

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, AM AND SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 7318/Mum/2019

(Assessment Year 2015-16)

Sulzer Pumps India Pvt Ltd.
Plot No.9, MIDC, Digha,
Thane- Belapur Road, Navi
Mumbai-400 708

Vs.

The Dy. Commissioner of
Income Tax, Circle 15(3)(2),
Room No. 451, Aayakar
Bhavan, Maharshi Karve
Road, Mumbai-400 020

(Appellant)

(Respondent)

PAN No. AAACK2238F

Assessee by : Shri V. Shridharan &
Ms. Manasi C, AR

Revenue by : Shri C T Mathew, DR

Date of hearing: 17.06.2022

Date of pronouncement : 16.09.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Sulzer Pumps India Private Limited (the assessee/ appellant) against the order passed by the Dy. Commissioner of Income-tax 15(3) (2), Mumbai (the learned Assessing Officer) under Section 143(3) of the Income Tax Act, 1961 [the Act] on 30th October, 2019, wherein the return filed by the assessee on 30th November, 2014 at ₹88,63,34,310/- is assessed at ₹115,86,77,740/-. This assessment order was passed incorporating the adjustment proposed per order under Section 92CA(3) of the Act dated 16th October, 2018

passed by the Dy. Commissioner of Income-Tax, Transfer Pricing, 4(1)(1), Mumbai (the learned Transfer Pricing Officer) pursuant to the direction issued by the Learned Dispute Resolution Panel, No. II, Mumbai (the learned Dispute Resolution Panel) on 25.09.2019.

02. The assessee has raised following grounds:-

"Being aggrieved by the order of the learned DCIT, Circle - 15(3)(2), Mumbai, (AO'), read with the order of the learned Dispute Resolution Panel (DRP'), Mumbai, the assessee begs to prefer the present appeal on the following grounds:

A. Grounds relating to additions other than Transfer Pricing Adjustments

1. That on the facts and in the circumstances of the case, the lower authorities erred in upholding the disallowance of Rs. 3,54,24,353/- on account of non-deduction of tax relating to export commission paid by the assessee to its associated enterprises.

1.1. The lower authorities erred in holding that the payments made towards export sales commission are in the nature of fees for technical services under section 9(1)(vii) of the Income-tax Act, 1961.

1.2. The lower authorities erred on facts and in law, in not appreciating the decision of Hon'ble Apex Court in the case of CIT V. Toshoku Ltd.

[1980] 125 ITR 525 (SC) and by the Bombay High Court in DIT v. Wizcraft International Entertainment Pvt. Ltd. [2004] 364 ITR 227 (Bom).

2. *That on the facts and in the circumstances of the case, the lower authorities erred in upholding the disallowance of Rs. 1,70,99,895/- relating to the commission expenditure incurred by the assessee on the export sales.*

2.1. *The lower authorities erred in not appreciating the fact that the commission expenditure is not an ad hoc expense recorded in the books of accounts but is assessee's actual liability computed on the basis of export sales.*

2.2. *The lower authorities erred in ignoring the documentation, factual and legal submissions Provided by the assessee to support its submission that the commission expenses are not its unascertained liability.*

3. *That on the facts and in the circumstances of the ease, the lower authorities erred in upholding the disallowance of Rs. 3,73,10,658/- relating to provision made by the assessee towards warranty expenses.*

3.1. *The lower authorities erred in not appreciating the fact that the warranty*

provision has been created by the assessee on a scientific basis, i.e. on the basis of the sales revenues of a given period.

3.2. The lower authorities erred on facts and in law, in not appreciating the decision of Hon'ble Apex court in the case of Rotork Control India Private Limited v. CIT [2009] 314 ITR 62 (SC).

4. That on the facts and in the circumstances of the case, the lower authorities erred in Upholding the disallowance of Rs. 9,44,719/- on account of non-deduction of tax relating to professional fees paid by the assessee to its associated enterprises as well as to third parties.

4.1. The lower authorities erred on facts and in law, in ignoring the fact that the appropriate taxes had actually been withheld by the assessee while remitting the payment for professional fees.

4.2. The lower authorities erred in not appreciating the documentation, factual and legal submissions provided by the assessee to support its submission that the deduction of tax before remittance.

5. That on the facts and in the circumstances of the case, the lower authorities erred in treating a sum of Rs. 5,29,687/- as the income of the assessee on

account of alleged discrepancy in receipts as per books of accounts and 26AS of the assessee.

B. Grounds relating to additions on account of Transfer Pricing Adjustments

6. That on the facts and in the circumstances of the case, the lower authorities erred in upholding the adjustment of Rs. 7,05,39,108/- to the income of the assessee on account of payment of trademark fees to the associated enterprise.

6.1. The lower authorities erred in rejecting the transfer pricing documentation and the economic analysis undertaken by the assessee without any robust reasons to determine the arm's length price for the use of the trademark 'SULZER'.

6.2. The lower authorities erred on facts and in law in determining the arm's length price of the payment of trademark fees to be Nil without following any of the prescribed methods under section 92C(1) of the Income-tax Act, 1961.

6.3. The lower authorities erred in ignoring the documentation, factual and legal submissions provided by the assessee to substantiate the benefit, corresponding economic or commercial value derived by the use of the trademark 'SULZER'.

7. That on the facts and in the circumstances of the case, the lower authorities erred in upholding the adjustment of Rs. 3,92,66,987/- to the income of the assessee on account of SAP related support services cost, paid by the assessee to its associated enterprise.

7.1. The lower authorities erred in rejecting the transfer pricing documentation and the economic analysis undertaken by the assessee without any robust reasons to determine the arm's length price of SAP related support services.

7.2. The lower authorities erred on facts and in law in determining the arm's length price of SAP related support services to be Nil without following any of the prescribed methods under section 92C(1) of the Income-tax Act, 1961.

7.3. The lower authorities erred in going beyond the scope of section 92CA and in questioning the commercial rationale of the legitimate business expenses incurred by the assessee.

7.4. The lower authorities erred in ignoring the documentation, factual and legal submissions provided by the assessee to substantiate the benefit, corresponding economic or commercial value derived on receipt of SAP related support services.

8. That on the facts and in the circumstances of the case, the lower authorities erred in upholding the adjustment of Rs. 1,01,08,087/- to the income of the assessee relating to payment of annual charges towards Microsoft licensing made by the assessee to its associated enterprise.

8.1. The lower authorities erred in rejecting the transfer pricing documentation and the economic analysis undertaken by the assessee without any robust reasons to determine the arm's length price of the annual charges towards Microsoft license.

8.2. The lower authorities erred on facts and in law in determining the arm's length price of the annual charges towards Microsoft licensing to be Nil without allowing any of the prescribed methods under section 92C(1) of the Income-tax Act, 1961.

8.3. The lower authorities erred in linking the transaction of Microsoft charges paid with that of the transaction of payment for SAP related Support services and holding that since arm's length price of SAP charges is determined at Nil, there cannot be charges for the maintenance of such software.

8.4. The lower authorities erred in ignoring the documentation, factual and legal submissions provided by the assessee to substantiate the



benefit, corresponding economic or commercial value derived oil of the Microsoft license.

9. That on the facts and in the circumstances of the case, the lower authorities erred in upholding the adjustment of Rs. 6,06,85,073/- to the income of the assessee on account of ASP management fees paid by the assessee to its associated enterprise.

9.1. The lower authorities erred in rejecting the transfer pricing documentation and the economic analysis undertaken by the assessee without any robust reasons to determine the arm's length price of management services.

9.2. The lower authorities erred on facts and in law in determining the arm's length price of ASP management services to be Nil without following any of the prescribed methods under section 92C(1) of the Income-tax Act, 1961.

9.3. The lower authorities erred in going beyond the scope of section 92CA and in questioning the commercial rationale of the legitimate business expenses incurred by the assessee.

9.4. The lower authorities erred in ignoring the documentation, factual and legal submissions provided by the assessee to substantiate the benefit corresponding economic or commercial value derived oil of management services.

10. That on the facts and in the circumstances of the case, the lower authorities erred in upholding the adjustment of Rs. 4,34,858/- to the income of the assessee on account of payment of professional fees to the associated enterprise.

10.1 The lower authorities erred in rejecting the transfer pricing documentation and the economic analysis undertaken by the assessee without any robust reasons to determine the arm's length price for the receipt of professional services.

10.2 The lower authorities erred on facts and in law in determining the arm's length price of the professional services to be Nil without following any of the prescribed methods under section 92C(1) of the Income-tax Act. 1961.

10.3. The lower authorities erred in going beyond the scope of section 92CA and in questioning the commercial rationale of the legitimate business expenses incurred by the assessee.

10.4 The lower authorities erred in ignoring the documentation, factual and legal submissions provided by the assessee to substantiate the benefit, corresponding economic or commercial value derived on receipt of professional services.

11. That on the facts and in the circumstances of the case, the lower authorities erred in levying interest of Rs. 5,95,42,221/- under section 234B and 234C of the Act.”

03. Fact shows that assessee is a company engaged in the business of manufacturing and sale of pumps for industrial use and is a part of Sulzer group based in Switzerland. Assessee filed return of income on 30/11/2014 declaring total income of ₹ 886,320,310/-. The return of income was picked up for scrutiny. As assessee has entered into certain international transactions, after approval from the principal Commissioner of income tax – 15, Mumbai per letter dated 22/6060 reference was made to The Deputy Commissioner of Income Tax (Transfer Pricing) – 4 (1) – 2, Mumbai (the learned TPO) for determination of arm’s-length price of the international transactions entered into by the assessee.
04. The assessee has undertaken 16 types of international transactions with its associated enterprises adopting various methods as most appropriate method submitting that same are carried out at Arm’s Length Price. The international transaction carried on by the assessee are as under:-

S.NO.	International Transaction	Amount (In INR)	Most Appropriate Method (MAM) adopted by assessee
1.	Purchase of raw materials, parts, etc.	22,23,13,683	Transactional net



			Margin Method ('TNMM')
2.	Purchase return of raw materials, parts etc.	26,63,387	TNMM
3.	Sale of finished goods	82,44,93,648	TNMM
4.	Use of Trademark and payment of Fees thereof	7,05,39,108	Comparable Uncontrolled Price method (CUP)
5.	Use of Technical know-how and payment of Royalty thereof	16,45,91,253	CUP
6.	Technical Service rendered, consideration received thereof	1,17,91,101,	Other method
7.	Professional services availed, and Fees paid thereof	4,34,858	Other Method
8.	Marketing services (agency services) received and Commission paid thereof	1,70,99,895	CUP
9.	Marketing services (agency services) rendered and Commission received thereof	28,62,597	CUP
10.	Warranty expenses paid to AES for undertaking repair/ rectification work on behalf of the Assessee (including reversal of amount charged by the AEs for warranty claims in earlier years)	2,29,53,871	Other Method
11.	SAP related support services received, and payments made thereof	3,92,66,987	Cost Plus Method (CPM)
12.	ASP management services received, and payments made thereof	6,06,85,073	CPM
13.	Microsoft licenses procured, and annual charges paid thereof	1,01,08,087	Other Method
14.	Corporate IT support services received, and payments made thereof	2,57,90,700	CPM
15.	Reimbursements/ Recoveries	1,12,02,025	Other Method
16.	Receivables/ Payables	All the balances due from and towards the AEs have been/ would be cleared within reasonable time as agreed.	

05. The learned transfer-pricing officer found that for assessment year 2014 - 15 same adjustment to the arm's-length price of the international transaction was made, therefore why identical adjustment should not be made during the year. The fact shows that for assessment year 2014 - 15 certain international transactions were



benchmarked by the learned TPO holding that arm's-length price of those transactions Rs. Nil.

06. He found that such transactions are with respect to

[1] Payment of ASP management fees of ₹ 60,685,073/- which was in relation to administrative/management services provided by a Chinese entity affiliated entities operating in Asia-Pacific region. The cost was allocated by associated enterprise providing these services entities including assessee based on time spent in providing the said services. Assessee was charged at cost plus a markup of 5%. The nature of services were sales and marketing, information technology, finance, management support and human resources. Assessee adopted cost plus method as the most appropriate method for payment of these fees. The weighted average margins of the comparable independent companies were found in the range of 5.28% to 6.68% with an arithmetic mean of 6.75%. Therefore, the assessee stated that this international transaction is at arm's-length. The learned transfer-pricing officer held that in assessment year 2013 – 14 and assessment year 14 – 15 the arm's-length price of the same is determined at Rs. nil that has been confirmed by the learned DRP. Learned TPO further noted that the agreement produced by the assessee did not have any clause of the quantification of services and assessee did not produce primary evidence to show that the services were actually rendered except



explaining the nature of services as well as producing some emails. AO found that assessee could not prove the services were rendered and a benefit of such expenditure. He further held that the allocation of management fees is nothing but diversion of profits from India and therefore he determined the arm's-length price of the service at Rs. nil.

[2] payment in relation to SAP related support services of ₹ 39,266,987/- which is pertaining to running the Sap server infrastructure and data centers as well as training, and implementation services which are more precisely described at paragraph number 10 of the order of the learned TPO. The assessee benchmarked the same showing the group transfer pricing policy where such services are charged at cost plus markup of 5% based on in to company agreement dated 2 August 2018. The learned TPO found that the identical service was also tested for its arm's-length price in earlier year where it has been determined at Rs. Nil and confirmed by the learned DRP. The learned TPO therefore determined the arm's-length price of the same at Rs. nil holding that assessee has merely submitted budget rate per user per month arrive at the cost and has not submitted any analysis on the basis of which such budget rate was arrived at. Merely a management certificate with respect to monthly cost was submitted without support of list of employees for whom such licenses were obtained. The



learned TPO found that the services are in the nature of on call services, which could not be shown resulting into benefit to the assessee.

[3] Payment of annual charges towards software licensing of ₹ 10,180,087/- which are the services with respect to the Microsoft volume license agreements cost charged based on the agreement allocated based on licenses. This was paid to Sulzer management AG. This cost is allocated by associated enterprise to the assessee based on the number of user licenses are located. Assessee substantiated the same as per submission dated 4/10/2018 submitting the invoice stating that this amount has been charged on back-to-back basis without any markup. The learned transfer-pricing officer held that these are annual maintenance cost of Microsoft licenses, as the SAP license fees have been determined at ALP at Rs Nil, in absence of the list of employees utilizing such licenses; this cost was also benchmarked at Rs. Nil

[4] payment for professional fees of ₹ 434,858/- was made for technical services representing expenses relating to repair/rework/rectification work carried out for the purpose for to the end customers and the warranty period in respect of such forms were expired. The assessee stated that as per the group policy the associated enterprises have charged cost plus a markup of 5% the assessee for provision of the above professional services



assessee also supported the same with sample copies of the invoices. The arm's-length price of the about transaction was determined by assessee adopting other method payment of the about transaction was clubbed with the transaction for payment of royalty. The region wise profitability was shown to the learned transfer pricing officer and stated that a markup of 5% which is within the range for the lower than that charged by the comparable companies in respective region and therefore the transaction is at arm's-length. The learned transfer-pricing officer held that assessee has not benchmarked this transaction, which is necessary, and assessee did not demonstrate that such services were indeed requested by the assessee and consequently rendered by the associated enterprises. Accordingly he determined its arm's-length price at Rs. nil.

[5] Payment of trademark fees of ₹ 70,539,108 – was incurred by the assessee for using the trademark brand name by its associated enterprise in terms of the agreement submitted on 2/8/2018. Assessee adopted comparable uncontrolled price method as most appropriate method. The comparability analysis was made based on the search conducted on Royalstate database. Assessee also explained the benefits derived by it and stated that the payment of the royalty is at arm's-length as the royalty rate of the comparable companies was found at 2.69% where the assessee has paid royalty at



the rate of 1.5% on sales to 3rd parties. The learned transfer-pricing officer has noted that assessee has submitted the agreement dated 2/1/2008 wherein the royalty rates were 1% from 1/1/2008 and the second agreement dated 9/2/2012 where the rate of royalty is 1.5% from 1/1/2012. As per these agreements the royalty was payable on monthly basis. He found that in the earlier years the arm's-length price of the royalty payment was determined at Rs. Nil as assessee failed to substantiate any benefit received. Accordingly, he also determined the arm's-length price of royalty payment at Rs. Nil.

Accordingly, as per order dated 16/10/2018 u/s 92CA (3) of the act he determined the arm's-length price of these payments at Rs. Nil and total adjustment with respect to these 5 payments of ₹ 181,034,113/- was made.

07. The learned Assessing Officer passed the draft assessment order on 28th December, 2018, therein he made the following additions;

I. The learned Assessing Officer noted that assessee has debited ₹3,73,10,658/- on account of warranty charges that held to be a mere provision and therefore, disallowed the same.

II. He even otherwise submitted that assessee has made payment to foreign party on which tax is required to be deducted under Section 195 of the

Act which has not been deducted and therefore, same was also disallowed under Section 40a(i) of the Act.

III. He further disallowed the provision of commission expenditure to the extent of ₹1,70,99,895/- under Section 37 of the Act as these expenses are not incurred in the relevant accounting year.

IV. He also made an addition of payment made to non-resident of ₹5,38,46,290/- for non-deduction of tax under Section 40a(i) of the Act. There were certain mismatches between the information available from annual information return wherein certain payments to the extent of ₹5,29,687/- are not offered as income. Therefore, same were added.

08. Consequently, total income of the assessee was determined at ₹117,61,65,952/-bypassing the draft assessment order u/s 143 (3) read with Section 144C (1) of the act on 28/12/2018 wherein total income of the assessee disclosed in the revised return of income of ₹ 799,172,952/- was determined at ₹ 1,176,154,952/-.

09. The draft assessment order was challenged by filing objections before the learned Dispute Resolution Panel who passed direction on 25th September, 2019. The learned dispute resolution panel upheld the transfer

pricing adjustment proposed by the learned transfer-pricing officer of ₹ 181,034,113/- based on the direction of the learned dispute resolution panel for earlier assessment years. The disallowance of warranty expenditure of Rs. 3 73,10,658/- disallowance of provision for the commission of Rs 170,99,895/-, disallowance u/s 40(a)(ia) of ₹ 363,69,080/- on account of warranty expenditure as payment is made to non-resident parties on which tax was required to be deducted Under the provisions of Section 195 of the act, disallowance on account of mismatch between annual information return with the income of the assessee of ₹ 529,687/-.

010. Accordingly, the final assessment order under Section 143(3) of the Act was passed on 30th December 2019. By this order, the learned Assessing Officer retain following additions:-

- I. Addition on account of Arm's Length Price of international transaction at ₹18,10,34,113/-.
- II. Disallowance of warranty expenditure of ₹3,73,10,658/-.
- III. Disallowance of provision for commission of ₹1,70,99,895/-.
- IV. Disallowance under Section 40a(ia) of the Act of ₹3,63,69,080/-.

V. Addition on account of AIR information of ₹5,29,687/-.

011. Assessee aggrieved by this order has preferred this appeal.

012. Ground number 1 of the appeal is with respect to the disallowance of commission paid to associated enterprise for procurement of export orders amounting to ₹ 35,424,361 on which the assessee did not deduct tax at source. The learned authorised representative submitted that this issue is squarely covered in favour of the assessee for the reason that for assessment year 2007 – 08 identical issue arose where the issue was set-aside to the file of the learned assessing officer by the coordinate bench and in set-aside proceedings the learned assessing officer passed an order u/s 143 (3) read with Section 254 of the income tax act on 29/12/17 where the learned assessing officer has deleted the addition relating to commission on account of non-deduction of tax u/s 195 of the act. Even Otherwise he submitted that issue squarely covered in favour of the assessee by the decision of the honourable Supreme Court and honourable Bombay High Court.

013. The learned departmental representative supported the orders of the lower authorities.



014. We have carefully considered the rival contention and perused the orders of the road lower authorities as well as the order of the assessing officer in case of the assessee for assessment year 2007 – 08. We find that assessee is a manufacturer of power driven pumps. These pumps are sold to customers in India as well as in overseas market. Assessee does not have any offices outside India but market is served by the associated Enterprises of the assessee. For this purpose, the assessee pays the commission to the associated enterprises. This year such commission payment was of ₹ 35,424,361/-. Though the transaction was accepted by the learned transfer pricing officer at arm's-length price, however, the learned assessing officer disallowed the same for the reason that assessee has not deducted tax at source u/s 195 of the Act and hence disallowable u/s 40 (a)(i) of The Act , as according to the learned assessing officer u/s 195 of the income tax act the commission paid to associated enterprises should have been subjected to tax deduction at source. In the present case the associated enterprises do not carry on any business operation in India, they merely acted as selling agents of the assessee outside India. The issue is squarely covered by the decision of the honourable Bombay High Court in 364 ITR 227 in DIT v Wizcraft International entertainment private limited wherein it has been held that the non-resident agent did not perform any services in India but rendered



services outside India and therefore the commission income to the agent is not liable to tax in India and therefore there was no obligation on part of the assessee to deduct tax at source at the time of making such payment. Further, in the case of the assessee the identical issue has been accepted by the learned revenue authorities in earlier years. In view of this, we do not agree with the findings of the lower authorities that the assessee should have deducted tax at source on payment of commission to its associated enterprises in Foreign Countries , that did not have any permanent establishment in India or were not carrying on any business in India but were rendering services outside India. Accordingly, ground number 1 of the appeal of the assessee is allowed and the learned assessing officer is directed to delete the disallowance of ₹ 35,424,361/- because of commission paid to associated enterprise for procurement of export orders.

015. Ground number 2 is with respect to the provision for commission incurred by the assessee to associated enterprise for procuring export orders which was disallowed by the learned assessing officer amounting to Rs 1,70,99,895/- stating that it represents a mere provision cannot and ascertained liability and therefore provisions are not deductible as an expenditure.



016. The learned authorised representative submitted that the commission expenses on account of concluded sales as per the matching concept of expenses for which revenue as per accounting policies has already been accounted as income, needs to be provided for. According to him, as soon as the sales are concluded, the resultant commission also accrues and therefore such expenditure is required to be provided for. The rate of commission is fixed based on export prices, the country of export is also known, therefore the associated enterprises, which would be receiving the commission, is also ascertained. Therefore the price, the commission payment, the recipient of the income are known to the assessee and therefore as the liability for payment of commission arises as soon as the sale is concluded, the commission is not merely a provision but an ascertained liability therefore it should have been allowed to assessee as deduction.
017. The learned departmental representative vehemently supported the order of the learned assessing officer stating that when the liabilities did not accrue, the deduction cannot be granted.
018. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, assessee exports the pumps to overseas customers. During the year, the assessee has exported of ₹ 251.91 crores, which is almost 50% of its turnover. Assessee does



not have any branch office outside India to source its export orders. For this reason the associated Enterprises of the assessee performs the duty of the agents and assessee pays them commission on the sales. During the year, the assessee has recorded Rs 4, 94,66,527/- as commission due on account of sales recorded during the year. The arm's-length price of the commission expenses are accepted by the learned transfer pricing officer but the learned assessing officer stated that the commission paid is merely a provision because the invoices for commission has not been received by the assessee during the year. Therefore, it is disallowed. We find that when the sales are concluded during the year, naturally the corresponding expenses of commission have also accrued to the assessee. For such commission, the amount of commission, recipients of commission as well as the basis of such commission payment are known to the assessee. The liability for payment of commission has already been incurred by the assessee as soon as sales are concluded for the reason that corresponding bills have not been received from the associated enterprises cannot come into the way of deduction claimed by the assessee. It is not the case of the revenue that subsequently also the assessee did not receive the bill or no export commission was required to be paid on such sales. Therefore, it is an ascertained liability of the assessee as soon as sales are made. Learned transfer pricing officer by determining the

arm's-length price of the commission expenses clearly proved that the services been rendered by those agents. Therefore, it cannot be said that such provision is not allowable. In View of this, we do not find any reason to uphold disallowance made by the learned assessing officer holding that provision for commission payable to associated enterprises for procuring export order is merely a provision and not an ascertained liability. Hence, we direct the learned assessing Officer delete the disallowance of Rs. 170,99,895/- on this account stop accordingly ground number 2 of the appeal is allowed.

019. Ground number 3 is against the disallowance of provision of warranty expenditure provided by the assessee at the rate of 1.25% of the pumps sold on account of between charges that firstly it is merely a provision and not an ascertained liability and secondly even if it is deductible as an expenditure, assessee has failed to deduct tax at source u/s 195 of the act on the sum amounting to ₹ 37,310,658/- and therefore, it is this allowable u/s 40(a)(i) of the act.

020. The learned authorised representative submitted that provision of warranty is made on the basis of past history of the failure of products, the provision made is not excessive, therefore, it is an ascertained liability. Therefore he submitted that the claim of the assessee of warranty expenditure squarely covered in favour of



assessee by decision of the honourable Supreme Court in case of Rotorok controls India private limited versus CIT 314 ITR 62 wherein the Hon. Supreme Court has held that the provisions for meeting warranty claims and sales computed on accrual basis as percentage method taking into account the past trends is an allowable expenditure.

021. On the issue of non-deduction of tax at source he submitted that if a resident is carrying business outside India or earning income from a source outside India, the expenditure of fees for technical services for that, cannot be subjected to withholding tax u/s 195 of the income tax act.
022. The learned departmental representative heavily relied on the orders of the lower authorities submitting that provision made by the assessee for warranty expenditure is not on scientific basis and further assessee has failed to deduct tax at source on payment of warranty expenditure to its associated enterprises u/s 195 of the income tax act and therefore the disallowance is correctly made by the learned assessing officer on twin charges.
023. We have carefully considered the rival contentions and perused the orders of the lower authorities. Assessee made provision for warranty expenditure on the pump and sold at the rate of 1.25% . Learned AO disallowed it stating that it is merely provision and not ascertained liability. The learned Assessing Officer further noted that



no tax has deducted at source on such expenditure under Section 195 read with section 9(1)(vii) of the Act, the disallowance of ₹3,73,10,068/- was made. We find that assessee is engaged in manufacturing and sale of centrifugal power driven pumps, assessee assures its customer warranty for period of 18 months after sales . As during this period of warranty, assessee indicates a liability to repair, rework and rectify any defect in the product and sold it provides warranty on the basis of past history and scientific basis of failure of the product sold. For 18 months of sale of pump, the assessee makes the provision of warranty. The learned Authorized Representative demonstrated the warranty expenditure for various period where the actual warranty percentage are ranging from 6.48% to 2.46% and which averages out to 1.25 percentage and therefore, the provision was credited in the books of account on that basis. He also referred to the past trend for last three years to show that average warranty is 1.17% of the sales. He submitted that as the warranty condition is embedded into the sale price, as soon as the sale are recorded and recognized as Revenue, related warranty cost is also required to be provided for according to the accounting standard 9 of the ICAI. He therefore, submitted that this warranty cost is ascertained liability and not merely the provision. He further, stated that this issue is squarely covered in favour of the assessee by the decision of the Hon'ble Supreme Court in

case of Rotork Controls India (P.) Ltd. (2009) 314 ITR 62 (SC). We find that the provision of the liability has been made by the assessee on the past trends available of the product failure and incurring of warranty expenditure for that. Naturally, assessee extends the warranty of the pumps sold for 18 months. The only information that could be used by the assessee is the past product failure. This is not proved to be incorrect by the revenue authorities. Warranty is necessary cost, which is embedded in the sale price. The contract of sale itself includes the same. Therefore, as soon as the sales are accounted for as income, the corresponding warranty liability is required to be provided as expenditure incurred. The quantum of warranty expenditure if determined in accordance with some method based on past trends of the product failure, and such provision is not excessive, same deserves to be allowed as expenditure against the sales income by the assessee. The honourable Supreme Court covers this issue in favour of the assessee. Before us, assessee has provided the calculations of each for provision of warranty made in the respective year as well as the financial statements of the assessee for earlier years to show that such provision are not in excess of any requirement for meeting warranty liability. The learned assessing officer and the learned dispute resolution panel did not show what is the scientific method other than this that the assessee should have employed for determining



the liability of warranty. In view of this, we are of the opinion that warranty provision made by the assessee is not an unascertained liability but definite and ascertained liability, which is quantified on the basis of past history of the product failure. Accordingly, the learned assessing officer is not correct in disallowing the warranty expenditure amounting to ₹ 37,310,658/- stating that it is not allowable. Therefore, the disallowance deserves to be deleted.

024. With respect to the deduction of tax at source, the learned authorised representative submitted that as the person whom the credit is given is unknown at the time of provisioning, therefore, no tax can be deducted, as the payee is not identified. We find no force in this argument because as soon as the sales are made, the assessee is aware in which geographical location such sales are made and which associated enterprises is going to perform this service over a period of 18 months. It is not the case of the assessee that there are multiple associated enterprises in a particular jurisdiction to perform this activity and assessee selects one of them to perform the same. Therefore, the payees are identified, the quantum is ascertained and the period for which the payment is required to be made is also known. Hence, we reject this argument. There is one more reason to reject the same because at the time of booking of export commission expenses without receiving the bill, the argument of the

assessee was exactly opposite. The export commission liability as well as the liability of warranty which are embedded in the sale price and are incurred simultaneously.

025. The next argument for non-deduction of tax of the warranty expenditure raised by the learned authorised representative is that as the warranty expenditure relates to services utilized in business carried out by the assessee outside India and thereby it falls into the exclusion under Section 9(1) (vii) (b) of the Act from the definition of income of fees for technical services. He submitted that assessee export goods manufactured by it to overseas customers. To them, the warranty obligation of the assessee was fulfilled by Associated Enterprises. These Associated Enterprises then, charges the assessee for the services provided by it. He submitted that the payment for availing repair services was utilized by the assessee for the business carried on by the assessee outside India of making or earning income from source outside India. Therefore, according him these payments falls in the exclusion clause of Section 9(1)(vii)(b) of the Act not liable for taxation in India. Therefore, no tax is required to be deducted at source. To further support his arguments, that assessee should be regarded as a person carrying on business outside India, he further referred to several judicial precedents. He submitted that this judicial precedents clearly lay down that even if the person does



not have a physical persons in another jurisdiction, he can be considered as carrying on business in that country, if he habitually and regularly sales goods in that country. He further submitted that the term business is of a very wide import, thus he submitted that warranty services have been availed from Associated Enterprises for earning income form a source outside India and therefore, the payment is not subject to TDS under Section 195 of the Act. He further distinguished the decision of the Hon'ble Delhi High Court in case of CIT vs. Hevells India Ltd as well as of Hon'ble Madras High Court in CIT vs. Anglo French textiles (1993) 199 ITR7 85 (Mad) Hon'ble Delhi High Court was not concerned with the applicability of first explanation to section 9(1)(vii)(b) of the Act. He submitted that the Hon'ble Gujarat High Court in case of Motive India InfoTech Pvt. Ltd. [2018] 409 ITR 178 (Guj) squarely covers the issue in favour of the assessee. He further relied on the decision of DCIT vs. Lufthansa Cargo Hon'ble Delhi High Court 375 ITR 85. He otherwise submitted that warranty charges are not liable to tax with respect to Associated Enterprises in Switzerland, Spain and Singapore in view of make available clause. He submitted that the warranty charges does not satisfy that condition and therefore, in any case, the warranty charges paid to Associated Enterprises who are residents of Switzerland, Spain and Singapore no tax is required to be deducted and therefore, no disallowance for non deduction



of tax can be made. We find that this issue is squarely covered in the favour of the assessee by decision of the honourable Gujarat High Court in [2018] 409 ITR 178 (Guj)in wherein it has been held as Under:-

“5. Having heard learned advocates for the parties, we notice that indisputably the assessee who provides software related services to many of its clients situated abroad, had hired services of the said M/s. Pacific Hub Corporation, Philippines. The said M/s. PHC, Philippines does not have a permanent establishment in India. It would render services for obtaining human resources and infrastructure services to the assessee for serving its foreign based clients. In this context, a question arises whether at the time of making payments for such services, deduction of tax at source was³¹ necessary.

6. In the case of GE India Technology Centre P. Limited v. CIT reported in [2010] 327 ITR 456 (SC), the ratio laid down by the Supreme Court was that mere remittance of money to a non-resident would not give rise to the requirement of deducting tax at source, unless such remittance contains wholly or partly taxable income. It is true that after such judgment was rendered, the Legislature had amended section 195 of the Act by inserting Explanation 2 by the Finance Act, 2012, but with



retrospective effect from April 1, 1962. Such Explanation provides that for removal of doubts, it is clarified that the obligation to comply with sub-section (1) of section 195, and to make deduction as provided therein applies and shall be deemed to have always applied to all persons, resident or non-resident, whether or not the non-resident person has a residence or place of business or business connection in India ; or any other presence in any manner whatsoever in India. Mere requirement of permanent establishment in India was thus done away with. Nevertheless, the basic principle that requirement of deduction of tax at source would arise only in a case where the payment made to a non-resident was taxable, still remains. It was observed in a decision dated April 9, 2018, rendered in Tax Appeal No. 290 of 2018 (Principal CIT v. Nova Technocast Pvt. Ltd. [2018] 12 ITR-OL 353 (Guj)) by the Division Bench of this court, as under (page 356 of 12 ITR-OL) :

"It can thus be seen that while confirming the order of CIT(A), the Tribunal relied on the judgment of the Supreme Court in the case of Page No : 183 GE India Technology Centre P. Limited v. CIT reported in [2010] 327 ITR 456 (SC). In such judgment, it was held and observed that the most important expression in



section 195(1) of the Act consists of the words, 'chargeable under the provisions of the Act'. It was observed that, '. . . A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act'. The counsel for the Revenue, however, drew our attention to Explanation 2 to sub-section (1) of section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from April 1, 1962. Such Explanation reads as under : 'Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

33- (i) a residence or place of business or business connection in India ; or (ii) any other presence in any manner whatsoever in India.' It is indisputably true that such Explanation inserted with retrospective effect provides that obligation to comply with sub-section (1) of section 195 would extend to any person resident or non-resident, whether or not non-



resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a nonresident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre P. Limited (supra), sub-section (1) of section 195 of the Act would not apply. The fundamental principle of deducting tax at source in connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not even seriously contended that the payment to foreign commission agent was not taxable in India."

7. In this context, we would refer to section 9(1)(vii)(b) of the Act. Sub-section (1) of section 9 enlists situations under which the income shall be deemed to accrue or arise in India. Clause (vii) contained therein pertains to income by way of fees for technical services payable by the Government or

a person who is a resident, or a person who is a non-resident under the circumstances specified therein. Sub-clause (b) thereof pertains to a person who is a resident and reads as under :

"9. Income deemed to accrue or arise in India.—(1) . . . (vii) income by way of fees for technical services payable by— (a) the Government ; or (b) a person who is resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or"35

8. As per sub-clause (b) thus, the income by way of fees for technical services payable by a person who is a resident would be deemed to accrue or arise in India. However, this clause contains two Explanations, namely, where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India, or for the purpose of making or earning any income from any source outside India. In other words, therefore, if the assessment of an assessee falls in either of these two clauses, the income by way of fees for technical services paid by the assessee would still not be covered within the deeming clause of sub-section (1) of section 9.

9. In the present case, the Commissioner (Appeals) and the Tribunal have accepted the assessee's factual assertion that the payments were for technical services provided by a non-resident, for providing services to be utilized for serving the assessee's foreign clients. Thus, the fees for technical services was paid by the assessee for the purpose of making or earning any income from any source outside India. Clearly, the source of income, namely, the assessee's customers were the foreign based companies.

10. We are fortified in the view by a judgment of the Karnataka High Court in the case of CIT v. ITC Hotels reported in [2015] 233 Taxman 302 (Karn), in which it was held that where the recipient of income of parent company is not chargeable to tax in India, then the question of deduction of tax at source by the payer would not arise.

11. Learned counsel for the Revenue, however, relied on a decision of the Delhi High Court in the case of CIT v. Havells India Limited reported in [2013] 352 ITR 376 (Delhi). In such case, however, the court was of the opinion that the payment made by the assessee to a US based company for certification facilitating export was not in relation to the source of income which was based in India. The facts were

thus different. It was also argued that the Commissioner (Appeals) had relied on a decision in the case of Adani Enterprises Ltd. (supra) against which, the Revenue's appeal has been admitted by the High Court. It prima facie appears that the facts in the case of Adani Enterprises were different. In the present case, we have primarily gone on the question of the nature of the assessee's activities and the nature of services rendered by the parent based company, for which commission was paid. Keeping the question pending before the High Court in the case of Adani Enterprises untouched, we can still dispose of this appeal."

026. Above decision of the honourable Gujarat High Court has also considered the decision of the honourable Delhi High Court of CIT V Havells India Ltd 280 taxman accordingly, we agree with the assessee that no tax is required to be deducted u/s 195 of the income tax act on the said sum of warranty expenditure paid to associated enterprises. Therefore , disallowance of warranty expenditure on this account is also not warranted. Accordingly, ground number 3 of the appeal of the assessee is allowed.

027. Ground number 4 of the appeal is with respect to the disallowance of professional fees paid to associated Enterprises and non associated enterprises for the reason

that assessee has failed to deduct tax at source . The disallowance was made of ₹ 944,719/-.

028. Before us, assessee submitted that the assessee has made payment of the above amount and in fact has deducted tax at source on the above payment. The assessee submitted the list of 13 parties stating that to them the amount of ₹ 944,719/- is paid and tax is deducted of ₹ 194,024 . It was also stated that assessee submitted these details before the learned dispute resolution panel however, they were ignored.

029. We have carefully considered the rival contention, perused the orders of the lower authorities, and find that if the claim of the assessee is found to be correct that the assessee has already deducted tax at source on the above payment, no disallowance could have been made. Therefore, in the interest of justice, we set-aside this ground of the appeal to the file of the learned assessing officer with a direction to the assessee to show that on these payments the assessee has deducted tax at source u/s 195 of the income tax act, the learned assessing officer may verify the same and decide the issue in accordance with the law. Accordingly, ground number 4 of the appeal is allowed.

030. Ground number 5 was not pressed and therefore it is dismissed.



031. Ground number 6-10 of the appeal of the assessee relating to the transfer pricing issues. The learned Authorized Representative submitted that ground no. 6 to ground no. 9 relates to the transfer pricing adjustments, which are covered in favour of the assessee by the order as co-ordinate Bench in assessee's own case for A.Y. 2012-13 and 2014-15. order of the coordinate bench was also placed in the convenience compilation submitted at page number 1 – 37 of the paper book .
032. Ground no 6 is against adjustment of Rs. 7,05,39,108/- to the income of the assessee on account of payment of trademark fees to the associated enterprise. Ld AR submitted that the royalty payment made to the associated enterprises which at the rate of 1.5% of sale price for use of trademark is at Arm's Length Price which is determined by the learned Transfer Pricing Officer at ₹ Nil and confirmed by the Dispute Resolution Panel amounting to ₹7,05,39,108/- challenged in this appeal by ground no. 6. It is squarely covered by ground no. 6 of the appeal of the assessee in order of ITAT for earlier years.
033. With respect to ground no. 7, he submitted that SAP license fee and Support fees paid to Associated Enterprises amounting to ₹3,92,66,987/-, whereas the learned Transfer Pricing Officer determine its Arm's Length Price at

₹ Nil is covered by ground no. 5 of the earlier years of the ITAT Orders.

034. The ground no. 8 of the appeal challenges the determination of Arm's Length Price at ₹ Nil of international transaction of ₹1,01,08,087/- of Microsoft software license fee reimbursed to the associate enterprises is covered by ground no. 7 of the order of the ITAT orders.

035. He submitted that ground no. 9 with respect to management fee paid to associate enterprises of ₹6,06,85,073/- whose Arm's Length Price is determined by Transfer Pricing Officer at ₹ Nil is also covered by ground no. 4 of earlier years order of ITAT order.

036. The Id DR Relied up on the orders of the Ld TPO and DRP.

037. We have carefully considered the rival contention and orders of lower authorities. We find that same issue arose in the case of assessee for ITA No. 1153/MUM/2017 [Assessment Year: 2012-13], ITA No. 6013/MUM/2017 [Assessment Year: 2013-14] and ITA No. 6660/MUM/2018 [Assessment Year: 2014-15] dated 23 March, 2021 wher in coordinate bench has hld as under :-

“25. We have heard the rival submissions and perused the relevant materials available on record. Having narrated at length the order of the TPO/AO and DRP, the contentions of the Ld. Counsel and the Ld. DR, we adjudicate below the above grounds appeal.



We find that the assessee had filed before the TPO on 22.06.2015 (i) Transfer pricing study report for financial year 2011-12 (ii) Form 3CEB for FY 2011-12 (iii) Financial statements of Sulzer India for the year ended 31 March 2012.

The assessee had also filed before the TPO on 04.09.2015 i) Copies of agreements for Trademark fees between Sulzer Management AG and Sulzer India, (ii) Copies of third party comparable agreements w.r.t trademark fees, (iii) Single year comparable companies margin for FY 2011-12, (iv) Calculation of operating margin of Sulzer India for FY 2011-12, (v) Description of services and benefits received for payment of ASP management fees,

(vi) Copy of agreement for ASP management fees, (vii) E-mail correspondences for payment of ASP management fees, (viii) Copy of inter-company agreement for SAP, (ix) Tickets raised by Appellant for SAP support services, (x) Agreement between Sulzer Holding Inc. and Microsoft Licensing GP, (xi) Agreement between Sulzer Holding Inc. and Sulzer Management AG, (xii) Inter-company memo between Sulzer Management AG and Sulzer India, (xiii) Inter-company invoices and trail of correspondence for engineering services.

The assessee had also filed before the TPO on 24.09.2015 (i) Show cause reply for ASP Management fees, (ii) Name of personnel, cost allocation and benefits received from ASP Management services, (iii) Description of services and cost allocation for payment of SAP software related support, (iv) Sample copies of inter-company invoices for SAP software related support, (v) Description of payment of annual charges towards Microsoft licenses fees, (vi) Invoice raised by Sulzer Management AG on SPIL for Microsoft licenses fees The assessee had also filed before the TPO on 08.12.2015 (i) Certificate from Sulzer Management AG for Microsoft Licenccce fees along with invoice from Sulzer Holding US to Sulzer Management AG for Microsoft licenses fees, (ii) Certificate from AE for payment of ASP Management fees, (iii) Certificate from AE for payment of SAP software related support The assessee had also filed before the TPO 15.12.2015 (i) Show cause reply for SAP software related support, (ii) Sample copies of email correspondence for SAP software related support, (iii) Show cause reply for payment of trademark fees, (iv) Show cause reply for payment of engineering services, (v) Show cause reply for payment of annual charges towards Microsoft licenses fees, (vi) Brief description for payment of Global IT support service.

Finally, the assessee had filed additional evidences before the DRP on 10.06.2016 (i) Detailed note on engineering services along with

copies of invoices, (ii) Copy of inter-company invoice for payment of Global IT support service, (iii) Sample copies of email correspondence w.r.t. Global IT support service, (iv) Analysis and benefits derived by use of Sulzer brand.

25.1 In the instant case, we are of the considered view that given the range of transactions involved, the arm's length method cannot be adequately applied on a transaction-by-transaction basis. Accordingly, for the purpose of determining the ALP, the assessee has rightly aggregated for the purpose of benchmarking (i) purchase of raw materials, sale of finished goods and engineering services that are essentials to its business, (ii) payment of ASP charges, IT and service charges to assist in business administration and (iii) payment of commission that assists the assessee in obtaining purchase orders from third parties.

25.2 Let us discuss a bit on the concept of burden of proof. This ambiguous term refers to two distinct concepts. The first concept is known particularly the burden of persuasion. A party meets this burden by convincing the fact-finder to view the facts in a way that favours that party. Today the phrase burden of proof most often bears this meaning. The second concept is known unambiguously as the duty of producing evidence, the burden of going forward with evidence, the production burden or the burden of evidence. A party meets this burden by introducing enough evidence to have a given issue considered in the case.

In burden of proof, the onus frequently shifts as the case proceeds from the person on whom it rested at first to his opponent. This occurs whenever, a prima facie case has been established on any issue of fact or whenever a rebuttable presumption of law has arisen.

Thus, the phrase burden of proof is used in two distinct meanings viz, the burden of establishing a case and the burden of introducing evidence.

It is well-settled that the primary onus is on the assessee to maintain documentation to demonstrate that the price charged in an international transaction complies with the ALP and the method followed to ascertain the price is the most appropriate method. The assessee discharges this onus by maintaining the documentation; thereafter, the onus shifts to the tax authorities. In the event, the tax authorities disagree with the assessee's view and seek additional explanation, the burden of proof against shifts to the assessee to prove why the method adopted by the assessee is correct.



In the instant case, as narrated hereinabove the assessee has discharged its onus by maintaining the documentation. Further, during the TP proceedings, the assessee has filed before the TPO sufficient details called for. Then the burden of proof has shifted to the TPO. However, the TPO has made the disallowances / adjustments on general propositions. We are reminded by the great aphorism of Justice Oliver Wendell Holmes in *Lochner v. New York*, 198 U.S. 45,76 (1905) that "general propositions do not decide concrete cases."

As mentioned earlier, the assessee vide letter dated 27.02.2015, 04.09.2015, 24.09.2015, 08.12.2015 and 15.12.2015 has filed sufficient details in response to the queries raised by the TPO during the course of TP proceedings. Further, the assessee has filed before the DRP additional evidence dated 06.06.2016. However, instead of examining / scrutinizing those submissions, the tax authorities have made disallowances/adjustments on general propositions.

Having considered the above factual scenario, we allow the 4th , 5th, 6th, 7th, 8th and 9th ground of appeal.”

038. We have carefully considered the decision of the coordinate bench. We find that in case of assessee identical issue decided in I.T.A. No. 1453/Mum/2014 (Assessment Year 2009-10), I.T.A. No. 4495/Mum/2015 (Assessment Year 2010-11) and I.T.A.(TP) No.1086/Mum/2016 (Assessment Year 2011-12) on 31/10/2018 where in this issue is decided as under :-

“9. Hence they are dismissed as Not Pressed. The remaining grounds give rise to the following issues:-

- (a) Disallowance of expenses of Royalty, technical knowhow fees and annual charges of Microsoft licencing fee by determining the ALP at NIL.
- (b) Disallowance of ASP Management fees
- (c) Addition on account of difference in income as per Form 26AS.

4. We heard the parties and perused the record. The first issue relates to the disallowance of Royalty, technical knowhow fees and annual charges of Microsoft licencing fee. We have considered an identical issue in the



assessee's own case in ITA No.6059/Mum/2013 relating to AY 2008-09 and we have restored the issues to the file of the AO for examining them afresh, as the Tribunal held the assessee to be "Licenced Manufacturer". For the sake of convenience, we extract below the operative portion of the order passed in Ay 2009-10 (supra):-

"9. We heard the parties and perused the record. We notice that the tax authorities have considered the assessee as a "Contract Manufacturer" and accordingly disallowed the Royalty and Technical knowhow expenses. In the written submissions, the assessee has demonstrated that the purpose of obtaining approval for sales from its AE is to avoid competition between the AEs. The assessee has also submitted that out of the total export sales of Rs.87.63 crores, the exports made to AEs was only Rs.37.70 crores and the remaining exports have been made to non- AEs. Had the assessee been a contract manufacturer, it could not have sold the goods to non-AEs. Accordingly it was submitted that the restrictions placed by the AE in the agreement entered with the assessee was with the objective of ensuring smooth business operations. We find merit in the said contentions of the assessee. If the assessee was really a contract manufacturer as considered by the tax authorities, it would be getting only a fixed amount of profit and further it would not be able to export goods on its own account. The facts available on record would show that the assessee has been selling goods to Non-AEs also. Accordingly we hold that the assessee should be considered as a Licence Manufacturer in the facts and circumstances of the case. u l z e r P u m p s I n d i a P v t . L t d.

10. Since we have held that the assessee is licenced manufacturer, the basic foundation on which the disallowances of royalty and technical knowhow expenses were made would fail. Further the assessee has also pointed out that the TPO has not adopted any of one of the prescribed methods for benchmarking the transactions. Further the assessee has also taken support of certain case laws to contend that the aggregation of intrically connected transactions and determining the ALP of the transactions at entity level under TNMM method was justified. We notice that the TPO had no occasion to examine all these contentions, since he considered the assessee to be a contract manufacturer. Accordingly we are of the view that the issues relating to Royalty and Technical knowhow requires fresh examination at the end of the AO/TPO. Accordingly we set aside the order passed by Ld CIT(A) on these two issues and restore the same to the file of AO/TPO for examining them afresh in accordance with the law.



11. With regard to disallowance of Annual charges of Microsoft licence fees, we notice that the reasoning given by the tax authorities to determine the ALP at NIL is not justified. The Ld A.R submitted that the Sulzer management AG and Sulzer Management Ltd are one and same company. The Tax authorities were under the impression that there is variation between the transactions reported in Form 3CEB and the actual agreement submitted by the assessee due to existence of different names, which according to assessee refers to same company, referred above. The assessee has furnished a document from Commercial Register of the Canton of Zurich to show that both the names refer to the same company. In any case, this transaction has also not been benchmarked under any of the recognised methods by the TPO. Accordingly we restore this issue also to the file of AO/TPO for examining it afresh."

Following the decision rendered for AY 2008-09, we restore these issues to the file of the AO/TPO with identical directions."

039. Therefore for Ay 08-9, 09-10 11-12, the issues are set aside to the file fo the ld AO and for Ay 2012-13 and 13-14, the grounds of the assessee were allowed on identical facts and circumstances.
040. While deciding the case for AY 2012-13, 13-14 perhaps above finding of the coordinate bench did not come to the notice of the coordinate bench and therefore for those years. Transfer pricing additions were deleted without testing the benchmarking analysis of the assessee of the International Transactions.
041. We failed to understand that how an international transaction of two different years, particularly in the transactions where the rendition test, benefit test, etc

are required to be proved . This exercise is required to be proved every year. Therefore, even if the issue is set aside or allowed in another years does not have any impact on determination of ALP of such transaction for the impugned year because assessee necessarily has to benchmark the transaction and then determine its ALP every year. Only some qualitative ratios of decision may have persuasive value.

042. Further in this year assessee itself has benchmarked these transactions adopting different Most Appropriate methods. It is not the case that assessee has aggregated these transactions for benchmarking.

043. The Ld TPO and Ld DRP has also approached the transaction based on judicial precedents for earlier years. This is not the mandate of provision of Ch X which required to determine ALP of International Transactions every year.

044. Ld TPO and Ld DRP has also noted that with respect to the International Transaction assess has also not submitted certain details . In both he orders of the coordinate benches, it s categorically held that Alp of International Transaction is not determined.

045. As there is no determination of ALP of International Transaction but rejection of evidences of Assessee based on earlier years proceedings, Therefore , we set aside



ground no 6 to 9 of the appeal of the assessee back to file of the d TPO to examine the information submitted by the assessee along with Most Appropriate Method adopted by assessee, verify the comparability analysis and then dermine ALP of International Transactions.

046. With respect to ground no. 10, the learned Authorized Representative submitted that assessee does not want to press the same for the smallness of amount where the learned Transfer Pricing Officer determine the Arm's Length Price of professional fees to its Associated Enterprises of ₹4,34,858/- at ₹ Nil.

047. He also submitted that assessee has raised additional ground of appeal for deduction of education cess, but in view of retrospective amendment by Finance Act, 2022, assessee does not want to press the same.

048. As the Authorized Representative did not press ground ground no.10 and additional ground raised, those are dismissed as not pressed.

049. Accordingly, appeal of assessee is partly allowed.

Order pronounced in the open court on 16.09.2022.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 16.09.2022



Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

- . The Appellant
- . The Respondent.
- . The CIT(A)
- . CIT
- . DR, ITAT, Mumbai
- . Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai