| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
SHRI GIRISH AGRAWAL, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 1501/Kol/2019
Assessment Year: 2012-13
&
I.T.A. No. 1639/Kol/2019
Assessment Year: 2013-14

Deputy Commissioner of Income Tax, Circle-9(1), Kolkata	Vs	**Apollo Gleneagles Hospital Limited** **58, Canal Circular Road** **Kolkata - 700054** **PAN: AAECA5407E**

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Ms. Vandana Bhandari, FCA and Shri Saibal Mukherjee, A/R
Revenue by :	Shri G. Hukuga Sema, CIT, D/R

सुनवाई की तारीख/**Date of Hearing : 08/02/2023**
घोषणा की तारीख /**Date of Pronouncement: 27/04/2023**

आदेश/O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these appeals are filed by the Revenue against two separate orders of the Learned Commissioner of Income Tax (Appeals) - 22, Kolkata, (hereinafter referred to as "ld. CIT(A)"), against the two separate assessment orders passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter the 'Act') dated 25.05.2016 for AY 2012-13 and dated 31.03.2016 for AY 2013-14 by ld. JCIT / DCIT, Circle – 9(1), Kolkata.

2. The issues involved in both these appeals are identical except for variation in quantum. Hence, they were heard together and are being disposed off by way of this common order.

3. We take up appeal in ITA No. 1501/Kol/2019 for Assessment Year 2012-13 to understand the facts of the case and the findings of the same would apply *mutatis mutandis* to the appeal for Assessment Year 2013-14.

4. Grounds of appeal for Assessment Year 2012-13 are reproduced as under:-

> *"1. Whether the CIT(A) is justified in facts and law in the circumstances of the case in deleting the addition made by the AO for international transaction of payment of management fee of Rs. 5,14,96,223/-.*
>
> *2. Whether the CIT(A) is justified in facts and law in the circumstances of the case in accepting that Assessee Company has received services from its AE during the F.Y. 2012-13 against payment for the management fee.*
>
> *3. Whether the CIT(A) is justified in facts and law in the circumstances of the case to acknowledge that services are stewardship in nature and under an independent arrangement Assessee would never pay for such services to third party.*
>
> *4. Whether the CIT(A) is justified in facts and law in the circumstances of the case to appreciate that assessee has not provided adequate evidence to demonstrate receipt of services*
>
> *5. Whether the CIT(A) is justified in facts and law in the circumstances of the case in ignoring the fact that the purported management fee rendered by GMSPL (the AE) were more in the nature of commands from the shareholder with a controlling interest to take care of group's interests in the assessee company rather that to meet the identified need of the assessee company*
>
> *6. Whether the CIT(A) is justified in facts and law in the circumstances of the case in deleting the addition on transfer pricing adjustment stating that the transaction between Assessee and its AE is at arm's length.*

7. Whether the CIT(A) is justified in facts and law in the circumstances of the case in deleting the addition made by the AO for disallowance under section 14A amounting to Rs.15,52,365/-.

8. That the department craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or hearing of this appeal."

5. Facts of the case as culled out from records are that assessee is a multi-specialty hospital providing latest generation diagnostic and treatment facilities. It is jointly promoted by Asian Healthcare giants 'Apollo Hospitals Group' and the Singapore based 'Parkways Healthcare Group'.

5.1. Initially, in the year 2002, Apollo Hospitals Enterprises Limited (for short "AHEL") and Gleneagles Development Pvt Ltd (for short "GDPL") had entered into a joint venture agreement. Since, AHEL and GDPL both were renowned hospital chains, both agreed to continue their operation in cohesion with each other as per the agreement dated 13.07.2002 to grow up a hospital in the name of Apollo Gleneagles Hospitals Ltd i.e. the assessee. As per clause 18 of this agreement, it was agreed between the parties that 5% of gross revenue generated from the hospital and diagnostic center shall be paid to AHEL and GDPL in equal proportion (i.e. 2.5% to each) by the Hospital Company as management fee. The said clause is extracted below for ease of reference:

Clause 18: Management of the Hospital

18.1 The parties have discussed and envisaged that the operations of the Hospital will be carried out by the Board of Directors, who shall have the authority to delegate any or all of their powers and functions to any committee or to any officer or officers of the Company. The Company if required shall enter into a suitable management agreement with AHEL & GDPL for the

managerial expertise to be rendered by them to the hospital and Diagnostic Centre.

It is agreed between the parties that 5% of the gross revenue generated from the hospital and Diagnostic Centre shall be paid to AHEL and GDPL in equal proportion by the Company as management fee under the above contract.

The other terms of the proposed management contract will be decided between the parties in discussions and negotiations that are to be held at a later date.

18.2. The pharmacy at the hospital management and at the Diagnostic Centre shall be set up and run by AHEL on its own. It is agreed that AHEL shall pay 5% of the gross revenue of the pharmacy to the Company.

5.2. Pursuant to clause 18.1 referred above, a tripartite agreement was entered into, effective from 01.07.2011 between the assessee, AHEL and Gleneagles Management Services Pte Ltd (for short "GMSPL"). The broad terms and conditions relevant to the present appeal are extracted below from the tripartite agreement:-

a) assessee is granted a non-exclusive right to use and display licensed trademarks "Apollo" and "Gleneagles" respectively, together right to use "Apollo Gleneagles" upon or in relation to the name of Hospital. In this respect the relevant clauses from the said agreement are reproduced for ease of reference.

USE OF REGISTERED TRADEMARK / TRADE NAME& SERVICES

2.1. GMSPL confirms that the Company has during the pendency of this agreement non-exclusive, non-assignable right to use and display the licensed trademarks "Gleneagles" upon or in relation to the name of the Hospital during the continuance of this agreement. For avoidance of doubt, it is agreed that such license shall entitle the Company to use the licensed trademarks as a part of its corporate or trade name or name of the Hospital / Diagnostic Centre / other facilities operated by the company.

2.2. AHEL confirms that the Company has during the pendency of this agreement, A non-exclusive, non-assignable right to use and display the Licensed Trade Marks "Apollo upon or in relation to the name of the Hospital during the continuance of this agreement. For avoidance of doubt, it is agreed that the license shall entitle the Company to use such licensed trademarks as a part of its corporate or trade name or name of the Hospital only.

2.3. The Company agrees that under the terms of this agreement, the trademarks shall be used only by the Company and no other Person and that the Company shall not sub-license the use of the licensed trade-marks nor creates or grants any security interest in the licensed trade-marks.

2.4. The company shall during the pendency of this agreement, shall have the right to use the word 'Apollo Gleneagles' in relation to the Hospital.

b) Further, in order to protect the goodwill associated with "Apollo" and "Gleneagles" names and to maintain the quality of assessee's healthcare services, GMSPL and AHEL will review and provide services (including but not limited to following) as referred in clause 2.5 of the said agreement, which is reproduced as under:-

i. new areas of health care services, designing layout, finalizing requirements of equipment's and personnel and any other matters relating to such new services.
ii. procurement of appropriate medical equipment and equipment suppliers and co-ordination of pre-installation and installation activities.
iii. technical support required in respect of training etc. of Doctors and other health personnel.
iv. the operation of accident and emergency services; disaster planning; environmental requirement; intensive care units; medical records; information system; policies and procedures development; professional relations; quality assurance; and any other aspect of the operation of the Hospital which is linked to the quality of service being offered.

v. operating policies affecting the appearance, maintenance, standards of operation, quality of service an / or appropriateness of the administrative policies and procedures and any other matter affecting the Hospital.

vi. the capabilities and credentials of all the administrators of the Hospital from time to time, make recommendations to the Board with respect to its organization and personnel (including medical and other professional staff);

vii. Make recommendations on the Hospital's requirements for medical and surgical supplies, consumables and medical equipment.

viii. Review and recommend to the Hospital with respect to nature, type, amount, Insurance Company etc. for insurance policy required against malpractice suits, loss or damage by fire, impact, explosion, storm, tempest and other insurable risks in the name of the Company in respect of the ownership and the operation of the Hospital

ix. Advise the Hospital as to the setting up of a risk management and maintenance system to maintain and keep the Hospital in good repair, including periodic safety checks, renew and replace any lifts, boilers, air-conditioning system, fire escape, lighting, safety lighting, fire or smoke detecting system, sprinkler system and any other plant or equipment.

c) As per clause 6 of the tripartite agreement, assessee is required to pay both, AHEL and GMSPL @ 2.5% (to each) of its Gross Operating Revenue as a consideration towards right to use trademark and management fee for services listed at para (b) above. The relevant clause 6 in this respect from the said agreement is reproduced as under:-

6. FEES

6.1 From the effective date, the company shall in each Financial Year, pay AHEL and GMSPL as consideration a fee equivalent to 5% of the Gross Operating Revenue is equal proportion.

6.2 Payment of fees

The fees shall be paid subject to withholding tax, as may be applicable, which shall be borne by AHEL or GMSPL as the case

may be. The fees shall be paid on annual basis and subject to adjustment in accordance with clause 6.3 shall be calculated based on the annual audited accounts of the company. The fees shall be paid to AHEL or GMSPL within 2 weeks of the last day (or such other day as the parties may agree in writing) of each quarter.

5.3. During AY 2012-13, assessee entered into the following international transactions with its Associated Enterprise (AE), GMSPL:-

Particulars	Amount (in Rs.)
Payment of management fee for advisory services and use of brand name "Gleneagles" @ 2.5% of gross operating revenue	5,14,96,223

5.4. Arm's length benchmarking exercise of above international transaction was carried out by assessee contained in its Transfer Pricing Study Report (TPSR). Assessee applied Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM), using Profit Level Indicator of Operating Profit / Operating Cost i.e. PLI of OP/OC. Assessee identified eight independent comparable companies for benchmarking. The OP/OC of assessee was 15.23% against industry average of 11.23 %. Hence, international transaction of management fee expenses was established at arm's length, as claimed by the assessee.

5.5. Ld. Transfer Pricing Officer (TPO) without pointing out any defect in the transfer pricing documents furnished by assessee, the comparables used and the benchmarking exercise carried out by assessee, went on to apply Comparable Uncontrollable Price (CUP) method. Assessee contested that since Ld. TPO could not find out even a single comparable hospital in India with foreign tie ups and

therefore, CUP could not be applied due to lack of comparable. Assessee has noted in its TP document that CUP cannot be applied as Most Appropriate Method in the given case because of lack of data of comparable uncontrolled transactions and lack of data of Hospitals having foreign tie ups.

5.6. According to the assessee, ld. TPO did not apply any of the six methods prescribed in Rule 10D of the Income Tax Rules, 1962 (the Rules) to arrive at CUP method as the 'most appropriate method' and could not show any uncontrolled transaction for comparison and instead in the guise of CUP method, he questioned the commercial expediency of management fee expense and benefit derived by the assessee therefrom. Ld. TPO instead of benchmarking the international transaction of management fee, disallowed the same on the grounds of commercial expediency/no benefit received/no evidence furnished for services received.

5.7. Assessee provided details on the nature of management services received both, before the ld. TPO and ld. AO. In this respect, in the course of hearing, Bench had given a specific direction to the ld. Counsel of the assessee vide order sheet entry dated 07.09.2022, to place on record certain material on sample basis for demonstrating the performance of services pursuant to the agreement since all along, ld. TPO and ld. AO have observed that no evidence for receipt of services and consequent benefits received have been submitted which could justify the charge. In compliance to this direction of the Bench, assessee vide its submission dated 08.12.2022, furnished a paper book containing 150 pages to demonstrate performance of services and benefits therefrom as envisaged under the agreement. The index of the said paper book is

extracted below to take note of the list of sample documents furnished by the assessee in this respect:-

Sr. No.	Particulars
1	Summary of representation
2	Extracts of Audit Com and Board Meeting-16th March, 2011
3	Mail Communication on Clinical parameters Dated 26 April, 2011 (With Attachment of Reports)
4	Extract of Board Meeting – 28th Sep. 2011
5	Notes on Robot (Part of ATR of BM Sep, 2011)
6	Extract of Audit Com & Board Meeting 06 Aug,2012
7	Training Certificates on Robot of AGHL Surgeons (ACM ATR 06 Aug,2012)
8	Status Report on Robot Surgeries (ACM ATR 06 Aug,2012)
9	Status Report on Pet CT (BM ATR 06 Aug,2012)
10	Extract Audit Com 16th Novemner,2012
11	Expansion Plan (ACM Agenda 16 Nov,2012)
12	Status Report on Robot Surgeries (ACM Agenda 16 Nov,2012)
13	Extract of Audit Com 01 Mar 2013
14	Gastro Expansion Proposal
15	ONCO Expansion Proposal
16	Email Communication for Evaluation of Project by GMSPL/Parkway (April2013)
17	Project Approval Mail
18	Parkway audit report Ops & Finance (Dated 02-12-2011)
19	Parkway audit report IT (dated 05-12-2011)

5.8. In respect of services received by the assessee from its AE pursuant to clause 2.5 of the tripartite agreement (*supra*), it was stated that GMSPL has a process of developing and refining from time to time, sets of Clinical Parameters which helps the healthcare institutions in providing guidance on clinical excellence and quality of care to the patients worldwide. GMSPL extends its support to assessee by assisting it in implementing these parameters in its system. It also reviews these parameters, quarterly, in order to ascertain the quality, reliability, security and robustness of the operations and treatments carried in the Hospital. The AE also conducts Clinical Audit, helps in framing organization policies and devising strategies from time to time. Further, they train the hospital staff and managers for improved operational excellence. Also, at

strategic level, GMSPL helps in developing Annual Operational Plan, budget, strategies on revenue generation and bringing in Clinical Excellence. It also conducts regular IT and Business Analytics audits to improve organizational performance.

5.9. Assessee paid management fee @ 2.5% of the Gross Operating Revenue to AHEL which has been accepted for similar nature of services received by the assessee from AHEL.

5.10. Assessment order was passed u/s 143(3) wherein entire management fee expense paid to GMSPL was determined by the ld. TPO at 'Nil' as a downward adjustment and the same was disallowed by the ld. AO while completing the assessment u/s 143(3) of the Act.

6. Assessee went in appeal against the above order before the ld. CIT(A) who allowed the appeal of the assessee. The observations and findings given by ld. CIT(A) while giving relief to the assessee are extracted as under:-

> *"1. I have carefully considered the entire facts and circumstances of the case and the submissions filed by the Ld. ARs for the appellant-company against the action of the Ld. AO/TPO in making the impugned additions. In the assessee's case under consideration, the Ld. TPO rejected TNMM, without giving any reasons The Ld. TPO though selected CUP as the method for benchmarking in such situations, but he himself failed to cite even a single comparable Company with similar comparable services. The assessee has submitted before the TP0, the detailed nature of the services received and the benefit obtained by it. The Ld. TPO has drawn the conclusion based on the presumption that no services and benefit have been availed by the assessee. This alone, in my considered view cannot be the basis for such disallowance. The jurisdiction of Ld. TPO is to conduct transfer pricing analysis to determine ALP, by applying one of the five methods prescribed by law u/s 92C1) and not to determine*

whether the service or benefit has been availed by the assessee. I observe that the Ld. TPO has exceeded his jurisdiction by disallowing the entire management fee/brand royalty on the ground that no service was rendered/no benefit was received and treating its ALP at NIL. During the course of appellate proceedings, the appellant has submitted the necessary evidence of receipt of services and the detailed clarification thereon regarding the nature of benefit received by the appellant-company in relation to its business. In the factual matrix emerging in the case, in my considered view of the matter, the services rendered by GMSPL to the appellant-company are those for which independent enterprises would have been willing to pay for or to perform in-house for themselves and hence, the value of the aforesaid services in comparable uncontrolled transactions could not be 'Nil'. Such a view has also been confirmed and endorsed by the Hon'ble Jurisdictional Kolkata Tribunal in the case of N LC Nalco India Ltd. vs. Deputy Commissioner of Income-tax Circle 10, Kolkata [2016] 71 taxmann.com57 (Kolkata - Trib.) / [2016] 177 TTJ 156 (Kolkata - Trib.)

2. Further the Ld. A.0 in the assessment order under section 143(3) has not made any adverse comment under section 37 in respect of the benefit / services received by the Assessee. During the course of scrutiny assessment proceedings, the assessee submitted before the Ld. A.0 on the same set of evidences of receipt of services as those submitted to the Ld. TPO, as per the direction of the Ld. A.O. It is pertinent to note that the Ld. AO has not made any adverse Comment under section 37 of the Income Tax Act, 1961. I have also examined the agreement and the nature of services availed for which the assessee has paid Rs.5,14,96,223/- towards use of the "brand Gleneagles" and for various other management services which were necessary to maintain the quality, standards, operating procedures, equipments and services associated with the brand. Therefore, in my considered view the assessee has availed the services and derived benefit out of it and hence the conclusion drawn by the Ld. AO for making the additions is not sustainable.

3. The above views has also been confirmed and endorsed by the Hon'ble Jurisdictional Kolkata Tribunal in A T& S India (P.) Ltd V Deputy Commissioner of Income-tax [IT Appeal No. 77 (Kol.) of 2017] and Chryso India (P.) Ltd v Assistant Commissioner of

Income Tax, Circle- 10 (2), Kolkata [IT Appeal No. 112 (Kol.) of 2017]; Hon'ble Bombay High Court in Commissioner of Income-tax, (Large Tax Payer Unit) v Johnson & Johnson Ltd [I.T. APPEAL NO. 1291 OF 2014] and CITv Lever India Exports Ltd [IT APPEAL NOS. 1306, 1307 & 1349 OF 2014].

In view of the above, and considering the ratio emanating from the judgments of the Hon'ble ITAT and Hon'ble High Court in the cases referred, as discussed above, the Ld. A0 is directed to delete the impugned addition of Rs. 5,14,96,223. The aforesaid grounds of appeal are allowed in favour of the appellant-company."

7. Aggrieved, Department is in appeal before the Tribunal.

8. Moot points for the downward adjustment of management fee expenses to GMSPL at 'Nil' by the ld. TPO are noted as under-

i. whether services are received as claimed and consequent benefits availed by the assessee from these services; and

ii. the rate at which uncontrolled parties would have transacted for similar nature of services following CUP method.

8.1. In addition to above, ld. TPO also noted that no brand valuation report has been submitted to substantiate the value of brand of GMSPL (AE) to justify the charge. Also, there is heavy increase in advertising, marketing and promotion (AMP) expenses.

8.2. Ld. TPO thus concluded that the transaction with GMSPL is not at arm's length, that there is no evidence for receipt of any services and consequent benefits and that no pricing analysis has been produced to substantiate payment of management fee @ 2.5%. Ld. TPO thus made a downward adjustment of Rs.5,14,96,223/- by taking the management fee expense at 'Nil' under CUP method.

9. After going through the above narrated factual matrix of the present case and perusal of the material placed on record and submissions made before us, we note that ld. TPO exceeded his jurisdiction by questioning whether or not services were received and whether or not assessee derived benefit from the said management services because it is the domain of the ld. AO to assess whether or not expense is genuine and whether or not expense is incurred for the business purposes. Further, it is not the domain of ld. TPO to question the commercial expediency of the expense and his role is limited to determining the ALP for international transactions/specified domestic transactions. From the language used in section 92CA(1), we understand that a reference is made by the Assessing Officer to the Transfer Pricing Officer is limited to 'computation of the arm's length price' in relation to the International Transaction / SDT. Also, in section 92CA(3), the TPO is required to 'determine the arm's length price' in relation to the International Transaction / SDT and send a copy of his order to the Assessing Officer / assessee.

9.1. We have perused the material before us and in our considered view, assessee has reasonably established rendition of services by its AE. Further, we find that there is a clear contradiction in the finding of the authorities below. On one hand, it is held that arm's length price of these services is 'Nil' since no evidence of services received and benefits derived therefrom has been furnished by the assessee and on the other hand, a ground has been raised vide ground no. 3 that the services received by the assessee are in the nature of shareholder activity/stewardship.

9.2. Also, in our considered view, 'benefit test' does not have too much relevance in the arm's length price ascertainment. When evaluating the ALP of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. In case, ld. TPO can demonstrate that the consideration for similar services, under the CUP method which he has adopted in the present case, is NIL, he can very well do so. That's not, however, his case. He only states that no evidence for receipt of these services and consequent benefits have been furnished by the assessee. Such a bald statement and sweeping generalization does not help the Revenue in its case. Assessee has benchmarked the transaction on TNMM basis, and unless the revenue authorities can demonstrate that some other method of ascertaining the arm's length price on the facts of this case will be more appropriate method of ascertaining the arm's length price, the TNMM cannot be discarded.

9.3. Assessee has established the arm's length nature of the management fee transaction by benchmarking its OP/OC by taking TNMM as the MAM against average industry mark-up of eight independent comparable companies. On this benchmarking exercise of the assessee duly furnished before the ld. TPO, he has not pointed out any defect in the said benchmarking exercise forming part of the Transfer Pricing document.

9.4. Further, ld. TPO resorted to CUP method without applying the process of arriving at the same as the 'most appropriate method' by showing any independent comparable transaction in order to apply CUP. On this aspect, assessee submitted comparative agreements

entered into by AHEL and GMSPL in India with their respective third parties for charging royalty at similar rates as charged from the assessee, though relating to AY 2013-14. Ld. TPO did not accept them as not being contemporaneous in nature. However, it is important to note that ld. TPO could not bring any uncontrolled comparable on record to substantiate the CUP method adopted by him to treat the management fee expenses at 'Nil'. As per the Rule 10B(1)(a), while applying the CUP Method, as a starting point, 'price charged or paid' for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, has to be identified. However, Ld. TPO has not identified any such similar transactions while resorting to CUP method. We do not ascribe to such an adhoc approach adopted by the ld. TPO in the present case which is not in accordance with the prescribed regulations.

9.5. No justification by the ld. TPO has been provided based on comparable data analysis to discard the TNMM arrived at by the assessee as MAM for benchmarking its international transaction with AE and adopt CUP method based on comparable data. One of the very basic pre-conditions for use of CUP method is availability of the price of the same product and service in uncontrolled conditions. It is on this basis that ALP of the product or service can be ascertained. It cannot be a hypothetical or imaginary value but a real value on which similar transactions have taken place. Coming to the facts of this case, application of CUP is dependent on the market value of the arrangements under which the present payments have been made. We are of considered view that in the absence of prerequisites for application of CUP method, it was not open for the ld. TPO to disregard TNMM employed by the assessee as

MAM. No defects have been pointed out in application or relevance of TNMM in this case. Under these circumstances, impugned action of ld. TPO does not meet our judicial approval.

9.6. It is also noted that management fee expense @ 2.5% of Gross Operating Revenue paid by the assessee to AHEL under the same tripartite agreement has been accepted by the Department during the year for the similar nature of services received from AHEL. It is also on record that claim of management fee expenses has been accepted by the Department and no addition has been made for the same in AY 2014-15 and AY 2015-16.

9.7. On the requirement by the ld. TPO of brand valuation report, we note that it is of no consequence in arriving at the ALP of international transaction entered into by the assessee, hence irrelevant.

9.8. In ground no. 3, Department has challenged that services received by the assessee are shareholder activity/stewardship services which issue has nowhere been raised in the proceedings before the ld. TPO, ld. AO and the ld. CIT(A). In the course of hearing, ld. Counsel for the assessee explained the shareholder/stewardship services which means, services in the nature of simply oversight function in order to protect the investment in the company. Further, shareholder activity means, activities relating to juridical structure of parent company such as parent company shareholder meetings, issuing shares in parent company, and supervisory board costs, costs relating to reporting requirements of parent company etc. In the present case, the services received by the assessee are in no way akin to

shareholder/stewardship services as explained above. Therefore, it is factually and legally erroneous to label these services as stewardship services/shareholder activity. These expressions of shareholder/stewardship services have been subject matter of discussion before the coordinate bench of ITAT Kolkata in the case of *Akzo Nobel India Ltd v. DCIT [2017] 81 taxmann.com 366 (Kol)* wherein para 10 and para 11 dealt with 'shareholder activities and stewardship activities, respectively. The same are reproduced as under:-

> *"10. Another aspect to be seen is as to whether the nature of services rendered should not in the nature of 'shareholder services'. If services are in the nature of 'share holder services', then such services should not bear a charge, as the benefits from shareholding activities ought to be received by the provider of the services rather than the recipient. What constitutes a shareholder activity. The current OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010 (amended since 1995), lists the following as shareholder activities:*
>
> *costs of activities relating to the juridical structure of the parent company itself, such as parent company shareholder meetings, issuing shares in the parent company and supervisory board costs;*
>
> *costs relating to reporting requirements of the parent company, including the consolidation of reports; and*
>
> *costs of raising funds for acquisition by its participants*
>
> *11. Furthermore, in relation to activities which concern more than one enterprise of an MNE, the OECD Guidelines state that shareholder activities should be distinguished from the broader concept of stewardship activities which include the following:*
>
> > *Stewardship activities cover a range of activities by a shareholder that may include the provision of services to other group members, for example services that would be provided by a coordination*

centre. These latter types of non- shareholder activities could include detailed planning services for particular operations, emergency management or technical advice (troubleshooting), or in some cases assistance in day to-day management.

Thus, in the case of central coordination and control activities, the focus has changed from the nature of the activity to the willingness to pay in an independent scenario. It follows implicitly from the OECD Guidelines that coordination activities (stewardship activities) qualify as services, unless a particular subsidiary does not need the activity and would not be willing to pay an unrelated party to perform it."

10. For our observations and findings noted above, we gainfully draw our force from the following judicial precedents. The same are referred as under:-

10.1. In respect of jurisdiction of TPO, coordinate bench of Kolkata ITAT in the case of *DCIT vs. AT&S India Ltd. [2022] 145 taxmann.com 506 (Kol),* held as follows:-

"23. In the instant case, the AO, while examining the evidences of receipt of IT services, did not make any adverse comment under section 37 of the I.T. Act but he only adopted the ALP adjustment of Rs. 4,10,08,010/- directed by the TPO because the order of the TPO was binding on him. As per the aforesaid decision of the Hon'ble High Court of Bombay, the jurisdiction of the TPO is specific and limited, i.e., to determine the arm's length price of an international transaction by applying any of the methods prescribed under sub-sections (1) and (2) of section 92C of the I.T. Act, being the most appropriate method. However, the TPO, in the instant case, determined the arm's length price of the international transaction at Nil value without applying any of the methods prescribed under sub-sections (1) and (2) of section 92C of the I.T. Act. The AO, in the instant case, had not disallowed the expenditure under section 37 of the I.T. Act but only adopted the ALP determined by the TPO in his order. We find that the principle enunciated by the Hon'ble High Court of Bombay in the aforesaid case is squarely applicable on the facts of the present case. Hence, we find that the aforesaid action of the TPO (that is, the

determination of the ALP of the international transaction under consideration at nil value) is without jurisdiction and it goes against the basic tenet of the Indian Transfer Pricing Regulation."

10.2. While dealing with the issue of jurisdiction of TPO and he determining the ALP of services at 'Nil' as well as the commercial expediency of the same, Hon'ble High Court of Delhi in the case of *CIT vs. Cushman and Wakefield (India) (P.) Ltd. [2014] 46 taxmann.com 317 (Delhi),* held as follows:-

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

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

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

35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO. This aspect was made clear by the ITAT in Delloite Consulting India (P.) Ltd. v. Dy. CIT/ITO [2012] 137 ITD 21/22 taxmann.com 107 (Mum):

'37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in Gemplus India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 352 (Bang.) of 2009, dated 20-10-2010] held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price.

38. In the case on hand, the Transfer Pricing Officer has determined the arm's length price at "nil" keeping in view the factual position as to whether in a comparable case, similar payments would have been made or not in terms of the agreements. This is a case where the assessee has not determined the arm's length price. The burden is initially on the assessee to determine the arm's length price. Thus, the argument of the assessee that the Transfer Pricing Officer has exceeded his jurisdiction by disallowing certain expenditure, is against the facts. The Transfer Pricing Officer has not disallowed any expenditure. Only the arm's length price was determined. It was the Assessing Officer who computed the income by adopting the arm's length price decided by the Transfer Pricing Officer at "nil".'

This is a slender yet crucial distinction that restricts the authority of the TPO. Whilst the report of the TPO in this case ultimately noted that the ALP was 'nil', since a comparable entity would pay 'nil' amount for these services, this Court noted that remarks concerning, and the final decision relating to, benefit arising from these services are properly reserved for the AO."

10.3. On arriving at CUP as the MAM by the TPO and its pre-conditions by discarding TNMM applied by the assessee, the Coordinate bench of ITAT Delhi in the case of *AWB India (P) Ltd. vs. DCIT, Circle-2(1), New Delhi [2014] 50 taxmann.com 323 (Delhi – Trib.),* dealt with same and held as under:-

"15. One of the very basic pre condition for use of CUP method is availability of the price of the same product and service in uncontrolled conditions. It is on this basis that ALP of the product

or service can be ascertained. It cannot be a hypothetical or imaginary value but a real value on which similar transactions have taken place. Coming to the facts of this case, the application of CUP is dependent on the market value of the arrangements under which the present payments have been made. Unless the TPO can identify a comparable uncontrolled case in which such services, howsoever token or irrelevant services as he may consider these services to be, are rendered and find out consideration for the same, the CUP method cannot have any application. His perception that these services are worthless is of no relevance. It is not his job to decide whether a business enterprise should have incurred a particular expense or not. A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient. As held by Hon'ble jurisdictional High Court in the case of CIT v. EKL Appliances Ltd. [2012] 345 ITR 241/209 Taxman 200/24 taxmann.com 199 (Delhi), "Even Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same".

16. The very foundation of the action of the TPO is thus devoid of legally sustainable merits. There is no dispute that the impugned payments are made under an arrangement with the AE to provide certain services. It is not even the TPO's case that the payments for these services were not made for specific services under the contract but he is of the view that either the services were useless or there was no evidence of actual services having been rendered. As for the services being useless, as we have noted above, it is a call taken by the assessee whether the services are commercially expedient or not and all that the TPO can see is at what price similar services, whatever be the worth of such services, are actually rendered in the uncontrolled conditions.

17. As for the evidence for each of the service stated in the agreement, it is not even necessary that each of the service, which is specifically stated in the agreement, is rendered in every financial period. The actual use of services depends on whether or not use of such services was warranted by the business situations whereas payments under contracts are made for all such services as the user may require during the period covered. As long as agreement is not found to be a sham agreement, the value of the services covered under the agreement cannot be

taken as 'nil' just because these services were not actually required by the assessee. In any case, having perused the material on record, we are satisfied that the services were actually rendered under the agreement and these services did justify the impugned payments.

18. We are also of the considered view that in the absence of prerequisites for application of CUP method being absent in the present case, it was not open to the TPO to disregard the TNMM employed by the assessee. No defects have been pointed out in application or relevance of TNMM in this case. Under these circumstances, the TPO's impugned action cannot meet our judicial approval.

19. For the detailed reasons set out above, we uphold the grievance of the assessee and direct the AO to delete the impugned ALP adjustment of Rs.31,23,325. The assessee gets the relief accordingly."

10.4. Issue on adhoc determination of ALP by the TPO and his jurisdiction dehors section 92C of the Act was dealt by the Hon'ble High Court of Bombay in the case of *CIT vs. Lever India Exports Ltd. [2017] 78 taxmann.com 88 (Bom),* wherein it was held as follows:-

"7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present

case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained.

8. In the above view, the question as proposed does not give rise to any substantial question of law."

10.5. The issue when no royalty was charged by the associated enterprise in the earlier years cannot be an estoppel against charging a fair or arm's length rate of royalty in the subsequent years as well as issue relating to shareholder/stewardship activities, were dealt by the coordinate Kolkata Bench of ITAT in the case of *DCIT vs. Bata India Ltd.* reported in *[2016] 69 taxmann.com 120 (Kolkata-Trib.)*, which held as under:-

"43.5 The plea of the Assessee with reference to the above conclusion of the TPO was that the fact that no royalty was charged by the associated enterprise in the earlier years cannot be an estoppel against charging a fair or arm's length rate of royalty in the subsequent years. Reliance was placed in this regard on the decision of the judgment of Hon'ble Supreme Court in the case of Shahzada Nand & Sons v. CIT[1977] 108 ITR 358 and CIT v. Laxmi Cement Distributors (P.) Ltd.[1976] 104 ITR 711 (Guj.), wherein it has been held that remuneration paid for services rendered could not be disallowed merely because no remuneration for such services was paid in the past. Similarly, in the case of Addl CIT v. Nestle India Ltd.[2005] 147 Taxman 20 (Mag.) (Delhi) the Hon'ble Tribunal held that it is not relevant that no

royalty was paid in the past. Similarly in the case of Dresser-Rand India (P.) Ltd. (supra) the Hon'ble Mumbai Bench of the Tribunal held that, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'." It was further submitted that such services can, by no stretch of imagination, be regarded as shareholder services.

43.6 In particular attention was drawn to the OECD Transfer Pricing Guidelines which defines the shareholder activity as under:

> *"Shareholder activity*
>
> *An activity which is performed by a member of an MNE group (usually the parent company or a regional holding company) solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder."*
>
> *Further attention was drawn to para 7.10 of the OECD Transfer Pricing Guidelines further provides the following examples of shareholder activity:*
>
> *"7.10 The following examples (which were described in the 1984 Report) will constitute shareholder activities, under the standard set forth in paragraph 7.6:*
>
> *(a) Costs of activities relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the supervisory board;*
>
> *(b) Costs relating to reporting requirements of the parent company including the consolidation of reports;*
>
> *(c) Costs of raising funds for the acquisition of its participations."*
>
> *It was thus submitted that shareholder activity is an activity which is performed by an entity solely because of its ownership interest in other company i.e. in the capacity of shareholder. It was thus submitted that specific services rendered by the associated enterprises in the domain of IT, Finance and Accounts cannot be regarded as provided by the associated enterprise in the capacity of a shareholder.*

44. We have given a careful consideration to the rival contentions. None of the reasons given by the TPO for disregarding the contentions put forth by the Assessee can be sustained. As rightly contended by the learned counsel for the Assessee, the fact that no remuneration was paid for similar services rendered by the AE in the past is no ground to reject payment in a later financial year as for non-business consideration. The activities performed by the AE were not in the capacity of a shareholder and for specific services. The conclusions of the TPO therefore that the activities performed by the AE were more in the nature of shareholder activity cannot be sustained. We therefore hold that Information system services were in fact provided by the AE to the Assessee."

11. In view of our above discussion on the factual matrix of the case, material placed on record, submissions made by both the parties and considering plethora of judicial precedents, we do not find any reason to interfere with the finding given by the ld. CIT(A) and uphold the arm's length price determination of the brand/management fee expenses paid by the assessee to its AE, GMSPL at Rs.5,14,96,223/- under the provisions of section 92CA of the Act and delete the addition/disallowance so made by the ld. AO in this respect. Accordingly, grounds 01 to 06 taken by the Department in this respect are dismissed.

12. Ground no. 07 is in respect of deletion of disallowance made by the ld. AO under section 14A of the Act, amounting to Rs.11,91,258/-.

12.1. In this respect, ld. CIT(A) has deleted the disallowance by taking note of fact that investments made by the assessee are such which do not yield exempt income as assessee had invested in debt mutual funds. More so, the income so earned on these investments had already been offered to tax by the assessee which was accepted

in the assessment. There is no exempt income earned by the assessee during the year. The findings given by the ld. CIT(A) are reproduced as under:-

> *"1. I have carefully considered the entire facts and circumstances of the case and the submissions filed by the Ld. ARs for the appellant-company against the action of the Ld. AO in making the impugned additions. I have also carefully perused the reasons recorded by the Ld. AO while making the impugned additions. In the case of the assessee under consideration, I find that the appellant has invested into debt mutual funds as evident from The Schedule of Current Investments reported in Note No.2.4 to the financial statement of the Company relevant for the subject Financial Year 2010-11.*
>
> *2. It is to be noted that income earned on such investments are not exempt, and accordingly it is seen that the same has been offered to tax under the head "Short -Term Capital gains". The above is evident from the Return of Income filed by the appellant for the subject Assessment Year; it appears that such a finding has escaped the attention of the Ld. A.O. In the factual matrix emerging from the above, in my considered view of the matter, the appellant has duly offered income from investments to tax as per the relevant provisions of the Income Tax act, 1961. Accordingly, as the appellant has not made any claim of exempt income, as has been held by various Hon'ble Courts, the Ld. A.0 is precluded from making any disallowance by invoking the provisions of Sec 14A of the Income Tax Act, 1961 read with Rule 8D of the Income Tax Rules, 1962. Accordingly, the action of the Ld. A.O is found to be unsustainable, and the disallowance under Section 14A is directed to be deleted. The ground stands allowed.*
>
> *3. Further, the Ld. AO has added the above disallowances while computing the book profits under section 115JB of the Act despite the fact that the said section provides only specific adjustments to be made to the book profits of the company. In view of the adjudication as above, such action of the Ld. A.O, as a corollary also stands deleted, and the Ld. A.0 is directed to exclude such disallowance while computing the Book Profits under section 115JB of the Act.*

4. The aforesaid grounds of appeal are allowed in favour of the appellant-company."

13. Considering the above factual finding given by the ld. CIT(A) on which nothing was brought on record to controvert the same by the ld. CIT(DR) in the course of hearing before us, we do not find any reason to interfere with the same. Accordingly, ground no. 7 taken by the Revenue in this respect is dismissed.

14. In the result, appeal of the Revenue for AY 2012-13 is dismissed. Since similar facts and issues are involved in the appeal for AY 2013-14 as aforesaid, our observations and conclusions for AY 2012-13 apply mutatis mutandis to the appeal for AY 2013-14. Accordingly, appeal for AY 2013-14 is dismissed.

15. In the result, both the appeals by the Revenue are dismissed.

Order pronounced in the Court on 27 April, 2023 at Kolkata.

Sd/-	Sd/-
(SANJAY GARG)	**(GIRISH AGRAWAL)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Kolkata, Dated 27/04/2023
SC SrPs

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,**आयकर अपीलीय अधिकरण,** कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ **BY ORDER,**
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata