

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 75/Bang/2022
(Assessment Year:2017-18)

M/s. Andritz Hydro Private ltd. D-17, MPAKVN Industrial Area, Mandideep Raisen (Appellant / Assessee)	vs.	DCIT Circe 1(1) Bhopal (Respondent/ Revenue)
PAN: AABCV 2466 R		
Assessee by	Shri Rahul, Kaul AR	
Revenue by	Shri P.K. Mishra, CIT-DR	
Date of Hearing	13.06.2023	
Date of Pronouncement	28.08.2023	

O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the assessment order dated 22.02.2022 passed u/s 143(3) r.w. section 144C(13) of the Act in pursuant to the directions of DRP dated 25.01.2022 passed u/s 144C(5) of the Act for Assessment Year 2017-18.

2. The assessee is subsidiary of Andritz Hydro Private Limited GmbH Austria and engaged in the business of design, manufacture, servicing, erection and installation of hydro and thermal power generators. It is stated that Andritz Group is a global supplier of turnkey electromechanical equipment and services for hydropower plants. The assessee filed its return of income for the year under consideration on

30.11.2017 declaring total income of Rs.42,46,53,612/-. The assessee also reported international transactions during the year under consideration amounting to Rs.344,96,10,445/- the details of the international transactions are given at page no. 2 & 3 of the order of TPO as under:

Sr. No.	Nature of Transaction	Amount
1	Purchase of RM & design. AP	64,44,192/-
2	Corporate Guarantee Charges	4.40,03,282/-
3	ECB Loan Agreement	5,56,988/-
4	Erection, commissioning, site work & supervision charges	8,90,16,868/-
5	IT Software Maintenance	8,09,21,726/-
6	Milling and Boring Machine	4.78,04,834/-
7	Payment of royalty	11,65,55,079/-
8	Pur of RM & design	25,95,58,299/-
9	Recovery of expenses	1,33,258/-
10	Reimbursement of expenses - Expect salary	3,80,44,697/-
11	Reimbursement of expenses Training	96,28,432/-
12	Revenue from projects	264,05,57,464/-
13	Sales & marketing expenses	2,26,70,845/-
14	Technical Services & Support Cost	9,37,14,421/-

	Total Amount	344,96,10,385/-
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3. In the Transfer Pricing Study Report the assessee has benchmarked its International transactions by applying TNMM as the most appropriate method with PLI as OP/OC and compared with the internal unrelated/uncontrolled transactions of domestic sales having profit margin @ 10.62% in comparison to the average gross margin of aggregated all international transactions @ 17.80%. Thus, the assessee has claimed that its international transactions are at Arm's Length Price. The TPO did not accept the TP Study Report of the assessee in respect of the two international transactions i.e. (i) revenue from project (ii) technical services and support cost.

3.1 As against aggregated transactions adopted by the assessee the TPO took each and every project as separate international transaction and picked up a particular transactions of project No. AO 2 OP-I with Andritz Hydro GmbH Austria which has shown loss of 25.5% and consequently the TPO proposed adjustment of Rs.8,94,106/- by considering ALP as uncontrolled price of the internal comparable of the assessee at 10.62%.

3.2 Secondly the TPO held that the payment towards technical services is part of the royalty payment for technical know-how under royalty agreement which covers all the payments including payment of technical services provided by the AE to the assessee and consequently the TPO determined ALP of the technical services at nil. As a result the TPO has proposed the adjustment of the entire payment towards technical services. Based upon the order of the TPO the AO prepared draft assessment order dated 15.04.2021 against which the assessee filed the objections before DRP. The DRP upheld the adjustment made by the TPO/AO while passing the directions dated 25.01.2022 culminated in impugned final assessment order.

4. Before the Tribunal the Ld. AR has submitted that the assessee has undertaken detailed economic analysis in respect of its international

transactions with its AE and determined the price of its international transactions at arm's length comparing with the internal uncontrolled price. He has referred to circular no.14 of 2001 issued by CBDT explaining the provision of section 92C(3) and submitted that where taxpayers determines arm's length price in accordance with rules and substantiated the same with prescribed documentation and data used for determining of arm's length price is reliable and correct then there can be no intervention by the AO. The assessing officer may intervene only if he is, on the basis of material or information or documents in his position, of the opinion that price charged in the international transactions has not been determined in accordance with sub-section (1) & (2) of section 92C or information and documents relating to the international transactions have not been kept and maintained by the assessee in accordance with provisions of section 92D(1) and rules made thereunder or the information or data used in computation of arm's length price is not reliable or correct. A similar explanation has been provided by the CBDT in circular no.12 dated 23rd August 2001. Thus, the Ld. AR has submitted as per the circular issued by the CBDT the TPO was bound to accept the analysis on account of the fact that the assessee has followed the guidelines laid down in the Rules. Ld. AR has submitted that even otherwise the overall operating margin of the assessee in respect of the international transactions is higher than the operating profit margins of the comparable. He has pointed out that the tribunal in assessee own case for assessment years 2010-11 and 2011-12 as well as for the assessment year 2006-07 to 2009-10 upheld the transfer pricing study of the assessee in respect of international transactions. The TPO has erred in out rightly rejecting the TNMM as the most appropriate method and adopting CPM when the TNMM has been adopted by the assessee in the preceding years and upheld by the Tribunal. The assessee has adopted combined transactions approach and compared the arithmetic mean of gross margin earned by the assessee from relating party transaction with arithmetic mean of margin from unrelated transactions. The TPO failed to consider the functional and risk differences between individual controlled

transactions and aggregate uncontrolled transactions. If the TPO decided to analysis and benchmarked each and every project as separate international transaction then the surplus revenue/profit exceeding ALP margin earned from other projects done with AE ought to have been set off against the negative margin project done with the same AE.

4.1 Ld. AR has relied upon the order of this tribunal in assessee's own case for A.Y.2010-11 & 2011-12 wherein the Tribunal has deleted the addition made by the TPO/AO. Ld. AR has referred to Rule 10A of the Income Tax Rules and submitted that the transactions includes a number of closely linked transactions as per Rule 10A and therefore, the aggregation of the closely linked transactions is provided in Rule 10A of the I.T. Rules. He has also referred to the OECD guidelines in support of assessee's approach of taking integrated transactions for benchmarking or determination of arm's length price. Ld. AR has submitted that when all the contracts are executed by the assessee under one master contract with Andritz Hydro Private Limited. then all the international transactions as per Rule 10A(d) are closely linked transactions to be treated as unitary transactions. He has also referred to the guidelines note of ICAI in relation to benchmarking of closely linked transactions. He has relied upon the decision of Kolkata Benches of the Tribunal in case of *Epcos India Private Limited* wherein the international transaction of purchase of Raw Materials & components, Royalty payments and receipt of indenting commission based on aggregate basis under TNMM are held to be closely linked transactions because they emanate from a common source i.e. manufacture and supply of electronic components by the assessee.

4.2 He has also relied upon various judgment on the point of aggregation of the international transactions for the purpose of determining arm's length price and submitted that the tribunal has repeatedly held that closely linked transactions emanating from a same source shall be aggregated for the purpose of determining arm's length price. The aggregation of transaction eliminates impact of accounting differences in various transactions. Further the assessee has also given

the working of determination of arm's length price by adopting CPM as most appropriate method. The CPM is normally used for pricing intra group sales of goods and services. Since the subject international transactions related to the export of finished goods and gross margin information was available in respect of related and unrelated party sales by assessee, CPM was considered as the most appropriate method for determining the ALP. The assessee is making sales of generators and related parts to related and unrelated entities. While doing the analysis for determination of arm's length price the assessee has aggregated transactions being undertaken to gross margins so that the impact of difference in terms and conditions of each project is neutralized. The gross margin earned by the assessee from project including sales of generating and related parts with unrelated parties is having a very wide range of individual margin of such projects with an average of 10.62% which has been compared with the gross margin of projects undertaken with AE's with average of 17.80 % across all projects. Even if CPM is to be considered as most appropriate method and applied on project by project basis the set off higher gross margin earned in some AE projects should be done against low gross margin AE project. He has referred to the details where the GP margin on AE projects on aggregate basis is arrived at Rs.23,63,81,323/- after reducing short fall in gross margin of one AE project for which the TPO has made the addition. Thus, the Ld. AR has submitted that the gross margin on the other projects with AE even after reducing short fall in the gross margin in one of the project is more than the arm's length price by taking internal uncontrolled price.

4.3 As regards the addition made on account of adjustment of payment for technical services the Ld. AR has submitted that the TPO as well as DRP erred in not considering the difference between the receipt of technical assistance and payment of royalty. Once the arm's length price is determined by taking TNMM as the most appropriate method then the payment made for technical services merged with the arm's length price

determined based on the TNMM as the most appropriate method. The royalty is paid for know-how provided by the AE under “the Technology and Know-how Agreement(TCA)” whereas the payment for technical services is depending on actual expenditure incurred by the AE for providing such technical services to the assessee. The royalty is paid @ agreed between the parties as per terms of the agreement and also within the limit prescribed by the authorities and therefore, the royalty payment can not be mixed with the fee for technical services. The ld. AR has relied upon the judgment of Delhi High Court in case of *Sony Ericson Mobile Communication India Pvt. Ltd.* wherein the Hon’ble High Court has held that where the transactions are to be analyzed using separate transactions approach i.e. on transaction by transactions basis then the short fall arising from one transaction first be set off against surplus from other transactions before any addition is proposed to the income as a result of transfer pricing review.

4.4 Ld. AR has referred to the technology and know-how agreement (TCA) with the AE and submitted that as per article 7.1 the payments for the services of time analyzing study and checking manufacturing instruction are specifically excluded under the said agreement and therefore, the payment made by the assessee in respect of these two services are not covered by the royalty agreement. Alternatively, the AR has submitted that even after the amount of Rs.7,97,140/- paid towards technical services is considered as part of the royalty and added to the payment of royalty then the total effective royalty payout would be still at

arm's length as 2.27% of the sales whereas as per the agreement (TCA) the rate of Royalty is 5%/8% of sales. Thus, he has pleaded that adjustment made by the TPO/AO is not justified and the same may be deleted.

5. On the other hand, Ld. DR has submitted that the TPO has already taken a very fair and reasonable approach in determining arm's length price and proposed the adjustment of Rs.16,91,246/- for the receipt of the international transactions about Rs.345 crore. He has relied upon the orders of the TPO and DRP and submitted that the TPO has analyzed each and every point of the issue and rightly concluded that when each project is having separate cost and revenue then ALP can be determined separately for each project instead of aggregation of the transactions which is the last resort where the price of each individual transactions with AE cannot be determined properly due to closely related transactions having impact on each other price and margins.

6. We have considered the rival submissions as well as relevant material on record. The TPO has gone to the details of each project executed by the assessee under the agreement with AE. The TPO has given details of international transaction with description and nature at page 2 & 3 as under:

<i>Sr. No.</i>	<i>Nature of Transaction</i>	<i>Amount</i>
<i>1</i>	<i>Purchase of RM & design. AP</i>	<i>64,44,192/-</i>

2	<i>Corporate Guarantee Charges</i>	4.40,03,282/-
3	<i>ECB Loan Agreement</i>	5,56,988/-
4	<i>Erection, commissioning, site work & supervision charges</i>	8,90,16,868/-
5	<i>IT Software Maintenance</i>	8,09,21,726/-
6	<i>Milling and Boring Machine</i>	4.78,04,834/-
7	<i>Payment of royalty</i>	11,65,55,079/-
8	<i>Pur of RM & design</i>	25,95,58,299/-
9	<i>Recovery of expenses</i>	1,33,258/-
10	<i>Reimbursement of expenses - Expect salary</i>	3,80,44,697/-
11	<i>Reimbursement of expenses Training</i>	96,28,432/-
12	<i>Revenue from projects</i>	264,05,57,464/-
13	<i>Sales & marketing expenses</i>	2,26,70,845/-
14	<i>Technical Services & Support Cost</i>	9,37,14,421/-
	<i>Total Amount</i>	344,96,10,385/-

6.1 Further the transactions relating to the sales to the AE for execution of the projects with project wise details are given at page 4 to 12 of the TPO as under:

Project Name	Customer	Actual					
		Sales	COGS	Gross profit	Adjustment for extra-ordinary items	Adjusted Gross Profit	GP Margin
Da A Guo	Andritz (China) Limited	57,991.991	51,826.762	6,165.229	-	6,165.229	11.90%
Burfell Power Station (1x100MW)	Andritz Hydro GmbH, Austria	66,902.206	61,917.748	4,984.457	2,631.426	7,615.883	12.30%
Nam Theun 1 - Prithla	Andritz Hydro GmbH, Austria	12,889.170	13,073.363	(184.193)	1,896.803	1,712.610	13.10%
Nam Theun 1 - Mandideep	Andritz Hydro GmbH, Austria	11,139.867	11,299.061	(159.194)	1,424.689	1,265.495	11.20%
Yusufeli HEPP (3 x 186 MW)	Andritz Hydro GmbH, Austria	4,176.447	4,338.557	(162.110)	704.430	542.320	12.50%
Nedre Otta 2x50 MVA HEP	Andritz Hydro AS	2,465.019	2,390.498	74.520	200.387	274.907	11.50%
Kandil Spares	Andritz Hydro GmbH, Austria	(1,283.035)	(1,014.074)	(268.960)	155.384	(113.576)	11.20%
Kpong	Andritz Hydro GmbH, Austria	19,374.970	3,965.559	15,409.411	(14,172.157)	1,237.254	31.20%
Musktrat Fall	ANDRITZ HYDRO Canada	24,983.037	967.834	24,015.202	(23,832.282)	182.921	18.90%
NAM LIK 1 HPP	Andritz (China) Limited	1,441.287	1,225.584	215.703	-	215.703	17.60%
Peusangan HPP	Andritz Hydro GmbH, Austria	185,516.281	113,864.554	71,651.727	(46,487.661)	25,164.066	22.10%

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Peusangan	Andritz Hydro GmbH, Austria	117,951.985	61,779.453	56,172.532	(47,646.968)	8,525.564	13.80%
Smibelg & Storavatn	Andritz Hydro AS	91,322.258	91,031.754	290.505	18,735.132	19,025.637	20.90%
Smibelg & Storavatn	Andritz Hydro AS	52,735.728	52,716.380	19.348	7,044.647	7,063.995	13.40%
Thoung Kon Tum	Andritz Hydro GmbH, Austria	18,739.213	15,899.924	2,839.289	-	2,839.289	17.86%
Thoung Kon Tum	Andritz Hydro GmbH, Austria	7,791.828	6,611.823	1,180.005	-	1,180.005	17.85%
Xayaturi	Andritz Hydro GmbH, Austria	502,335.989	372,301.217	130,034.772	-	130,034.772	34.93%
Xe-kaman 1	Andritz Hydro GmbH, Austria	194,467.130	186,012.482	8,454.648	12,378.750	20,833.398	11.20%
Xekaman	Andritz Hydro GmbH, Austria	70,951.589	52,333.786	18,617.803	-	18,617.803	35.58%
Srinagairind	Andritz Hydro GmbH, Austria	350,439.143	344,390.861	6,048.281	35,623.013	41,671.294	12.10%
Srinagarind	Andritz Hydro GmbH, Austria	33,348.138	32,772.578	575.561	3,717.647	4,293.208	13.10%
NKULA	Andritz Hydro GmbH, Austria	112,584.148	103,570.891	9,013.257	3,622.391	12,635.649	12.20%
NKULA - Prithla	Andritz Hydro GmbH, Austria	34,776.017	32,008.893	2,767.124	1,432.443	4,199.567	13.12%
DUE HEP	Andritz Hydro SAS	120,044.705	118,952.188	1,092.518	12,943.840	14,036.358	11.80%
Ringedalen	Andritz Hydro AS	10,536.666	9,435.195	1,101.471	-	1,101.471	11.67%
Sabanilla HEP	Andritz Hydro SAS	2,844.470	2,304.239	540.231	-	540.231	23.45%

Upper Lillooet - Large	ANDRITZ HYDRO Canada	30,625.637	3,310.994	27,314.643	(26,235.260)	1,079.384	32.60%
Upper Lillooet - Small	ANDRITZ HYDRO Canada	4,638.896	1,739.408	2,899.489	(2,398.539)	500.949	28.80%
Convento	ANDRITZ HYDRO Italy	106,477.297	101,530.266	4,947.032	6,728.949	11,675.981	11.50%
Boulder Creek	ANDRITZ HYDRO Canada	343.336	244.549	98.787	(36.671)	62.115	25.40%
Chaudiere	Andritz Hydro SAS	4,980.963	148.820	4,832.143	(4,800.296)	31.848	21.40%
BOCAC 2	Andritz Hydro SAS	3,973.915	314.726	3,659.189	(3,568.863)	90.326	28.70%
DUE HEP	Andritz Hydro SAS	-	(47.060)	47.060	(58.307)	(11.247)	23.90%
Cienten 1 .lb insurance	PT Andritz Hydro	2,488.829	2,115.500	373.329	-	373.329	17.65%
Upper nam HTUM	Andritz Hydro SAS	1,285.504	1,058.720	226.784	-	226.784	21.42%
ANDRITZ HYDRO Indonesia (cibalpulang)	PT Andritz Hydro	92.668	0.010	92.658	(92.656)	0.002	18.60%
ANDRITZ HYDRO S.A.S. guide vans	Andritz Hydro SAS	559.665	287.979	271.686	(216.682)	55.004	19.10%
Govddesaga	Andritz Hydro AS	5,276.185	4,510.514	765.671	-	765.671	16.98%
Aratiatia HEP	Andritz Hydro GmbH, Austria	75,988.258	73,383.242	2,605.016	6,421.123	9,026.139	12.30%
Aratiatia HEP	Andritz Hydro GmbH, Austria	14,754.201	14,248.744	505.458	1,403.874	1,909.332	13.40%
Cataguniya	Andritz Hydro GmbH, Austria	14,810.840	13,628.963	1,181.877	385.454	1,567.331	11.50%

Cataguniya	Andritz Hydro GmbH, Austria	5,201.886	4,786.839	415.047	159.373	574.421	12.00%
Mwadingusha (4x14.3 MVA) Generators	Andritz Hydro GmbH, Austria	2,624.866	2,213.455	411.411	-	411.411	18.59%
ORSIERES	ANDRITZ HYDRO AG	-	246.174	(246.174)	281.131	34.957	14.20%
Phoulaphuca	Andritz Hydro GmbH, Austria	14,635.395	10,478.633	4,156.762	(2,291.566)	1,865.197	17.80%
Bjurfors Stator Coil	Andritz Hydro AB	3,526.400	25.042	3,501.358	(3,495.573)	5.785	23.10%
Erregung Zederhaus	Andritz Hydro GmbH, Austria	245.000	214.431	30.569	-	30.569	14.26%
STE Croix	Andritz Hydro GmbH, Austria	413.000	360.662	52.338	-	52.338	14.51%
Cirata 1	Andritz Hydro GmbH, Austria	322.000	282.632	39.368	-	39.368	13.93%
ANDRITZ HYDRO	Andritz Hydro GmbH, Austria	263.810	235.894	27.916	-	27.916	11.83%
JOSTEDAL	Andritz Hydro GmbH, Austria	345.000	288.659	56.341	-	56.341	19.52%
Wassen	Andritz Hydro GmbH, Austria	216.000	185.325	30.675	-	30.675	16.55%
OHAU	Andritz Hydro GmbH, Austria	73.600	62.613	10.987	-	10.987	17.55%
OHAU	Andritz Hydro GmbH, Austria	68.000	60.086	7.914	-	7.914	13.17%
Lauca	Andritz Hydro GmbH, Austria	110.400	95.639	14.761	-	14.761	15.43%
Ambuklao	Andritz Hydro GmbH, Austria	83.750	68.299	15.451	-	15.451	22.62%

Drawing Services	Andritz Hydro GmbH, Austria	77.500	73.810	3.690	9.595	13.286	18.00%
Gerstheim	Andritz Hydro GmbH, Austria	268.000	222.765	45.235	-	45.235	20.31%
Osobsky/Zeichnungen	Andritz Hydro GmbH, Austria	77.500	73.810	3.690	9.595	13.286	18.00%
Tarbella 1-4	Andritz Hydro GmbH, Austria	335.000	279.240	55.760	-	55.760	19.97%
Topplia	Andritz Hydro GmbH, Austria	268.000	224.020	43.980	-	43.980	19.63%
Topplia	Andritz Hydro GmbH, Austria	201.000	168.800	32.200	-	32.200	19.08%
Bel Monte	Andritz Hydro GmbH, Austria	169.500	135.431	34.070	-	34.070	25.16%
Eisenhutenstadt	Andritz Hydro GmbH, Austria	160.000	127.680	32.320	-	32.320	25.31%
Manosque & ST	Andritz Hydro GmbH, Austria	199.000	70.677	128.323	(110.866)	17.457	24.70%
Shawinigan 2	Andritz Hydro GmbH, Austria	36.000	29.736	6.264	-	6.264	21.07%
S-Neuhaus	Andritz Hydro GmbH, Austria	328.000	241.744	86.256	-	86.256	35.68%
Branau-Simbach	Andritz Hydro GmbH, Austria	340.000	185.980	154.020	(131.144)	22.876	12.30%
GKW-JO	Andritz Hydro GmbH, Austria	128.600	88.439	40.161	(6.466)	33.695	38.10%
GKW-OE	Andritz Hydro GmbH, Austria	213.000	156.246	56.754	(15.630)	41.124	26.32%
Grimsel	Andritz Hydro GmbH, Austria	156.000	83.304	72.696	(49.537)	23.159	27.80%

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Rauhalahti	Andritz Hydro GmbH, Austria	340.000	185.980	154.020	(112.175)	41.846	22.50%
Supply of 1 no. Ckt. Braker	Andritz Hydro GmbH, Austria	1,195.723	1,063.411	132.312	-	132.312	12.44%
WASSEN SBB	Andritz Hydro GmbH, Austria	82.860	49.390	33.471	(22.951)	10.520	21.30%
Lubuk Gadand	PT Andritz Hydro	549.055	494.918	54.137	-	54.137	10.94%
Olidan HEP	Andritz Hydro GmbH, Austria	37.664	1.000	36.664	(36.448)	0.216	21.60%
Lubuk Gadand	PT Andritz Hydro	143.691	67.709	75.982	(56.075)	19.906	29.40%
Peusangan	PT Andritz Hydro	389.824	383.340	6.484	54.850	61.334	16.00%
Kalwakurthy HEP	ANDRITZ AG	1,514.204	1,090.227	423.977	(82.736)	341.241	31.30%
Kalwakurthy HEP	ANDRITZ AG	1,514.204	1,090.227	423.977	(168.864)	255.113	23.40%
Bungin 1	PT Andritz Hydro	27.997	18.173	9.824	(7.625)	2.199	12.10%
Peusangan	PT Andritz Hydro	3,001.365	3,192.968	(191.603)	622.653	431.051	13.50%
A02OP-T (TM2500)	Andritz Hydro GmbH, Austria	1,961.075	2,634.340	(673.266)	-	(673.266)	-25.56%
A03 One Time Cost	Andritz Hydro GmbH, Austria	0.000	(122.776)	122.776	(148.804)	(26.028)	21.20%
A03OP U#01	Andritz Hydro GmbH, Austria	0.000	301.413	(301.412)	367.723	66.311	22.00%
A03OP U#02	Andritz Hydro GmbH, Austria	0.000	(677.310)	677.310	(755.878)	(78.568)	11.60%
A03OP U#03	Andritz Hydro GmbH, Austria	(0.000)	(614.367)	614.366	(726.181)	(111.815)	18.20%
A03OP U#04	Andritz Hydro GmbH, Austria	0.002	(968.106)	968.107	(1,095.897)	(127.790)	13.20%

A03OP U#05	Andritz Hydro GmbH, Austria	0.000	(398.177)	398.177	(454.718)	(56.541)	14.20%
A03OP U#06	Andritz Hydro GmbH, Austria	2,123.062	1,582.897	540.164	-	540.164	34.13%
A03OP U#07	Andritz Hydro GmbH, Austria	2,818.914	2,173.884	645.031	-	645.031	29.67%
A03OP U#08	Andritz Hydro GmbH, Austria	2,837.485	2,786.689	50.796	339.340	390.136	14.00%
A03OP U#09	Andritz Hydro GmbH, Austria	3,940.086	3,951.968	(11.882)	604.678	592.795	15.00%
A03OP U#10	Andritz Hydro GmbH, Austria	4,415.840	4,014.638	401.202	80.554	481.757	12.00%
A03OP U#11	Andritz Hydro GmbH, Austria	13,276.979	7,785.146	5,491.833	(4,067.152)	1,424.682	18.30%
A03OP U#12	Andritz Hydro GmbH, Austria	6,161.669	5,294.512	867.156	-	867.156	16.38%
A03OP U#13	Andritz Hydro GmbH, Austria	8,251.348	7,129.452	1,121.896	-	1,121.896	15.74%
A03OP U#14	Andritz Hydro GmbH, Austria	6,827.391	5,897.889	929.502	-	929.502	15.76%
A03OP U#15	Andritz Hydro GmbH, Austria	6,909.132	5,969.863	939.269	-	939.269	15.73%
A03OP U#16	Andritz Hydro GmbH, Austria	8,403.030	7,517.986	885.044	-	885.044	11.77%
A03OP U#17	Andritz Hydro GmbH, Austria	8,400.534	7,515.721	884.813	-	884.813	11.77%
A03OP U#18	Andritz Hydro GmbH, Austria	8,400.534	7,515.690	884.844	-	884.844	11.77%
A03OP U#19	Andritz Hydro GmbH, Austria	8,386.181	7,502.665	883.517	-	883.517	11.78%

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A03OP U#20	Andritz Hydro GmbH, Austria	8,400.534	7,515.690	884.844	-	884.844	11.77%
A03OP U#21	Andritz Hydro GmbH, Austria	8,533.877	7,583.195	950.682	-	950.682	12.54%
A03OP U#22	Andritz Hydro GmbH, Austria	8,533.877	7,583.198	950.679	-	950.679	12.54%
A03OP U#23	Andritz Hydro GmbH, Austria	8,546.326	7,545.329	1,000.997	-	1,000.997	13.27%
A03OP U#24	Andritz Hydro GmbH, Austria	8,546.326	7,545.329	1,000.997	-	1,000.997	13.27%
A03OP U#25	Andritz Hydro GmbH, Austria	8,546.326	7,583.198	963.128	-	963.128	12.70%
A03OP U#26	Andritz Hydro GmbH, Austria	8,546.326	7,583.198	963.128	-	963.128	12.70%
A03OP U#27	Andritz Hydro GmbH, Austria	8,546.326	7,604.772	941.554	-	941.554	12.38%
A03OP U#28	Andritz Hydro GmbH, Austria	8,546.326	7,583.198	963.128	-	963.128	12.70%
A03OP U#29	Andritz Hydro GmbH, Austria	4,142.982	3,728.620	414.361	-	414.361	11.11%
A03OP U#30	Andritz Hydro GmbH, Austria	5,509.781	4,827.352	682.429	-	682.429	14.14%
A03OP U#31	Andritz Hydro GmbH, Austria	5,346.405	4,684.212	662.193	-	662.193	14.14%
A03OP U#32	Andritz Hydro GmbH, Austria	4,837.235	4,249.993	587.241	-	587.241	13.82%
A03OP U#33	Andritz Hydro GmbH, Austria	4,533.463	3,983.100	550.363	-	550.363	13.82%
A03OP U#34	Andritz Hydro GmbH, Austria	4,082.329	3,586.734	495.596	-	495.596	13.82%

A03OP U#35	Andritz Hydro GmbH, Austria	5,815.480	5,109.479	706.001	-	706.001	13.82%
Laksola Tape development (HAW) Phase-IV	Andritz Hydro GmbH, Austria	1,026.458	862.552	163.906	-	163.906	19.00%
NEW JERSEY HAW ORDER	Andritz Hydro GmbH, Austria	3.227	2.965	0.262	0.361	0.623	21.00%
HAW: Engineering services for Quintana Roo	Andritz Hydro GmbH, Austria	392.023	312.329	79.693	-	79.693	25.52%
HAW SUND RTDS	Andritz Hydro GmbH, Austria	26.990	27.822	(0.832)	7.788	6.956	25.00%
Quintana Roo	Andritz Hydro GmbH, Austria	22,425,019	19,669,535	2,755,484	-	2,755,484	14.01%
Check Valve	Andritz Hydro GmbH, Austria	3.998	2.998	0.999	-	0.999	33.33%
Total		2,640,650.132	2,187,824.706	452,825.426	(63,394.604)	389,430.821	17.80%

6.3. It is clear from the details of the international transactions that the assessee has entered into international transactions with as many as 14 AE's based in different tax jurisdictions. The details of the AEs are given in TP study at page no.107 & 108 as under:

<i>Associated enterprise</i>	<i>Amount (Inr)</i>
ANDRITZ HYDRO GmbH, Austria	2,104,875,334
ANDRITZ HYDRO AS, Norway	162,335,856
ANDRITZ HYDRO S.A.S, France	133,689,223
ANDRITZ Hydro S.r.l. Unipersonale, Italy	106,477,297
ANDRITZ HYDRO Canada Inc., Canada	60,590,906

<i>ANDRITZ (China) Ltd, China</i>	59.433,278
<i>PT ANDRITZ HYDRO, Indonesia</i>	6,600,761
<i>ANDRITZ HYDRO AB, Sweden</i>	3,526,400
<i>ANDRITZ AG, Austria</i>	3,028,409
<i>Total</i>	2,640,557,464

<i>Associated enterprise</i>	<i>Amount (Inr)</i>
<i>ANDRITZ HYDRO GmbH, Austria</i>	201,638,612
<i>ANDRITZ HYDRO GmbH, Germany</i>	18,860,676
<i>ANDRITZ HYDRO S.A.S, France</i>	14,472,459
<i>ANDRITZ Hydro AG Switzerland</i>	11,701,353
<i>ANDRITZ HYDRO AB Sweden</i>	6,980,177
<i>ANDRITZ HYDRO Ltd. Canada</i>	3,432,687
<i>ANDRITZ HYDRO GmbH, New Zealand</i>	932,950
<i>ANDRITZ HYDRO Indonesia</i>	899,422
<i>ANDRITZ Power Sdn. Bhd. Malaysia</i>	392,706
<i>ANDRITZ HYDRO S.L. Spain</i>	186,174
<i>ANDRITZ HYDRO Vietnam Co. Ltd. Vietnam</i>	61,083
<i>Total</i>	259,558,299

6.4. The concept of aggregation of closely linked transactions refers to the various transactions between the assessee and its associated enterprise and the same cannot be evaluated separately as individual basis due to the reason that price of one transaction is having a bearing on the price of the other transactions between the assessee and its AE. If number of transaction(s) are closely linked or continuous in nature and arising from continuous transaction of supply of services then such transaction can be regarded as closely linked transaction for the purpose of determining arm's length price as provided under rule 10A(d). The income tax rules permits the aggregation and clubbing of close related transactions as it is also supported by the OECD guidelines on transfer pricing. In order to examine whether number of transactions are closely linked or continuous so as to aggregate for the purpose of determining of arm's length price it is to be seen that one transaction is follow on the earlier transaction and subsequent transactions is carried out and depending wholly or substantially on the earlier transactions. It can be *vice versa* when the earlier transactions has been entered into between parties by keeping in mind that a continuous transaction of similar nature between the parties thereafter. Therefore, the pricing of the transactions are influenced by each other and particularly in determining price and profit involved in the transaction are depending on each other then those transactions can safely be regarded as closely linked transactions.

6.5 In case in hand the assessee has entered into various international transactions with different AEs located at different tax jurisdiction having different geographical and economic conditions then this concept of aggregation of closely linked transactions would be restricted only to the number of transactions which each AE executed in same geographical and economical environment. The transactions with separate AE's cannot be aggregated under the rule of aggregation. Further when the AEs are based at different economic, market and geographical conditions then the transactions of project executed for different AE at different tax jurisdiction, economic, geographical and market conditions can not be

grouped together for determination of ALP. Section 92C(1) provides for determination of ALP of an international transactions or specified domestic transactions. For ready reference section 92C(1) is quoted as under:

“(1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

- (a) comparable uncontrolled price method, by which,—*
 - (i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;*
 - (ii) such price is adjusted to account for differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;*
 - (iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction [or the specified domestic transaction] ;*
- (b) resale price method, by which,—*
 - (i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;*
 - (ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;*
 - (iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;*
 - (iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;*

- (v) *the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise;*
- (c) *cost plus method, by which,—*
 - (i) *the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;*
 - (ii) *the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;*
 - (iii) *the normal gross profit mark-up referred to in sub-clause (ii) is adjusted to take into account the functional and other differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit mark-up in the open market;*
 - (iv) *the costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii);*
 - (v) *the sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise;*
- (d) *profit split method, which may be applicable mainly in international transactions [or specified domestic transactions] involving transfer of unique intangibles or in multiple international transactions [or specified domestic transactions] which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which—*
 - (i) *the combined net profit of the associated enterprises arising from the international transaction [or the specified domestic transaction] in which they are engaged, is determined;*
 - (ii) *the relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;*
 - (iii) *the combined net profit is then split amongst the enterprises in proportion to their relative contributions, as evaluated under sub-clause (ii);*

(iv) the profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction [or the specified domestic transaction] :

Provided that the combined net profit referred to in sub-clause (i) may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction [or specified domestic transaction] in which it is engaged, with reference to market returns achieved for similar types of transactions by independent enterprises, and thereafter, the residual net profit remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution in the manner specified under sub-clauses (ii) and (iii), and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise on the basis of its relative contribution shall be taken to be the net profit arising to that enterprise from the international transaction [or the specified domestic transaction] ;

(e) transactional net margin method, by which,—

(i) the net profit margin realised by the enterprise from an international transaction [or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction [or the specified domestic transaction];

[(f) any other method as provided in rule 10AB.]

6.6 This section contemplates for determination of ALP in relation to international transactions. The legislative intent is clear that every international transaction of the assessee is to be benchmarked individually. However, it is not always necessary that every transaction of an entity is independent in all respects. In case the assessee entered into transactions with AE but the functions performed, assets employed for the purpose of that transaction in singularity cannot be ascertained then in such cases the functions performed or assets employed will have to be considered for similar transactions in unity. As per the provisions of section 92C(1) the ALP to be determined by application of most appropriate method (MAM) having regard to the nature of transactions or class of transactions or class of associated person or functions performed by the AE to the transaction. The Rule 10A(d) provided the definition of transaction for computation of arm's length price which reads as under:

“10A. For the purpose of this rule and rules [10AB] to 10E-

(a) Associated enterprise shall

(b)

(c)

(d) “transaction” includes a number of closely linked transactions.”

6.7 This rule permits the aggregation of control transaction for the purpose of determination of ALP if the number of transactions are closely linked transactions. The income tax Act does not define terms closely linked transactions; however, guidance note on transfer pricing u/s 92E of the Act published by ICAI-2017 clarified in para 5.7 as under:

“Two or more transactions can be said to be linked when these transactions emanate from a common source being an order or a contract or an agreement or an arraignment and the nature, characteristic and terms of the transaction are substantially flowing from the said common sources”

6.8. Therefore, a situation may arise where it will be appropriate that ALP in relation to such group of transactions may be determined by the

aggregating based on parameters provided in section 92C(1) and Rule 10A(d). Thus, the aggregation of the transactions is not prohibited by TP regulation under the Income Tax Act but the scope of closely linked transaction is limited to common source or arrangement between two parties which meant multiple transactions between two parties and emanating from common source or arrangement. Therefore, the transactions between the assessee and it's more than one AE having separate and independent functions performed or assets employed cannot be aggregated for the purpose of determination of ALP. OECD guidelines also provides for aggregation of controlled transaction in para 3.9 as under:

“Ideally in order to arrive at the most appropriate approximation of the fair market value, the arm’s length principle should be applied in a transaction by transaction basis. However there are often situation where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on separate basis.”

6.9 Thus, portfolio approach is recognized for determination of arm’s length price but the relevant factors for aggregation or segregation of international transactions could be FAR analysis of the segment of which the transactions form part. The DRP has considered and decided this issue summary in para 8.3 as under:

“8.3 Discussions and Directions of DRP on Grounds 2 to 4:

It is found that the assessee has entered in to an aggregate value of international transactions amounting to Rs 344,96,10,445/-, whereas, the total amount of variations/ adjustments proposed are Rs 16,91,246/- only. Prima-facie, we find that the TPO has already been very fair and careful in proposing adjustments. Besides, there is a litigation history in respect of TP adjustments in this case. On some issues, the decisions of Hon'ble ITATS and the DRPS have also come whose reference has also been made in the TPO's order. The TPO has proposed adjustments after duly considering those tribunal judgements and DRP orders. For example, while proposing the first adjustment of Rs 8,94,106/- on account of the contract revenue from the AES, he has calculated the average gross margin as per CUP and thereafter, in only one instance, found a variation worth-proposing. We do not find any un-resonableness in the approach of the TPO and uphold the same. As for the another small amount of Rs 7,97,140/- being proposed on account of payment of technical services, the TPO

has clearly mentioned at para C.2.5 at Page 95 that he has considered the Tribunal and DRP orders and the same cannot rescue the assessee as the impugned payments were duplicative and hence, there was no requirement for finding any comparable data as no commercial reasons could probably be given for double payment for the same services. We find the stand of the AO to be unassailable. There is no need to go further in to the matter. We uphold the adjustments made. Keeping in view the same, the objections of the assessee on TP grounds are hereby rejected.”

6.10 Thus, it is clear that DRP has not even discussed the objections raised by the assessee particularly in respect of the aggregation of the transactions as well as the other claim of most appropriate method and setting off the excess of margin above the arm's length price in respect of the some projects against the short margin of the other project for which the TPO has made adjustment.

7. In view of the above legal proposition the aggregation of transactions between the assessee and each of the AEs is permissible and the arm's length price to be determined as aggregated transactions with each AE and to be compared with uncontrolled transactions having regard to functions formed, or assets employed and risk involved (FAR). Accordingly in the facts and circumstances of the case when the assessee has aggregated all the transactions entered into with as many as 15 AEs located and based at different countries under the different tax jurisdiction and in different economic, market, geographical conditions is beyond the scope of aggregation of the transaction which are closely linked and continuous depending upon each other. Similarly the TPO in rejecting aggregation in toto is also not right and therefore, in our considered view the transfer pricing analysis is required to be done afresh having regard to the scope of aggregation of closely linked transactions provided u/s 92C(1) r.w.s 10A(d) of the Act as well as FAR analysis. The DRP has not given speaking or reasoned finding on the issue of adjustment on account of payment for technical services. Therefore, both these issues of determination of arm's length price in respect of contract receipts as well as the payment of technical services are set aside to the record of the TPO for fresh determination of arm's length price. Needless

to say the assessee be given appropriate opportunity of hearing before passing afresh order.

8. In the result, appeal of assessee is allowed for statistical purpose.

Order pronounced in the open court on 28.08.2023.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 28.08.2023

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore