

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 58/Ahd/2022
Assessment Year 2017-18**

Ineos Styrolution India Ltd., Vadodara PAN: AAACB6164H (Appellant)	Vs	The DCIT, TP-I, Ahmedabad (Respondent)
---	----	--

**Assessee by: Shri Ajit Kumar Jain, A.R. &
Ms. Sonal Pandey, A.R.
Revenue by: Shri Mohd. Usman, CIT-D.R.**

Date of hearing : 12-05-2022
Date of pronouncement : 03-08-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of CIT(DRP-2), Mumbai-1, in DIN & Order No. ITBA/DRP/F/144C(5)/2021-22/1038281304(1) vide order dated 30/12/2021 passed for the assessment year 2017-18.

2. The assessee has raised the following grounds of appeal:-

“Aggrieved by the order u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B passed by the National Faceless Assessment Centre ('NFAC / Learned AO'), the Appellant wishes to raise the following Grounds of Appeal for the kind adjudication of the Hon'ble ITAT:

1. That the learned AO / Transfer Pricing Officer ('TPO') / Dispute Resolution Panel ('DRP') has erred in law and on facts in making arbitrary, adhoc and inconsistent transfer pricing ('TP') adjustment of FNR 309,156,218 in respect of payment for following intra-group services availed by the Appellant from Associated Enterprises ('AEs') viz. INEOS Styrolution Group GmbH ('INEOS Germany') and INEOS Styrolution APAC Pte. Ltd. ('INEOS Singapore):

a. Global Head Office ('GHO') Charge availed from INEOS Germany : INR 97,670,814

b. Regional Head Office ('RHO') Charge availed from INEOS Singapore : INR 211,485,404

2. That the DRP has erred in directing the NFAC/AO/TPO to consider and verify the contentions of the appellant thereby violating the mandatory provisions of section 144C(8) of the Act. Thus, the Final Assessment order and DRP directions deserve to be set aside and quashed.

3. That the learned AO has erred in not incorporating the directions issued by the DRP, thereby violating the mandatory provisions of section 144C(13) read with 144B(1)(xxx) and (xxxi) of the Act. Thus, the final assessment order deserves to be set aside and quashed.

4. That the learned AO / TPO / DRP has erred in law and on facts in doing the TP adjustment contrary to provisions of section 92CA (3) read with Section 92C(3), thereby disregarding the detailed benchmarking approach and the methodology adopted by the

Appellant, in its TP documentation maintained under section 92D of the Income Tax Act, 1961 read with Rule 10D of the Income Tax Rules, 1962.

5. *That the learned AO / TPO / DRP has erred in law and on facts in not stating / disclosing any reasons to show that either of the conditions mentioned in clause (a) to (d) of section 92C(3) of the Act were satisfied before proposing a TP adjustment to the total income of the Appellant.*

6. *That the learned AO / TPO / DRP has erred in law and on facts in making an adjustment for the part services provided by Group CEO, CFO, Global Financial Controller and Risk Management by concluding that the intra-group services i.e. GHO Services and RHO Services availed by the Appellant are in the nature of shareholder services for which no independent entity would agree to make any payment, thereby ignoring the fact that part of the services pertaining to shareholder activities are already excluded by the AEs while charging the Appellant for GHO Services and RHO Services.*

7. *That the learned AO / TPO / DRP has erred in law and on facts in adopting an arbitrary approach in determining the arm's length price of the intra group services at NIL, without providing any cogent reasons and without appreciating the detailed evidence filed by the Appellant to substantiate the provision of such services by the Group, the cost incurred by the Group in rendering such services and the basis on which these costs have been allocated to the Appellant.*

8. *That the learned AO/ TPO / DRP has erred in law and on facts in summarily rejecting the voluminous evidence submitted by the Appellant to justify provision of services and the benefit derived by the Appellant, without disputing / rebutting or without providing an explicit findings / observation on the voluminous / plethora of evidence filed by the Appellant. Further, the learned DRP has erred in summarily rejecting the contentions of the Appellant against the Remand Report provided by the Learned TPO.*

9. *That the learned AO / TPO / DRP has erred in law and on facts by exceeding their jurisdiction by incorrectly applying any of the*

prescribed methods under section 92C of the Act read with rule 10AB / 10B(1) of Rules and thus determining the Arms Length Price ('ALP') of intra-group services as 'Nil'. Thus, the order of the Learned TPO / AO / DRP is bad in law and liable to quashed.

10. *That the learned AO / TPO / DRP has erred in law and on facts in confirming the action of the AO / TPO in ignoring the fact that there was no intention by the Appellant to shift profits outside India.*

11. *That the learned AO / TPO / DRP has erred in law and on facts in ignoring the fact the TDS has been deducted on the income earned by the AEs on account of GHO and RHO services and requisite compliances have been done by the AEs in India.*

12. *That the AO / TPO / DRP has erred in law and on facts in ignoring Rule of consistency in view of the fact that no adjustment was made by the Learned TPO for same transaction (GHO and RHO services) in the earlier years.*

13. *That the learned AO /DRP/ TPO has. erred in law and on facts in not adjudicating the following mistakes apparent from records:*

a. *Adopting the ALP of IT Charges based on the percentage of Capitalized SAP users in India instead of IT enabled users.*

b. *Adopting the ALP of Software Charges based on the percentage of Capitalised SAP user in India instead of running SAP users.*

c. *Proposing double disallowance of INR 99,01,874 with respect to mark up on GHO Non-IT services.*

14. *That the learned AO has erred in law and on facts in incorrectly computing the demand issued under section 156 of the Act.*

15. *That the learned AO has erred in levying interest amounting to INR 8,59,81,048 u/s 234B of the act and interest amounting to INR 30,16,075 u/s 234C of the Act.*

16. *That the learned AO / TPO has erred in law and on facts in initiating the penalty u/s 270A r.w.s. 274 of the Act.”*

3. The facts of the case are that Ineos Styrolution India Ltd (assessee) is engaged in manufacturing of plastic granules used in manufacturing plastics for varied industries such as automotive, home appliances, electrical and electronics, construction and healthcare. The assessee is part of the Ineos Styrolution Group headquartered at Germany. During the year under consideration, the assessee availed services from its Global Head Office situated at Germany (called GHO Services) and from its Regional Head Office situated at Singapore (called RHO services). The cost incurred for providing these services were allocated to the group entities of the Ineos Styrolution Group which benefited from the activities performed, including the assessee, based on a certain cost allocation formula. The services availed by the assessee under the head GHO services can be broadly divided two heads- non-IT services (these comprise of CEO activities, CFO activities, global strategy support services, regulatory affairs services, corporate legal services, Treasury support services, corporate finance services, corporate HR services, internal audit services etc.) and IT services (under which groups IT team is responsible for providing standardized IT systems and software with the view of providing the benefits of consistent IT system across the group entities of the Ineos Styrolution Group). In addition to GHO services, the assessee also availed RHO services from its regional Ineos Styrolution headquarter situated at Singapore. The RHO services comprised of providing regional management support, technology and production support, business management support, sales management and procurement support, corporate support etc.

4. During the course of assessment, the transfer pricing Officer (Ld. TPO) noted that a total amount of ₹ 21,46,89,860/- was allocated to India under the head GHO services and amount of ₹ 21,14,85,404/- was allocated to India under the head RHO services. The Ld. TPO, on perusal of the various services availed under the head GHO and RHO services analyzed the nature of services provided under various subcategories and made certain adjustments under several heads/sub-categories. In respect of various activities for instance CEO activities and Administrative expenses, Finance Activities (comprising of Treasury, CFO, corporate finance, pension and global Controlling), the Ld. TPO asked the assessee to provide the basis of cost allocation to India office and also to provide documentary evidence in support of the assessee's claim that global head office actually devoted time for work for the Indian entity. He analyzed the emails exchanged between the global / regional head office and the assessee company and came to following conclusions (stated in brief for various services under the head GHO services-both IT and non-IT and RHO Services):

- (i) There is no justification for allocation of expenditure to the assessee company. The CEO and finance functions are completely the shareholder function in general and there is no documentary evidence to show that the CEO/other employees/Directors of HO have given any special attention/handled any special work for the Indian entity.
- (ii) The assessee was asked to submit proof of the actual receipt of services, however the assessee has failed to provide the same. The documents furnished by the assessee which are claimed to be in

support of such functions do not contain any actual receipt of services. Therefore, the assessee has failed to discharge the primary onus cast upon it under law.

- (iii) The allocation done by the assessee for the services is not based on the facts of the case and no third independent party would pay for the services in an independent situation.
- (iv) The assessee has paid mark-up of 6% on cost allocated by GHO, which includes cost of salary to CEO/CFO/employees of group entities which is nothing but the GHO earning profit on salary of CEO/CFO/employees of group entities. There is no reason as to why the head office of the assessee company should make a profit on account of carrying on their own business and charge it to the Indian company. Therefore, the markup charged by GHO is not based on the facts of the case and no third independent party would pay any markup for such services in an independent situation.
- (v) It is seen that the assessee have benchmarked the markup taking the foreign AE as the tested party and using the foreign database for determining the ALP of markup. However, on going through the companies which have been selected by assessee, it is noticed that all these companies are engaged in providing services to different entities. They are engaged in providing “active services” to other entities thereby earning profit by provision of services in that range. However, in the case of assessee company, AE are not providing any active services to the assessee company in India. It is just an allocation of the expenses based on a formula which has been decided by the assessee’s parent company.

(vi) Accordingly, the benchmarking of the transaction adopted by the assessee is rejected and the ALP of the transaction of cost allocation by AE for provision of such services is determined by using “any other method”. The ALP of the transaction allocation of cost for the provision of such services by AE along with the markup is taken as “Nil” as the allocation done by the assessee for the provision of such services is not based on the facts of the case and no third independent party would pay for such services in an independent situation.

5. According, Ld. TPO made a total addition of ₹ 32,30,17,496/- (₹ 10,09,57,822/- on account of Global Head Office (GHO) charges and an amount of ₹ 22,20,59,674/- on account of Regional Head Office (RHO) charges) to the total income of the assessee in order that the international transactions undertaken by the assessee company is at arms-length. While passing the order, the TPO made the following observations:

*4.1 Assessee had contended that need benefit documentation is not required to substantiate the need of a transaction. In this regard, assessee had not understood the difference between need benefit documentation and the documents asked to verify the nature of the transaction based on which the comparable transactions can be identified after considering the FAR analysis. **The TPO had never asked the need benefit documentation or never questioned the commercial expediency of the transaction. TPO had only asked the document in support of actual receipt of service so that to understand the nature of service and to conduct the FAR analysis.***

*However, assessee had failed to understand the basic difference between need benefit documentation and the documents asked to verify the nature of the transaction based on which the comparable transactions can be identified after considering the FAR analysis. **It is once again reiterated that TPO had never asked for need benefit documentation. TPO had also not asked the sufficiency of services.** Further, the facts of the decisions relied upon by assessee is not applicable in the case of assessee as the facts of the case discussed herein above are different from the facts of the decisions relied upon by the assessee. Further, in the transfer pricing, the transaction of the current year is benchmarked and ALP determined accordingly. Therefore, assessee's reliance on previous years decisions is not applicable. Therefore, all the contentions of the assessee is not supported by the facts and hence rejected.*

6. The assessee filed appeal before the Dispute Resolution Panel (DRP), who gave order dated 30-12-2021 confirmed most of the additions made by the TPO, while giving some relief by way of giving directions in respect of dual disallowance/incorrect additions made in the order passed by the TPO. The relevant extracts of the order passed by DRP is reproduced for reference:

“In this regard, the entire facts and circumstances of the case have been gone through carefully by the DRP. It is found that the issue of intra-group payments and services is a recurring issue in TP assessment over a number of years.

4. It is found that in the present case, an amount of Rs.21,46,89,860/- has been allocated to the assessee company on account of GHO services, a break-up of which is as under:-

Non I. T Charges	8,10,45,412
I. T Charges	8,39,85,825
Capitalised I. T	3,31,24,307
Software licence	1,85,34,316
Total cost allocated to the assessee company	21,46,89,860

The A.O has discussed all these charges in his draft assessment order and has proposed an adjustment of Rs.32,87,008/- in respect of non I.T. charges. The TPO has proposed an upward adjustment of Rs.10,09,57,822/- on account of Global GHO services under various heads like non I.T. charges, I.T. charges, capitalised I.T and software licence and an amount of Rs. 22, 20,59, 674/- has been proposed to be adjusted on account of RHO services. Thus, in total, an amount of Rs.32,30,17,496/- has been proposed to be made in this case.

5. As far as TP adjustment of Rs. 8,43,32,420/- pertaining to non IT section is concerned, we are of the considered opinion that the findings of the TPO in this regard has merit and the same need to be endorsed. We find support the fact that the sub-categories of impugned contents of the GHO services (non-IT) are too general in nature and as rightly pointed out by the TPO such services are not tangible enough to be recognised/ received by an independent third party against which payments could be made. This is further corroborated by the fact that the assessee is paying royalty charges to the concerned AE. These impugned services are overlapping with the services/ liability arising out of royalty payments. Besides the

assessee has also paid insurance, legal and professional charges and employee benefit expenses which are local in nature and does not call for a separate payment to the AE. Therefore, the objection of the assessee in this regard is not accepted.

6. Now, coming to the IT. charges, the AO / TPO has proposed an adjustment of Rs.56,42,798/- out of the total IT. charges claimed of Rs.8,39,85,825/-. We have gone through the entire facts of the matter. The adjustment proposed is really insignificant compared to the total amount claimed. Accordingly, the same is not interfered with.

7. Coming to the software licence charges, the AO / TPO has proposed an adjustment of Rs.10,80,730/- This part of the item concerns the licensing cost that the group pays to third party vendors such as SAP and Microsoft etc. The assessee had claimed the same. The AO / TPO has stated in his order that the assessee had failed to submit documentary evidence regarding actual receipt and use of software licence by the assessee. Therefore, the claim of the assessee is not supported by documentary evidence. When show-caused, the assessee submitted that the software licence costs is in respect to running license fees and amortisation from capitalised one-time licences fees from third-party software vendors such as SAP and Microsoft. The TPO determined the ALP by using any other method by taking into account the price which has been charged or paid or would have been charged or paid for the same or similar in uncontrolled transaction with or between non-associated enterprise under similar circumstances and after considering all relevant facts. The DRP has considered the facts and circumstances concerning this head and have found that the computation of adjustment has been done by the TPO after carefully considering all the facts and figures on the matter. Therefore, the same is not interfered with.

8. The last issue with regard to the GHO service is charging of mark-up of 6% of such cost allocation. The TPO has not agreed with the charging of such mark-up. The TPO has stated that no third independent party would pay such mark-up for such services in an independent situation. ***The TPO has wondered as to whether the mark-up of 6% on such cost as salary, would mean that GHO was earning on profits of salary of "CEO, CFO" etc. The TPO has also***

observed that the company chosen for benchmarking of the assessee are the ones who are providing "active" service to other parties thereby earning profit by provision of such services in that range. However, in the case of assessee company, the offshore company is not providing any active service to the company in India. That, it is just an allocation of expenses which has been managed by the assessee company. Therefore, the TPO has stated that comparative analysis and the benchmarking analysis carried out by the assessee company were not only faulty but also not as per the functional comparability of the services for which an allocation has been made to the assessee company. Therefore, the TPO took the ALP of "mark-up being charged on all such allocation of GHO services at NIL and made an adjustment of Rs.99,01,874/-. We at the DRP have considered the entire facts and circumstances of the matter carefully and we find that the TPO has given cogent reasons for taking the ALP of mark-up as NIL. We also find that this cost of mark-up over and above the actual cost, is rather a superfluous head. In the field of TP, a more conservative outlook is required to be taken as regards these intra-group payments. Therefore, the stand of the AO is upheld on this issue.

9. Coming to the RHO services, the TPO has proposed an adjustment of Rs.22,20,59,674/-. The assessee had allocated the total cost of Rs.21,14,85,404/- on account of RHO expenses. The TPO asked the assessee to specifically provide documentary evidence in support of the claim. In response, the assessee provided a management certificate for the entire RHO service charges. In the said certificate, the management had certified that "the cost included in the cost base for allocation of the different services include all actual direct and indirect costs as a result of the provision of the RHO services per business year." That, this was the mechanism in which cost was allocated by the INEOS Singapore which has been certified by the Management. Further, the management had certified the detailed cost and mark-up working as per the said certificate. As far as benchmarking was concerned, the TPO again found that the companies chosen by the assessee were engaged in providing active service to the other parties thereby earning profits by provision of those service in that range and hence, the benchmarking was rejected by the TPO.

10. As far as, CEO activities, salary of CFO, treasury, corporate finance, global technology and operations are concerned, we are of the considered opinion that the findings of the TPO in this regard has merit and the same need to be endorsed. We find support the fact that the sub-categories of impugned contents of the RHO services are too general in nature and as rightly pointed out by the TPO such services are not tangible enough to be recognised/ received by an independent third party against which payments could be made. This is further corroborated by the fact that the assessee is paying royalty charges to the concerned AE. These impugned services are overlapping with the services/ liability arising out of royalty payments. Besides the assessee has also employee benefit expenses and does not call for a separate payment to the AE. Therefore, the objection of the assessee in this regard is not accepted.

11. The mark-up of Rs. 1,05,74,270/- has been rejected by the TPO and as in the case of GHO, so here too, we find ourselves in agreement with the TPO and the ALP of the mark-up is considered to be NIL. The action of the A.O on this matter is upheld.”

7. The assessee is in appeal before us against the aforesaid order passed by the DRP as duly incorporated in the assessment order dated 27-01-2022.

8. Before us, counsel for the assessee submitted that the purpose of providing GHO/RHO services is that this service support is very necessary for the assessee to manufacture and sell the products at India level. The GHO/ RHO services help the assessee maintaining an optimal employee structure and achieving the benefits of the experience of the global headquarters (for technology, regulatory and strategy support) and the regional headquarters (for foreign sales management and customer management). The counsel for the assessee submitted that in view of the importance of services received by the assessee company, the markup of 5%

to 6% charged by the overseas offices is very nominal, considering the value which has been received by the assessee in India. The counsel for the assessee took us through the paper book and transfer pricing documentation to explain that the allocation to the Indian entity i.e. the assessee is done on a very scientific basis, which has been explained at page 54-55 of paper book (volume 1). The counsel for the assessee submitted that the TPO and DRP were provided with adequate documentation in the form of emails to substantiate that India specific services had been made available the assessee company. The assessee during the course of assessment/proceedings before DRP had given enough evidence to substantiate rendition of services specific to the Indian entity. The counsel for the assessee submitted that the TPO has erred in facts and law in determining ALP at “Nil” without application of any method, which is also contrary to law, in support of which the Ld. Counsel for the assessee placed reliance on various judicial precedents. The counsel submitted that as per Rule 10AB of the IT Rules, arm’s-length price cannot be determined at “Nil” and the Ld. TPO has to apply some methodology to apply arm’s length price. The counsel for the assessee drew attention to pages 23-24 of the paper book and submitted that in transfer pricing study report, the TNMM method was deployed for computing the markup at 6% for GHO services and 5% for RHO for services. Counsel for the assessee explained that the group follows centralized model where critical business strategies and operational strategies are taken on a global (centralized)/regional basis, rather than a decentralized model, where each group entity operates independently. The experience and skill set of the employees of the global/regional office helps all affiliated companies including the assessee company in achieving

organizational goals by operational excellence. Since the assessee company derives substantial benefit from the group and regional office, the assessee company had to recruit limited employees for day-to-day functioning. The same can be substantiated by the ratio of employee benefit cost over sales incurred by the assessee in FY 2016-17 which is only 3.02%. It was submitted that even if GHO and RHO charges are added to the assessee's employees cost, even then the employee benefit cost is 5.5% which is less than any other independent company. Thereafter, the counsel for the assessee drew attention to various emails evidencing rendering of GHO and RHO services with a view to substantiate those services were not general in nature and were aimed at providing India specific benefit to the assessee company.

In response, Ld. Departmental Representative argued that the services are general in nature and are not India specific. Further, the allocation formula is not verifiable, and the same does not give a clear picture of whether cost allocation is commensurate with the services stated to be provided to the assessee company in India. Further, it is difficult to verify the global figures for the Indian Revenue Authorities, and the basis of allocation is also not verifiable. Further, the assessee has not been able to substantiate that the cost is related to the Indian entity. The global formula has no nexus/connection with services being provided to the Indian entity. Further, Ld. Departmental Representative argued that most of the activities incorporated in the GHO/RHO service agreement are shareholder/ stewardship functions aimed at controlling the Indian entity. The onus is on the assessee company to substantiate that India specific services have been rendered/availed, which the assessee has failed to discharge. The DR further submitted that if no

services have been rendered to the Indian entity, in absence of any transaction taking place, there is no question of valuing the same on arm's-length basis. Therefore, the TPO was justified in computing the ALP at "Nil".

9. We have heard the rival contentions and perused the material on record. We shall divide our conclusion in two parts- firstly, whether factually it can be concluded that the assessee has availed India related services from its global/ regional headquarters. In our considered view, the Ld. TPO has taken a rather restrictive view while coming to the conclusion that no India related services have been rendered in the instant set of facts. The Ld. Counsel for the assessee took us through various e-mails exchanged between the assessee and its overseas offices. The services received in the form of e-mails have been classified under various heads viz. Treasury functions, Controlling functions, Information Technology, Finance support, Information Technology support, CFO functions etc. On perusal of the Summarized Chart furnished to us (along-with copies of emails), we observe that India specific support has been provided via GHO / RHO Services to the assessee and it would be incorrect to conclude entirely that no India related services have been provided/ no benefit has been received at the India level. It would be incorrect to brush aside all evidences and conclude that all services are general in nature and do not relate to Indian entity. In fact, Ld. Counsel for the assessee submitted before us voluminous Paper-Books and took us through the services rendered which are aimed at giving India specific benefit. On numerous occasions, we see the overseas staff had meetings with the assessee to provide Regional Management support/

Business management Support to provide support at the India level. While we agree that a perusal of Agreement suggests that some information/support may be of general nature aimed at providing general guidance to the Ineos Group as a whole/or may not have been availed during the year under consideration, but that cannot lead to the conclusion that no India specific services have been availed by the assessee in India. In our considered view, Ld. TPO as well as DRP have not fully appreciated the substantial evidence placed on record to come to the conclusion the assessee has not been able to substantiate that no services have rendered by the overseas Head Office / Regional Office or that the assessee has not been able to discharge the onus of receipt of India specific services, thereby making it impossible to compute arm's length price for the aforesaid services.

10. Now this brings us to the second issue: whether Ld. TPO is correct in computing ALP of the services at "Nil" on the basis that no services have been rendered for which any third independent party would pay and/or whether the Ld. TPO is under a legal requirement to compute ALP based at least one of the methodologies provided for under the Income Tax Act, 1961 read with I.T. Rules. In our view, the judicial opinion on this issue is unanimous that where TPO does not resort to any transfer pricing exercise as per any of methods prescribed in section 92C(1) and determines ALP at Nil, transfer pricing adjustment with respect to such services received by assessee from its foreign AE is not sustainable.

10.1 In the case of **Henkel Chembond Surface Technologies Ltd. v. ACIT [2021] 125 taxmann.com 65 (Mumbai - Trib.)**, the Mumbai ITAT

held that where TPO did not resort to any transfer pricing exercise as per any of methods prescribed in section 92C(1) and determined ALP of regional management services at nil, transfer pricing adjustment with respect to regional management services received by assessee from its foreign AE be deleted.

13. We have perused the orders of the lower authorities and the material available on record, and are unable to persuade ourselves to subscribe to the view taken by the lower authorities as regards determining of the arms length of the regional management services received by the assessee from its domestic AE at Rs. Nil. On a perusal of the records, we find that the assessee had placed on the record of the lower authorities sufficient documentary evidences, viz. copy of service agreement, bifurcated details of regional management charges paid to the AE, copies of invoices raised by the AE towards regional management charges etc. in order to substantiate rendition of regional management services by its domestic AE. Accordingly, we are unable to agree with the view taken by the lower authorities that the assessee had failed to place on record any evidence in support of its claim of having received services from its domestic AE.

10.2 The Mumbai ITAT in the case of **Merck Ltd v. DCIT [2016] 69 Taxmann.com 45 (Mumbai ITAT)** made the following observations on this issue before us:

There is a clear contradiction in the findings of the authorities below. On one hand, the stand of the authorities below is that no services are rendered, and, on the other hand, there are categorical findings that the services rendered are so general in nature that even an employee of the assessee could have rendered the same. In the event of no services actually having been rendered, there cannot be any occasion for the same services being rendered by a person without specialized knowledge. On one hand, it is held that arm's length price of these services is zero value, and, in the same breath, it is held that 'there would hardly be any substantial payment' for these services. Clearly, services are rendered on the facts of the present case. There is sufficient material on record to show that the assessee was, under the agreement, entitled to receive a package of services on as and when required basis. The e-mails and other documentary evidences show that the assessee was in receipt of these services. Just because these services were too general, in the perception of the authorities below, or just because the assessee did not need these services from the outside agencies, cannot be reason enough to hold that the services were not rendered at all.

10.3 In the case of **Sabic Innovative Plastics India (P.) Ltd. v. ACIT [2017] 88 taxmann.com 810 (Ahmedabad - Trib.)**, the assessee was engaged in the business of manufacturing and trading of advanced engineering thermo-plastics and was trading of polycarbonate sheets. During the relevant previous year, the assessee made certain payments, on account of intra-group management services to its associated enterprises. The TPO

however determined value of service at NIL on the basis that such services were not worthwhile. The Ahmedabad ITAT held that there was reasonable evidence of the rendition of service and it could not be open to TPO to proceed on the basis that the services were not rendered. The impugned ALP adjustments was directed to be deleted. While passing the order, Ahmedabad ITAT made the following observations:

10. In any case, we have carefully perused the evidence of services rendered and the nature of services in question, on random sample basis. In our considered view, there is reasonable evidence of the rendition of service and it cannot be open to TPO to proceed on the basis that the services were not rendered. The method of ascertaining the arm's length price, on the basis of TPO's subjective perception about worth of services, is not sustainable in law either. In view of these discussions, as also bearing in mind entirety of the case, we deem it fit and proper to delete the impugned ALP adjustments. Ground Nos. 2 to 8 are, therefore, to be allowed. In view of the fact that the assessee succeeds in his grievance against ALP adjustment on merits, grievances raised in ground Nos. 9 and 10 are dismissed as infructuous.

10.4 In the case of **AT & T Global Network Services (India) (P.) Ltd. v. DCIT [2017] 86 taxmann.com 158 (Delhi - Trib.)**, Delhi ITAT held that where assessee while rendering high-speed internet services to its clients, availed various support services from AE in respect of which assessee brought on record inter-company agreements, list of assignments on which

team of AE assisted, ALP of payments made for said services could not be taken as nil. The Delhi ITAT made the following observations, while passing the order:

*.....We agree with the argument of the assessee that if the network related problems prevent the customers from using its services, the assessee is bound to suffer reputational damage and potential loss to business. Addressing the customer's problems promptly and by a specialized team (which may be an AE) should satisfy the benefit test, as the assessee received an economic benefit to maintain its business operation. Therefore in this regard we are of the view that assessee has substantiated that these services are required by it for its business sustainability. The only allegation which TPO/DRP made was that the assessee has not been able to substantiate need test by way of appropriate documentation and held that the assessee should have availed these services from an independent third party in India rather than from its AE. After going through the fact and submissions placed on record we are of the view that the assessee has satisfied the need/benefit test for availing these services from its AE. Regarding the rendition of the services by the AE, the appellant submitted before the TPO, the copy of inter-company agreements, tickets processed by GCSC, sample list of project assignment on which GCSC team assisted the assessee, list of deals on which GSE presales team assisted the assessee. **The assessee also explained the allocation key with details of teams spread across different countries, copies of invoices etc. For the purposes of substantiating the services rendered by the assessee it***

has submitted the details of all the service rendered by the AE to the assessee as in the paper book same are placed on sample basis. Therefore, assessee has placed substantial material evidencing the receipt of the services. Regarding the receipt of the services from AE, the assessee can be asked to maintain and produce the evidence of receipt of services, which a business person keeps and maintains regarding services related from the third party. The burden cannot be higher on the assessee for evidencing the receipt of services of higher level merely because the services have been rendered by its AE. Against these evidence placed by the assessee before the lower authorities Id. DRP has merely stated that assessee has not been able to provide sufficient evidence and that the AE has provided such services to the assessee. We failed to understand what 'sufficient evidence' was and what was lacking in the case of the assessee. We could not find any instances placed where the TPO/DRP held that the evidence placed by the assessee are not substantiated by rendition of service by the AE.....

10.5 In the case of **TNS India (P.) Ltd. v. ACIT [2014] 48 taxmann.com 128 (Hyderabad - Trib.)**, ITAT held that role of TPO is to determine arm's length price of a transaction, however, he cannot reject entire payment under provisions of section 92CA.

10.6 In the case of **PPG Coatings India (P.) Ltd. v. DCIT [2022] 139 taxmann.com 165 (Mumbai - Trib.)**, Mumbai ITAT has held that TPO is mandated by law to determine ALP by following one of methods prescribed

under section 92C read with rule 10B and when no such exercise is carried out by TPO, determination of ALP at Nil is not sustainable.

10.7 In the case of **Adama India (P.) Ltd. v. DCIT [2021] 128 taxmann.com 365 (Hyderabad - Trib.)**, the Hyderabad ITAT held that where assessee-company availed management services from its AE but TPO determined ALP of receipt of management services to be Nil, since assessee had filed supportive evidence indicating receipt of management services in day-to-day functioning from its Associated Enterprises and there was no rebuttal coming from revenue's side, impugned ALP adjustment at "Nil" was not sustainable.

10.8 In the case of **Megger India Pvt. Ltd. Vs DCIT (ITAT Mumbai) I.T.A. No. 6886/Mum/2018**, the Mumbai ITAT held that TP adjustment without applying any prescribed benchmarking method is unsustainable.

10.9 Now, we note in the instant facts that the lower authorities claimed to have adopted 'other method' by applying need, benefit and evidence test for considering the arm's length price of this transaction to be "NIL". In this regard it is pertinent to note that the provisions of Rule 10AB of the Income Tax Rules, 1962, which provides as under:

"10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction or a specified domestic transaction shall be any method which takes into account the price

which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.”

11. Thus, as per the provisions of aforesaid Rule, the ‘other method’ shall be the method which takes into account the price which has been or would have been charged or paid for the same or similar uncontrolled transaction between non-associated enterprises. However, in the present case, the Ld. TPO without searching for similar uncontrolled transaction between non-associated enterprises, straightaway treated the value of the international transaction to be at “NIL”. In the present case, no search was conducted to find out the independent entity in a comparable transaction and the arm’s length price of the international transaction was treated to be NIL. In the present case, no doubts about payments made by the assessee have been raised by the Assessing Officer under section 37 of the Act. Further, accrual of benefit to assessee or the commercial expediency of any expenditure incurred by the assessee cannot be the basis for disallowing the same, as held by Hon’ble Delhi High Court in the case of EKL Appliances Ltd. [2012] 345 ITR 241 (Del.). In our considered view, the assessee has been able to demonstrate, with substantial supporting material that it availed India specific services from its Head Office / Regional Office. The Ld. Transfer Pricing Officer in view has taken a rather restrictive view in coming to the conclusion that no services were rendered for which any independent third party would pay and hence it was not possible to determine arm’s length price in the instant set of facts. As held in various decisions, the TPO cannot

stand in judgment on what benefits the assessee has derived from the services and assessee's obligation lies to the extent of demonstrating receipt of services. Once, the assessee has been able to demonstrate receipt of services, in our view, Transfer Pricing adjustment without applying any prescribed benchmarking method is unsustainable and Ld. TPO cannot determine ALP at "Nil" and has to determine ALP under any one of the methods prescribed under the Income Tax Act read with the IT Rules. Accordingly, in our view, Ld. TPO has erred in facts and in law in treating the value of the transactions at "Nil".

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 03-08-2022

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Ahmedabad : Dated 03/08/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद