

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI**

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
MS. KAVITHA RAJAGOPAL, JM

**ITA No. 862/Mum/2013**  
(Assessment Year: 2008-09)

**ITA No. 6881/Mum/2013**  
(Assessment Year: 2009-10)

E O S Power India Private  
Limited  
Unit No.57, SDF-II, Seepz-SEZ  
Andheri (East), Mumbai-400 096

Vs.

Jt. Commissioner of Income  
Tax (OSD) 8(1),  
Mumbai

**(Appellant)**

**(Respondent)**

**PAN No. AACCCC3626K**

**Assessee by** : Shri Dhanesh Bafna, AR  
**Revenue by** : Ms. Vranda U. Matkari, DR

**Date of hearing:** 28.04.2023

**Date of pronouncement :** 25.07.2023

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. These are the two appeals filed by EOS Power India Pvt. Ltd. (assessee / appellant) for A.Y. 2008-09 in ITA No.862/Mum/2013 and ITA No.6881/Mum/2019 for A.Y. 2009-10 against the assessment order passed under Section 143(3) read with section 144C of the Act for respective assessment years.
02. The facts for A.Y. 2008-09 shows that assessee has filed this appeal against the appellate order passed by the



Commissioner of Income-tax (Appeals)-15, Mumbai dated 5<sup>th</sup> November, 2012, wherein the appeal filed by the assessee against the assessment order dated 31<sup>st</sup> January, 2012 passed by the Jt. Commissioner of Income-tax (OSD)-8(1), Mumbai (the learned Assessing Officer) under Section 143(3) read with section 144C (3) of the Act, was dismissed.

03. The assessee has raised several grounds but in substance assessee is contesting the adjustment of Arms length price of reimbursement of expenses upheld by the Id CIT (A) of Rs53744032/- on account of Marketing support services and Rs 8431645/- on account of IT support services.
04. Fact shows that Assessee Company is engaged in the business of manufacturing of switch board power supplies and other computer peripherals. It filed its return of income on 29<sup>th</sup> September, 2008, declaring net loss of ₹8,14,06,120/-. The return was picked up for scrutiny.
05. As the assessee has entered into various international transactions, reference was made under Section 92CA (1) of the Act for examination of Arm's Length Price of such international transactions. The learned Transfer Pricing Officer noted that assessee is engaged in manufacturing and export of Switch Mode, Switch Mode Power Supplies (SMPS) and sub-assemblies thereof. The products are in the category of electrical hardware. The international transactions in dispute are allocation of corporate expenses. In the transfer pricing documentation assessee



mentioned ₹2.63 crores as allocation of corporate expenses whereas, the learned Transfer Pricing Officer noted that actual corporate expenses allocation is ₹9,84,57,908/-. The learned Transfer Pricing Officer noted that allocation of corporate expenses is ₹2,63,06,343/-, reimbursement of expenses of ₹16,70,138/- and further, reimbursement of expenses is ₹7,04,81,427/- totaling to total allocation of corporate expenses of ₹9,84,57,908/-. The learned Transfer Pricing Officer asked the assessee to justify the Arm's Length Price of allocation of corporate expenses in the form of intra group services payments. The assessee submitted that this allocation of corporate expenses of ₹2,63,06,343/- was not claimed as deduction in its return of income. The learned Transfer Pricing Officer noted that assessee has voluntarily disallowed the above expenditure but Transfer Pricing Officer is required to determine the Arm's Length Price of intra group services. The learned Transfer Pricing Officer examined whether the services have been rendered and assessee has received any benefit of the same or not. After analysis, the learned Transfer Pricing Officer noted that assessee has incurred a loss of ₹10.97 crores on turnover of ₹57.68 crores and therefore, assessee did not get any benefit of intra group services payments. He further held that the loss is mainly on account of ₹9.85 crores shown as allocation of corporate expenses paid to its Associated Enterprises. He held that independent parties would not have made such a huge payments. However, after considering various explanation, he treated the Arm's Length Price of the

corporate expenses of ₹9,84,57,908/- only at ₹83,05,750/- and proposed an adjustment of ₹9,01,52,158/-. The learned Transfer Pricing Officer also held that the above payments resulting into substantial beneficial ownership in the hand of the respondent becomes deemed dividend under Section 2(22) of the Act to the extent of accumulated profit. The learned Assessing Officer was also advised to look into the same. Order u/s 92 CA (3) was passed accordingly.

06. The learned Assessing Officer noted that the price shown in the books of account of the intra group services is ₹9,84,57,908/-. The learned Transfer Pricing Officer determined Arm's Length Price of the same at ₹83,05,750/-. Therefore, there is an adjustment of ₹9,01,52,158/-. The assessee itself has disallowed corporate expenses of ₹2,63,06,348/- and accordingly, the resultant addition on transfer pricing adjustment is required to be made of only ₹6,38,45,815/-. It was further found that assessee has debited capital issue expenditure of ₹12,60,000/- which is capital in nature and therefore, same is disallowed. Accordingly, the total income of the assessee was computed at loss of ₹1,63,305/-. The draft assessment order was made on 2<sup>nd</sup> December, 2011.
07. The assessee did not file any objection before the learned Dispute Resolution Panel and therefore, the final assessment order under Section 143(3) read with section 144C of the Act was passed on 31<sup>st</sup> January, 2012,

determining taxable income of the assessee at a loss of ₹ 1,63,305/-.

08. The assessee aggrieved with the assessment order preferred an appeal before the learned CIT (A). The assessee before the learned CIT (A) submitted the details breakup of cost with respect to marketing business development and finance related services, IT related, etc. The claim of the assessee is that the Arm's Length Price of international transaction adjustment made by the learned Transfer Pricing Officer is not proper. The learned CIT (A) examined the claim of the assessee. He found that the above allocation of expenditure is supported by agreement only up to 31<sup>st</sup> July, 2007 and thereafter, there was no agreement after 1<sup>st</sup> August, 2007 to 31<sup>st</sup> march, 2008. Further, the agreement made on 11<sup>th</sup> September, 2008, on expiry of the earlier year agreement has been executed with retrospective effect. The details are also submitted by the assessee in the form of email etc., on sample basis. The learned CIT (A) also considered the explanation of the assessee that the learned Transfer Pricing Officer has chosen the assessee as a 'tested party'. After considering the facts and circumstances of the case, the learned CIT (A) reached at a conclusion that if market supports services have been rendered by the Associated Enterprises to the appellant, such services would be undertaken by the Associated Enterprises as that of a distributor. He further held that in the present circumstance the application of Comparable Uncontrolled Price as the most appropriate method is justified. He further noted that

assessee has disallowed ₹2.63 crores on its own. The above disallowance is also pertaining to the part of the year being only four months and further no reasoning are given for balance period. Accordingly, he dismissed the appeal of the assessee on this ground. Thus T P Adjustment was confirmed. With respect to the disallowances of ₹12,60,000/- as capital expenditure, he confirmed the action of the learned Assessing Officer following the decision of the Hon'ble Supreme Court in case of Brooke Bond India Limited Vs. CIT 91 taxman 26 (SC) dated 27<sup>th</sup> February, 1997. The appellate order was passed on 5<sup>th</sup> November, 2012. The assessee is aggrieved with that and preferred this appeal.

09. During the hearing assessee has preferred the additional ground of appeal by letter dated 7<sup>th</sup> December 2020, which was not pressed for its admission before us. Therefore, application is dismissed.
010. Therefore, only grievance against the addition on account ALP adjustment of Intra Group service of corporate expenses allocation of ₹5,37,44,032/- for marketing the support and related services and ₹84,31,645/- for IT support services. The learned Authorized Representative submitted that the learned Transfer Pricing Officer and CIT (A) has rejected the Function, Assets and Risk ("FAR") analysis provided by the assessee and have reached at a wrong conclusion that Red Rocket Inc. (AE) is responsible for marketing support services. It was wrongly held that the amount charged by the Associated Enterprises is not

for the business purpose of the assessee merely because there is absence of the agreement for balance period of 8 months. With respect to the intra group services, the various email submitted by the assessee demonstrating that such services have been received by the assessee was not appreciated. It was further argued that in fact assessee is a manufacturer having its manufacturing facilities at Seepz in Mumbai but the lower authorities have treated the assessee as distributor. It was also challenged the approach of the lower authorities to compare the expenses of intra group services as percentile of sales based on comparable companies. Accordingly, the learned Authorized Representative stated that the orders of the lower authorities deserves to be quashed.

011. The learned Departmental Representative extensively referred to the order of the learned Transfer Pricing Officer and also of the learned CIT (A) and submitted that assessee has miserably failed to prove the rendition of intra group services as well as benefit derived from those services. Unless the above services are demonstrated with all this ingredients, the orders of the lower authorities cannot be disturbed.
012. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, in this case, the intra group services paid by the assessee are supported by agreement only for the part of the years. For the balance period merely on the basis of conduct of the assessee, the Arm's Length Price of intergroup



services cannot be determined. Further, it is also the fact that assessee is not a distributor but is a manufacture. As the learned Transfer Pricing Officer himself has determined the Arm's Length Price of the intergroup services and after that holding that Arms Length Price is merely Rs. 85 lacs of the total intergroup services of ₹9.84 crores, itself says that there are certain services which were required by the assessee and same were provided by Associated Enterprises. Naturally to that extent the benefit is derived by the assessee. Further, assessee has also submitted certain email communications on the basis of which assessee wanted to prove that services have been rendered. Those emails are only on sample basis. Therefore, assessee has not submitted the complete details of proof of services received by the assessee. For the purposes of determination of Arm's Length Price of the intra group services, assessee must demonstrate the Need test, benefit test, rendition rest and to show that services are not duplicative in nature and are not part of shareholders' activity. If the assessee fails to show satisfaction of this test, then only the Arm's Length Price of the international transaction of intergroup services can be determined. If assessee fails to prove those tests, it is apparent that no independent party would agree to pay for those services to the Associated Enterprises. Thus, applying the Comparable Uncontrolled Price method ALP is required to be determined of intergroup services at ₹ Nil only. However, in the present case, the assessee submitted the functional and economical analysis of the

assessee as well as the nature of the services, however, the learned lower authorities have held that Associated Enterprises is responsible for marketing support services. Further, the email correspondence and other documents produced by the assessee were also not discussed. The assessee was considered as a distributor, but it is a manufacturer and therefore, naturally the assessee cannot be considered as a distributor. Further, determination of Arm's Length Price of marketing support services by applying the proportionate sales percentage based on the sale of comparable companies is also not a correct approach for the reasoning nature of the services rendered by Associated Enterprises to the assessee was not demonstrated to be similar. The assessee has also failed to completely demonstrate the Arm's Length Price of intra group services by satisfying need test, benefit test, rendition test, duplicative test etc. In view of this, we set aside the whole issue back to the file of the learned Assessing Officer/ Transfer Pricing Officer with a direction to the assessee to substantiate the Arm's Length Price of the intra group services demonstrating the above tests / ingredients mentioned. On submission of the detail by the assessee, the learned Transfer Pricing Officer may examine and determine the Arm's Length Price in accordance with the law. Accordingly, ITA No.862/Mum/2013, is allowed for statistical purposes.

013. ITA No.6881/Mum/2013 is also filed by the assessee, wherein the assessee is aggrieved with the assessment order passed under Section 143(3) read with section



144C(1) of the Act dated 6<sup>th</sup> September, 2013 and has preferred the appeal before us. The only adjustment in the assessment order was with respect to the determination of Arm's Length Price of the intra group services and adjustment of ₹4,41,05,838/-. The grounds of appeal raised by the assessee are also challenging this issue only.

014. The brief facts shows that assessee filed its return of income on 29<sup>th</sup> September, 2009 at ₹ nil. Subsequently, the return of income was revised on 30<sup>th</sup> September, 2009 at ₹nil. The return of income was picked up for scrutiny. As the assessee has entered into the international transaction, the reference was made to the learned Transfer Pricing Officer for determination of Arm's Length Price. The only dispute was with respect to the intra group services amounting to ₹9,07,38,948/- on account of business development, marketing support finance support and IT support services, which is benchmarked by the assessee following the Transactional Net Margin Method as the most appropriate method. The learned Transfer Pricing Officer has examined the above international transaction. The assessee has made the above payment to its enterprises M/s Red Rocket Incorporation based on the service agreement dated 11<sup>th</sup> September, 2008. The assessee for the purpose of benchmarking considered the foreign Associated Enterprises as a tested party. Based on the transfer pricing study report, assessee stated 4% of the markup levied by the Associated Enterprises by comparing it with 11 comparable companies whose margin is 7.20%, assessee concluded that markup charged at the



rate of 4% by the Associated Enterprises is at Arm's Length Price.

015. The learned Transfer Pricing Officer noted that assessee has made payment of ₹9 crores against the total loss of ₹42 crores. The learned Transfer Pricing Officer noted that any independent distributor would only spend maximum of 1.46% of the sales on selling and distribution and therefore, the Arm's Length Price of the marketing support services is only 1.46% of sales. The assessee submitted that assessee is a manufacture and not a distributor and therefore, such percentage cannot be applied in intergroup services. The learned Transfer Pricing Officer asked the assessee to show the documentation showing the benefits received by the assessee and also the breakup of the cost. Assessee submitted the breakup. He also examined the number of employees employed by the assessee. The learned Transfer Pricing Officer reached at a conclusion that documentation submitted by the assessee could not demonstrate tangible and direct benefit received by the assessee. Therefore, the learned Transfer Pricing Officer compared seven comparables with their sales, total marketing expenses and the percentage thereto. The learned Transfer Pricing Officer found that 19.54% is the marketing expenditure of the comparable companies, whereas the assessee spend is 29.99%. Accordingly, he made an adjustment of ₹4,41,05,838/- on account of Arm's Length Price of the above services by passing an order under Section 92CA(3) of the Act on 23<sup>rd</sup> November, 2011. Based on this, the draft assessment order was



passed determining the total taxable income at ₹ Nil after setting of the losses. In the draft order, the adjustment of Arm's Length Price of international transaction of ₹4,41,05,838/- was made.

016. The assessee preferred an objection before the learned Dispute Resolution Panel. The assessee objected that Id TPO has selected assessee as tested party, Assessee selected its Associated Enterprises as tested party. Ld TPO reejcted Foreign AE as tested party because assessee claimed to have received services for the goods produced in India. Further, the learned Dispute Resolution Panel upheld the action of the learned Transfer Pricing Officer taking assessee as a tested party. The learned Dispute Resolution Panel also upheld the manner of determination of Arm's Length Price of the international transaction. Based on this, the final assessment order was passed on 6<sup>th</sup> September, 2013, which is challenged before us.
017. The learned Authorized Representative reiterated his argument made for A.Y. 2008-09. He further submitted that there is no reason why a foreign tested party i.e. foreign Associated Enterprises cannot be taken as a tested party. He otherwise submitted that intra group services have been rendered by the Associated Enterprises and they have been remunerated at Arm's Length Price.
018. The learned Departmental Representative vehemently supported the orders of the lower authorities.



019. We have carefully considered the rival contentions and perused the orders of the lower authorities. Identical issue in the case of the assessee was remitted back to the file of the learned Transfer Pricing Officer for A.Y. 2008-09. The nature of services in this year also is similar. In view of this, in the interest of justice, we also remand this appeal back to the file of the learned Transfer Pricing Officer with a direction to the assessee to substantiate the Arm's Length Price of these intra group services. The learned Transfer Pricing Officer may examine the claim of the assessee and determine the Arm's Length Price of these intergroup services. We make it absolutely clear that Onus would be on assessee first to show that international transaction is at arm's length. Our direction for this year also similar to our direction for A.Y. 2008-09.

020. In the result, appeal of the assessee is allowed for statistical purposes. Both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 25.07.2023.

Sd/-  
(KAVITHA RAJAGOPAL)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 25.07. 2023

*Sudip Sarkar, Sr.PS*

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai



5. Guard file.

BY ORDER,

True Copy//

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