आयकर अपीलीय अधिकरण
मुंबई पीठ "जे", मुंबई
श्री विकास अवस्थी,न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

आ.अ.सं.1622/मुं/2015 (नि.व. 2010-11)
ITA No.1622/MUM/2015 (A.Y.2010-11)

M/s. UPS Express P. Ltd.
Plot No.6-A, Shyam Nagar Off JVLR
Mejas Village, Jogeshwari (E),
Mumbai – 400 060
PAN: AAACU4322N ..... अपीलार्थी /Appellant

बनाम Vs.

The Assistant Commissioner of Income Tax-
11(1)(2), Aaykar Bhavan, Mumbai-400 021 ..... प्रतिवादी/Respondent

आ.अ.सं. 1591/मुं/2015 (नि.व. 2010-11)
ITA No. 1591/MUM/2015 (A.Y.2010-11)

The Assistant Commissioner of Income Tax-
11(1)(2), Aaykar Bhavan, Mumbai-400 021 ..... अपीलार्थी /Appellant

बनाम Vs.

M/s. UPS Express P. Ltd.
Plot No.6-A, Shyam Nagar Off JVLR
Mejas Village, Jogeshwari (E),
Mumbai – 400 060
PAN: AAACU4322N ..... प्रतिवादी/Respondent

C.O.No. 66/MUM/2015 (A.Y.2010-11)
(Arising out of ITA No. 1591/MUM/2015 (A.Y.2010-11)

M/s. UPS Express P. Ltd.
Plot No.6-A, Shyam Nagar Off JVLR
Mejas Village, Jogeshwari (E),
Mumbai – 400 060
PAN: AAACU4322N ..... अपीलार्थी /Appellant

बनाम Vs.

The Assistant Commissioner of Income Tax-11(1)(2), Aaykar Bhavan, Mumbai-400 021 ..... प्रतिवादी/Respondent

Assessee by	:	Shri Nitesh Joshi, Advocate
Revenue by	:	Shri Rignesh Das, Sr. DR

सुनवाई की तिथि/ Date of hearing	:	29.01.2024
घोषणा की तिथि/ Date of pronouncement	:	08.04.2024

आदेश/ **ORDER**

PER VIKAS AWASTHY, JM:

These cross appeals by the Assessee and Revenue are directed against the Assessment Order dated 16.1.2015 passed u/s 144C(1) r.w.s.143(3) of the Income Tax Act, 1961 (in short 'The Act'), for the Assessment Year 2010-11.

ITA No. 1622/Mum/2015 (Assessee's appeal)

2. The Assessee is a joint venture entity (60:40) between UPS International Forwarding Inc. and Jetair Ltd., India. The Assessee is providing transportation services for international inbound and outbound time sensitive parcels and packages in India. The Assessee entered into a 'International Transportation Services Agreement" with UPS Worldwide Forwarding Inc. (UPS WWF). The Assessee commenced its operations of outbound business in January, 2001 and inbound business in April, 2001.

3. During the period relevant to Assessment Year under appeal, the Assessee entered into international transactions with its Associated enterprises (AEs). The TPO vide order dated 9.1.2019 rejected Assessee's benchmarking of international transactions and re-computed arms length price of the transactions and, thus, made certain adjustments. Against the adjustments made, the Assessee filed objections before the DRP. Since, the Assessee failed to get desired relief on the adjustments made by the TPO, from the Dispute Resolution Panel (DRP), hence, the present appeal before

the Tribunal. Apart from the adjustments made by the TPO, there were certain corporate additions made by the Assessing Officer in the draft assessment dated 26.3.2014. The gist of grounds raised in the appeal by the Assessee is as under:

1. *Transfer Pricing adjustment in respect of Technical know-how fees of Rs. 6,65,80,278/- paid by Appellant to its Associated Enterprise ('AE').*
2. *Transfer Pricing adjustment in respect of reimbursement of employee related expenses of Rs. 1,87,39,390/- paid by Appellant to its AE.*
3. *Incorrect rejection of comparable companies.*
4. *Reimbursements of Rs. 16,16,752/- at cost to UPS WWF, towards legal services from DT Exim Private Limited ('Titus'), disallowed under Section 40(a)(i) of the Act.*
5. *Disallowance of depreciation of Rs. 4,98,068/- under Section 32 of the Act on the fixed assets purchased from UPS WWF in Assessment Year 2008-09.*
6. *Levy of interest under Section 234B.*

4. Shri Nitesh Joshi representing the Assessee submits that the Assessee had entered into a Technical License Agreement with United Parcel Services of America Inc. (UPSAI). The Assessee made payments to UPSAI in accordance with the said agreement for provision of technical information, support, application programmes, data communications, user training, etc. The ld. Counsel for the Assessee submitted that adjustment on account of technical Know how was made in Assessment Year 2013-14 on identical set of facts. The agreement in consideration in Assessment Year 2013-14 was the same as is in impugned Assessment Year. The Assessee applied Transaction Net Margin Method (TNMM), as the most appropriate method to benchmark the transaction. The TPO rejected the same and held the ALP to be 'NIL'. The ld. AR referred to the findings of Tribunal in Assessee's own case in ITA No.6318/Mum/2017 for Assessment Year 2013-14, decided on 27.9.2019. The ld. AR pointed that the TPO in the impugned order has also referred to need based test. The Tribunal in Assessee's case in Assessment Year 2018-19 in ITA No.2439/Mum/2022 decided on 16.10.2023 has also considered the aspect of 'need based test' and rejected the same.

4.1 In respect of ground no.2 relating to reimbursement of employees expenses, the Assessee submitted that during the period relevant to Assessment Year under appeal, two foreign employees visited and worked in India, i.e., Mr. Roderick Agustin and Mr. Brian Frank. The details of both the aforesaid employees were furnished to the TPO. He pointed that the visa details of Mr. Roderick Agustin are at page 851 to 854 of the paper book. A perusal of the same would show that it is a business visa (Type BV). Mr. Roderick Agustin had visited India for training. The other employee Mr. Brian Frank had visited India for employment. The details of his passport and visa are at pages 849 to 850 of the paper book. A perusal of the same would show that his visa is Type E, i.e., for employment. He was 'Country Business Development Manager'. The ld. Counsel for the Assessee asserted that the documents on record clearly show that both the aforesaid foreign nationals were in India for business purpose. To further substantiate that the aforementioned foreign nationals were in India for business purpose/employment, the Assessee filed additional evidence, i.e., Form No.16 of Mr. Brian Frank, etc. The ld. Counsel submitted that in Assessment Year 2012-23 and 2013-14, similar expenditure were allowed by the TPO.

4.2 In respect of ground no.3 of appeal, the ld. counsel submits that the assessee has assailed rejection of some of the comparables by the TPO viz., First Flight Courier Ltd., Patel Integrated Logistics Ltd.(segmental), On Dot Courier & Cargo Ltd., and AFL Pvt. Ltd. (Segmental). He submitted that in appeal by the Revenue ground no. 1 & 2 of appeal are against the findings of DRP in holding forex gain as operational income and income arising on account of excess provisions written back, respectively. If the said grounds in appeal by the Revenue are rejected then this ground no.3 in appeal by the assessee would become infructuous. Hence, ground no.3 in Assessee's appeal may be taken up along with the appeal of the Revenue.

4.3 In respect of ground no.4 of appeal relating to disallowance u/s. 40(a)(i) of the Act, the ld. Counsel submits that similar disallowance was

made by the Assessing Officer in the past Assessment Years. The Tribunal restored the issue to Assessing Officer to examine if DT Exim Pvt. Ltd has discharged the tax liability. The Tribunal directed that if the tax liability has been paid by DT Exim Pvt. Ltd., no disallowance u/s. 40 (a)(i) of the Act is warranted.

4.4 In respect of ground no.5 relating to disallowance of depreciation, the ld. Counsel submits that the Assessee had purchased fixed assets from UPF WWF Inc. in period relevant to Assessment Year 2008-09. The Assessing Officer disallowed depreciation on said assets in Assessment Year 2008-09. The issue travelled to the Tribunal in ITA No.3311 and 3447/Mum/2013. The Tribunal vide order dated 27.2.2015 allowed Assesse's claim of depreciation. The impugned assessment order is subsequent assessment, hence, consequent to the relief allowed by the Tribunal in Assessment Year 2008-09, the depreciation is to be allowed in the impugned Assessment Year as well.

4.5 In respect of ground no.6 relating to the levy of interest u/s. 234B, the ld. Counsel submitted that it is consequential.

5. Per contra, Shri Rignesh Das, representing the Department strongly defended the assessment order and the findings of the DRP. However, the learned Departmental Representative (in short 'ld. DR') fairly submitted that the issue relating to technical know how and Assessee's claim of depreciation on assets purchased from UPS WWF have already been considered by the Tribunal in Assessee's own case. With regard to reimbursement of employees expenses, the ld. DR submitted that if the additional evidences are accepted, the issue can be restored to the file of Assessing Officer for examining additional evidences.

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have considered the decisions

and the documents referred by the ld. Counsel for the Assessee during the course of hearing.

7. The first issue raised by the Assessee in appeal is with respect to adjustment on account of technical know-how fees paid by the Assessee to AE in pursuance to Technical License Agreement. We find that similar addition in respect of technical know-how fees was made in Assessment Year 2013-14. The Co-ordinate Bench in Assessee's appeal in ITA No.6318/Mum/2017 (supra) after recording the facts and considering Technical License Agreement held as under:

> *"6. We have heard rival submissions. We find that the Id. DRP had merely followed the decision taken by them in A. Y (2010 - 11) and 2012-13 in assessee's own case. Against the said orders of the Id. DRP, assessee had preferred appeals before us and the same are pending to be heard. We find that the appeal for A.Y.2013-14 alone was taken up for hearing as it was a Stay granted matter, on out of turn basis. Hence, this issue though recurring in nature, needs to be adjudicated for A.Y.2013-14. We find that the preliminary issue that is to be decided in the instant case is whether the Id. TPO was justified in determining the ALP of technical knowhow fees at Rs. Nil without following the benchmarking analysis provided in any one of the prescribed methods as provided in the statute read with relevant rules thereon. In this regard, we find that assessee had carried out benchmarking analysis by applying TNMM to substantiate that the transaction for payment of technical knowhow fees was included with arm's length principle under independent transfer pricing regulations. The details of benchmarking carried out by the assessee have been explained hereinabove. The Id. TPO however, ignored the benchmarking analysis carried out by the assessee and determined the arm's length principle for payment of technical knowhow fees at Rs. Nil by not following any of the methods prescribed u/s.92C(1) of the Act read with Rule 10B of the Rules. Rule 10B of Income Tax Rules, 1962 (for short "the Rules"), provides the mechanism for determination of arm's length price under the aforesaid methods prescribed under section 92C of the Act. If the Ld AO in course of assessment proceedings finds that the assessee has entered into international transactions with its AE, he may with the previous approval of the authority concerned make a reference to the Ld TPO under section 92CA(1) of the Act to compute the arm's length price of the international transaction by applying any of the methods prescribed under section 92C of the Act. After receiving such a reference from the Ld AO, the Ld TPO is required to determine the arm's length price of the international transaction as per the provisions contained under section 92C and 92CA of the Act read with relevant rules. Thus, as could be seen from the reading of the aforesaid provisions, the duty of the Ld TPO is restricted only to the determination of arm's length price of an international transaction between two related parties by applying any of the methods prescribed under section 92C of the Act r/w 10B of the Rules. Thus, there is no provision under the Act empowering the Ld TPO to determine the arm's length price on estimation basis, that too, by entertaining doubts with*

regard to the business expediency of the payment and in the process stepping into the shoes of the Ld AO for making disallowance under section 37(1) of the Act. This, in our considered opinion, it is not in conformity with the statutory provision, hence, unacceptable. The Ld TPO is duty bound to determine the arm's length price of the international transaction by adopting one of the method prescribed under the statute and cannot deviate from the restrictions / conditions imposed under the statute. The Hon'ble Jurisdictional High Court in CIT v/s Johnson & Johnson Ltd., ITA No.1030/2014, dated 7th March 2017, while dealing with identical issue of determination of arm's length price of royalty by resorting to estimation by the Ld TPO had held as under:-

> *"(d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical knowhow has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know how royalty by the TPO was ad-hoc and arbitrary as held by the CIT(A) and the Tribunal."*

6.1. We find that the Id. TPO having not determined the ALP in conformity with the statutory provision and in the process having failed to demonstrate that ALP shown by the assessee is incorrect, the contentions of the Id. DR to restore the issue to the file of the Id. TPO for fresh determination of the ALP, is unacceptable. Respectfully following the aforesaid decision, we hold that there is no provision made in the statute empowering the Id. TPO for determining the ALP of a particular international transaction at Nil without resorting to any methods prescribed. Since, the relief is granted to the assessee on the preliminary issue of the Id. TPO not following the prescribed methods as provided in the statute for determination of ALP, the other arguments advanced by the Id. AR and the Id. DR on merits of ALP adjustment are left open and not adjudicated herein. Accordingly, the ground Nos. 1.1 to 1.3 raised by the assessee are allowed."

[Emphasized by us]

A perusal of above findings of the Co-ordinate Bench, would show that the DRP decided the issue in Assessment Year 2013-14 following the decision taken in Assessment Year 2010-11. Both the sides are unanimous in stating that the facts in Assessment Year 2010-11 are identical to Assessment Year 2013-14. The TPO has rejected Assessee's bench marking and has questioned the benefits accruing to the Assessee. The TPO finally quantified ALP of the services at NIL. It is no more res integra that the TPO cannot ask for need-benefit-test. The TPO is only required to determine ALP of the

transaction. Thus, in light of above facts we have no hesitation in allowing ground no.1 of appeal for parity of reasons.

8. The ground no.2 of appeal is with regard to transfer pricing adjustments qua reimbursement of employees cost. The Assessee reimbursed Rs.1,87,39,390/- to its AE on secondment of employees. A perusal of TP order (Para 13.3) shows that the only document the Assessee has purportedly furnished before the TPO is a copy of invoice of Hotel Marriot, Chennai. The TPO after examining the said invoice commented that from said invoice it cannot be understood that Mr. Roderick had visited India for the purpose of Assessee. On the contrary, the ld. AR of the Assessee brought to our notice that the Assessee had furnished copy of passport and visa of Mr. Roderick Agustin and Mr. Brian Frank to show that the aforesaid persons had visited India on business visa/employment visa. The Assessee has also placed on record Form 16 of Mr. Brian Frank indicating payments made from 1.6.2009 to 31.3.2010 that is relevant to the Assessment Year 2010-11. The Assessee has furnished additional evidences to substantiate that the aforesaid person had infact worked for the Assessee in India and the payments/reimbursements are in connection with their services rendered in India. The additional evidences filed by Assessee vide application dated 10.4.2023 are taken on record. Taking into consideration the fact, that the Assessee had furnished visa/passport details of both the aforesaid employees which were not considered by the TPO and additional evidence placed on record before the Tribunal, we deem it appropriate to restore this issue to the file of Assessing Officer/TPO for deciding the issue afresh after considering the documents, in accordance with law. Thus ground no.2 is allowed for statistical purposes.

9. The ground no.3 of appeal is inter-related to ground no.1 & 2 in the appeal of the Revenue. Hence, the aforesaid ground will be taken up alongwith the appeal of Revenue.

10. Ground No.4 of appeal is with regard to disallowance u/s 40 (a)(i) of the Act in respect of payments made for legal services provided by Titus India. The Assessee made payment to UPS WWF in respect of legal services provided by Titus India. The contention of the Assessee is that the payments are made through UPS WWF for administrative convenience. We find that disallowance in respect to similar payments made to Titus India was made in Assessment Year 2008-09. The issue travelled to the Tribunal in ITA No.3311/Mum/2013 (supra). The Coordinate Bench deleted the disallowance by observing as under:

> *"13. With regard to disallowance of Rs. 36,69,834 paid to the UPSWWF for services rendered by Titus, we Kurd that assessee has obtained legal services, payment for which was initially made by UPSWWE and were later on reimbursed by assessee. The AO observed that UPSWWF is only facilitator. The payment so made is subject to TDS as per Section 195 r.w.s.9(1)(vii) and Explanation to section 9(2). Accordingly, disallowance was made us. 40(a)(i). By the impugned order, the CIT(A) confirmed the disallowance.*
>
> *14. It was also argued by ld. AR that Titus being a resident law firm, is liable to tax in India. In view of proviso to Section 40(a)(i), in case of tax has been paid by payee, no disallowance is warranted in the hands of the payer u/s.40(a)(i) of the Act.*
>
> *15. We have considered rival contentions and found that invoices raised by UPSWWF on assessee can be matched back-to-back with the invoices raised by Titus, the payment so made was in the nature of reimbursement. However, since payment was made to resident legal firm, same was subject to TDS and lable for disallowance u/s.40(a)(i). However, keeping in view the purpose behind insertion of second proviso by Finance Act, 2012 in Section 40(a)(ia), it can be said to be declaratory and curative in nature and therefore, it should be given retrospective effect from 1-4-2005, being the date from which sub clause (ia) of section 40(a) was inserted by Finance (No.1) Act, 2004. This view is propounded by various benches of the Tribunal which are as under*
>
> *(1) Dr. Adi R. Nazir v. ACIT [IT Appeal No. 10556 (Mum.) of 2011, dated 26-11-2014];*
> *(ii) Dy. CIT v. Ananda Marakala [2014] 48 taxmann.com 402/150 ITD 323 (Bang), and*
> *(iii) Rajeev Kumar Agarwal v. Addl. CIT [2014] 45 taxmann.com 555/149 ITD 363 (Agra)*
>
> *16. In view of the above discussion, we restore the matter back to the file of AO to verify as to whether the Titus has paid tax on the impugned payments by incorporating the same in their respective income. If the AO finds that the Titus has already paid tax by including such payments in its income, no further tax can be collected from assessee which amounts to double taxation and no*

disallowance can be made in the hands of He assessee u/s.40(a)(in). We direct accordingly."

The Revenue has failed to rebut aforesaid findings of the Coordinate Bench or to show any material distinguishing the facts in impugned Assessment Year. Hence, following the decision of Co-ordinate Bench, ground no.4 of appeal is allowed for statistical purpose, for parity of reasons.

11. The ground no.5 of appeal is with regard to disallowance of depreciation in respect of fixed assets purchased from UPF WWF in the period relevant to Assessment Year 2008-09. We find that in Assessment Year 2008-09, the Coordinate Bench in ITA No.3311/Mum/2013 (supra) allowed Assessee's claim of depreciation by observing as under:

"17. With regard to disallowance of depreciation on assets imported by assessee in the form of computers, scanners, printers from UPSWWF of Rs.42,98,029/-, the AO disallowed assessee's claim of depreciation by observing that assessee has not furnished any evidence in the form of customs clearance certificate, bill of entry etc. As per AO it is not verifiable as to whether the goods have been actually imported by assessee and payment has been made to UPSWWF. By the impugned order, the CIT(A) confirmed the action of the AO, against which assessee is in further appeal before us.

18. Ld. AR drew our attention to the statement of facts evidencing furnishing of documents discussed by the AO. We found that payment has been made by assessee to the custom authority while importing the assets. The payment for purchase of computers so made has been accepted by TPO. We, therefore, do not find any merit in the action of the lower authorities for declining the claim of depreciation on the assets so imported."

Once the assets enter the Block and depreciation has been allowed in the preceding Assessment Years, depreciation has to be allowed on said assets in the subsequent Assessment Year. In light of findings of the Tribunal in Assessment Year 2008-09, the Assessee is eligible to claim depreciation on the said assets in impugned Assessment Year. The ground no.5 of appeal is thus, allowed.

12. In ground no.6 of appeal, the Assessee has assailed levy of interest u/s 234B of the Act. Charging of interest u/s 234B is consequential and

mandatory. Therefore, we find no merit in ground no.6 of appeal, the same is dismissed.

ITA No. 1591/Mum/2015 (Department's appeal)

13. The Department has assailed the impugned assessment order on following grounds:

1. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in concluding that forex gains are operational in nature without taking into account the nature and details of the forex gains earned. ?*
2. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in holding the income arising on account of excess provisions written back as regular accounting system without appreciating the fact that that since this income was not forming part of operating income for the comparables, it cannot be taken part of operating income of the assessee as well?*
3. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in directing the TPO/AO to delete the TP adjustment made in respect of the two reimbursement amount on account of (a) Stationery and Printing Rs.70,70,858/- and (b) Scanning and Digital of Customs related documents Rs.9,37,058/ without appreciating that the DRP had admitted and relied upon fresh evidences which were submitted only during the course of DRP proceedings, without providing an opportunity to the Assessing Officer to examine them and to offer comments thereon?*
4. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in directing the assessing officer to delete the addition of Rs.61,27,515/- made by the assessing officer u / s 40(a)(i) of the IT Act, without appreciating the fact that the assessee and M / s RMS were in contractual relationship?*
5. *Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP has erred in holding that the payment made to M / s RMS as professional charges cannot be taxable in India due to its non-resident status without appreciating the fact that M / s RMS was appointed as a collection vendor?*

14. The learned Departmental Representative submits that the DRP has erred in holding forex gains as operational income. The Assessee has foreign exchange gain of Rs.3,90,01,527/- during the relevant period. The ld. DR

supporting the findings of the TPO submitted that foreign exchange gain is not an operating income.

15. Per contra, the ld. Counsel vehemently defending the findings of DRP on this issue prayed for rejecting the ground raised by the Revenue. To support his contention that foreign exchange gains are in the nature of operating income, he placed reliance on following decisions:

- PCIT Vs. Rampgreen Solutions Pvt Ltd. in ITA No. 340/2016 decided on 27.5.2016 by Hon'ble Delhi High Court; and
- PCIT Vs. Rolls Royce India Pvt. in ITA No.419/2016 decided on 23.10.2017 by Hon'ble Delhi High Court.

The ld. Counsel further pointed that in the subsequent Assessment Years, i.e., Assessment Year 2012-13 and 2013-14 and in the immediate preceding Assessment Year i.e., Assessment Year 2009-10, the TPO has accepted foreign exchange loss as operating in nature. Once foreign exchange loss is accepted as operating in nature, the same treatment should be given to the foreign exchange gain in the impugned Assessment Year.

16. Both sides heard. The TPO in the impugned Assessment Year has held foreign exchange gain as non-operating income. The ld. AR has pointed that in immediate preceding Assessment Year, i.e., 2009-10 and in subsequent Assessment Years i.e., 2012-13 and 2013-14, TPO has accepted foreign exchange loss as operating in nature. This fact has not been disputed by the Department. The Hon'ble Delhi High Court in the case of PCIT Vs. Rampgreen Solutions Pvt. Ltd. (supra) has held that foreign exchange fluctuation losses are part of operating expenses and to hold so, the Hon'ble High Court in turn placed reliance on the decision in case of CIT Vs. Woodward Governor India Pvt. Ltd. [312 ITR 254(SC)] . We find no merits in ground no.1 of appeal hence, the same is dismissed.

17. In ground no.2 of appeal, the Revenue has assailed the findings of DRP with respect to excess provisions written back. The ld. DR submits that provisions written back is not part of operating income.

18. Per contra, the Ld. Counsel placed reliance on decision in case of PCIT Vs. Petro Araldite Pvt. Ltd. [96 taxmann.com 385 (Bombay)] and PCIT Vs. Tetra Pak India Pvt. Ltd. in ITA No.876 of 2018 decided by Hon'ble Bombay High Court decided on 27.9.2023 and strongly supported the findings of DRP on this issue.

19. We find that the DRP has allowed excess provisions written back by observing as under:

> *"4. With reference to the next item of excess provisions written back of Rs. 51,74,733 that is in dispute, the TPO had disallowed it on the ground that it did not relate to the period under consideration. However, here again it is seen that the normal accounting practice is that at the time of closing of the books certain expenses are booked as provisions on an estimated basis and once the relatable expenses get crystallized, then the appropriate excess provision is written back or the shortages booked, as the case may be. That being a regular accounting system not just the assessee but the comparables as well, would be passing similar entries in their books. As long as these provisions were on revenue account they would remain operational in nature and the TPO is found to be not justified in excluding the same while computing the net profit margin of the assessee. The AO / TPO are accordingly directed not to exclude excess provisions written back in the benchmarking exercise."*

20. In the case of PCIT Vs. Petro Araldite (P) Ltd. (supra) one of the questions for consideration before the Hon'ble High Court was-

> *"(c) Whether on the facts and circumstances of the case and in law, the Tribunal erred in directing that the provisions pertaining to earlier year but written back during the current year be treated as operational income of the current year without appreciating that the benchmarking process for transfer pricing purposes has to be based only on current year's operational profits?"*

The Hon'ble High Court dismissed the said question by observing as under:

> *"5. Re Question(c):-*
> (*i) The impugned order of the Tribunal has upheld the order of the DRP that the provisions pertaining to the earlier years written back in the subject Assessment Year would be in the nature of operating income. Thus, not exclude-able while determining the operating profits. The impugned order of the Tribunal places reliance upon the orders of is Co-ordinate Bench in Income Tax Appeal Nos.*

2414/M/2013 in the case of Asstt. CIT v. Zee Entertainment Enterprises (P.) Ltd. [2014] 51 taxmann.com 231 (Mum. - Trib.) - wherein it was held that provisions of writing back were to be considered as operating revenue, if an uniform approach is adopted unless of course, any contrary material is brought on record.

(ii) The aforesaid decision of the Tribunal in Zee Entertainment Enterprises (P.) Ltd's case (supra) was appealed to this Court being Income Tax Appeal No.205 of 2015 - (CIT v. Zee Entertainment Enterprises (P.) Ltd.,). Moreover, it appears that the aforesaid issue had not been appealed to this Court by the Revenue. In any case, above Appeal of the Revenue has not been admitted on this issue.

(iii) Moreover, the Revenue has not even made any attempt to point out why the reasoning of the Tribunal in Zee Entertainment Enterprises (P.) Ltd.'s case (supra) was incorrect or that it was not applicable to the present facts.

(iv) In view of the above, the question as framed does not give rise to any substantial question of law. Thus, not entertained."

The Hon'ble Jurisdictional High Court in the case of Tetra pack (supra)taking similar view held, liability written back and doubtful debts written back are inextricably linked with the business operations, hence, should be considered as operating income. In view of the facts of the case and the aforesaid decisions, we find no merit in the ground of appeal of the Revenue, hence dismissed.

21. In ground no.3 of the appeal, the Revenue has assailed the TP adjustment deleted by the DRP in respect to reimbursement of a) Stationery and Printing Rs.70,70,858/-; and b) Scanning and Digital Storage of customs related documents Rs.9,37,058/-. The ld. DR submits that the DRP decided the issue on the basis of additional evidences filed by the Assessee.

22. Per contra, the ld. Counsel for the Assessee pointed that the Department has made factually incorrect statement in ground no.3 of appeal. No additional evidences were filed by the Assessee before the DRP. The DRP has decided the issue considering the documents already on record.

23. We have heard the submissions made by both the sides. The contention of Assessee that no additional evidences were filed by the

Assessee before the DRP, whereas, Department contends that DRP has deleted the addition on the basis of fresh evidences. We have examined the directions of the DRP. The issue is discussed in para 12 of the directions. From perusal of findings of the DRP it does not emanate that any fresh evidence was considered by the DRP to decide the issue in hand. The DRP ostensibly decided the issue on the basis of documents already on record. A specific query was raised by the Bench as to what were the additional evidences furnished by the Assessee before the DRP. To this the ld. DR was unable to point out the alleged additional evidence. Hence, we are unable to accept the allegation of the Department that the issue was decided in favour of Assessee on the basis of additional evidences. Apart from above no other argument was advanced by the Department. In light of above, we hold that ground no.3 of appeal is devoid of any merit.

24. In ground no.3 of appeal by the Assessee, the Assessee has assailed exclusion of comparables by the TPO. The ld. Counsel for the Assessee made statement at Bar that if ground no.2 & 3 in Department's appeal are dismissed, the ground no.3 in Assessee's appeal would become infructuous as there would be no transfer pricing adjustment. The ld. Counsel to support his submissions placed on record a chart tabulating the effect of DRP directions w.r.t. Provision written back, sundry income (reimbursement of expenditure) on T.P adjustment. A perusal of same shows that ever after exclusion of comparable companies the margins are within ±5% range hence, no T.P adjustment is required. Ergo, ground no.3 in Assessee's appeal is dismissed as infructuous.

25. The ground no.4 & 5 of Department's appeal relates to disallowance made u/s.40(a)(i) in respect of payment made to M/s. Receivable Management Service, USA (RMS). The Assessee had entered into an agreement with 3 rd party vendor (M/s. RMS) for collection of dues from the overseas debtors of the Assessee. For administrative convenience, AE of the Assessee, i.e., UPS WWF initially made payment to M/s. RMS and thereafter payments made are reimbursed by the Assessee to UPS WWF. The said

reimbursements are on cost to cost, without any mark-up. The Assessing Officer disallowed payment made u/s 40(a)(i) on the presumption that AE was only a conduit/facilitator in this payment made to the non-resident and the Assessee is obliged to withhold tax u/s. 195 r.w.s 9(1)(vii) and Explanation to Section 9(2) of the Act. When the Assessee filed objection before the DRP, the DRP records that M/s. RMS is a non-resident and it is protected by Article 12(4) of India US DTAA. Payments so made to M/s. RMS are taxable under the head 'Business Profits', since M/s. RMS does not have PE in India, no part of its income from the services rendered overseas would be taxable in India. Once the receipts are not chargeable to tax in India, there could be no liability on the Assessee to withhold tax on the payment made to M/s. RMS through its AE. We find that identical issue was considered by the Co-ordinate Bench in Assessment Year 2008-09 (supra). The Co-ordinate Bench after examining the facts of the case and various decisions held that no disallowance u/s. 40(a)(i) of the Act is warranted in respect of payments made to M/s. RMS. Extract of the findings of the Tribunal on this issue are as under:

> *"12. We have considered rival contentions and gone through the orders of the lower authorities. From the record, we found that invoices issued by UPSWWF on assessee are matched back to back with the invoices raised by the RMS. It was a clear case of reimbursement without any profit element. We also found that there was mere provision of services which is not enough for bringing to same in the tax net. The services should also make available technical knowledge skill, experience, know or process. If the assessee would have made direct payments to RMS for debtors collection services it does not fall within the ambit of Royalties or Fees for Technical Services under the Act as well as under Article 13 of the India-USA Tax Treaty and hence provisions of Section 195 does not get attracted. Accordingly, we do not find any merit in the disallowance made by the AO u/s.40(a)(i) of the Act."*

No contrary material is placed on record by the Department hence, we see no reason to take a different view. Ground no.4 & 5 of appeal are thus dismissed.

CO-66/M/2015 (Arising out of ITA No.1591/Mum/2015 for Assessment Year 2010-11)

26. The Assessee has filed cross objections in support of the findings of the AO/DRP on the following grounds:

1. Grounds related to Transfer Pricing adjustment
2. Reimbursement of payment for Debtor Collection Services from Receivable Management Services (RMS)

27. The findings of the DRP on TP adjustments in respect to sundry income Rs.7,85,651/- and reimbursement of payment made to M/s. RMS have been upheld by us while deciding the appeal of Department. Since, both these issues raised in the appeal by the Department were dismissed, the cross objections filed by the Assessee have become infructuous. Thus, the cross objection is dismissed, as such.

28. To sum up, appeal of the Assessee is partly allowed, the appeal of Revenue and cross objections by the Assessee are dismissed.

Order pronounced in the open court on Monday the 08th day of April, 2024.

Sd./-	Sd./-
(GAGAN GOYAL)	(VIKAS AWASTHY)
लेखाकार सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 08.04.2024
Mini, Sr. PS

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय. अपी. अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai