

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad**

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA.No.573/Hyd/2022		
Assessment Year: 2018-19		
Kalburgi Cement Private Limited, Hyderabad. PAN : AACCV8513G.	Vs.	Dy.Commissioner of Income Tax, Circle 2(1), Hyderabad.
(Appellant)		(Respondent)
Assessee by:		Sri Kalyanasundaram, C.A.
Revenue by:		Sri Jeevan Lal Lavidiya, CIT-DR
Date of hearing:		25.04.2023
Date of pronouncement:		15.05.2023

ORDER

Per Shri Laliet Kumar, J.M.

The captioned appeal arose against the assessment order passed by the Deputy Commissioner of Income Tax, Circle – 2(1), Hyderabad u/s 143(3) r.w.s. 26 of the Income Tax Act, 1961 (hereinafter referred as “the Act”) dated 25.08.2022, in pursuance to the directions of the Dispute Resolution Panel – “DRP”, Bangalore-1’s for the A.Y. 2018-19 on the following grounds :

“1. For that, in the facts and circumstances of the case, the order (“impugned order”) of the Learned Transfer Pricing Officer Hyderabad (“TPO”), directions of the Hon’ble Dispute Resolution Panel-I, Bengaluru (“DRP”) and consequent order of the Learned Deputy Commissioner of Income-Tax, Circle 2(1), Hyderabad (“AO”) (collectively referred to hereinafter as “Lower Authorities”) are erroneous in law and the additions upheld/claims denied deserve to be deleted.

2. *For that, in respect of transfer pricing adjustment of Management Fees amounting to INR 6,17,73,273 the Lower Authorities have erred by:*

a. Not properly appreciating the evidence furnished by the assessee;

b. Applying the "Benefits Test" by ignoring the settled legal position that it is not for the TPO to determine whether or not there is a service from which the assessee has benefited;

c. Applying the "Renditions Test" ignoring the settled legal position that the authority of the TPO is limited to conducting a transfer pricing analysis;

d. Stating that the services received by the assessee were shareholder services;

e. Resultantly, concluding that the ALP is NIL by applying Comparable Uncontrolled Price ("CUP") method without setting out the comparables used.

(Tax Effect: INR 2,04,24,098/-)

3. For that, the Lower Authorities have erred in law by holding that the reimbursement of social security costs of expatriate employees amounting to INR 88,98,832 is in no way an obligation of the assessee when the expatriate employees were working in India for the assessee, were paid salaries in India and have filed their returns of income in India. (Tax Effect: INR 29,42,221/-)"

2. **Brief facts of the case :**

The brief facts of the case are that assessee company engaged in the business of manufacture of cement, filed its return of income on 28.11.2018 declaring total income of Rs. Nil. The case was selected for scrutiny through the CASS and notice u/s 143(2) of the Act was issued on 22.09.2019 and duly served on the assessee. Thereafter, notice u/s 142(1) of the Act was issued on 22.09.2019 and 25.11.2020 calling for relevant details, which were duly served on the assessee. In response to the notices issued, the assessee filed copy of audited financial statement and reply to questions asked in notice u/s 142(1) of the Act. As the assessee had large international transactions, the matter was referred to the TPO, who made an adjustment of Rs.6,17,73,273/- towards fee paid for availing management services for arriving arm's length price and passed order u/s 92CA of the Act on 30.07.2021 and initiated penalty u/s 270A of

the Act. Thereafter, final assessment order was passed u/s 143(3) r.w.s. 144C(4) read with section 144B of the Act dt.23.11.2011.

2.1. Being aggrieved by the order dt.23.11.2011, assessee company filed an application u/s 263 of the Act before the PCIT – 2, Hyderabad, seeking revision of the assessment order dt.23.11.2011 passed by the National Faceless Assessment Centre, Delhi wherein addition of Rs.6,17,73,273/- was made on account of adjustment u/s 92CA of the Act. Thereafter, PCIT-2, Hyderabad set aside the assessment order dt.23.11.2011 with a direction to the Assessing Officer to pass final assessment order after receiving the order of DRP-1, Bangalore. Subsequently, DRP-1, Bangaluru perused the objections filed by the assessee company and issued directions vide order dt.18.06.2022 which was communicated to the Assessing Officer on ITBA portal on 04.07.2022. In its order, the DRP upheld the ALP determined by the TPO in respect of management fees paid by the assessee to its AE and further directed the Assessing Officer to disallow of expenses of Rs.88,98,832/- reimbursed by the assessee to its A.E. With the above observations, the final assessment order passed.

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

4. Ground No.1 is general in nature and requires no adjudication.

5. Ground No. 2 is with respect to the managerial services. In this regard, the assessee has drawn our attention to Paras 5.1.9 to 5.1.26 of the order of TPO (Pages 112 to 114 of Volume – 1 of the paper book) wherein the TPO has recorded the following finding :

“5.1.9 Analysis of TPO

Transfer pricing aspect of intra group services from a global perspective:

CUP method is followed in the comparability analysis of intra group service payments paid by the taxpayer to its AE. Though the Indian transfer pricing guidelines do not specifically give the methodology in quantifying the intra group services vis a-s -with the benefits derived there from In this regard different countries regulations on the principle involved in intra group pricing are studied These principles have been applied to see whether these principles are followed by the taxpayer in justifying the intra group service payments

5.1.10 The OECD guidelines on the issue of intra group services are mentioned below:

i) Determining whether intra-group services have been rendered:

7.6 “ Under the arm’s length principle, the question whether an intra-group service has been rendered when an activity is performed for one or more group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance its position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for by an independent enterprise or would have performed the activity in-house for itself. If the activity is not one for which the independent enterprise would have been willing to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle.”

5.1.11 As per the above, the taxpayer has to prove two things in justifying the payment for intra-group services.

a) Whether the recipient of the services, the taxpayer, resulted in any economic commercial value to enhance its commercial position.

b) To determine the above, whether an independent party would be willing to pay for the activity performed by an independent party or would have performed by itself.

5.1.12 Further, the taxpayer did not prove whether the same services are received from third party, what could be the amount to be paid for the so called services received. This clearly indicate that the AE did not render any services to the taxpayer or the taxpayer failed to categorically prove the services which were rendered have benefitted it.

5.1.13 The OECD guidelines further prescribe that the parent company need not be paid for each and every activity.

"7.9 A more complex analysis is necessary where an associated enterprise undertakes activities that relate to more than one member of the group or to the group as a whole. In a narrow range of such cases, an intra-group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not justify a charge to the recipient companies. It may be referred to as a "shareholder activity", distinguishable from the broader term "stewardship activity" used in the 1979 Report. Stewardship activities covered 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 coordinating center. These latter types of non-shareholder activities could include detailed planning services for particular operations, emergency management or technical advice (trouble shooting), or in some cases assistance in day-to-day management."

5.1.14 The fundamental issue in determining the appropriate taxation treatment for intra-group services is whether expenses incurred by one entity should be apportioned and allocated to other members of the group or whether a charge should be levied by the service provider that reflects the value of the services supplied.

5.1.15 To conform with the arms 'length principle the costs of intra group services can only be charged for where the recipient of the services expected at the time the relevant activities were undertaken to derive a benefit from those activities. The expected benefit must be sufficiently direct and substantial so that an independent recipient, in similar circumstances, would be prepared to pay for it. If no benefit has been provided (or was expected to be provided), (or was expected to be provided), the service cannot be charged for.

5.1.16 To determine the amount of charges for intra-group services, the arm's length principle requires that the consideration should be determined from the perspective of both the service provider and the service recipient The consideration includes:

- How much a comparable independent service recipient, under comparable circumstances, would be willing to pay for that service; and
- Whether an independent service provider would be willing to supply the service at that price.

5.1.17 The taxpayer must maintain documentation that establishes the benefits provided, i.e., what services are chargeable, and the cost of providing such services. Further, the classification of the services as core and non-core needs to be documented. Therefore, in applying the arm's length principle to intra-group services, a taxpayer must first determine whether a specific activity performed by a member of the group for another member is a service for which a charge is justified. An arm's length entity would be willing to pay for an activity

only to the extent that the activity confers on it a benefit of economic or commercial value.

5.1.18 *The test to determine if a charge for an activity is justified, would involve the following question: Would the entity for whom the activity is being performed either have been willing to pay for the activity if performed by an arm's length entity or have performed the activity itself? Where it would not have been reasonable to expect the entity to either pay an arm's length entity for the activity or to perform it itself, it is unlikely that any charge for the activity would be justified.*

5.1.19 *It would be unusual for a group member to incur a charge for a service performed by another member of the group if that activity is performed by the member itself or by an arm's length party on the member's behalf. In some cases, however, there may be a valid business reason for duplicating a service. In this case, the taxpayer is also rendering technical services to its AEs as well by deputing the managers by way of overseas postings.*

5.1.20 *Where a charge for a service is justified, the amount charged should be determined in accordance with the arm's length principle. The OECD Guidelines state that the issue must be considered from the point of view of both the supplier and the recipient of the service. The arm's length charge is not only a function of the price at which a supplier is prepared to perform the service (or the cost of providing the service), but also a function of the value to the recipient of the service. Therefore, the determination of an arm's length charge must take into consideration the amount that an arm's length entity is prepared to pay for such a service in comparable circumstances. In this case, the taxpayer did not prove this aspect as detailed above.*

5.1.21 *The taxpayer must show that their own allocations reflect an arm's-length charge. This is the first burden. For this first burden, the TPO is not required to support the adjustment with proof. Under the second burden, which only arises after the taxpayer has satisfied the first burden, the taxpayer still have the burden of proving that their own allocation satisfies the arm's length standard.*

5.1.22 *It is concluded that taxpayer's allocations are not an arm's length charge because taxpayer provided no evidence of an independent transaction between unrelated parties in similar circumstances. Also, the above facts support the TPO's conclusion that taxpayer and the AE were not dealing at arm's length but were, instead, allocating their costs based on an ability to pay.*

5.1.23 *A multi-step process should be applied in pricing intra.-group services. The first step is to determine if a charge for a particular service is justified, and then the amount to be charged should be determined. Deciding whether a charge is justified requires determining whether the taxpayer would have paid a third party for the service (in other words, does the activity confer benefits of value). Once a service is justified, the amount of the charge must be determined based on arm's length principles. Often the most focused upon element of the intra group service payments analysis is what allocation factor should be used to allocate costs from the service provider to the recipient. Deriving appropriate allocation factors requires a detailed assessment of the services, benefits and costs. However, using an entity's sales as a percentage of the total group's sales is rarely the most appropriate method.*

5.1.24 *The OECD guidelines also mention that no charge should be paid for the intra group services which the taxpayer is performing by it also. Thus, if there is a duplication of the same services no payment is justified. In the instant case, we have seen that the taxpayer is by himself performing all of the functions which are necessary to his business. Thus, the so called functions performed by the AE were either not needed for the taxpayer or there was a duplication of functions or for which an independent party may not be willing to pay.*

5.1.25 *All the judgments relied upon by the tax payer are case specific and cannot be relied upon. In view of the foregoing, the stand taken by the taxpayer that the amount paid to its AE towards management fee and is justifiable is not accepted.*

5.1.26 **Determination of arm's length price of payments made towards intra-group services:**

The taxpayer failed to furnish / substantiate with any documentary evidence the need for such services, if there is a need, whether the services were actually rendered, if rendered, whether there are any benefits derived there from, if there are any benefits, the payments made are commensurate with the benefits derived. Therefore, the arm's length price of the intra-group services rendered is determined at Rs. Nil. Accordingly, the adjustment arising out of these transaction amounting to Rs. 6,17,73,273/- is done to the total income of the taxpayer by benchmarking this transaction by taking CUP as MAM."

6. The assessee had filed the petition before the DRP and the DRP (vide Para 2.4.6 to 2.4.14 of his order – Pages 013 to 015 of the Volume 1 of the paper book) had upheld the order of Assessing Officer / TPO by holding as under :

"2.4.6 As seen from the P&L account, operational profit for Ambuja cements is 4011 crores and the operational cost is 22030 crores which works out to OP/OC of 18.2%, whereas in the Table 6 (page no 51 of TP study) PLI of Ambuja cement is shown to be 10.09%. There is no reason to believe that analysis has been done objectively and a uniform approach has been followed for all the comparables. There is no information provided on the assumptions of the analysis despite reminders.

2.4.7 Thus we cannot give any credence to the argument of the assessee that the TNMM method shows very high profit for itself as compared to comparables in the TO study. Thus the TPO was right in rejecting the TO study of the assessee.

2.4.8 Now coming to the determination of ALP for the intra group services, the assessee before this panel has stated that it benefited hugely in monetary terms as well as non-monetary terms. Certain examples cited by the assessee on the financial benefits are as follows :

1. *Vicat with their long history in the cement field and their expertise, guided the management of Kalburgi Cement in procurement planning of coal.*
2. *The parent company also does research on fluctuations on worldwide coal prices being the essential raw material and take advantage of lowest and risk of fluctuations in currency prices.*

3. *Enjoying a credit period of 60 days LC from the import vendors saving interest on working capital funds from banks. The 'supply arrangement negotiated and arranged by the parent company.*

4. *In respect of ECB borrowings, the parent company with its presence in foreign lands had offered advice for restructuring and pre-closure of loan saving in terms of interest and hedge costs to the tune of Rs. 2,56,87,295 per annum.*

2.4.9 We find that all the cited examples are in the nature of shareholder activities. These activities are routine activities pertaining to operations which can be done by any 3rd party's logistic activities or banking service provider. Moreover, as the sole owner of the assessee, the parent is duty bound to take care of the commercial interest and these activities in no way can be claimed to have been done out of the ordinary.

2.4.10 We note that as a parent which has-created a business in India to pursue operations, such services as claimed by the assessee to have been rendered are part of the normal monitoring of operations-and there is no evidence of having worked on a special project or product by the AE. The incidental benefit, if any, will flow to the economic owner viz., the AE itself. As per the OECD guidelines, the costs related to shareholders activity should not be charged under service to other group companies by parent or holding company as independent enterprise would not be willing to pay for it.

2.4.11 Further, the assessee has submitted documentation relating to evidence in respect of availing of management services before this panel.

2.4.12 The documents furnished ostensibly for evidencing the availing of management services appear to be mostly irrelevant. In fact, bulk of the documentation is in French which the assessee has not taken care to translate. Rest of the documents comprise of trivial emails pertaining to malfunctioning of laptop (D2 of paper book), finding villas for expats (D1), arrangements of flight tickets for family (D3), transport arrangements (D9) etc. it is also seen that page no 242-309 of the Paper book is the entire budget plan for the Group for 2017(again, in French) which has no bearing on the ground for payment of management fee.

2.4.13 Thus it is seen that the submission does not offer evidence for the exact services rendered nor does it justify the quantum of the payment made. It is pertinent, to refer to the decision of the Hon'ble ITAT in Forsoc chemical IT(TP)A No.148/Bang/2014 wherein it was held that filing of voluminous correspondence and mere description of the services would not suffice.

2.4.14 We find that the TPO has computed the ALP at NIL as this would be the price that an independent party in the simi(ar circumstances will be willing be pay. The TPO is justified as the assessee had failed to prove that the services were actually availed by it. In this connection the decision of the Hon'ble ITAT Bangalore in the case of Herbal Life International Pvt, Ltd vs ACIT (IT (TP)A No. 1406/Ban g/2010 and IT(TP)A No. 924/13ang12012) is relevant wherein it was held that

"It is matter of fact that before the lower authorities as well as before us, the assessee company had only described the nature of technical knowhow and nature of administrative services received. It does not conclusively prove that the assessee company actually received the administrative services as well as the technical knowhow which are used in the manufacturing activity of the appellant Therefore, the AO/TPO was Justified in adopting the ALP in respect of payment of administrative services and royalty at Nil."

7. Ld. AR for the assessee has submitted that it is not within the purview of the TPO to comment on whether the services received by the assessee were needed by the assessee or not and further, the TPO cannot examine the benefit if any accrued by the assessee or not based on such services. For the above said purposes, he relied upon the decision of Hon'ble Delhi High Court in the case CIT Vs. M/s. Cushman and Wakefield (India) Pvt. Ltd. (ITA 475/2012 dt.23.05.2014).

8. The ld. AR had further submitted that on the aspect of alleged non-rendition of services, the Assessing Officer/TPO had recorded that the assessee has not furnished the evidence of rendition of services, it was submitted by the ld. AR that enough evidence was provided to the lower authorities and hence, matter may be remanded back to the file of Assessing Officer/TPO for the limited purpose of examining a fresh evidence of "rendition of services" so as to enable the Assessing Officer/TPO to determine ALP. It was submitted that despite availability of evidence, the said lower authorities have not examined the evidence and passed a cryptic order wrongly holding that no services were received by the assessee.

9. Per contra, ld. DR had submitted that unless the Assessing Officer / TPO determine whether the services are rendered or not, the Assessing Officer / TPO cannot embark upon the benchmarking the ALP of the said services. He had relied upon the following decisions in support of the case of Revenue.

1. CIT Vs. M/s. Cushman and Wakefield (India) Pvt. Ltd. (ITA 475/2012 dt.23.05.2014)
2. M/s. Cisco Systems Capital (India) Pvt. Ltd. Vs. ACIT (IT(TP)A No.1558/Bang/2012 dt.19.09.2014)
3. 3M India Ltd Vs. ACIT (LTU), Bangalore – (2016) 78 taxmann.com
4. CIT Vs. Lever India Exports Ltd – (2017) 78 taxmann.com 88 (Bombay) dt.23.01.2017.
5. Volvo India (Pvt.) Ltd. Vs. CIT, LTU Bangalore - (2017) 77 taxmann.com

10. We have heard the rival submissions and perused the material on record. The issue is whether the Assessing Officer / TPO can examine whether the services received by the assessee are needed or not and whether the assessee has benefitted from the said services or not, is no more res integra and the hon'ble Delhi High Court in the case of CIT Vs. Cushman and Wakefield (India) Pvt. Ltd. had held that it is not within the domain of the Assessing Officer/TPO to determine actual benefit derived from the international transactions or not and it is also not within the domain of the Assessing Officer / TPO to dwell upon whether such services are needed by the assessee or not. For the above said purpose, we may fruitfully rely upon the decision of Bangalore Bench of the Tribunal in the case of 3M India Ltd Vs. ACIT wherein it was held as under :

"8. We heard rival submissions and perused material on record. A perusal of the TPO's order reveals that the ALP in respect of intra-group services was determined at 'nil' as, in his perspective, no benefits were derived by the assessee-company out of such services and there was no need of such services and there was no proof in support of rendition of such services to the assessee-company. The TPO has neither challenged the keys applied for allocation of cost by AE nor the TPO has disputed the actual cost incurred by the AE.

9. Now, we shall analyze each of the above reasons assigned by the TPO for determining ALP at 'nil'. The law is now quite well settled that it is beyond the scope and powers of the AO/TPO to question the necessity of incurring expenditure. The Hon'ble Delhi High Court in the case of *CIT v. EKL Appliances Ltd.* [2012] 345 ITR 241/209 Taxman 200/24 taxmann.com 199, after considering the judgment of the Apex Court in the case of *CIT v. Walchand & Co. (P.) Ltd.* [1967] 65 ITR 381 (SC), *Sassoon J. David & Co. (P.) Ltd. v. CIT* [1979] 118 ITR 261/1 Taxman 485 (SC) held that the TPO cannot determine ALP at nil by holding that there was no need to incur such expenditure. While coming to this conclusion, the Hon'ble High Court has referred to the judgment of the Apex Court in the case of *Eastern Investments Ltd. v. CIT* [1957] 20 ITR 1 (SC) and *CIT v. Rajendra Prasad Moody* [1978] 115 ITR 519 (SC). It has been held by the Hon'ble High Court that:

It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In Eastern Investment Ltd. v. CIT, [1957] 20 ITR 1, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In CIT v. Walchand & Co. etc., (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in Hughes v. Bank of New Zealand, [1938] 6 ITR 636 that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in CIT v. Rajendra Prasad Moody, (1978) 115 ITR 519, and it was observed as under: -

"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income."

It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section

37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.

20. In the case of *Sassoon J. David & Co. Pvt. Ltd. v. CIT*, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that *inter alia* finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised. It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In *Eastern Investment Ltd. v. CIT*, [1957] 20 ITR 1, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In *CIT v. Walchand & Co. etc.*, (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in *Hughes v. Bank of New*

Zealand, (1938) 6 ITR 636 that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in CIT v. Rajendra Prasad Moody, (1978) 115 ITR 519, and it was observed as under: -

"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income."

It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section 37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.

20. In the case of Sassoon J. David & Co. Pvt. Ltd. v. CIT, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance

12. Similarly, the Hon'ble Delhi High Court in the case of *Schneider Electric (Ind.) Ltd. v. CIT (21008) 304 ITR 360 (Del.)* held that in the absence of material on record suggesting that the commission agents had procured the sale orders, no commission should be allowed. The relevant para of the judgment is reproduced below;

"13. We agree with the Tribunal that there is absolutely no material on record to suggest that M/s Ram Agencies had procured any sale orders for the assessee. The production of a few bills or payment having been made by account payee cheques cannot by itself show that M/s Ram Agencies had procured sale orders for the assessee. Apart from an internal note, there is no evidence of any correspondence or any personal; meetings etc. between the assessee and M/s Ram Agencies to suggest that there was any relationship on the basis of which M/s Ram Agencies procured some orders for the assessee for which it was entitled to receive commission. Moreover, we find that the understanding between the parties was an oral understanding and it appears to be doubtful that such an oral understanding can be arrived at without any long standing relationship having been established between the assessee and M/s Ram Agencies. It seems a bit out of place that the parties entered into an oral business relationship involving such huge amounts of money over a period of time".

13. The Co-ordinate Bench of Delhi in the case of *Printer House Pvt. Ltd. v. DCIT (Del.)* authored by Accountant Member, after referring to the above precedence on this issue held as follows:

"Thus, having regard to the ratio laid down in the above cases that in the absence of proof in support of the services rendered by the commission agent, no commission can be allowed as a deduction. Therefore, we dismiss the appeal filed by the assessee and allow the appeals filed by the revenue".

14. In the present case, the learned CIT (A) had not examined any evidence to show that the agents have actually rendered their services. The learned CIT (A) had totally misdirected himself by examining the issue from the angle of tax deducted at source and he had failed to examine whether the services are actually rendered by the commission agents or not. Therefore, we are unable to sustain the order of the learned CIT (A) and hold that the commission payments in question are not allowable keeping in view the ratio laid down in the cases cited supra. The assessee company had miserably failed to demonstrate the actual services rendered by the agents to whom the commission payments were made, despite ample opportunity granted by this Tribunal to furnish evidence in support of service rendered by commission agent.'

10. In light of the ratio laid down in the cases cited supra we hold that the condition of rendition of services should be satisfied by the assessee so as to allow the same as expenditure. In the present case, assessee-company had not produced any evidence in support of rendering of services before the TPO. It is only before us, by way of additional evidence, assessee-company has filed some material, in support of the actual services rendered by the AE. The CIT (A) had no occasion to examine this evidence as it was claimed that this evidence was filed for the first time before us. Therefore, the CIT (A), without examining the aspect of actual rendition of services by the AE in respect of IT services, had directed the allowance of expenditure. Therefore, in interests of justice, we restore this issue to the file of the AO for purposes of verification of this evidence and come to conclusion whether the services are actually rendered by the AE or not and direct the TPO/AO to bench

mark the transaction of rendering of services of market management support services, after being satisfied himself that the services are actually rendered by the AE.

11. On the principle of consistency, we hold that each assessment year is separate and distinct. The principles of res judicata have no application to income-tax assessment proceedings. Simply because in the preceding year, this expenditure came to be allowed without any probe or enquiry it does not preclude the AO from making the enquiries on these issues.

12. In the result, both the appeals filed by the assessee-company as well as the revenue are partly allowed for statistical purposes.”

11. In light of the above, we are of the opinion that it is not for the TPO to examine whether actual benefit, if any, derived by the assessee by receiving the international transactions or not? In our view, once the Assessing Officer has recorded a finding that the services are intrinsically related to the activities of the assessee and have not disallowed the expenditure on the basis of section 37 of the Act, then the scope of determination of TPO is limited to compute whether the prices paid for the services or product received by the assessee were within the ALP range or not. In the present case, the above said exercise was required to undertake by the TPO after rejecting TNMM method and record a finding whether the services rendered by the assessee were within the ALP or not and what would be the price paid by the third party for the same / similar kind of services in an uncontrolled environment. In the present case, though the evidence was available on record, the TPO/DRP had not recorded any finding saying that either no services or some of the services or negligible services were received by the assessee. In the light of the above, we deem it appropriate to remit back the matter to the file of Assessing Officer/TPO with a direction to determine any managerial services as claimed by the assessee from its A.E. were received or not. If the assessee was able to demonstrate with the help of evidence that services were received by the assessee then the TPO shall determine the ALP having regard to the CUP method adopted by the TPO. In the light of the above, the ground of the assessee is allowed for statistical purposes. Needless to say that

the assessee is at liberty to file any documents which may it deem proper to prove that the actual services were received by it from its A.E. Thus, ground no.2 is allowed for statistical purposes.

GROUND NO.3

12. Ground No.3 raised by the assessee before us is that the cost of reimbursement of social services and administrative expenses paid by the assessee to its A.E. with a view to safeguard the employee's interest. Our attention was drawn to the page 115 to Para 7.1 of the TPO's order whereby the TPO had not made any addition in that regard. However, in the proceedings before the DRP, the DRP had directed the TPO to disallow the reimbursement of social services and findings of the DRP is given at page 016 (Page 12 paras 2.4.1 and 2.4.24 of the order) which read as under :

"Reimbursement of expenses

2.4.21 In the TP study furnish by the assessee, it is seen that the assessee has reimbursed expenses of Rs.88,98,832 to its AE. In the 1P study it is stated that this pertains to the 'social security expenses' incurred by the AE in respect of expat deputed by Vicat to the assessee. During the proceedings the assessee was asked to give the break up of the reimbursement and also to explain why the social security expenses of expats should be allowed under section 37 of the Act.

2.4.22 In its reply dated 07.06.2022, the assessee stated that the expenses were in respect of 3 employees of Vicat deputed .to India and as per the agreement between the assessee and Vicat, the social security payments would be reimbursed. According to the assessee the reimbursement in respect of the expatriates who were 'effective' employees of the assessee was done under commercial and business obligation and also wholly and exclusively for the purpose of business.

2.4.23 It is seen from the cost reimbursement agreement dated 08.02.2015. at para 3.4 that

"during the period of deputation, it is agreed by both the parties that Vicat shall incur costs on social security as per its regulatory commitments for the expatriates working in India for Vicat Sagar. Vicat Sagar shall reimburse the actual costs incurred on the social security and the same will be payable to V/cat in foreign currency. This agreement specifically is applicable for reimbursement of social security costs."

2.4.24 Thus it is seen that the parent company, Vicat has to incur the cost on account of the social security benefits in respect of its employees who are in their payroll but deputed temporarily to India on short term assignments. It is the regulatory obligation on the part of the legal employer and in no way can become the obligation of the assessee. AO is directed to disallow the reimbursement of expenses."

12.1 It was the contention of the assessee that the above said reimbursement of social security expenses was paid by the assessee pursuant to the agreement entered between the assessee and Vicat and our attention was drawn to Paras 3.4 and 3.5 on Page 211 of Volume I of the paper book.

“3.4 During the period of deputation, it is agreed by both the parties that Vicat shall incur costs on social security as per its regulatory commitment for the expatriates working in India for Vicat Sagar shall reimburse the actual costs incurred on social security and the same will be payable to Vicat in foreign currency. This agreement specifically is applicable for the reimbursement of the social security costs.

3.5 Vicat Sagar shall be responsible for complying with the requirements of withholding tax under the Indian tax laws, on salary and related benefits paid to the Expatriates and the Exchange Control Regulations.”

13. On the other hand, the Id. AR submitted that the above said cost is bilaterally agreed between the parties and hence, the same is required to be reimbursed by the assessee. It was submitted by the Id. AR that unless the social security benefit are not given to the expatriate employees, who are working in India for the assessee, no such employees would be ready and willing to work in India. It was submitted that similar treatment is given by the companies whose employees are rendering similar services outside of India by the foreign companies.

14. Per contra, Id. DR referred to the decision of DRP and submitted that the same is not permissible.

15. We have heard the rival submissions and perused the material on record. Undoubtedly, in the present case, the TPO has given the benefit of reimbursement of social and administrative expenses incurred by the assessee. However, DRP relying upon the agreement had disallowed the expenditure. From the perusal of the order passed by the order of DRP /TPO, it is apparent that the order of the DRP was cryptic and no reasoning /

details were given with respect to regulatory commitment for expatriate employees by the lower authorities. In view of the above, this issue is also remanded back to the TPO for passing a fresh speaking order. Thus, ground No.3 is allowed for statistical purposes.

16. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 15th May, 2023.

Sd/-

Sd/-

(RAMA KANTA PANDA) ACCOUNTANT MEMBER	(LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 15th May, 2023.

TYNN /sps

Copy to:

S.No	Addresses
1	Kalburgi Cement Private Limited, 8-2-26, Reliance Majestic, Khairatabad, Hyderabad – 500034, Telangana.
2	Dy.Commissioner of Income Tax, Circle 2(1), Hyderabad.
3	CIT(IT & TP), Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order