

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

**BEFORE SHRI B.R. BASKARAN, AM &
SHRI N. K. CHOUDHRY, JM**

ITA No. 1644/Mum/2021 (AY 2011-12)

&

ITA No. 1642/Mum/2021 (AY 2012-13)

ACIT, Circle- 14(1)(2)
Room No. 455, 4th Floor,
Aayakar Bhavan, M.K.
Road, Mumbai- 400020

VS

M/s. Wyeth Pharmaceuticals
India Pvt. Ltd.
1802/ 1901, G-Block,
Capital Plot No. C-70, Bandra-
Kurla Complex, Bandra-East,
Mumbai- 400051

PAN No. **AAACW6225E**

Appellant) : Respondent)

C.O. No. 82/Mum/2022
(Arising out of I.T.A. No. 1644/Mum/2021
Assessment Year: 2011-12)

&

C.O. No. 81/Mum/2022
(Arising out of I.T.A. No. 1642/Mum/2021
Assessment Year: 2012-13)

M/s. Wyeth Pharmaceuticals
India Pvt. Ltd.
1802/ 1901, G-Block, the
Capital Plot No. C-70, Bandra
Kurla Complex, Bandra-East,
Mumbai- 400051

VS

ACIT, Circle- 14(1)(2)
Room No. 455, 4th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai- 400020

PAN No. **AAACW6225E**

Appellant) : Respondent)

Appellant by : Shri. Vishal Kalra, Ld. Adv.
Respondent by : Shri. Prakash Kishinchandani,
Ld. Sr. AR

Date of Hearing : 02.02 .2024
Date of pronouncemer : 29.02 .2024

O R D E R

Per N. K. Choudhry, JM:

These appeals and cross objections respectively by the Revenue Department and the Assessee have been preferred, against the orders even dated 31.01.2020, impugned herein passed by the National Faceless Appeal Centre (NFAC) Delhi/ Ld. Commissioner of Income Tax (Appeals) {in short Ld. Commissioner'} u/s.250 of the Income Tax Act 1961 (in short 'the Act') for AYS. 2011-12 & 2012-13.

2. As the facts and issues involved in the appeals and cross Objections under consideration are exactly similar except variation in amounts therefore for the sake of brevity, we are inclined to decide the same by this consolidated order. For brevity, we will decide ITA No. 1644/Mum/2021 and connected C.O. No. 82/Mum/2022, as a lead case and result of same would be applicable mutatis mutandis to connected appeal and CO as well.

3. ITA No. 1644/Mum/2021. At the outset, we observe that there is delay of 531 days in filling of the instant appeal, which occurred during the Covid-19 period i.e. from 15.03.2020 till

28.02.2022 and the same has been excluded/waived for the purposes of limitation as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, by the Hon'ble Apex Court by passing the order dated 10-01-202 in SUO MOTU WRIT PETITION (C) NO. 3 OF 2020, hence the delay of 531 days in filling of the instant appeal is condoned.

3.1 Coming to the merits of the case, we observe that in this case, the Assessee had declared its income at Rs. 1,92,02,104/- by e-filing its return of income on 29.11.2011, which was accepted by intimation dated 28.11.2012 u/s 143(1) of the Act. Subsequently, the case of the Assessee was selected for scrutiny and therefore, statutory notices were issued, in response to which the Assessee filed requisite replies/documents.

By perusing the financials of the Assessee, the AO observed that the Assessee is a domestic company engaged in the business of facilitating clinical research and development, business process outsourcing, back office data, data processing and other business support services etc. . On perusal of Appendix-B (Clause-10) of 3CEB shows that the details and description of international transaction with Associated Enterprises (AEs) where the receipts from five AEs have been shown at Rs. 3,81,61,644/- in its Profit & Loss A/c and after claiming an expenditure of Rs. 3,41,64,000/- , the Net Profit has been shown at Rs. 62,56,000/-. The AO by perusing the Form-3CBB Appendix-C (Clause-13) further noticed that the total amount received/receivable as per Arms Length Price (ALP) on

account of reimbursement charges from AEs is shown at Rs. 6,14,25,224/-, breakup of the same is a under:

Sr.No.	Name of Parties	Nature of reimbursements	Amount
1	Wyeth Ayerest International Inc, USA	Charges paid to CROs	4,04,44,911/-
		Back office charges	30,00,102/-
2	Pfizer Limited, UK	Charges paid to CROs and back office charges	1,62,38,359/-
3	Wyeth Pharmaceuticals Inc, USA	Back office charges	8,33,366/-
4	Wyeth Corporate, USA	Incentives paid to employees.	5,08,486/-
		Total	6,14,25,224/-

3.2 The AO also noticed that the Assessee has claimed all expenses which were eligible for claiming in its Profit & Loss A/c and the Accounts are audited, however, the Assessee has not declared the said amount as income in Profit & Loss A/c, neither any expenses are claimed on account of these reimbursement, therefore, entire amount of Rs. 6,14,25,224/- deserves to be treated as income of the Assessee and to be added in the income. Consequently the AO show-caused the Assessee as to why the amount of Rs. 6,14,25,224/- should not be treated as its income as declared in Form-3CEB and added to its total income.

3.3 The Assessee before the AO mainly claimed that during the year under consideration, the Assessee was engaged in the business of co-operating of research and development on behalf of the AE's business outsourcing, back office data, data processing and other business support services. The Assessee on dated 01.01.2017 entered into a clinical research and development agreement (R & D agreement) with Wyeth to provide research and development services directly or indirectly to Wyeth and its affiliates. The agreement inter-alia provides that WPIL directly or indirectly through research scientists etc. shall perform research and development work as may be required by Wyeth or its affiliates. As the Assessee does not have adequate reserve therefore it entered into an agreement dated 07.03.2008 with Wyeth Ltd. to receive administrative support services through their employees (service agreement), copy of the same is filed with letter dated 21.01.2014. Under the service agreement, Wyeth Pharma is liable to pay support service charges at cost plus a mark-up.

3.4 The AO though considered the aforesaid reply/claim of the Assessee, but not found satisfactorily and therefore ultimately disallowed the amount of Rs. 6,14,25,224/- {claimed as reimbursement of expenses by the Assessee} by treating the same as income of the Assessee and consequently added to the total income of the Assessee, by observing and concluding as under:

“5.5. The reply of the Assessee has been carefully considered but the same is not found satisfactory. It is observed that the assessee company has received an amount of Rs. 6,14,25,224 from its Associate Enterprises towards the reimbursement of expenditure on account of clinical research and development expenses and support service charges etc. But party-wise details of clinical research and development expenses and support service charges, work orders for major parties, copies of the debit note/invoice/vouchers for support service charges, clinic research and development expenses & actual rendering of such income and expenditure were NOT FURNISHED. No reimbursement details of expenses have been furnished by the assessee as evidence that the same has been actually incurred by the assessee and thereafter the same are reimbursed. Further no details regarding the TDS deducted on the same are furnished by the assessee for verification.

5.6 It is claimed that the reimbursement has been made on a cost to cost basis. However, the assessee was unable to produce any documentary evidence in respect of reimbursement expenses to prove that such amount represents reimbursement at cost and does not have any profit element. In absence of details the assessee should have deducted tax under section 194C/194J of the I.T.Act, 1961 on the payments made for obtaining services for which expenses has been reimbursed. There is no evidence placed by the assessee on record, which shows that these receipts on account of reimbursement & are capital in nature, and not of revenue nature. Since it is claimed that for this reason the such payment have not been noted through the P&L A/c. The assessee has not produced any evidence of having incurred the expenditure on account of reimbursement & service receipts not offered to tax. No bank details have been produced. Which makes the claim of the assessee fully doubtful so also the expenditure incurred on these services on account of which reimbursement has been received?

However, since the assessee has reported receipts of the payments on a/c of reimbursement of expenses & these receipts not being of capital nature, the same are shown as receipts by the assessee in 3CEB, therefore these receipts, are treated as income of the assessee for the assessment year in reference. Further, no TDS has been deducted in respect of the aforesaid expenditure incurred on account of reimbursements of Rs. 6,14,25,224/-.

5.7 *The income/amounts appearing in the appendix-C have been admitted as expenditures by the Associate Enterprises of the assessee company and because for the same have been reported in the Form-3CEB. Therefore, following the same equation this amount is directly the income of the assessee for the assessment year under reference.*

5.8 *Since the assessee has failed to discharge its onus to prove the genuineness of the expenditure & also failed to produce any documentary evidences to prove that the above expenses has actually been incurred by the assessee. Further assessee also failed to produce documentary evidence to show deducting TDS on such expenditure, therefore the amount of Rs. 6,14,25,224/- claimed as reimbursement of expenses deserves to be treated as income of the assessee, Accordingly the amount of Rs. 6,14,25,224/- is added to total income. Since the assessee has furnished inaccurate particulars of its income, therefore, penalty u/s. 271(1)(c) is also initiated on this issue."*

4. The Assessee being aggrieved with the aforesaid addition/disallowance of Rs. 6,14,25,224/- preferred first appeal before the Ld. Commissioner, who accepted the claim of the Assessee qua reimbursement of expenses by holding as under:

3.3. Decision:

3.3.1 *I have considered the facts of the case, findings of the AO and submissions made by the appellant. The reasons for which AO has made the additions are (i) no evidence that the reimbursement of expenses were actually incurred to warrant such a reimbursement and (ii) non deduction of tax at source on payments made leading to the incurring of these expenses. The AO has therefore questioned the incurring of these expenses on behalf of a third party and also the fact that no TDS has been done on such payments.*

3.3.2 *The appellant is a domestic company engaged in the business of facilitating clinical research and development business process outsourcing, back office data, data processing and other business support services. The*

appellant has entered into a clinical research and development agreement with Wyeth, a corporation under the laws of Delaware to provide research and development services directly or indirectly to Wyeth and its affiliates. As per the terms of the R & D agreement, Wyeth & its affiliates shall compensate the appellant all the internal costs with a mark-up and external costs without a mark-up. The classification of these internal and external costs is as per the terms of the R & D agreement that has been signed by the appellant with Wyeth. The external costs incurred towards clinical trial related services are in the nature of pass through costs and have not been debited in the profit & loss of the appellant. "Pass through costs are ordinarily costs for which payment is made by the service provider to third parties (generally) on behalf of the Sponsor. Broadly such pass through cost are incidental or ancillary to the primary business activity of the service provider and the service provider does not perform any value added activities and does not assume any significant business risks. The role of the service provider is more in the nature of facilitation.

3.3.3 In the instant case, the appellant pursuant to the R & D agreement, has facilitated the activities of Wyeth with respect to clinical trials. The relevant terms of the R & D agreement is reproduced:

1.1 WPIL agrees during the term of this Agreement to perform, either directly at its facilities in the Territory or indirectly through research scientists, technicians and consultants it may engage, such research and development work as WYETH.....

1.2 The request by WYETH to WPIL for performing administrative or research and development work hereunder shall be submitted to WPIL in the form of written proposals in which the compound or product is identified and the scope of work to be performed by WPIL is defined. WPIL shall proceed to perform research and development work or engage, or award a grant or stipend to, such independent research scientists, technicians and consultants it may require to perform such work, all in accordance with the provision of such proposal...

As per para 2.2 of the agreement, external costs have been defined to include but not limited to "all costs and expenses to engage independent third parties on a sub- contract basis to perform research and development work under this agreement, such as the costs and expenses associated with grant, award or stipend to any independent research scientist, technician or consultant."

3.3.4 From the above terms of agreement, it is apparent that the appellant is responsible to facilitate the clinical trials of Wyeth in India and for this purposes it has to make some payments to third parties, which are not its own cost and hence not debited in its profit & loss account. It is not the case of the AO that these costs should form a part of the cost base on which mark-up is to be received from Wyeth on account of the services rendered by the appellant or whether mark-up is to be charged on the payments reimbursed by its affiliates on account of these payments made by the appellant on their behalf. The case of the AO is that as to whether these expenses have been incurred at all. Looking into the facts of the case, industry practice and also the agreement between the appellant and Wyeth, I am not in agreement with the AO as regards to the genuineness of incurring these expenses Accordingly, this finding of the AO that since no expenses have been incurred, there can be no reimbursement and hence the receipt is in the nature of income is rejected.

3.3.5 As regards the other ground of the AO that the same is in the nature of income since no TDS has been done, it is important to remember that these costs are pass through costs and have not been debited in the profit & loss account of the appellant. The provisions of Sec 40(a)(ia) provides for disallowance of expense in case of non-deduction of tax at source. I am in agreement with the submission of the appellant that since these payments are in the nature of pass through costs and have not been debited in the profit & loss account, the fact of deduction of tax at source cannot be a basis of treating these payments as income. Hence this alternate finding of the AO is also rejected.

{Highlighted by us for clarity}

5. The Ld. Commissioner however during the appellate proceedings also asked the Assessee as to how these payments which have been claimed as reimbursement are different from the other internal expenses, on which markup has been charged by the Assessee. Further, as to why these expenses should not form a part of cost base on which mark-up should also be received from Wyeth or the respective Associate entities.

5.1 The Assessee by filling its detailed submissions before the Ld. Commissioner, mainly claimed: *“External costs should not form part of the cost base to ascertain the mark-up, as the external cost incurred towards clinical trial related services are in the nature of pass through cost "Pass through costs" are ordinarily costs for which payment is made by the service provider to third parties (generally) or behalf of the Sponsor. Broadly such pass through cost are incidental or ancillary to the primary business activity of a taxpayer. Even the mark-up, shall not be covered within the scope of section 251 of the Ad and therefore ought to be dropped.”*

5.2 The Ld. Commissioner not being convinced with the said claim/submissions of the Assessee, ultimately directed the AO to charge a mark-up of 13% on the said amount of Rs.6,14,25,224/- by concluding as under:

3.3.8 The submission of the appellant primarily states that these costs cannot form a part of the cost base for mark-up to be charged from Wyeth because these are that parties costs. The important issue here is as to whether the services rendered by the appellant in providing facilitation services to Wyeth

could have been possible without making these payments. The R & D agreement filed by the appellant is a consolidated agreement that provides for the appellant providing support services to ensure that the clinical trials of Wyeth in India are successfully conducted. As far as Wyeth is concerned, costs may be in the nature of internal or external and mark-up on the same may be decided in terms of their own agreement, but it is also essential to state that these costs are integral to the clinical trials that the appellant is expected to facilitate in India for Wyeth. The appellant has not been able to establish that these internal costs are different or less important than the external costs on which its getting a mark-up of 13%. Thus, even if it is held that these costs cannot form a part of the cost base for the purpose of mark-up from Wyeth, it cannot be ascertained that these expenses are not necessary for the appellant and hence the mark-up would have to be charged from the entities, making these payments to the appellant. Transfer Pricing principles are equally applicable in respect of these payments also.”

3.3.9 The appellant has also contended that since the AO has not raised this issue, the same is beyond the scope of Section 251 of the Act. This contention is not acceptable since Section 251 provides that the CIT(A) has the powers of confirmation, reduction, enhancement or annulment of assessment and the only requirement is that an enhancement should not be made without giving reasonable opportunity to the appellant. In the instant case, technically though this is not an enhancement since the total quantum of addition sustained after this order shall still be less than the addition done by the AO, opportunities of being heard has been provided to the appellant.

3.3.10 In view of the discussion above, the action of the AO in adding Rs.6,14,25,224/- as income on

account of non-deduction of tax at source or not being reimbursement as the corresponding expense has not been incurred is deleted. The AO is however directed to charge a mark up of 13% on this amount of Rs.6,14,25,224/- on account of payment received from the entities mentioned in para 1.4 of the order. These grounds of appeal are therefore partly allowed.

6. The Revenue Department being aggrieved with the decision of the Ld. Commissioner in allowing the Assessee's claim of reimbursement charges of Rs. 6,14,25,224/-, is in appeal before us.

7. We heard the parties and perused the material available on record. In the instant case, the Assessee has claimed that as per R & D agreement referred to above, the Assessee was required to facilitate the clinical trials of Wyeth in India and supposed to make some payments to third parties. Therefore pursuant to the same, facilitated the activities of Wyeth qua clinical trials and got reimbursed the costs which were not its own cost and therefore, has not debited in its P&L A/c. We observe that the Ld. Commissioner thoroughly considered the terms and conditions of the said Agreement and approved the action of the Assessee in not debiting the amount under consideration in its profit & loss account by observing that it is apparent that the appellant is responsible to facilitate the clinical trials of Wyeth in India and for this purposes it has to make some payments to third parties, which are not its own cost and hence not debited in its profit & loss account. The Ld. Commissioner also rejected the finding of

the AO to the effect since no expenses have been incurred, there can be no reimbursement and hence the receipt is in the nature of income. We further observe that the Ld. Commissioner also considered "as to whether the provisions of section 40A(ia) which provides for disallowances of expenses in case of non-deduction of TDS, are applicable or not" and held that since these payments are in the nature of pass through costs and have not been debited in the profit & loss account, the fact of deduction of tax at source cannot be a basis of treating these payments as income, hence this alternate finding of the AO is also rejected. We have given thoughtful consideration to the aforesaid determination/conclusion drawn by the Ld. Commissioner and even otherwise we do not find any plausible reason and/or material to contradict such findings of the Id. Commissioner, as the findings are based on peculiar facts and circumstances of the case, hence the same needs no interference and **consequently the Assessee is entitled to claim deduction of reimbursement of such external costs, incurred if any, but subject to verification.** We observe that the AO in the assessment order by specifically mentioning "*that the Assessee failed to provide party wise details of clinical research and development expenses and support service charges, work orders for major parties, copies of debit note/invoice/vouchers for support service charges, clinical research and development expenses and actual rendering of such income and expenditure and reimbursement details of expenses and evidence in order to show that the expenses have actually been incurred by the Assessee and therefore, the same were reimbursed,*" treated the said amount of Rs. 6,14,25,224/-

allegedly claimed as reimbursement of expenses, as income of the Assessee. The Ld. Commissioner though approved the action of the Assessee in treating the expenses incurred which have been reimbursed from Wyeth and its affiliates for clinical trials and not routing the same as pass through cost incidental or ancillary to the primary business activities of the service provider and non- deduction of tax at source, however as it appear from impugned order, it is a fact which though refuted specifically by the Ld. AR that Ld. Commissioner failed to examine the party wise details of clinical research and development expenses and support service charges, work orders for major parties, copies of debit note/ invoice/vouchers for support service charges, clinical research and development expenses and actual rendering of such expenditure and any other documentary evidence such as bank details etc. qua reimbursement of expenses that such amount represents reimbursement of cost and does not have any profit element, hence, **for the limited purpose for examination of such parameters as noted above**, we are inclined to remand the instant issue to the file of the Ld. Commissioner with a direction to verify the aforesaid details/documents as noted above and/or any other corroborative material which the Assessee intends to rely in order to substantiate its claim and recompute the claim of reimbursement accordingly. Hence the instant issue is remanded to the file of Ld. Commissioner accordingly. **Resultantly, the Appeal i.e. 1644/Mum/2021 filed by the Revenue department is partly allowed for statistical purposes.**

8. Coming to the **C.O. No. 82/Mum/2022** filed by the Assessee, we observe that Assessee has challenged the direction given by the Ld. Commissioner to the AO to charge a markup of 13% on the said amount of Rs.6,14,25,224/- on account of payment received from the said entities. We observe that the Ld. Commissioner during the appellate proceedings also asked the Assessee to explain "as to why these payments which have been claimed in the nature of reimbursement are different from the other internal expenses, on which mark up has been charged by the Assessee" and "as to why these expenses are not formed a part of cost basis, on which mark up should also be received from Wyeth or its AEs".

8.1 The Assessee inter-alia claimed that as per terms of the agreement, Wyeth and its affiliates were liable to compensate the Assessee all the internal cost with mark up and the external cost without a mark up and during the year under consideration, the Assessee incurred expenditure of Rs. 6,14,25,224/- as external cost which was duly recovered from its AEs. The Assessee also claimed that though the AO has made the addition qua reimbursement from the AEs and considered the same as the Assessee's income, however, he did not make any adjustment to the service income charged by the Assessee from its AEs. Therefore, the proposed adjustment involving inclusion of the extraordinary cost for ascertaining mark-up, shall not be covered within the scope of section 251 of the Act. The Assessee also claimed that the extraordinary cost incurred towards clinical trial

related services are in the nature of pass through cost, which are ordinarily costs for which payment is made by the service provider to third parties generally or on behalf of the sponsor and broadly such pass through cost are incidental and ancillary to the primary business activity of a tax payer. Further, the Assessee has not performed any value added activities and does not assume any significant business risk as the role of the Assessee was more or less in the nature of facilitation, therefore, while using a cost based recovery model, these cost are excluded from the costs while computing operating profit to total costs ratio and therefore, these cost are recovered separately on cost to basis as per terms of the agreement. The Assessee further claimed that since the Assessee is neither equipped (i.e. it does not have any infrastructure and specialized facilities) nor authorized to perform clinical trial activities in India, therefore, it gets such clinical research, performed by engaging independent agencies for the purpose of getting the clinical research done. The Assessee approached various parties and identified third party investors in India, who would be willing to perform the clinical trial activities and thereafter Wyeth group decide on the investors and their competency and after a such decision, third party investors are assumed the job of performing clinical research with whom the Assessee shall co-ordinate and supervise the work and report the status of work and data collected back to Wyeth group entities and therefore, in consideration for providing the above services the Assessee receives remuneration based on actual cost + mark up cost for facilitating clinical research and development activities

in India as the Assessee pays the investors for the clinical and investigation expenses on behalf of its AE and no value added activities are performed by Assessee qua performance or delivery of the service provided by the investors. The payment to these investors are recovered from AEs in the form of "reimbursement (-) pass through cost". Thus, such payments to the investors are excluded from the "service income" for the provision of clinical study related support services. From the aforesaid, it is evident that the Assessee does not bear any risk vis-à-vis services performed by the third parties and therefore, accordingly in absence of any value added activities being performed, the Assessee has recovered these third party external costs without adding any mark up as per internal company service agreement. Costs have been bifurcated into internal cost and external cost and agreed to be reimbursed by AE without any mark up. At last the Assessee claimed that it did not undertake the clinical trial activities on its own, hence it is not accountable for the services provided by the third parties and therefore, the Assessee has neither performed any value added activities nor assumed any significant risk with respect to the services performed by third parties.

9 The Ld. Commissioner though considered the claim of the Assessee but not found acceptable, and ultimately directed the AO to charge a mark-up of 13% on this amount of Rs.6,14,25,224/- on account of payment received from the entities, by mainly holding as under:

“ That as the Assessee has failed to establish that these internal costs are different or less important than the external costs on which its getting a mark-up of 13%. Thus, even if it is held that these costs cannot form a part of the cost base for the purpose of mark-up from Wyeth, it cannot be ascertained that these expenses are not necessary for the appellant and hence the mark-up would have to be charged from the entities, making these payments to the appellant. Transfer Pricing principles are equally applicable in respect of these payments also.

The appellant has also contended that since the AO has not raised this issue, the same is beyond the scope of Section 251 of the Act. This contention is not acceptable since Section 251 provides that the CIT(A) has the powers of confirmation, reduction, enhancement or annulment of assessment and the only requirement is that an enhancement should not be made without giving reasonable opportunity to the appellant. In the instant case, technically though this is not an enhancement since the total quantum of addition sustained after this order shall still be less than the addition done by the AO, opportunities of being heard has been provided to the appellant.”

10. We observe that though the Assessee on the one side, has claimed that Assessee’s duty is to approach and identify the third party investors who would be willing to perform clinical trial activities and thereafter the Wyeth group is entitled to decide qua the appointment of investors and once such a decision is made and the identified third party investors are assigned the job of performing clinical research, the Assessee shall co-ordinate and supervise the work of such identified third party investors

and report the status of work and data collected to the Wyeth group entities. The Assessee on the contrary claimed that the Assessee has not performed any value added activities and the role of the Assessee is in the nature of facilitator and/or conduit between the third party Institutions (Investors) and Wyeth group.

10.1 We also observe that the OECD has also laid down certain guidelines qua mark-up on the cost of the services as reproduced and considered by the Hon'ble Co-ordinate Bench of the Tribunal in the case of Vedanta Limited Vs. ACIT (2020) 522 (Del-Trib.) {ITA No. 12/Del/2020 decided on 21.09.2020} and which are reproduced herein below for brevity and ready reference.

"When an associated enterprise is acting only as an agent or intermediary in the provision of services, it is important in applying the cost-plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the service themselves. In such a case, it may not be appropriate to determine arm's length pricing as a mark-up on the cost of the services but rather on the cost of the agency function itself, or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than would be appropriate for the performance of the services themselves. For example, an associated enterprise may incur the costs of renting advertising space on behalf of group members, costs that

the group members would have incurred directly had they been independent In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function."

10.2 We further observe that in the UNTP Manual, 2017, pass through cost have also been considered and relevant discussion/extract is reproduced herein below for ready reference:

"In some circumstances an MNE group may decide to outsource some services to an independent entity and to use an associated enterprise to act as an agent for the group to pay the accounts and to then allocate the charges to its associated enterprises on an objective basis. These may be called pass through costs. As an agent, its only role may be to pay the independent service provider and to then allocate the total cost of services among group members on an objective basis. In such a case, it may not be appropriate to determine arm's length pricing, as a mark-up on the cost of the outsourced services rather on the costs of the agency function itself and allocate the outsourced costs without mark-up."

11. Considering the aforesaid guidelines and peculiar facts of the case, though we are in agreement with the Ld. Counsel of

the Assessee that if no services have been provided, except playing the role of conduit only, then no mark up would be applicable, however where the Assessee has played an active/main role in identifying and selecting the third parties, making the arrangements, controlling and supervising their work and reporting their working to the principal and **charged for such services from the alleged reimbursement/external costs**, then in our considered opinion mark-up would be necessitated, hence, for the just decision of the case and for substantial justice, we deem it appropriate to remand this issue to the file of Ld. Commissioner for decision afresh by considering the exact role of the Assessee, as to whether the Assessee has played the role of conduit only without discharging any important role for deciding the investors and their roles and activities in performing the work assigned to them, as to whether the amount of alleged reimbursement qua external costs as received from the Wyeth and/or its affiliates, has been paid in entirety to the third parties/investors on behalf of Wyeth group **without any deduction from such reimbursement/external cost**, for rendering specific services such as identifying, co-coordinating, controlling and supervising the clinical research and trials etc.. Thus the issue is remanded to the file of Ld. Commissioner accordingly. Resultantly the **CO No. 82/Mum/2022** filed by the Assessee stands allowed for statistical purposes.

12. Coming to ITA No. 1642/Mum/2021 and CO no. 81/Mum/2022 {AY 2012-13}, in view of our judgment in ITA No. 1644/Mum/2021 and CO No. 82/Mum/2022 {AY 2011-12}, **ITA No. 1642/Mum/2021** is partly allowed whereas **CO no. 81/Mum/2022** {AY 2012-13} is allowed, for statistical purposes in the same terms.

13. In the result, the Appeals and Cross Objections filed by the Revenue Department and the Assessee are allowed in part and full respectively for the statistical purposes.

Order pronounced in the open court on 29-02-2024.

Sd/-
(BR BASKARAN)
Accountant Member
SK, Sr.PS.

Sd/-
(N. K. CHOUDHRY)
Judicial Member

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai