately, even though consisted of three senior officers, did not apply its mind to the valid objections raised by assessee. In view of this, without deciding the merits of various issues, we set aside the orders and direct the TPO to re-consider the entire order and analyse them in fresh, first by determining the most appropriate method and then analyzing the transactions under the provisions of the TP. The orders of the TPO/DRP on the TP issues are therefore set aside and the entire issue on TP analysis is restored to the file of AO for fresh consideration. The grounds raised are accordingly allowed for statistical purposes."

5. The Revenue vehemently contended that the learned lower authorities have rightly adopted a direct method i.e., CUP which carries precedence over all other indirect methods; including TNMM, as per Serdia Pharmaceutical India Pvt. Ltd Vs. ACIT (2011) 44 SOT 391 (Mum). We find no reason to accept the Revenue's instant argument more particularly in view of the fact that this is second round of consequential proceedings wherein the earlier learned co-ordinate bench had already rejected the very contentions seeking to decline both aggregation as well as TNMM; as the case may be (supra).

6. The Revenue's next vehement contention before us is that the assessee had not even furnished the relevant details having adopted aggregation as well as TNMM method in the consequential proceedings.

We find no substance in the Revenue's instant last argument as well since this is once again a second round of assessment wherein no such objections had been put forth from the departmental side in the former round. Be that as it may, we therefore accept the assessee's contentions seeking to imply "aggregation" as well as TNMM method and leave it open for the "TPO" to finalize the consequential computation as per law. We further make it clear that it shall be very much open for the assessee to file on record all the necessary details pertaining to the comparable(s) list submitted in "TNMM" in the consequential computation. Ordered accordingly."

11. It was further submitted by the ld.AR for the assessee that pursuant to the decision of the Tribunal in the second round of appeal (supra), the AO has given effect to the order passed by the Tribunal and granted relief to the assessee and for that purpose, the ld.AR has drawn our attention to the order of the AO for A.Y. 2009-10 to the following effect.

"13. We have considered the issue and pursued the evidences on record, including the documents placed on the Paper Books. We are of the opinion that the approach of the TPO is not correct. Even though the payments made by assessee to the AEs are just a fraction of the total turnover of assessee, these transactions are invariably inter-linked to the manufacturing and trading of cement by the assessee-company. Therefore, the approach of the TPO in considering the CUP method for analyzing independent transactions is not fully justifiable. Apart from that, the methodology used in various analysis is also faulty. As far as the royalty payment on sales is concerned, as rightly pointed out by the Ld.Counsel, there are no comparable companies which are offering similar services. The TPO's comparison on transactions of assessee subsidiary company much prior to the year under consideration cannot be justified. Therefore, on that basis itself, the comparison cannot be considered as an internal CUP. Moreover, the need for not charging royalty from SVCL was also explained as the subsidiary company was a sick company and in the process of reviving the company, assessee has not charged any royalty to its subsidiary company. Therefore, on FAR analysis, SVSL's past record with that of present transactions of assessee-company is not correct. Then, coming to external comparables, we were surprised to note that the TPO considered the technical fee payments without analyzing the nature of the payments. In some cases, it is royalty for acquiring the lime stone from Govt., which is not a 'royalty' for getting the technology from foreign AE. There is foreign exchange expenditure also considered as 'technical know-how fee'. A detailed objections of the assessee were not even considered or

discussed either by the TPO or by the DRP. Therefore, on the basis of an external CUP ALP of 0.91% itself is not correct. Therefore, the entire exercise undertaken by the TPO on this issue is erroneous and cannot be justified.

14. Leave alone that amount, even the sub license fee for the use of trade mark is also faulty. Under the guise of TPO provisions, the TPO cannot determine the ALP at NIL as held by the Hon'ble Delhi High Court in the case of CIT Vs. EKL Applicances Ltd., (supra). Therefore, rejecting the entire payment without there being any analysis on the CUP method cannot be accepted. In the guise of analyzing the transactions in the CUP method, the TPO has not brought any evidence on record to reject the 1% payment made to Italcementi Group. Moreover, while determining the price at NIL on the issue, the TPO surprisingly holds that assessee has transferred its 'Zuari Brand' to 'Italcementi Group'. We are unable to understand this logic. Italcementi Group never obtained, acquired or used Zuari Brand anywhere in the world, so that this cannot be considered for Transfer Pricing analysis. It is the Italcementi Group brand which is used by assessee-company. The TPO's analysis of AMP expenses are also not correct. Even though Italcementi Group was being used from earlier years, AMP expenses of current year also included in this, which is not correct. Moreover, Italcementi Group itself is a 50% shareholder in the assessee-company from the beginning. Therefore, it cannot be stated that 'Zuari Cements' is exclusive brand owner of the Birla Group in exclusion of Italcementi Group. The entire approach by the TPO is biased and cannot be justified on the facts of the case. Therefore, we are not in a position to uphold any of the contentions raised by TPO in his order. Likewise, the disallowance of various service fees including reimbursements made by assessee to AE. Since we do not find any valid reason for TPO to disallow these expenditures, we have no other go than to set aside the entire order of the TPO which is based on wrong presumptions and propositions. DRP unfortunately, even though consisted of three senior officers, did not apply its mind to the valid objections raised by assessee. In view of this, without deciding the merits of various issues, we set aside the orders and direct the TPO to re-consider the entire order and analyse them in fresh, first by determining the most appropriate method and then analyzing the transactions under the provisions of the TP. The orders of the TPO/DRP on the TP issues are therefore set aside and the entire issue on TP analysis is restored to the file of AO for fresh consideration. The grounds raised are accordingly allowed for statistical purposes."

5. The Revenue vehemently contended that the learned lower authorities have rightly adopted a direct method i.e., CUP which carries precedence over all other indirect methods; including TNMM, as per Serdia Pharmaceutical India Pvt. Ltd Vs. ACIT (2011) 44 SOT 391 (Mum). We find no reason to accept the Revenue's instant argument more particularly in view of the fact that this is second round of consequential proceedings wherein the earlier learned co-ordinate bench had already rejected the very contentions seeking to decline both aggregation as well as TNMM; as the case may be (supra).

> *6. The Revenue's next vehement contention before us is that the assessee had not even furnished the relevant details having adopted aggregation as well as TNMM method in the consequential proceedings. We find no substance in the Revenue's instant last argument as well since this is once again a second round of assessment wherein no such objections had been put forth from the departmental side in the former round. Be that as it may, we therefore accept the assessee's contentions seeking to imply "aggregation" as well as TNMM method and leave it open for the "TPO" to finalize the consequential computation as per law. We further make it clear that it shall be very much open for the assessee to file on record all the necessary details pertaining to the comparable(s) list submitted in "TNMM" in the consequential computation. Ordered accordingly."*

12. On the basis of the above, it was submitted by the ld.AR that since the issue has been finally decided by the Tribunal on the identical facts in the case of the assessee for A.Y. 2009-10 in favour of the assessee, therefore, the same principle is applied and decided in favour of the assessee by holding that the method adopted by the assessee i.e. TNMM was the most appropriate method and accordingly, a direction was issued to the TPO / AO to adopt TNMM as the most appropriate method for determination of transfer pricing adjustments.

13. Per contra, the ld.DR had submitted that it is correct that the Tribunal in the second round of litigation had reiterated the finding recorded wherein it was held that the transactions are required to be determined / benchmarked on the basis of TNMM. However, it was submitted that he has to verify whether the appeal was preferred by the Department. It was further submitted that the correctness of TNMM was not examined by the TPO.

14. In rebuttal, the ld.AR for the assessee has submitted that the assessee has checked from the website of the hon'ble High Court and there is no such appeal was preferred by the Department against

the order passed by the Tribunal for A.Y. 2009-10. Further, it was submitted that even assuming that there was some appeal filed by the Department against the order of the Tribunal but the situation is no stay was granted by the hon'ble High Court against the decision of the Tribunal.

15. We have heard the rival contentions of the parties and perused the material available on record. The DRP for the A.Y. 2009-10 vide his direction dt.22.09.2017 has observed in pages 5 to 7 as under :

> We also note that the DRP in the assessee's case for A.Y. 2011-12 & A.Y. 2012-13 have rejected the TNMM study, which are relevant for discussion, the extract of the same is as under:

Having considered the submissions of the assessee, we have perused the TP Order to find that this issue was examined at length by the TPO in Para 7 on Pages 5-7 of the TP Order and we are in complete agreement with the stand taken by the TPO and the rationale. Further, it is clear from the plain reading of Explanation to Section 92 of the Act, that "the allowance for an expense or interest arising from an international transaction shall also be determined having regard to the arm's length price" which makes it clear that in addition to the determination of any income arising from an international transaction, the allowance for an expense has also to be determined having regard to the arm's length price. Hence, we are not in agreement with the submission of the assessee that once the income of the manufacturing segment has been accepted at arm's length under TNMM, no separate evaluation of the expenses claimed under the head under 'royalty, sub-licence fee for use of trade mark, compensation payable to AE, etc., can be made. The Hon'ble Punjab & Haryana High Court in IT Appeal No.182 & 172 of 2013 (O&M) in the case of Knorr Bremse India Pvt. Ltd., whether composite transaction approach to be adopted or separate transaction approach to be adopted for evaluation of the international transactions, in paragraph 41 observed that "the question, therefore, in each case must first be whether the sale of goods or the provision of services was a separate independent transaction agreement or whether they formed part of an international transaction, i.e. a composite transaction." If the rationale of the observation of the Hon'ble Punjab & Haryana High Court is applied to the present case, it is an undisputed fact that the assessee entered into independent agreements for payment of licence fee and management fees, and therefore, such transactions cannot be aggregated with the evaluation of manufacturing under TNMM. The view also finds support from the decision of the Hon'ble ITAT, New Delhi, in the case of JCB India Ltd. vs. DCIT, in ITA No.1075/Del/2016, wherein, in paragraph 7.6, held that "Nitty gritty of the above discussion is that aggregation of related transactions is permissible, but there is no rule that all the related and unrelated transactions can be combined and shown at ALP under the TNMM on entity level. The Hon'ble Punjab & Haryana High Court in ITA No.1075/Del/2016 Knorr-Bremse India P. Ltd. vs. ACIT (2016)380 ITR 307

(P&H) has held that in order to combine two or more transactions, it is essential that they should be either inextricably linked to each other either by way of a package deal or that a number of transactions are priced differently but on the understanding that the assessee will accept all of them together (i.e. either take all or leave all). It further held that merely because purchase of goods and acceptance of services lead to manufacture of final product, it does not follow that they are dependent transactions." It is further held in paragraph 7.7 that "On going through the facts and ratio of the decisions in Sony Ericsson (supra) and Knorr-Bremse (supra), it is manifest that the contention of the ld. AR for aggregating all the international transactions including ₹Payment of royalty', and then applying TNMM on entity level, cannot be upheld because the international transaction of 'Payment of royalty' is independent of other transactions. The tribunal in assessee's own case has also jettisoned such argument advanced on behalf of the assessee for earlier years and has rightly held that the ALP of the international transaction of 'Payment of royalty' should be done ITA No.1075/Del/2016 separately on a transaction by transaction approach, which has been rightly interpreted by the assessee as a CUP method, that was employed by the assessee in its transfer pricing study report for the year under consideration. Ergo, we turn down the argument of the ld. AR and approve in principle that the TNMM cannot be applied and the international transaction of payment of royalty in respect of model 3DX has to be benchmarked by applying CUP as the most appropriate method." Further, the TNMM is not appropriate method considering the fact that against the total operating cost of ₹1,304.58 crores, the payments to the AEs are only to the extent of ₹30 crores (2.29%). Similarly, against the total revenue of ₹1,498.53 crores, the revenue from the AEs is only ₹9.32 crores (0.62%). The similar objection raised for the assessment year 2011-2012 has been rejected by the DRP.

In view of the above factual and legal position, with due respect to the decisions on which reliance has been placed by the assessee, we are of the view that the TNMM is not the most appropriate method for evaluating the international

transactions entered into by the assessee with the AEs, and CUP would be the most appropriate method. Accordingly, the above objections are rejected.

2.3 Ground of objection No. 3: Payment for Technical Know-how and related service fee is at arm's length

Ground No. 1: The learned TPO erred in concluding that the ALP of the technical know-how and related service fee is 0.61% of sales and thereby arriving at the TP adjustment amounting to a sum of Rs.3,86,16,198.

Ground No. 2: The learned TPO failed to examine the evidence including commercial agreement filed by the assesse to demonstrate that the expenditure was incurred for obtaining the operational efficiency in production of cement.

Ground No. 3: The learned TPO erred in rejecting external Comparable Uncontrolled Transaction ("CUT") searches performed by the assessee to justify the ALP of the international transaction pertaining to payment of royalty. The assessee had relied on the results of the following searches for comparable agreements:

- External search identifying four comparable agreements with an arithmetic mean royalty rate of 2.75%;
- External search identifying eight comparable agreements with an arithmetic mean royalty rate of 2.78%; and
- Internal CUP agreement, whereby AE of ZCL charged royalty at 2.5% on Kronos International for use of technical know-how

Ground No.4: The learned TPO erred in not taking cognizance the observations made by the Hon'ble ITAT in assessee's own case for AY 2009-10.

Having considered the submissions, we note that in the earlier para we have rejected TNMM as the Most Appropriate method, and we note CUP would be the MAM in the facts & circumstances of the case. We also do not find any infirmity in the TPO's action in rejecting CUT analysis, as these are companies in different jurisdictions and their comparability to the assessee's case has not been established.

16. The closure scrutiny of the direction given by the DRP for A.Y. 2009-10 clearly shows that the case of the assessee was similar for all the A.Ys. i.e., 2009-10 to 2013-14, therefore, as there are no change in facts, it would be in the interests of justice and with a view to maintain the consistency, the Tribunal is duty bound to apply TNMM as most appropriate method by respectfully following the decision of this co-ordinate bench of the Tribunal for A.Y. 2009-10.

17. Respectfully, following the decision of the Tribunal for A.Y. 2009-10, we are of the opinion that the international transactions of the assessee are required for benchmarking by applying TNMM method as most appropriate method instead of CUP method and accordingly TPO is directed to apply TNMM as most appropriate method for benchmarking. Further on perusal of the record, we found that the TPO had no occasion to benchmark the transactions by applying TNMM, and thereafter applied CUP method. We accordingly send back these issues to the file of AO / TPO with the direction to work out the international transactions by applying TNMM as most appropriate method and determine the ALP.

Accordingly, the grounds 2 to 4(d) raised by the assessee are allowed for A.Y. 2011-12.

18. Having decided the issue for A.Y. 2011-12, we would like to mention that the international transactions mentioned by the TPO for A.Y. 2012-13 to the following effect :

Name of AE	Nature of transaction	Amount (INR)
Ciment Francais SA	Technical know-how and research and other fee	13,51,55,686

Ciment Francais SA	Sub-license trademark fee For use of Trademark	6,59,49,226
Inter bulk Trading SA	Sale of Clinker	9,32,50,303
Italcementi Fabbriche Riunite Cemento SpA	Procurement services fee paid	72,27,381
Bravo Solutions SpA	E-Procurement Consultancy services fee paid	88,18,278
CTG SpA	Consultancy services fee paid	8,26,52,781
Ciment Francais SA	Reimbursement of expenses paid	86,61,340
Bravo Solutions SpA	Reimbursement of expenses paid	8,06,176
Italacementi Fabbriche Riunite Cemento SpA	Reimbursement of expenses paid	18,61,405
Climent Francais SA	Reimbursement of expenses received	23,41,868
Italacementi Fabbriche Riunite Cemento SpA	Reimbursement of expenses received	62,26,926
CTG SpA	Reimbursement of expenses received	58,17,683
Ciment Francais SA	Payables	5,42,53,321
Bravo Solutions SpA	Payables	56,06,477
CTG SpA	Payables	2,40,43,258
Italacementi Fabbriche Riunite Cemento SpA	Receivables	1,64,97,030

Similarly for A.Y. 2013-14 which are forming part of Para 4 of the TPO order to the following effect :

International Transactions		
Name of the Associated Enterprises	**Nature of Transaction**	**Amount (Rs)**
Ciment Francias SA	Technical knowhow and research and other service fees	14,38,61,822
Ciment Francias SA	Sub-license fee for use of trademark	7,16,59,490
Itlacementi Fabbriche Riunite Cemento SpA	Procurement service fee paid	71,85,927
Bravo Solutions SpA	E-Procurement service fee paid	67,68,345
Ciment Francais SA	Software Lincense fees paid	48,89,635
CTG SpA	Consultancy service fee paid	4,47,17,617
CTG SpA	Consultancy service fee paid (CWIP)	5,28,26,169
Itlacementi Fabbriche Riunite Cemento SpA	IT services	2,35,51,829

Itlacementi Fabbriche Riunite Cemento SpA	Reimbursement of expenses paid	6,95,167
Deynya Cement AD	Reimbursement of expenses paid	15,42,727
Suez Cement Company SAE	Recovery of expenses	53,41,449
CTG SpA	Recovery of expenses	8,37,971
Ciment Francais SA	Recovery of expenses	51,33,114
Itlacementi Fabbriche Riunite Cemento SpA	Receivables	1,51,59,049
Suez Cement Company SAE	Receivables	22,53,036
Bravo Solutions SpA	Payables	21,33,648
CTG SpA	Payables	65,09,730
Ciment Francais SA	Payables	5,32,56,697
Itlacementi Fabbriche Riunite Cemento SpA	Payables	51,45,697

19. A closer look of the international transactions mentioned by the TPO in Para 4 of the respective order u/s 92CA(3) clearly shows that the transactions for A.Ys. 2012-13 and 2013-14 are similar with AYs. 2011-12. Therefore, respectfully following our decision for A.Y. 2011-12, we also allow the T.P grounds raised by the assessee in these set of appeals, namely, **ITA 254/Hyd/2017, ITA 182/Hyd/2018 and ITA 66/Hyd/2019.** Accordingly, the TPO / AO is directed to apply TNMM as most appropriate method in respect of the international transactions mentioned by the assessee in Form 3CEB and determine the ALP.

20. **NON-TRANSFER PRICING ISSUES.**

Firstly, we will deal with ground Nos. 5(a) and 5(b):

With respect to grounds 5(a) and 5(b) for A.Y. 2011-12, the ld. AR had drawn our attention to the draft assessment order dt.31.03.2015 wherein at Page 3, the Assessing Officer has mentioned as under :

"The assessee debited to Profit and Loss Account an amount of Rs.9,56,82,000/- towards cash discounts. The assessee has not filed any proof in respect of discounts given and in view of the same, the assessee's claim is disallowed."

Feeling aggrieved by the draft assessment order dt.31.03.2015, assessee had filed objections before the DRP and the DRP dealt with the issue at Pages 32, 33 and 34 to the following effect.

"3. Other than TP adjustments.

3.1 Objection No.11 - Disallowance of Cash Discount

The learned AO has erred in disallowing cash discount amounting to Rs. 9,56,82,000.

(i) The learned AO has erred in not accepting the Company's plea that the said cash discounts have been given to the customers to encourage early realization of debt, to improve working capital cycle and to avoid bad debts.

(ill) The learned AO has erred in disregarding the fact that this is a normal business practice in cement industry and has direct nexus to the business,

(iv) The learned AO has erred in holding that the Assessee has not maintained/produced concrete or proper vouchers in support of the said cash discount.

It is submitted that the assessee is not in agreement with the addition proposed due to the following reasons :

- *The cash discount has been given in the normal practice of business followed."*
- *Further, the assessee has maintained proper documentation in support of the Cash discount and provided the required details to the leaned AO.*

It is further submitted that the first appellate authority for the AY 2009-10 has held that cash discount as an allowable expenditure.

It is submitted that during the year it has incurred an amount of Rs.9,56,82,000 towards cash discount. Further, the Assessee wishes to submit that the cash discount have been given to the customers to encourage early realization of debt, to improve working capital cycle and to avoid bad debts. Section 37 of the 'Act inter alia states that "Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or

expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession."

In the given case, it is clear that the cash discount is expected to provide benefit to the Company (in terms of extended sales). Further, the Company provides various kinds of discount such as incentives, trade discount, price cards, special rebates, dealer incentives, service dealer commission, service commission to commission agent and quantity discounts depending on the person to whom the discount is offered, All these discounts are offered to different person/ customer as per the business policy of the Company, Apart from all these discounts, Company also offers cash discount for early realization of its debt. Providing all these kinds of discount is essential for the smooth operations of the business.

Further, it is normal industry practice followed by various companies to provide cash discounts to customer. Therefore, it cannot be said that just because company is offering various other types of discount, cash discount is not warranted. Offering cash discount is the management decision to carry out business activity of the company effectively.

Having considered the submissions, it is noticed from the assessment order that the assessee failed to furnish any evidence to support such cash discounts, in such circumstances, we are of the view that the A.O. was justified in disallowing such claim as the assessce lies to submit the evidences that such expenses have been incurred wholly and exclusively for the purpose of the business carried on during the year, for allowing deduction u/s 37(1) of the Act. The objection is accordingly rejected."

21. As there was no evidence filed by the assessee to show that the expenses were incurred wholly and exclusively for the purpose of business carried out during the year under consideration, the DRP has rejected the objections raised by the assessee.

22. The Assessing Officer on the basis of the directions issued by the DRP has disallowed the cash discount sought by the assessee. Aggrieved with the directions of DRP, assessee is now before us.

23. Before us, the assessee has submitted the following written submissions :

"*The Appellant gives cash discounts to the customers to encourage early realization which in tum improves the working capital cycle and reduces the exposure of bad debts. During the course of assessment proceedings, the Appellant submitted the break-up of the cash discount given to the customers. Further, giving cash discounts is a normal industry practice and allowable under section 37(1) of the Act being expenditure incurred for the purposes of business or profession.*

In the current year, both the Assessing Officer and the DRP have disallowed the said expenditure for want of evidences.

In Assessment Year 2009-10 similar issue had come up in the first round of The DRP gave a finding that these expenses were allowable as business expenditure under section 37(1) of the Act. However, given the lack of, directed to submit the same before the AO.

In the Final Assessment Order dated 30.01.2014, the Assessing Officer on appreciation of the evidences filed allowed the claim. Copy of the Final Assessment Order for AY 2009-10 and a copy of the DRP order dated 25.11.2013 is appended along with this chart separately.

By way of an application under Rule 29 dated 09.05.2018 the Appellant has filed additional evidence in respect of this ground of appeal. This is duly supported by an affidavit of the director of the company. The additional evidences are referred to below.

Since the disallowance in the curet year is only on account of want of evidence, it is prayed that this Hon'ble Tribunal may allow the Rule 29 application, admit the evidences and remand the matter back to the AO for verification.

Evidences:

Price card for the month of July 2010 indicating the discount policy of the Company, Page No. 1-2 of Additional Evidence Paper Book.

Month-wise and region-wise break-up of cash discount, Page No. 3-4 of Additional Evidence Paper Book

Samples of party-wise and month-wise break-up of cash discount, Page Nos.5-6 of Additional Evidence Paper Book

Sample workings of cash discount given by the Company, Page No.7-20 of Additional Evidence Paper Book."

21. On the other hand, the ld.DR had submitted that no evidence was filed before the AO during the assessment proceedings or

during the first appellate proceeding before the DRP and therefore, the same is now entitled to any relief. It was further submitted that even the application filed by the assessee under Rule 29 dt.09.05.2018 is required to be rejected.

22. We have heard the rival contentions of both the parties and perused the material available on record. The draft assessment order was passed in this case by Assessing Officer on 31.03.2015 and thereafter, the DRP has issued directions on 29.12.2015 and the final assessment order was passed on 25.02.2016 and thereafter, the assessee has filed the present appeal before us dt.23.05.2016. After filing of the appeal before this tribunal, the assessee filed the application for admission of the additional documents only in the year 2018. In our view, sufficient opportunities were given by the lower authorities however despite grant of opportunities, the assessee had failed to file any document/claim before the lower authorities, no for the first time the assessee had filed the document and sought to claim the deduction on account of cash discount. In our view such it plea at belated stage cannot be accepted more particularly when the assessee is a company and is run by the professionals and also advised by the professionals. We may draw support from the decision of the High Court in the case of A.K. Babu Khan [1976] 102 ITR 757 (AP), wherein the High Court had held as under:-

> *"Mr. Habeeb Ansari, learned counsel appearing for the legal representative of the deceased-assessee, contended that the Tribunal has not considered the scope and effect of the words "or for any other substantial cause" occurring in rule 29 and, therefore, it is fit case where it should be held, having regard to the fact that the legal representative is in possession of the material which became available to him*

subsequent to the death of the assessee, that he should be allowed to produce that evidence.

Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963, reads:

"The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Income-tax Officer has decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by him or not specified by him, the Tribunal may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."

This is not a case where the Wealth-tax Officer had decided the case without affording sufficient opportunity to the assessee to adduce evidence. Any number of adjournments given by the Wealth-tax Officer or by the Appellate Assistant Commissioner were not availed of by the assessee to place an iota of evidence with the result that the Wealth-tax Officer and the Appellate Assistant Commissioner had to determine the net wealth of the assessee ex parte. It is also not a case where the Tribunal required any documents to enable it to determine the question of the net wealth of the assessee. It is purely within the discretion of the Tribunal to permit additional evidence to be adduced to enable it to pass orders or, in its opinion, if there is any substantial cause for receiving additional evidence.

The expression "or for any other substantial cause" occurs in rule 27(1)(b) of Order 41, Civil Procedure Code, and this expression has been the subject-matter of decisions by the

Privy Council, Supreme Court and High Courts. In Parsotim Thakur v. Lal Mohar Thakur AIR 1931 PC 143it was held that the words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence and it is only where the appellate court requires any document to be produced or any witness to be examined that this rule will apply. The discretion to receive additional evidence is to be exercised only when any point is required to be cleared up in the interests of justice. This power given to the Tribunal has to be exercised cautiously and sparingly in order to advance the interests of justice. Rule 29 is not intended to allow an assessee who has been unsuccessful throughout to patch up the weak parts of his case or to fill up omissions.

It is well settled that a party guilty of remissness and gross negligence as in this case is not entitled to indulgence being shown to adduce additional evidence. The assessee had ample opportunities and year after year, he was given opportunities to produce material so that assessment could be made on a consideration of the material placed by him. Merely for the reason that the legal representative of the deceased-assessee has come on record at the stage of second appeal before the Tribunal, it will not entitle him to say that he should be afforded sufficient opportunity to dispute the assessments made by the Wealth-tax Officer. He cannot put himself in a better position than the assessee himself. The words "for any other substantial cause" have been clearly held to refer to the requirement of the court. That position is made clear by the Privy Council in Parsotim's case (supra).

Satyanarayana Raju J. (as he then was) in Bobbili Gowresu v. Kottu Subhadramma AIR 1957 AP 961,964., while construing rule 27 of Order 41, Civil Procedure Code, observed:

"..........the court must be satisfied that it is necessary for the disposal of the case that the document sought to be admitted must be received in evidence or in the alternative, there must be sufficient cause."

The Supreme Court in Arjan Singh v. Kartar Singh AIR 1951 SC 193, 195 observed:

"If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored and the case decided as if it is nonexistent."

Dealing with the scope of rule 29, a Division Bench of the Madhya Pradesh High Court in Commissioner of Income-tax v. Babulal Nim [1963] 47 ITR 864 (MP), held that the admissibility of additional evidence under rule 29 depends on whether or not the Tribunal requires it to enable it to pass orders or for any other substantial cause.

There is also nothing to suggest from the order of the Tribunal that it had not exercised its discretion properly in refusing to receive the additional evidence sought to be produced by the legal representative. We, therefore, answer the question in the negative and against the assessee."

22.1 Though it was argued by the assessee that the DRP had issued the directions to the AO to consider the evidence submitted by the assessee before DRP for A.Y. 2009-10. Thereafter, the AO in final assessment order dated 30.1.2014 for Assessment Year 2009-10 had

allowed the deduction on account of cash discount . Assessing Officer at Page 5 of the final assessment order which is to the following effect.

(i) <u>Cash discount of Rs.12,16,46,070/-</u> :-

The assessee's AR stated the cash discounts were given to the customers to encourage early realization of debts, to improve working capital cycle and to avoid bad debts. This is a normal business practice in cement industry and a very much related to business. In support of this claim they have adduced evidence for cash discounts for early payments and they have also explained that it is a business practice and requested to allow the expenditure claimed.

The assessee's claim was examined in detail by going through the material furnished in support of the above expenditure and the expenditure is found necessary for the business and also reasonable. Therefore, the same is **allowed**.

23. Admittedly, the DRP has given the opportunity to the assessee for A.Y. 2009 – 2010 for producing the evidence / documents to prove the disallowance on account of cash discount given to the consumers. Before us, the assessee had filed the application for admitting the additional document to show that the actual discounts are offered and given to the various consumers / concerns and the same was required to be treated as business expenditure while computing the income of the assessee. The Ld.AR has submitted that a separate application dated 9.5.2018 was filed for the purposes of admitting the additional evidence filed by the assessee. The assessee has given the reasons for not filing the said document before the lower authorities and had submitted that this additional document be permitted to be file on record. As noted hereinabove the assessee was negligent in not following the claim before the lower authorities by

seeking deduction on account of cash discount either before the AO or before the DRP and also failed to file any documentary evidence in support thereof before lower authorities . Records shows that DRP had passed directions on 25/11/2013 and Assessing Officer passed order on 30.1.2014 for Assessment Year -2009-10, however despited that nothing was done for the current assessment year by the assessee by way of bringing on record the document of cash discount before the lower authorities. Admittedly assessee had filed the application for admission of additional document on 9/5/ 2018 after passage of two years from the date of institution of the present appeal, therefore in our view the assessee was not able to make out a case for admission of the additional documents at this stage more particularly when no offered for made by the assessee either before the assessing officer or before the DRP at the first instance. Accordingly the application for admission of the additional document is rejected and hence the ground raised by the assessee is also rejected by relying upon the decision of the direction High Court in the case of A.K. Babu Khan (supra) .

GROUND NO.6

24. At the outset, ld.AR for the assessee submitted that the assessee is not pressing ground No.6 which is with respect to allowance of write off loans and advances of Rs.4,50,451/- and requested that the same may kindly be dismissed as not pressed.

30. In view of the submission of ld.AR, we are hereby dismissing this ground as not pressed. Accordingly, ground No.6 is dismissed.

GROUND NOS.7(a) and 7(b):

31. **The next grounds raised i.e. 7(a) and 7(b) are with respect to depreciation on goodwill.**

In this regard, the ld.AR has submitted that the assessee has filed a letter dt.05.02.2015 before the Assessing Officer for grant of depreciation on goodwill to the assessee. However, the Assessing Officer has not mentioned anything about allowing or disallowing of the depreciation on the goodwill in the draft assessment order. The ld.DRP on appeal has granted the benefit to the assessee at Para 3.7 at Page 55 of his directions to the following effect.

> *"3.27 Objection No. 27 - Depreciation on Goodwill*
>
> *(i). The learned AO has erred in granting deduction of goodwill amounting to Rs.16,60,91,410.*
>
> *(ii) The learned AO has erred in not considering the submission made assessee in this regard.*
>
> *(iii) The learned AO ought to have granted depreciation on 'goodwill based on the directions given by the DRP members for the AY 2010-11.*
>
> *It is submitted that in the Assessee's own case for AY 2010-11, the Honorable DRP has directed the leaned AO to allow the clam for depreciation on Goodwill, Based on the same, depreciation on goodwill should be allowed to the Assessee for the AY 2011-12 also.*
>
> *Having considered the submission , we direct the A010 allow the depreciation issued by the DRP in AY. 2010-11, in accordance with the provisions of the Act.*

32. The AO while passing the final assessment order has dealt with the issue at Pages 4 and 5 of the order to the following effect :

> *B(iii) Depreciation on Goodwill: The assessee has claimed depreciation on goodwill of Rs.16,60,91,410/- by filing a letter dt.05.02.2015 before the Assessing Officer request for allowance of depreciation on goodwill. Before the Hon'ble Dispute Resolution Panel it was submitted that in assessee's own case for Asst. Year 2010-11 the Hon'ble Dispute Resolution Panel has directed the Assessing Officer to allow the claim for depreciation on goodwill and as such depreciation on goodwill should be allowed for the year under consideration. This was the additional ground. The Hon'ble Dispute Resolution Panel has directed the Assessing Officer to allow the depreciation in accordance with the direction issued by the DRP in Asst. Year 2010-11, in accordance with the provisions of the Act. In this connection, the Hon'ble Dispute Resolution Panel in its order at para no. 18.10 for Asst. Year 2010-11 has 'observed as under:*
>
> *"The Assessing Officer is therefore directed to arrive at the correct valuation of goodwill in the light of the judgment of DCIT Vs. Toyo Engineering India Ltd. (Supra) and if the fair value of assets of the 'SVCL' is less that the consideration of amalgamation, the difference between the two should be considered as the amount incurred for 'goodwill'. Accordingly, the correct amount of depreciation will be calculated. Objection is allowed with above direction.*
>
> *The Hon'ble Income Tax Appellate Tribunal, 'L' Bench, Mumbai in DCIT Vs. Toyo Engineering India Ltd., (ITA No.3279/Mum/2008 dated 25-05-2012) has held at para no.20 of the order as follows: "... unless the valuation has been done of each and every asset of the company and, therefore, goodwill, if any, is also valued and investment is earmarked as having been incurred towards the purchase of goodwill, the question of apportioning certain amount towards purchase of goodwill does not arise.*
>
> *In assessee's case, the amalgamation was with its subsidiary company viz., Sri Vishnu Cement Ltd. (SVCL) and no valuation was independently done for each and every asset of the companies involved and no investment was earmarked as having been incurred towards the purchase of goodwill. In these circumstances, the assessee's claim for allowance of depreciation on goodwill cannot be accepted.*

33. The ld.AR before us has submitted that the assessee took over Sri Vishnu Cement Limited (SVCL) through a scheme of amalgamation on approval of hon'ble High Court of Andhra Pradesh. On account of amalgamation, goodwill amounting to Rs.17,975.03 lakhs arose. It was the case of the assessee that the valuation report

was submitted before the AO and the assessee claimed the depreciation of Rs.1660.91 lakhs on the above said goodwill. However, the Assessing Officer has declined the claim of the assessee on the basis of the reasons mentioned hereinabove. It was submitted by the ld.AR that the similar issue was arose in A.Y. 2010-11 and the Tribunal order dt.05.08.2016 has allowed the claim of the assessee.

34. Per contra, the ld.DR for the Revenue has submitted that against the first order on 17.04.2015 in ITA 471/Hyd/2014, the issue of the depreciation was dealt by the Tribunal in Para 15.2 and 15.3 which read as under :

> *"15.2 We have to accept that judicial principles relied on by assessee are very clear that assessee can raise any additional ground on legal matters, however, rider is that the facts should be available on record. Assessee submitted that the merger took place w.e.f. 01-01-2007 i.e., in A.Y.2007-08. We are considering appeal in AY.2009-10. How, the goodwill arose what is the amount and why assessee has not claimed depreciation and other issues require examination in AY.2007-08. In AY.2009-10, if a depreciation was allowed on an asset which is in the block of assets in earlier year, only consequential depreciation can be allowed. Since assessee is claiming fresh depreciation on the goodwill, which arose in AY.2007-08, we cannot allow the ground in this assessment year. As rightly held by the Hon'ble Supreme Court in the case of S.A. Builders Ltd., [289 ITR 26 (SC)], additional ground cannot be considered, in the absence of any facts on record.*
>
> *15.3 In view of this, since the issue did not arise in the year under consideration and the facts pertaining to the quantification of the claim are not on record, we cannot entertain the additional ground, just because law on this was settled on legal principles. If at all assessee's claim to depreciation was allowed in AY.2007-08, then, assessee can claim consequential depreciation in this assessment year, before the AO, the additional ground is accordingly rejected."*

35. It was submitted by the ld.DR that no direction was given by the Tribunal in the 2nd order dt.24.09.2016 for A.Y. 2009-10. It was

submitted that even the M.A. filed against the first order dt.12.08.2015 vide M.A.No.78/Hyd/2015 in ITA 471/Hyd/2014 was dismissed by the Tribunal with the following observations:

> *"4. As can be seen from the above, the ITAT has consciously not considered the ground as the facts were not on record. Just because an amount was shown in the balance sheet and claimed depreciation on the basis of entries in Books of Accounts, it cannot be considered that all facts are on record. In fact in para 15.2 itself, doubt has been expressed 'how the goodwill arose, what is the amount, why assessee has not claimed depreciation and other issues require examination in AY. 2007- 08'. The claim of depreciation has to be examined in the year in which such asset becomes part of Block of assets. Then in later years only consequential depreciation on WDV has to be allowed. Admittedly the Goodwill came into assessee books in AY 2007-08. Since, we were adjudicating the issues in AY. 2009-10, Bench also gave a clear finding that consequential depreciation can be allowed in AY. 2009-10.*
>
> *Assessee also admits that issue and the claim for AY. 2007-08 is still pending before the CIT(A). In these circumstances, we are of the opinion that there is no mistake apparent from record and accordingly, the contentions raised by assessee are rejected."*

36. Ld.DR had drawn our attention to the amendment to the Finance Act, 2021 whereby there is change in law wrt definition of intangible asset ("goodwill") and depreciation thereon.

36.1 To rebut the same, the ld. AR has filed written submission dt.29.04.2022 which was reproduced below :

> *"During the course of hearing conducted on 21.04.2022, relating to grounds relating to disallowance of depreciation on goodwill, in each of the subject assessment years it was for the Appellant before this Hon'ble Bench that the Assessing submitted by the Officer ("AO") has erred in not allowing the claim of depreciation on goodwill in terms of the judgment of the Hon'ble Supreme Court in the case of Smifs Securities Limited vs. Commissioner of Income-tax, Kolkata (2012) (348 ITR 302).*
>
> *In view thereof, a query was raised by the Hon'ble Bench as to whether the allowability of the said claim was affected by the amendments brought about in section 2(11) (definition of block of assets) and Section 32(1)(ii) of the Income Tax Act, 1961 ("the Act") vide Finance Act, 2021.*

> *In connection with the above, itis most respectfully submitted that the said amendments made by the Finance Act, 2021 are applicable only from 01.04.2021 and have no retrospective application. Hence, the amendments do not in any way restrict or effect the allowability of the claim of depreciation on goodwill in the subject assessment years (i.e, AY 2011-12 to AY 2014-15)."*

37. We have heard the rival contentions of both the parties and perused the material available on record. Admittedly, the scheme of amalgamation was approved by the hon'ble High Court of A.P., and the assessee had filed valuation report before the Assessing Officer as mentioned by the assessee. However, the valuation report, which was filed by the assessee was required to be considered with respect to computation of valuation of the goodwill for the A.Y. 2007-08 i.e year of acquisition. However, it was informed to us that as the issue is pending for adjudication before the lower authorities and the same has not attained finality.

38. In the light of the above, we deem it appropriate to remand back this issue to the file of Assessing Officer with a direction that if the Assessing Officer on consideration of the evidences filed on record for A.Y. 2007-08 comes to a definite figure of valuation of goodwill, then accordingly depreciation shall be allowed to the assessee for the year under consideration in accordance with law. However, with respect to the effect of amendment which changed the definition of tangible asset and depreciation on the tangible asset, we are of the opinion that the change in law has brought into book w.e.f 01.04.2022, as is clear from Explanation to the Budget at page 107 where it is categorically mentioned that the change in law will came into effect w.e.f. 01.04.2022 . Further it is also provided that if the assessee has already claimed depreciation on the goodwill in the earlier assessment years,

the same will be taken into account while considering the value of the intangible asset namely, the goodwill. In the light of the above, there will not be any effect of the amendment in the Act for the current set of appeals as amendment will operate prospective, hence the valuation of the goodwill and depreciation thereon shall be computed on the basis of the existing law as applicable for the A.Y. 2007-08 and thereafter. In the light of the above, we deem it appropriate to remand back the issue of depreciation pertain to the goodwill to the file of jurisdictional Assessing Officer with a direction to give depreciation on the valuation of the intangible asset on the basis of valuation of goodwill if any for A.Y. 2007-08. Needless to say, the outcome for A.Y. 2007-08 would have bearing on the subsequent assessment year, as the valuation as on 01.04.2007 or thereafter when the goodwill was acquired by the assessee on amalgamation would be the commencing point for determining the depreciation on the Goodwill. Accordingly, grounds 7(a) and 7(b) are allowed for statistical purposes.

GROUND NOS. 8(A), 8(B), 9 AND 10

40. At the outset, ld.AR for the assessee submitted that, the assessee is not pressing ground Nos. 8(a), 8(b), 9 and 10 and hence, requested that the same may kindly be dismissed as not pressed.

41. In view of the submission of ld.AR, we are hereby dismissing ground Nos.8(a), 8(b), 9 and 10 as not pressed. The grounds are dismissed accordingly.

GROUND NOS.11 TO 15

42. **Next, we will deal with ground No.11 to 15.**

The assessee had filed a letter before the DRP on 20.07.2015 whereby the assessee sought to raise the additional grounds of objections. The contents of said letter are reproduced below :

> *"We refer to the captioned objection for the AY 2011-12 which was filed on May 5, 2015.*
>
> *The Assessee would like to file additional ground of objection with respect to the following:*
>
> *a) Objection No 1.29: Claim of balance 50% of the additional depreciation under section 32(1) (iia) of the Income-tax Act, 1961 in the subsequent year.*
> *b) Objection No. 1.30: Claim of provision for site restoration fund.*
> *c) Objection No. 1.31: Claim for prevision for obsolescence of spares.*
> *d) Objection No. 1.32 : Claim for Community development expenses*
> *e) Objection No. 1.33 : Claim for giveaways*
> *f) Objection No. 1.34 : Claim towards environment protection expenses.*
>
> *We request the Hon'ble DRP member to please take the above as an integral part of the captioned objection filed on May 5, 2015."*

43. The DRP had passed an order on 02.12.2015. However, in the directions issued by the DRP, there was no adjudication in respect of these additional grounds raised by the assessee and the DRP in respect of ground No.11 has issued a direction to the AO to verify the computation of income filed along with revised return of income and that if it is found that the assessee has offered the same as income, the

proposed income should be deleted. However, with respect to ground Nos.12 to 15, there was no adjudication by the DRP.

44. The ld.AR before us submitted that assessee had debited an amount of Rs.21,14,056/- towards provision for obsolete stocks and spares in profit and loss account and that this provision was made in respect of slow or non-moving stock and spares and the net realizable value of it was zero and further submitted that the AO has not verified the return of income and he erroneously added the same though it was already added by the assessee.

45. During the course of assessment proceedings, the Assessing Officer with respect to ground No.11 had not verified the return of income filed by the assessee and had erroneously added the same though it was already offered by the assessee. However, the Assessing Officer has not discussed with respect to ground No.11 in the final assessment order.

46. Admittedly, it is clear from the letter dt.20.07.2015 (supra), the assessee has raised additional grounds in respect of ground Nos.11 to 15 before DRP. However, the DRP has not made any comments with respect to ground Nos.12 to 15. Further, there was no direction by the DRP to allow the provision for obsolete stock to the Assessing Officer. In light of the above, it was submitted by the ld.AR that the matter is required to be remanded back to the file of Assessing Officer with a direction to consider the objections raised by the assessee namely, ground nos.11 to 15 before the DRP afresh and pass an appropriate order in accordance with the law. In our view, whether the DRP was

under an obligation to consider and decide the grounds afresh before it by the assessee is not come under res integra and the same has been accepted by the Tribunal in many matters, referred hereinabove by the assessee in the written submissions.

46.1 the Ld. DR for the revenue relied upon the order passed by the lower authorities

47. We have heard the rival contention the parties and perused the material of liberal on record .In the Case of Electrosteel Castings Ltd Vs. DCIT , the Calcutta tribunal in paragraphs 54 and 55, after reference to the decision of the Hon'ble Supreme Court in the matter of Goetze (India) Limited had held as under :

> *"54. As far as ground No. 3 raised by the Revenue is concerned, the issue that arise for consideration is as to whether the Dispute Resolution Panel could have directed the Assessing Officer to entertain the claim of the assessee that sales Tax remission received by it is capital receipt not chargeable to Tax when the said claim was not made by filing a revised return of income before the Assessing Officer but only by filing a computation of income before the Assessing Officer.*
>
> *55. We are of the view that there is no merit in ground No. 3 raised by the Revenue. The Dispute Resolution Panel as a first appellate authority has the power to entertain a new claim even in the absence of a revised return of income. The Supreme Court in the case of Goetze (India) Ltd. (supra) has clarified that "the decision was restricted to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under section 254 of the Income-Tax Act, 1961". This has been interpreted in several judicial pronouncements as applicable even to the first appellate authorities. The Hon'ble Delhi High Court in the case of CIT v. Jai Parabolic Springs Ltd. [2008] 172 Taxman 258/306 ITR 42 (Delhi) has held that the appellate authorities under the Act, were free to consider a claim made by an assessee even in the absence of a revised return of income and that the requirement for filing a revised return of income as laid down by the Hon'ble Supreme Court in the case of Goetze (India) Ltd. is applicable only when a claim is made contrary to the return of income before the Assessing Officer. The Hon'ble Delhi High Court in the case of CIT v. Bharat*

> *Aluminium Co. Ltd. [2007] 163 Taxman 430 [2008] 303 ITR 256, has inter alia ruled that the assessee can file revised computation in the course of ongoing assessment proceedings under the Act, without making recourse to revised return, despite the fact that time limit for revising return under section 139(5) had expired. In the light of the aforesaid decisions, we are of the view that the Dispute Resolution Panel was right in accepting the revised claim that sales Tax remission received is capital receipt and not chargeable to Tax."*

48. Further in the matter of Tieto India Pvt. Limited Vs. DCIT in Para 7, the Tribunal has held as under :

> *"7. Scope of directions by the DRP has been set out in sub-section (8) which states that the DRP "may confirm, reduce or enhance the variations proposed in draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.' It is manifest from the prescription of sub-section (8) that the DRP has been empowered to confirm, reduce or enhance the variations proposed in draft order. There is specific prohibition contained in the provision to the effect that the DRP cannot set-aside any proposed variation or issue any direction for further enquiry and passing of the assessment order."*

49. In view of the above, it is crystal clear that once the additional grounds were raised by the assessee before DRP, then it is required to be adjudicated by the DRP. Accordingly, we are of the view that these grounds are required to be remanded back to the file of Assessing Officer for passing an order in accordance with the law as provided under Chapter X of the I.T. Act. Needless to say that before passing an order, the AO shall pass a draft assessment order and thereafter, if the assessee is aggrieved with the draft assessment order, then assessee may prefer proceedings before DRP or in any forum as provided and thereafter, the final assessment order shall be passed by the Assessing Officer. Thus, the ground Nos. 11 to 15 are partly allowed.

GROUND NOS.16 AND 17

50. At the outset, ld.AR for the assessee submitted that the assessee is not pressing ground Nos. 16 and 17 and hence, requested to dismiss the grounds as not pressed.

51. In view of the submission of ld.AR, the grounds 16 and 17 are dismissed as not pressed.

GROUND NO.18

52. Ground No.18 is general in nature and hence, does not require any adjudication.

53. **IN THE RESULT,** the appeal of the assessee in ITA No.616/Hyd/2018 is partly allowed for statistical purposes.

ITA NO.254/HYD/2017

54. **Now, we will deal with appeal in ITA No.254/Hyd/2017 for A.Y. 2012-13.**

55. The assessee had raised as many as 18 grounds in this appeal and also raised additional grounds from 19 to 24, which are more or less similar to the lead appeal ITA 616/Hyd/2016 for A.Y.2011-12.

GROUND NOS.1 TO 7 AND 10

56. The ground nos. 1 to 7 and 10 of this appeal pertain to the transfer pricing adjustments and determination of most appropriate method for determining ALP. As we have already held in the lead appeal i.e. ITA 616/Hyd/2016 that TNMM as the most appropriate

method, and directed the Assessing Officer to apply the same for benchmarking the ALP, all the issues are subsumed in the said issue. Therefore, we direct the Assessing Officer to apply TNMM as most appropriate method in benchmarking the transactions. Accordingly, ground nos. 1 to 7 and 10 of this appeal are allowed.

GROUND NOS.8 AND 9

57. At the outset, ld.AR for the assessee submitted that the assessee is not pressing ground Nos.8 and 9 which are with respect to payment of procurement service fee and consultancy fee and requested that the same may kindly be dismissed as not pressed.

58. In view of the submission of ld.AR, we are hereby dismissing these grounds as not pressed. Accordingly, ground Nos.8 and 9 are dismissed as not pressed.

GROUND NO.11

59. Ground No.11 is with respect to recover of salary expenses. In this regard, at Para 8.5.1 of his order, the TPO has mentioned as under :

> *"8.5.1 In its submission filed on 19.01.2016, the taxpayer stated that during the year, ZCL deputed its employees to the CF where the employees had remained under the supervision and control of the CF. The salary cost has been charged back to the AE. The taxpayer has now submitted a copy of the deputation agreement and the supporting documents with respect to the travel expenses of the employees. The issue is identical to that of the last year. Sri T. Poornananda Sai, and Sri Gopinath have been deputed to France on behalf of CF for assistance. As per the agreement, it is agreed that no mark up shall be added to the actual costs incurred on salary, allowances, bonus, leave, provisions, social security / welfare contributions, insurance premiums, out of pocket expenses, etc.*
>
> *The services provided by the employee of the taxpayer are of high-end as the concerned employee was a highly trained expert, who can handle*

technical requirements related to project implementation. Therefore, the said service cannot be reimbursed at cost. At arm's length, the services rendered by the taxpayer by way of employees secondment to overseas locations has to be marked up at cost plus 33.37%, which taxpayer earns in India.

Out of the total expenditure of Rs. 1,43,86,477/- cost and reimbursed the balance by is the towards AEs a sum of Rs.23,41,868/- is towards salary third party payment.

The arm's length compensation for the services rendered i.e. salary cost of Rs.23,41,868/- to CF by deputing the personnel of the taxpayer to overseas location is computed as under :

*Arm's length compensation of services rendered by employees of ZCL in France (23,41,868*133.37%)*	*31,23,350*
Price received by ZCL from AE	*23,41,868*
Adjustment u/s. 92CA	*7,81,482*

Thus, the arm's length price of the taxpayer is Rs.31,23,350/- and the shortfall of Rs.7,81,482/- is treated as adjustment u/s 92CA of I.T. Act and the total income of the taxpayer will be enhanced accordingly, u/s 92CA(3) of the I.T. Act."

60. Feeling aggrieved by the draft assessment order, the assessee has preferred proceedings before DRP and the DRP in his directions at Page 59 of the Paper Book has decided the issue against the assessee observing as under :

"2.9 Grounds of Objection No 11: Recovery of salary expense is at arm's length.

Ground No. 1: That on the facts & circumstances of the case, the learned Transfer Pricing Officer ("Ld. TPO") erred in not following the Hon'ble ITAT ruling in the assessee's own case for the AY 2009-10 & Hon'ble DRP's direction in the assessee's own case for AY 2011-12.

Ground No. 2: That on the facts & circumstances of the case, the Ld. TPO erred in ignoring the fact that the recovery of expenses was not towards any services rendered by the assessee and arbitrarily proposed an adjustment of Rs.7,81,482/without providing any cogent reasons.

It is submitted that the assessee has recovered expenses pertaining to the salary, travel and stay expenses for the employees seconded by the assessee to Ciments Francais S.A ("CF"). The said expenses initially borne by the assessee

are cross charged to the AE at cost. These costs are reimbursed by CF without any mark up and hence, the transaction is at arm's length price.

With respect to reimbursement of salary expenses received by the assessee, the TPO determined the arm's length compensation for the services received as Rs.31,23,350/- based on a mark-up at cost of 33.37% and proposed an adjustment of Rs.7,81,482/-

In this regard, it is submitted that the Ld. TPO has erred in not relying on the Hon'ble ITAT ruling in the assessee's own case for A.Y. 2009-10 wherein the Hon'ble ITAT vide Para 14 of its order [Refer Page no.1826-1843 of Volume II – Part D] observed as under :

" ... The entire approach by the TPO is biased and cannot be justified on the facts of the case. Therefore, we are not in a position to uphold any of the contentions raised by TPO in his order. Likewise, the disallowance of various service fees including reimbursements made by assessee to AE. Since we do not find any valid reason for TPO to disallow these expenditures, we have no other go than to set aside the entire order of the TPO which is based on wrong presumptions and propositions."

The assessee also relied on the directions of the Hon'ble DRP in assessee's own case for AY 2011-12 wherein the Hon'ble Panel vide Para 2.9 of its Direction held that the TPO has not given any rationale for computing a mark-up of 33.37% and accordingly, directed the AO to delete the proposed adjustment.

During the year, the assessee deputed its employees to CF where the employees had remained under the supervision and control of CF. The salary cost of these employees incurred by the assessee during the period has been charged back by the assessee to CF. Hence, CF has reimbursed salary expenses at cost to the assessee. Further, the assessee has also recovered stay and & travel expenses incurred on behalf of CF at 'actuals'. The details of expenses recovered by the assessee from CF have been tabulated here-in-under:-

Sl.No.	Particulars	Amount (in Rs.)
1	Salary Expenses	14,56,777
2	Stay & Travel Expenses	8,85,091
	Total	23,41,868

Having considered examined the submissions, we have perused the record to observe that the TPO has examined this issue in paragraph 8.5 of his order dated 29th January, 2016 and determined the arm's length compensation for the services received as Rs.31,23,350/- based on a mark up at cost of 33.37% and proposed an adjustment of Rs.7,81,482/-

In its objections filed before us, the assessee has while acknowledging the fact that its technical experts were indeed deputed with the AE in France submitted that it recovered expenses pertaining to the salary, travel and stay expenses for the employees seconded by the assessee to Cimenti Francais S.A

("CF"). The said expenses initially borne by the assessee are cross charged to the AE at cost. These costs are reimbursed by CF without any mark up and hence, the transaction is at arm's length price. Assessee did not answer the point raised by the TPO as to the service element. The deputation of the technical experts has to be for a definite purpose to benefit the AE and benefit from the expertise and productivity of these experts while depriving the assessee of their services, Therefore, we are of the considered view that the TPO is justified in making the proposed adjustment. It is also noticed by us that the DRP in the proceedings for the previous assessment year had taken a view that the TPO had not spelt out proper rationale for making similar adjustment. However, in view of the sound rationale given for the assessment year, we are constrained to confirm the action of the TPO in spite of the contrary view taken by the DRP in the previous year."

61. We have heard the rival contentions of both the parties and perused the material available on record. On perusal of the orders of lower authorities, we had considered that there is no reason to interfere with the order passed by the DRP and we considered the view of the DRP whereby the DRP has mentioned that the deputation of the technical expert can only be for a definite purpose to benefit the AE and benefit from the expertise and productivity of these experts while depriving the assessee of their services. Therefore, we conclude that there should be some benefit to the assessee with the deputation of technical expert and therefore, we do not find any reason to interfere with the decision of learned lower authorities. Accordingly, this ground is dismissed.

62. **NON-TRANSFER PRICING ISSUES.**

GROUND NO.12.

Firstly, ground No.12 – Disallowance of depreciation on goodwill. This issue was already decided by us while deciding lead appeal ITA 616/Hyd/22016 at Para 38(supra) wherein we held that

the matter may be remanded to the file of jurisdicitonal Assessing Officer with a direction to the Assessing Officer to consider the evidences filed on record for A.Y. 2007-08 for arriving at the valuation of the goodwill after amalgamation of the companies. The value attached to the goodwill in the said assessment year shall be considered for the purpose of allowing the depreciation on the basis of the rate as provided by the Act / Rules. Following the same reasoning, this issue is remanded back to the file of jurisdictional Assessing Officer. Accordingly, ground No.12 is allowed for statistical purposes.

GROUND NOS.13 AND 14

63. Coming to ground nos.13 and 14 of this appeal, the DRP at Para 2.11 in Page 33 had dealt with the issue of ECB and the DRP had rejected the claim of the assessee on account of forex loss by relying upon the decision of Hon'ble Supreme Court in the matter of Goetze (India) Limited and also on the basis of decision of Hon'ble Orissa High Court in the case of Orissa Rural Housing Development Corporation Ltd. Vs. ACIT in W.P.(C) 4554 of 2011 and held that as the assessee has not claimed the forex loss in the return of income or in the revised return of income, therefore, this claim is not sustainable. However, the Assessing Officer in Para 3.1 had also disallowed the claim of the assessee after relying on the directions of Hon'ble DRP and in addition had denied the claim after relying upon section 43A of the Act. Now, the assessee is in appeal before us.

64. The ld.AR for the assessee had submitted the following written submissions in support of his case reading as under :

"That, the position adopted by the AO for not even allowing the actual loss is contrary to his own conclusions where he says that only the actual loss on payment would be allowed.

That, the issue of allowance of the revised liability arising on account of foreign exchange fluctuation is no longer res-integra. The issue stands covered in favour of the Assessee by way of the judgement of the Hon'ble Supreme Court in the case of CIT v. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254, where the Hon'ble SC has clearly held that forex loss arising on account of restatement of liabilities at the year end is not notional in nature and is an allowable deduction."

65. On the other hand, ld.DR. relied upon the orders of lower authorities.

66. We have heard the rival submissions and perused the material available on record. From the perusal of orders of Assessing Officer and DRP, it is abundantly clear that primarily, the case of the assessee was denied on the premise that the assessee has not filed the return of income and claimed the forex loss in it and had also not filed revised return thereto. In our view, this issue of adjudication of fresh grounds by the appellate authority / Tribunal is no more *res integra* as the Hon'ble Supreme Court recently in the case of Wipro Vs. CIT 137 Taxmann.com 230 had held as under :

"11. Learned ASG had placed reliance on the decision of this Court in Goetze (India) Ltd. vs. Commissioner of Income Tax10 in support of the objection pressed before us that it is not open to entertain fresh claim before the ITAT. According to him, the decision in National Thermal Power Co. Ltd.11 merely permits raising of a new ground concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. We are not impressed by this argument. For, the observations in the decision in Goetze (India) Ltd.12 itself make it amply clear that such limitation would apply to the "assessing authority", but not impinge upon the plenary powers of the ITAT bestowed under Section 254 of the Act. In other words, this decision is of no avail to the department."

67. In view of the categorical decision of the Hon'ble Supreme Court, we have no doubt that the lower authorities are duty bound to decide the issue even if the claim has not been filed in the return of income or in the revised return of income.

68. In light of the above, we deem it appropriate to remand the matter back to the file of Assessing Officer with a direction to examine the case afresh after considering the decision of Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India Pvt. Ltd (2009) 312 ITR 254 as well as the decision of Hon'ble Supreme Court in the case of Wipro Vs. CIT 137 Taxmann.com 230 and also the provision of section 43A of the Income Tax Act. The assessee is directed to provide all the information required by the Assessing Officer and after considering all the documents / evidence, the Assessing Officer shall decide the issue in accordance with the law after following due process of law. Accordingly, these grounds are allowed for statistical purposes.

GROUND NOS.15 TO 18

69. At the outset, ld.AR for the assessee submitted that the assessee is not pressing ground Nos.15 to 18 which are with respect to the claim of balance of 50% additional depreciation, excess levy of interest u/s 234B and 234C and non-grant of full credit for taxes paid and requested that the same may kindly be dismissed as not pressed.

70. In view of the submission of ld.AR, we are hereby dismissing these grounds. Accordingly, ground Nos.15 to 18 are dismissed as not pressed.

GROUND NOS.19 TO 24

71. Coming to the additional grounds 19 to 24 filed by the assessee, we found that assessee had filed a letter before the DRP whereby the assessee sought to raise the additional grounds of objections. We have already decided the above issue at Para 44(supra) while dealing the lead appeal ITA 616/Hyd/2016 wherein we have remanded these grounds to the file of AO. Hence, following the same reasoning, these grounds are also remanded back to the file of AO. Thus, these grounds are partly allowed for statistical purposes.

72. **IN THE RESULT,** the appeal of the assessee in ITA No.254/Hyd/2017 is partly allowed for statistical purposes.

ITA NO.182/HYD/2018

73. **Now, we will deal with ITA No.182/Hyd/2018 for the A.Y. 2013-14.**

TRANSFER PRICING ISSUES :

GROUND NOS. 1 TO 11

73.1. In this appeal, assessee has raised as many as eleven transfer pricing issues and seven non-transfer pricing issues. We have already allowed transfer pricing grounds in our lead appeal for A.Y. 2011-12. Following the same reasoning, all the transfer pricing

grounds are allowed in this appeal too. Accordingly, ground nos.1 to 11 are allowed.

NON-TRANSFER PRICING ISSUES :

GROUND NO.1

74. Coming to non-transfer pricing issues, ground no.1 is with respect to disallowance of depreciation on goodwill. This ground has already been decided in ITA 616/Hyd/2016 for A.Y. 2011-12, therefore, respectfully, following the same, we remand this ground to the file of Assessing Officer.

GROUND NOS. 2 AND 3

75. Ground nos. 2 and 3 are related to ECB. The DRP in Para 2.14 had held that ECB loan was taken for purchase of fixed assets and any loss caused to the assessee on account of foreign exchange fluctuation would come within the purview of the section 43A of the Act. However, the ld.AR had disputed the applicability of 43A of the Act on the transactions and had submitted that the matter may be remanded back for fresh examination in the light of the decisions of hon'ble Supreme Court in the cases of Woodward Governor and Wipro (supra). We have heard the rival contentions of both the parties on identical facts, we have remanded the matter to the file of Assessing Officer, therefore, we issue similar direction as done in lead appeal in ITA 616/Hyd/2016 and remand back the matter to the file of

Assessing Officer for fresh examination. Accordingly, ground nos. 2 and 3 are allowed for statistical purposes.

GROUND NOS 4 TO 6

76. Coming to ground nos.4 to 6, these grounds were already dismissed as not pressed (supra). Hence, these grounds are dismissed as not pressed.

GROUND NO.7

Coming to ground No.7, it is consequential in nature and requires no adjudication. Accordingly, ground no.7 is dismissed.

ITA NO.2169/HYD/2018

77. **Now, we will deal with ITA No.2169/Hyd/2018 for the A.Y. 2012-13.**

As we have already decided the main appeal ITA 254/Hyd/2017 where the assessee has raised grounds and additional grounds and these grounds raised in the appeals have already been adjudicated in the said appeal while deciding the said appeal. Accordingly, no separate adjudication is required. In the light of the above, the appeal in ITA No.2169/Hyd/2018 is dismissed.

77.1 **IN THE RESULT,** the appeal of the assessee in ITA No.2169/Hyd/2018 is dismissed.

ITA NO.66/HYD/2019

78. **Now, we will deal with ITA No.66/Hyd/2019 for the A.Y. 2014-15.**

GROUND NOS.1 TO 8

In this appeal, assessee has raised as many as eight transfer pricing issues and five non-transfer pricing issues. We have already allowed transfer pricing grounds in our lead appeal for A.Y. 2011-12. Following the earlier orders for A.Y. 2009-10 and 2010-11 and the reasoning given while deciding appeal for A.Y. 2011-12, we allow the transfer pricing issues. Accordingly, ground nos.1 to 8 are allowed.

GROUND NOS. 9 TO 13

79. Coming to non-transfer pricing issues (ground nos. 9 to 13), first ground is with respect to disallowance of provision for site restoration fund.

With regard to ground no.9, ld.AR has drawn our attention to Para 2.8 at Page 30 of the DRP order whereby the DRP has provided as under :

> *"2.8.1 Having considered the submissions, we note that the assessee's audit report has qualified this provision as a contingent liability and the basis of the provision was stated to be management's estimate. We also note that the assessee's has not given any scientific basis and the basic factual information for the said provision. It was also contended that the company required to comply with the provisions of the Mines and Minerals (Development and Regulation) Act and that the provisions towards site restoration expense is a statutory requirement. We are unable to accept the plea. The statute does not stipulate creation of provision in the accounts. The statutory requirement is to restore, reclaim and rehabilitate the land affected by the mining operations before the conclusion of the operation. This statutory requirement was not met, no information or evidence was filed as to the expenditure incurred in reclaiming and rehabilitating the affected land. The assessee appears to be merely creating provision year after year without actually fulfilling the statutory mandate. Without fulfilling the public interest mandate contained in the legislative provision, the assessee cannot be allowed to claim tax benefit by merely creating provision. The AO is justified in disallowing the claim. The proposed addition is upheld."*

80. It was submitted by the ld.AR that this ground of the assessee is required to be allowed as the assessee has provided scientific basis for the purpose of claiming the charges for site restoration. Per contra, the ld.DR has relied on the order of lower authorities.

81. We have heard the rival submissions and perused the material on record. As the assessee willing to provide the necessary scientific information to show that the expenditure was incurred by it in reclaiming and rehabilitating the affected land. In the light of the above, we remand back this issue to the file of Assessing Officer with a direction to the assessee to provide all the information, documents / evidences showing the actual expenditure incurred for restoration / reclaiming of the site. Accordingly, ground No.9 is allowed for statistical purposes.

GROUND NO.10

82. Ground no.10 is with respect to depreciation on goodwill. This ground was already decided while dealing lead appeal ITA No.616/Hyd/2016 for A.Y. 2011-12. Hence, as per the decision in the said lead appeal, this ground is remitted to the file of AO and accordingly, the same is allowed for statistical purposes.

GROUND NO.11

72. Ground No.11 is already dismissed as not pressed in lead appeal. Hence, ground No.11 is dismissed as not pressed.

GROUND NO.12

73. Ground No.12 is with respect to disallowance of provision for obsolete spares. Respectfully following the overall decision in ITA No.616/Hyd/2016, we remand this issue back to the file of the assessing officer for fresh adjudication.

GROUND NO.13

74. Ground No.13 is the alternative addition made by the Revenue as the lower authority was of the opinion that the assessee has not furnished any actual rendition of services. The ld.AR had drawn our attention to Para 2.2.8, 2.2.9, 2.10 to 2.2.19 of DRP's order and it was submitted that the assessee has provided the necessary

evidence for rendition of services. However, the DRP has wrongly concluded that no evidence was filed by the assessee for actual rendition of services. It was submitted that once the issue has already been considered while benchmarking the transactions, no separate addition can be made under section 37 of the I.T. Act.

75. Per contra, the ld.DR submitted that the order passed by lower authorities is in accordance with the law.

76. Since we have already held that TNMM as the most appropriate method and the services are required to benchmark by applying TNMM method. In our view, once the TPO/AO benchmarked the transactions by applying TNMM then this alternative ground / disallowance would not survive as it will be subsumed in TP bench marking and therefore, no separate addition u/s 37 can be made by the Assessing Officer. However, in case, the AO / TPO concludes otherwise, then the Assessing Officer may examine the issue under section 37 of the Act and in that eventuality the assessee will provide all the documentary evidence etc to demonstrate that the services were provided wholly and exclusively for the purpose of carrying out the international transactions.

77. In the light of the above, we are of the opinion that this issue is required to be remand back to the file of Assessing Officer with a direction to the assessee to provide the necessary evidence for rendering of services etc to the satisfaction of Assessing Officer. Accordingly, this issue is allowed for statistical purposes. Needless to say while giving effect to the direction of the tribunal order, the

assessing officer/ TPO, shall follow the principle of natural justice by affording opportunity of hearing to the assessee in accordance with.

78. **IN THE RESULT,** the appeal of the assessee in ITA No.66/Hyd/2019 for A.Y. 2014-15 is partly allowed for statistical purposes.

79. To sum up, the appeal of assessee in ITA No.2169/Hyd/2018 is dismissed and the remaining i.e., ITA No.616/Hyd/2016, 254/Hyd/2017, 182/Hyd/2018 and 66/Hyd/2019 are partly allowed for statistical purposes.

Order pronounced in the Open Court on 27th June, 2022.

Sd/-	**Sd/-**
(LAXMI PRASAD SAHU) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 27th June, 2022.
TYNM/sps

Copy to:

S.No	Addresses
1	Zuari Cement Limited, Krishna Nagar, Yerraguntla, Kadapa District – 516 311.
2	The ACIT, Circle 1(1), Kadapa.
3	ITO (OSD) & Secretary, DRP-1, Bengaluru.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order