

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I" DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI NARINDER KUMAR, JUDICIAL MEMBER**

I.T.A. No.2015/DEL/2022
Assessment Year 2013-14

Borgwarner Emissions Systems India Private Ltd., 15A/20, WEA Main Azmal Khan Road, Karol Bagh, Central Delhi – 110 005	Vs.	Deputy Commissioner of Income Tax, Circle-4(2) New Delhi
TAN/PAN: AABCE7232N (Appellant)		(Respondent)

Appellant by:	Shri Rohit Tiwari, Advocate		
Respondent by:	Shri Rajesh Kumar, CIT(DR)		
Date of hearing:	14	08	2024
Date of pronouncement:	29	08	2024

ORDER

PER : Narinder Kumar, Judicial Member.

Assessee - a private Limited company- has challenged order dated 28.07.2022 passed by Assessing Officer, Circle 4(2), Delhi.

2. Matter pertains to the assessment year 2013-14. Issues involved have arisen on application of Transfer Pricing provisions as available under the Income Tax Act, 1961 (hereinafter referred to as the Act).

Vide impugned order, Assessing Officer has assessed total income of the assessee in respect of assessment year 2013-14. At Rs.29,67,93,105/-by making following two additions:

(a) Difference in TDS reconciliation: Rs. 2,297/-.

(b) Adjustment proposed by TPO: Rs.9,09,43,495/-

In addition thereto, directions were issued to charge interest under sections 234Aa, 234B, 234C and 234D. Even penalty proceedings under section 271(1)(c) were also directed to be initiated separately.

The two additions pertain to international transactions regarding:

- (i) payment for Business support service (BSS);
- (ii) Payment for Technical support service (TSS); and
- (iii) Royalty payment.

The issues involved herein are:

- (a) Whether any Technical Support Service was availed of by the assessee from its AE(s) ?
- (b) Whether any Business Support Service was availed of by the assessee from its AE(s) ?
- (c) Whether the transactions were to be treated while adopting aggregative approach or segregative approach?
- (d) Whether transaction pertaining to Royalty payment was intertwined with other transactions?
- (e) Whether the approach adopted in the previous years in the case of the assessee in respect of said transactions was required to be followed or could be deviated for any reason?
- (f) Which of the prescribed methods needed to be applied

for determination of arm's length price?

- (g) Whether Dispute Resolution Panel conducted proceedings in accordance with law and as per the directions issued by the Co-ordinate Bench of Appellate Tribunal in the first round of litigation?

3. It may be mentioned here that this is second round of litigation between the parties, before this Appellate Tribunal.

4. Initially, order under section 92CA(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was passed on 18.12.2016. In pursuance to the directions issued by Learned Dispute Resolution Panel-1, New Delhi, (hereinafter referred to as DRP-1), on 13.9.2017, assessment order under section 143(3) of the Act was passed.

The Appellate Tribunal, vide order dated 4.9.2018, set aside the assessment order dated 13.9.2017 and restored the matter to the files of TPO/AO in respect of all the three issues, which had led to making of adjustment.

Consequently, vide letter dated 18.2.2019, fresh reference under section 92CA(1) of the Act came to be issued by ACIT, Circle 5(1), New Delhi.

Then, fresh order under section 92CA(3) of the Act was passed on 31.12.2020, thereby making final adjustments as regards the assessee, as under:

1. Payment for business support service: **Rs. 4,08,06,578/-;**
2. Payment for Technical support service: **Rs.1,73,61,018/-;**
3. Royalty payment: **Rs.3,27,73,602/-.**

In this manner, a total adjustment of Rs.9,09,41,198/-came to be made.

5. On 24.9.2021, a show cause notice was served upon the assessee. The assessee submitted its response thereto. Vide Draft Assessment order dated 27.9.2021, the adjustment of the abovesaid amount was proposed, in addition to initiation of penalty proceedings.

6. Against the proposed adjustment, the assessee submitted objections before DRP. Vide order dated 7.6.2022, DRP upheld action on account of Arm's Length Price adjustment to the tune of Rs.9,09,41,198/-.

Thereafter, the Transfer Pricing Officer observed that no changes were required, as per directions issued by DRP. That is how, vide order dated 19.7.2022, the TPO gave effect to the directions issued by DRP.

Ultimately, vide impugned final assessment order dated 28.7.2022, adjustment of Rs.9,09,41,198/-came to be added to the total income of the assessee, in addition to directions for initiation of penalty proceedings because of concealment of income by the assessee.

Income tax demand of Rs. 4,64,10,920, including amount of interest under section 234B and 234C has been raised against the assessee-appellant.

Hence, this appeal.

7. Arguments heard. File perused.

8. The assessee-appellant-company claims that it is engaged in manufacturing and marketing of Exhaust Gas Recirculation systems

(in short “EGR” systems) and its components for use by automotive industry.

Registered office of the appellant company is in New Delhi; It has manufacturing facility at Manesar (Haryana).

9. Assessee also claims to have availed of Technical Support Services (hereinafter referred to as “TSS”) and Business Support Services (hereinafter referred to as “BSS”) from its AEs- BorgWarner Emission Systems Spain S.L. and BorgWarner Emission Systems of Michigan Inc., USA.

It further claims to be providing technical support services to its customers in relation to EGR systems and its components.

TSS

Assessee claims that there was need for said services i.e.

- application Engineering services;
- prototypes of products being developed by BorgWarner India;
- Manufacturing engineering services;
- Quality control services, and;
- Other services as were to be requested by BorgWarner India.

Information as regards 7 TSS said to have been provided by AEs in USA and Spain, during the relevant year, has been made available at page 573 of the Paper Book-I.

As per column no.2 of this table, in the Application Engineering Department, Engineering Signoff (ESO) for New

Programs; Engineering Signoff for changes in Existing Programs; Global Product Manager Support and Global Chief Engineer Support were required.

3 TSS are stated to have been provided by the AEs in USA and Spain, as according to the assessee, there was need for said services as described in column No.3 of said table. Column No.2 depicts that in the Manufacturing Engineering Department, such services were provided as regards new project reviews; support for furnace and Manufacturing Engineering Signoff.

Available at page 664 & 665 (PB-II) is Annexure 5, which depicts names of employees, with their designation, period of employment, and salary. This pertains to the FY 2012-13.

BSS

On the point of BSS, Ld. TPO observed that the assessee had included a number of services, for which support from AE was alleged to have been received. As observed by Ld. TPO, most of said services pertained to Marketing and some of the services pertained to Finance.

Ld. TPO further observed that the assessee had failed to furnish any credible evidence about requisitioning said service or actually obtaining the same.

Ld. TPO further observed that when the assessee made payment of Rs.4.08 crores towards same service in the financial year 2012-13, receipt of highly specified advice from the AE were expected, but the assessee led evidence only about travel plans of some executives. In other words, the evidence led by the assessee did not establish that any specific advice was sought by the assessee from the AE.

In para 20 of the order Ld. TPO observed that the assessee had failed to file any tangible evidence regarding service and that no enquiry was conducted as regards commercial expediency of the assessee's purported transaction, but the

enquiry was conducted only to find out whether these transactions actually existed. Ultimately, it was observed that the assessee had failed to file any tangible evidence of the services, to hold that the value had to be determined at NIL.

Ultimately, Ld. TPO held that the assessee had failed to prove rendering of actual service in the form of BSS. It was further observed that when the buyer is not getting any real service it would not have paid anything if it was not controlled by the payee.

10. As regards TSS, having regard to the terms and conditions of the two agreements, Ld. TPO rightly observed that the assessee had right to receive Know How and technical training as part of the license agreement with its AE, for which it paid royalty, but the assessee failed to prove that it required additional Know How/training to run its business and for that assessee paid additional amount of Rs.1,73,61,018/- as TSS fee.

11. Ultimately Ld. TPO concluded that in the given facts of the case, when the buyer was not getting any real service, the assessee would not have paid anything if it was not controlled by the payee.

Arm's Length Price (ALP) & Adjustment made

12. Having regard to the provisions of Rule 10AB, the arm's length price of the purported service (TSS) was held to be NIL and adjustment of Rs.1,73,63,018/- was made on this account.

As per Rule 10AB, arm's length price of BSS was held to be NIL, and thus an adjustment of Rs. 4,08,06,578/- was made as regards said service.

13. Record reveals that on proceedings conducted after remand, TPO observed that the assessee had failed to prove that any Technical Support Service or Business Support Service was actually rendered by the AE to the assessee. Ld. DRP upheld this view.

Contentions

14. Learned AR for the appellant has submitted that in terms of the directions issued by the Appellate Tribunal, the assessee filed

additional evidence before Ld. DRP, for benchmarking, but said additional evidence has been rejected, without being properly considered.

It has been argued on behalf of the assessee-appellant that there was difference in the Technical Support Services received under the two agreements. In this regard, reference has also been para 3.4 of the reply submitted by the assessee to the show cause notice issued by the TPO.

Learned AR for the appellant has submitted that it is not a case of duplicate services. He has pointed out that under the Licencing Agreement, the licensor was allowed to provide a reasonable or limited support of 20 man days in a year and to the extent of manufacturing and sale of parts only.

As regards services under Engineering Agreement subsequently entered into between the assessee and the AE, it has been submitted on behalf of the assessee that that as per said agreement the AEs agreed to assist the company in manufacturing of EGR systems and components as per specifications provided by the customer, notwithstanding the limited support of 20 man days in a year.

Learned AR for the assessee has urged that Technical Support Services and Business Support Services were actually received by the assessee. In support of this contention, our attention has been drawn to pages 664 (Paper Book- II) and pages 954 to 1083 (PB-III); pages 582 to 590 (PB-1); pages 592 to 649 (PB-1).

As to the details of new products and their sales value, reliance has been placed on the list -page 372 (PB-I), whereas about the nature of services received, need for said services, and the

benefits received therefrom, reliance has been placed on the document available at page 573 (PB-1).

Learned AR has pointed out that as per para 3.4 of response of the assessee to the show cause notice issued by the TPO, it was submitted that details of only four projects were provided by the assessee to the TPO, on sample basis, expressing further that list of all projects undertaken by the assessee would be submitted. In this regard, reliance has been placed on the sample invoices available at page 1480 and 1481 (PB-III). In this regard, attention has been drawn to copy of said list Annexure 2.

Business Support Service

15. Learned AR for the appellant has submitted that Service Agreements were arrived at between the assessee and AEs to avail of assistance in product pricing, supply chain management, sales support, business expansion strategies and issues relating to product warrant and quality etc.

As regards exact nature of such services received, need for said services and benefits received on said services, reliance has been placed on pages 574 to 579(PB-I).

In proof of the contention that said services were actually rendered, reliance has been placed on evidence said to contain in pages 1083 to 1193 (PB-III).

One of the contentions raised on behalf of the assessee is that that margins of the assessee were continuously increasing and having regard to the healthy margins, and as such benefits available to the assessee under the law could not be denied to the assessee.

16. On the other hand, Learned DR has vehemently contended that no Technical or Business Support Services were actually received by the appellant, and as such the authorities below have rightly rejected the claim of the appellant for the reasons recorded in the respective orders.

Ld. DR has also contended that in view of the Licence agreement already arrived at between the assessee and its AE(s), there was no need at all for entering into fresh Engineering agreement as regards said services.

It has also been contended that the assessee did not produce on record any invoice to prove that any of said services was ever requested or rendered. As regards the emails filed on behalf of the assessee, the contention is that none of the emails pertains to any request for any such service.

Discussion

17. As noticed above, the first round of litigation between the parties came to an end vide order dated 4.9.2018 passed by Appellate Tribunal in ITA No.6840/Del/2017. Vide said order, ground No.3 of the appeal challenging addition of Rs.9,55,07,159/- and ground No.2 were set aside and matter was remanded to the files of Learned TPO/Assessing Officer to determine ALP of the impugned 3 international transactions, whereas grounds No.1,4 and 5, which were general in nature, were dismissed.

Admittedly, while restoring the matters, certain directions were issued by the Appellate Tribunal to Ld. TPO/AO.

In the first round of litigation, the Appellate Tribunal noticed that certain additional evidence was submitted on behalf of the assessee before Ld. DRP, but there was no finding recorded by Ld.

DRP to suggest if said additional evidence was or was not considered.

Evidence on Technical Support Services (TSS) & Business Support Services-consideration thereof

18. So far as transactions pertaining to Technical Support Services (TSS) are concerned, on remand of the matter, Learned TPO observed in para 12 of the order dated 31.12.2020 that not only these services were found to be of duplicate nature, having been already covered by the Royalty agreement), even there was no evidence of requisition of or actual availing of these services.

Emails

19. While referring to the material in the form of copies of emails submitted by the assessee, Learned TPO observed that majority of the emails submitted pertained to the subsequent period i.e. beyond the relevant financial year 2012-13.

While referring to the agreement made available by the assessee for TSS, Learned TPO observed that as per its terms, TSS were to be provided on written request, but, the assessee did not lead any evidence that any written request was made for providing TSS.

Learned DRP upheld abovesaid observations.

Ld. DRP also upheld another observation by Ld. TPO that few emails received during the relevant previous year did not show that same were received from the purported service provider or any technical guideline provider.

As regards copies of emails, which form part of Paper Book-III, Ld. TPO observed that few emails did not appear to have been

received from the purported service provider.

On perusal of the record, particularly copies of emails starting from page 956 to 1061 and 1065-66 (PB-III), it transpires that these are copies of emails sent in the years 2016 or 2017, whereby copies of certain previous emails i.e. of the years 2012-13 are purported to have been communicated.

This shows that evidence as regards emails of the years 2012-13 is of secondary nature. Best or primary evidence regarding said emails of the years 2012-13 was not led, as rightly submitted by Learned DR.

Copies of emails at page 1063-64 and 1068-69 are duplicates.

Copies of certain emails available subsequent thereto are of the FY 2012-13.

Available at page 1083-84 (PB-III) is summary of emails said to have been exchanged between the assessee and its AE(s) as regards BSS.

Copy of email available at page 1085-96 (PB-III) pertains to certain refunds relating to the year 2012 as regards Forecasted Cash Tax Payments.

From the above observations, it can safely be said that even though some emails pertained to the FY 2012-13, and many emails had copies of emails of the said year by way of annexures, but the fact remains that same were produced by the assessee before Ld. TPO and Ld. DRP.

Before arriving at the conclusion that certain evidence, like emails does not establish that any such service was provided by the AE(s) to the assessee or before discarding any such piece of

evidence, DRP is required to discuss said evidence, so as to show application of mind and give reasons in rejecting the same.

Even otherwise, while deciding objections filed by an assessee-objector, and also while dealing with the observations made by the TPO, DRP is required to deal with each and every objection raised by the Objector and then give reasons either to uphold or set-aside the certain observations or the entire order by the TPO.

Reasons are the soul of such an order. In absence of any discussion or reasons, it becomes difficult for the higher authority, like Appellate Tribunal, to appreciate as to what had weighed with the DRP in passing the order and in rejecting the objections and in judging legality or illegality of an order.

Herein, we do not find any discussion in the order passed by Ld. DRP as regards the evidence in the form of emails.

On going through the order passed by Learned DRP, we find that while deciding the objections filed by the assessee-objector, in upholding the observations made, and the action taken by TPO, the Panel has neither made its own observations nor given own reasons. This goes to show non application of mind by Learned DRP in passing the order, which led to confirmation of the draft assessment.

Invoices

20. In suchlike matters, in support of its claim regarding actual rendering of services, an assessee is required to submit invoices. Here, the onus to produce and prove invoices was on the assessee.

As noticed above, plea of the Revenue is that no invoice was produced by the assessee in support of its claim that its AE(s) rendered services (TSS & BSS) and it made them payments for said services.

Record reveals that on behalf of the assessee, reliance was placed

to copies of two invoices. One is available at page 1480 and the other at page 1498.

In the course of arguments, Learned AR submitted that the first invoice pertains to TSS and the second one pertains to BSS.

No doubt, these copies have been represented to be sample invoices, but while dealing with the objections, Ld. DRP nowhere recorded any observation so as to reject said invoices.

In the first invoice, in the column meant for description, there is mention of “2012 Engineering Services”.

In the second mentioned invoice, in the column meant for description, there is mention of “2012 Emissions HQ Annual Service Charge”.

As per these invoices payments were made in EUROS. It is significant to note that at no stage of the proceedings, for the concerned assessment year, any of the books of accounts of the assessee have been rejected on any such ground.

In case, any clarification was required from the assessee-objector regarding these invoices, Ld. DRP could exercise its powers in this regard. But, there is nothing on record to suggest that any clarification as regards the contents of said invoices was ever sought or was not provided by the assessee.

In view of all this, we see no reason for discarding this valuable piece of evidence produced by the assessee.

21. Before Learned DRP, it was submitted on behalf of the assessee that the line of difference in both type of services is that under the ‘licencing agreement, the licensor is allowed to provide a reasonable limited support i.e. 20 man days in a year to the extent of

manufacturing and sale of parts only, but in case of engineering agreement, the AEs assist the company in manufacturing of EGR systems and components as per customised specification of the customer, irrespective of the limited support in terms of man hours' days.

Learned DRP rejected the above claim of the assessee by observing in para 4.2.3.4 that the assessee had failed to discharge its primary onus to file details of new products introduced during the year and their sales value as reasoned by TPO.

Same argument has been raised by Learned AR for the assessee to highlight that there was a time limit for providing such services under the licence agreement, and this led the assessee to engage other employees having special skill, so that the services could be better utilized.

To appreciate this contention, we have to refer to the agreements/contracts between the assessee and AE(s).

Agreements/Contracts-between the assessee and AE(s).

22. Admittedly, initially a Licence Agreement was arrived at between the appellant and AE.

Copy of Licence Agreement between the appellant and AE-Borgwarner Emissions Systems Spain, S.L. is available at page 75 to 98 (PB-I). It was effective from January 1, 2011.

As per this agreement the licensee-appellant had desired to :

(a) manufacture and sell exhaust gas recirculation collers, tubes and other associated products and components for emissions systems, and any modification or improvement thereto, and

(b) to acquire rights under patents, trade secrets and other intellectual property rights including technical designs, manufacturing information and other engineering knowledge relating thereto, which the AE was willing to grant limited rights to do so to the licensee.

Admittedly, subsequently, Engineering Support Agreements were also arrived at between the assessee and AE(s).

Copy of the Engineering Support Agreement is available at page 100 to 122. It was entered into between the parties on 1.5.2010.

Another Engineering Services Agreement between the parties and effective from 1.1.2012 is available at page 107 to 116.

Still copy of another Service Agreement between the parties and effective from 1.5.2010 is available at page 117 to 122.

From page 123 to 126 is available **copy of another Service Agreement** between the parties and effective from 1.1.2011 is available.

Copy of **another Service Agreement** between the parties and effective from 1.1.2012 is available from page 129 to 134.

There is **another copy of Service Agreement** between the parties, effective from 1.1.2011, available from page 135 to 139.

23. As per license agreement arrived at between the assessee and its AE, it was agreed that the licensee shall acquire rights under Patent, Trade Secrets and other Intellectual Property Rights including technical design, manufacturing information and other engineering knowledge relating thereto, which the licensor and AE agreed to grant limited rights to the licensee.

As per para 3.02 of the said agreement the AE agreed to disclose and provide to the licensee such KnowHow, which the licensor deemed necessary and useful to the licensee in production of the applicable licensed products.

As per para 3.03 Know How furnished by the licensee under the said agreement will be prepared with the same degree of care the licensor was using in the preparation of its own technical information and such KnowHow would be the same as the Know How used by the licensor.

24. Coming to the *Engineering Service Agreement* arrived at between assessee and its AE- contractor, the contractor was to effectively provide to the assessee certain engineering and related services, described below:

- i) application engineering service;
- ii) prototypes of products being developed by the assessee;
- iii) manufacturing engineering service;
- iv) Quality control service; and
- v) other services requested by the assessee in writing, and which were specifically agreed to by the AE.

New Projects in FY 2012-13

25. Records reveals that Ld. TPO was also of the opinion that no evidence was led by the assessee in proof of receipt of any technical support as regards the new products.

Ld. TPO was also of the opinion that the assessee had failed to provide value of sale of 4 products, specified in Annexure-3 to the letter dated 27.2.2020, during the relevant previous year.

Ld. TPO also observed that as per agreement for technical support service, the assessee was required to pay for TSS at 105% of the cost incurred by the supplier, which was to consist of direct cost and indirect cost, but the assessee did not provide any detail about the cost incurred by the purported supplier and any supporting evidence in respect thereof.

26. As regards new projects, record reveals that the assessee has submitted a list. It is available at page 372 (PB-1) as well as at page 650 (PB-II). These projects are stated to have been taken up in FY

2012-13.

Information as regards 7 TSS said to have been provided by AEs in USA and Spain, during the relevant year, has been made available at page 573. Assessee claimed that there was need for the services as described in column No.3 of said table.

As per column no.2 of this table, in the Application Engineering Department, Engineering Signoff (ESO) for New Programs; Engineering Signoff for changes in Existing Programs; Global Product Manager Support and Global Chief Engineer Support were required.

3 TSS are stated to have been provided by the AEs in USA and Spain, as according to the assessee, there was need for said services as described in column No.3 of said table. Column No.2 depicts that in the Manufacturing Engineering Department, such services were provided as regards new project reviews; support for furnace and Manufacturing Engineering Signoff.

Available at page 664 & 665 (PB-II) is Annexure 5, which depicts names of employees, with their designation, period of employment, and salary. This pertains to the FY 2012-13.

In the course of arguments, on behalf of assessee, it was argued that the employees already employed by the assessee for said services were not having the capabilities to render services, and that is why, eligible and competent employees were employed and services were availed of from the AEs.

27. Ld. DRP appears to have not considered the time limit for the services agreed to be provided by the AEs to the assessee as per the licence agreement. Further, the Panel appears to have not considered the list of the employees engaged by the assessee to avail of said

services from the AEs after the time limit agreed under the licence agreement was over. Why an assessee would need fresh employees with technical skills, in presence of employees already helping in availing of said services? Objection of the assessee on this issue has nowhere been discussed by Ld. DRP in the order. The Panel could conduct thorough enquiry in this regard, if so desired. But, no step in this direction appears to have been conducted.

Conclusion

28. In view of the above discussion, the rejection of the claim or objection raised by the assessee explaining need of entering into Engineering agreement even after having entered into licence agreement at the outset, and availing of TSS and BSS subsequently, can be said to have been done without proper enquiry and application of mind.

Whether it is a case of benchmarking as per Aggregation or Segregation approach?

29. As per record, while dealing with the contention as to whether the transactions of TSS, BSS and Royalty should be benchmarked at aggregate level, as claimed on behalf of the assessee, or at segregate value, as per case of the Revenue,

Learned TPO observed that for a transaction to be benchmarked at aggregate level, essential condition is that the transaction are so interlinked with other transactions that same cannot be benchmarked separately, but, the assessee was unable to prove that its TSS, BSS and Royalty transactions are so intertwined that they cannot be benchmarked separately.

Learned TPO held that the assessee had failed to demonstrate that in its case Royalty, TSS or BSS could not be benchmarked

separately.

Contentions

Learned AR for the appellant has submitted that the authorities below erred in rejecting Aggregation approach adopted by the assessee for benchmarking its international transactions pertaining to payments for BSS, TSS and Royalty, and by applying Segregation approach i.e. Transaction by transaction approach.

The contention is that all these transactions are closely linked to each other or intertwined, and as such, the Aggregation approach should have been adopted and accepted by the authorities, particularly, keeping in mind the observations made by the Appellate Tribunal in the first round of litigation.

Learned AR has placed reliance on decision in **Sony Ericsson Mobile Communications India (P)_ Ltd., v. CIT**, 55 taxmann. Com 240(Delhi), also relied on by Learned TPO; only para 10 extracted from the decision in **Bonfigioli Transmissions Private Ltd.**, by Coordinate Bench of ITAT, Chennai, reported in TS-388-ITAT-2018 (CHNY)-TP); on para 16 only extracted from the decision by Hon'ble Bench of ITAT, Delhi, in **Goodyear India Ltd. v. DCIT**, (2016) 70 taxmann. Com 67 (Delhi); on the observations extracted from decision in **CIT v. Cushman & Wakefield (India) P. Ltd.**, (2014) 367 ITR 730; observations extracted from decision in **Magneti Marelli Powertrain India (P) Ltd. v. DCIT**, ITA No.350 of 2014, by Hon'ble Delhi High Court.

At the same time, Learned AR for the assessee has contended that when Ld. TPO was unable to provide sufficient data of comparability as regards TSS and BSS, it was imperative to adopt Aggregation approach i.e. by aggregating the transactions with the

transactions pertaining to purchase of raw material.

Learned AR for the assessee has submitted that Learned DRP accepted in the order and well took the contention raised on behalf of the assessee that the TPO was unable to provide sufficient data of comparability as regards TSS and BSS.

Learned AR has relied on para 3.4 of the document available at page 587 PB-II) and pages 651, 652, 654 and 680 to highlight that the sales of the assessee had increased.

30. On the other hand, Learned DR has submitted that all the abovesaid three services are different from each other and cannot be said to be intertwined or closely linked to each other, and as such the authorities were justified in adopting Segregation approach in place of Aggregation approach.

31. On this issue, Ld. DR has placed reliance on decision in **LG Electronics India (P) Ltd. v. ACIT**, (2014) 52 taxmann.com 240; **Akzo Nobel India Pvt. Ltd., 137 taxmann.com 369 & AT Kearney Ltd. v. DCIT**, ITA No.959 & 960/Del/2018, decided by Co-ordinate Bench of ITAT, Delhi; and decision in **MAN Diesel & Turbo India (P.)Ltd., v. ACIT**, (2019) 112 taxmann.com 155 (Pune-Tribunal).

32. It has been argued on behalf of the assessee, that the authorities below have erred in rejecting the aggregation approach adopted by the assessee to benchmark the international transactions in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962. Further, it has been argued that by applying segregative approach i.e. transaction by transaction, ignoring that the transactions are closely linked to each other.

Discussion

33. As observed in Sony Ericsson's case, the core object and purpose for undertaking the exercise of transfer pricing analysis is to determine the fair market price of the transaction. In said proceedings, TPO is required to determine that whatever amount has been paid by the assessee to the AE for said services, is an arm length price. TPO is also to find out whether the prices paid by the assessee for availing of the services are at arms length price or not.

34. As regards application of the method to determine arms length price, in **Garware Polyester Ltd. V. ACIT**, 143 ITD 87 (Mum) and **TNS India Pvt. Ltd. V. ACIT**, 163 TTJ 576 (Hyd), it has been held by the Co-ordinate Benches of the Appellate Tribunal that in absence of any comparable uncontrolled instances, CUP method is not to be applied, and that only TNM method would be applicable.

In the course of arguments, we raised a specific query to Learned DR as to why TNM method was adopted?

35. Learned DR responded that firstly, during the relevant period, things were still evolving, and secondly, that the assessee did not lead any evidence before the TPO about rendering of services. In support of his contention, Learned DR also referred to the decision in **L.G. Electronics India (P) Ltd. v. ACIT**, (2014) 52 taxmann.com 240 (Delhi).

36. In reply, learned AR for the assessee has submitted that in the first round, CUP method was adopted by the TPO, but in the second round, TNM method has been adopted, and that no justification has been given for adopting TNMM and in not adopting "other method" in the given facts and circumstances.

37. Learned AR has contended that agreement was arrived at

between the appellant and AE BorgWarner Emission Systems Spain SL for use of technology, patents, know-how and trademarks; that as agreed, the assessee pays royalty @ 5% on net sales due to sale of licensed products within India; that as agreed, the assessee pays royalty @ 8% of net sales outside India. Further, it has been submitted that licensing agreements were so arrived at with AEs to save its time, and cost, which the assessee would have been required to invest, in absence of transfer of intangible items from the AE.

It has also been submitted that for manufacture of new products developed by the group, AEs provide technical information and know-how in the form of designs, process, and bills of the material. In this way, cost of registration and maintenance etc. of the newly developed products and intangible items are incurred by the AEs and not by the assessee.

38. Learned DR for the assessee has submitted that the assessee itself relied on 6 comparables and the TPO removed 3 of the comparables and took the best comparables, and as such, there is no merit in the grounds raised on behalf of the assessee as regards transactions of payments pertaining to Royalty.

39. Provisions as contained in Chapter X of the Act, relating to Transfer Pricing provide for determination of arm's length price or cost of an international transaction between two associated enterprises.

In **Sony Ericsson's case**, Hon'ble Delhi High Court has observed that TNM method is equally effective and reliable when applied to closely linked and continuous transactions.

In **L.G. Electronics India (P) Ltd.'s case** (supra), the assessee had benchmarked the international transaction of royalty by

clubbing it along with the other international transactions, such as, import of raw material and components, service spares, export of finished goods along with commission, training fee, import of software services etc. All these were benchmarked in a combined manner under TNM method on an entity level.

It was held that royalty is not closely linked with other international transactions and hence should be benchmarked separately. Further, it was held that evidently transaction of royalty cannot be considered as closely linked with the other international transactions as were clubbed by the assessee. In this way, the ALP of royalty payment required to be determined separately, was determined by Ld.TPO separately, justifying departure from the contrary view taken in the previous year. As a result, therein, the contention of assessee to follow rule of consistency was not accepted.

In **Magneti Marelli Power Train India's** case (supra), Hon'ble Delhi High Court, the assessee had received various intra-group services which were interlinked with the production and sale of the product. Said services were in the nature of import of raw materials, sub-assemblies and components, and transactions of payments pertained to technical assistance, royalty of software and as regards purchase of fixed assets.

Therein, for the purposes of arm's length price, all said services were held to be covered by manufacturing of automotive components. Whereas the assessee had invoked TNM method for all the services, collectively, the TPO applied TNM method except as regards payments made by way of fee for technical assistance, but worked out arm's length price for said fee on an entirely different method-CUP method.

In the given facts and circumstances, it was held that once the TPO had applied TNM method as the most appropriate method, it was not open to the TPO to determine arm’s length price in respect of the sole element i.e. payment of fee for technical assistance on CUP method.

40. Herein, as claimed by the assessee, following services were rendered to and availed of by it-the appellant:

“Financial Year 2012-13-Business Support Services

Sl.No.	Particulars of Services provided by Borg Warner Emissions Systems of MI Inc.USA Borg Warner Emissions Systems Spain S.L. Spain	Need for the services	Benefit Translation
A	Application Engineering Department		
1.	Engineering Signoff(ESO) for New Programs	Engineering Signoff shortly called as the ESO for New Programs to be done, Only based on this Signoff the Start of Production(SOP)will be executed.	The Diesel Engine Part(Exhaust Gas Recirculation Coolers) manufactured and sold by BorgWarner Emissions Systems India Private Limited is Technologically superior products and BorgWarner Spain & USA has got the technical expertise in Producing the products. Thee Technical Support received from BorgWarner, Spain and USA has provided the Indian Company with the Expertise in this Technology and hence the Indian Company was able to cater to the needs

			of the Automotive Companies in India. The Technologically superior products manufactured by the Indian Company was supplied in 4 Wheeler Automotive companies.
2.	Engineering Signoff(ESO) for changes in Existing Programs	Engineering Signoff shortly called as the ESO for existing Programs to be done whenever there is any change in the Product or the raw Materials used for making the Product. Only based on this signoff the Start of Production (SOP) will be executed.	
3.	Global Product Manager Support	Support required for assisting in the Product development and Product Engineering stages.	
4.	Global Chief Engineer Support	Support required for assisting in the Product development and Product Engineering stages.	
B.	Manufacturing Engineering Department		
1.	New Project Reviews	Robust review process is required to closely monitor the New Projects and ensure that we hit the Customer Set Target/Deadlines.	The New Projects with both existing and the New Customers require high technical expertise to hit the Customer Targets. BorgWarner Spain & USA's robust reviews helped us to implement new Programs and Projects. The same

			improved the Revenue stream of the Company.
2.	Support for Finance	Furnace was newly installed during the Financial Year. Technical Expertise was required to run the Furnace without any Flaws.	The main item of our finished product is Exhaust Gas Recirculation Cooler. The Quality of the Coolers greatly depends on the Technically of the Heat Treatment Furnace. The Newly installed Furnace enhance the production capacity and also the quality of the output of EGR Coolers components. The Commissioning of the furnace required high Technical Expertise, the same was provided by BorgWarner, Spain.
3.	Manufacturing Engineering Signoff((MSOK)	Manufacturing Signoff shortly called as the MSOK for New Programs to be done. Only based on this signoff the Start of Production(SOP) will be executed.	The analysis of the Manufacturing process resulted in Quality Product Output and efficient Engineering Process. This resulted in Cost Effectiveness and cost savings.

Financial Year 2012-13-Business Support Services

Sl. No	Particulars of Services provided by Borg Warner Emissions Systems of MI Inc, USA BorgWarner Emissions Systems Spain S.L. Spain	Need for the services	Benefit Translation

C.	Sales Department		
1.	TAP Review-Target Agreement Process	Fixing of targets for sales and support to Sustain the Growth of the Company. To identify New Projects and New Customers in this highly Competitive Automotive Market.	Improvement in Revenue. New Business and improvements in the existing Business opportunities were identified. Revenue Targets were achieved and the future Revenue growth is also substantial.
2.	New Quote Review and Guidance for discussing New Programs with Customers	The Company's Business is Manufacture and Sale of Diesel Engine Part(Exhaust Gas Recirculation Coolers). In this Competitive Automotive World Quotes given to Customers to be competitive and accurate. Robust Review by experienced Senior personnel is required. Global Team Guidance to deal with New Customers is required for winning the confidence of the new Customers.	Major Automotive Manufacturers in India are Global Companies, they have their decision making centres in USA, Korea and Japan. Guidance from the BorgWarner Global Senior Management Team has resulted in Sales Growth and provided a Flat form for a sustained profitable growth of BorgWarner Emissions Systems India Private Limited.
3.	Auto Expo Exhibition Support	Support to Show Case the New Technology of BorgWarner in the Auto Expo held in New Delhi.	Improvement in Sales Revenue and helped to achieve a Good Name for BorgWarner Emissions Systems India Private Limited in the Indian Automotive Market.
4.	Support for Negotiations with Customers	Interaction with the Existing and New Customers.	Established a Name with the Customers and placed BorgWarner Emissions Systems India Private Limited as a leading Manufacturer and Sale of Diesel Engine Part (Exhaust Gas Recirculation Coolers).

Sl. No	Particulars of Services provided by Borg Warner Emissions Systems of MI Inc.USA Borg Warner Emissions Systems Spain S.L. Spain	Need for the services	Benefit Translation
D	Application Engineering Department		
1.	Engineering Signoff(ESO) for New Programs	Engineering Signoff shortly called as the ESO for New Programs to be done, Only based on this Signoff the Start of Production(SOP)will be executed.	The Diesel Engine Part(Exhaust Gas Recirculation Coolers) manufactured and sold by BorgWarner Emissions Systems India Private Limited is Technologically superior products and BorgWarner Spain & USA has got the technical expertise in Producing the products. Thee Technical Support received from BorgWarner, Spain and USA has provided the Indian Company with the Expertise in this Technology and hence the Indian Company was able to cater to the needs of the Automotive Companies in India. The Technologically superior products manufactured by the Indian Company was supplied in 4 Wheeler Automotive companies.
2.	Engineering Signoff(ESO) for changes in Existing Programs	Engineering Signoff shortly called as the ESO for existing Programs to be done whenever there is any change in the Product or the raw Materials used for making the Product. Only based on this signoff the Start of Production (SOP) will be executed.	
3.	Global Product Manager Support	Support required for assisting in the Product development and Product Engineering stages.	
4.	Global Chief Engineer Support	Support required for assisting in the Product development and Product Engineering stages.	

Sl. No .	Particulars of Services provided by Borg Warner Emissions Systems of MI Inc.USA Borg Warner Emissions Systems Spain S.L. Spain	Need for the services	Benefit Translation
E	IT Department:		
1.	Global support for projects – New implementation of ERP	Support is required to setting up and smooth functioning of the ERP system. We use Oracle Based TERMS, Mawai.	Good and proven ERP system in place and smooth running of the operations.
2.	ERP-JDE support	Support for ERP running	Good and proven ERP system in place and smooth running of the operations.
3.	Weekly staff reviews conducted by Vice President IT	Support for all IT Related activities	Good maintenance of the ERP system, good maintenance of other IT communication systems like E-mail and other intra Net services.

Sl. No .	Particulars of Services provided by Borg Warner Emissions Systems of MI Inc.USA Borg Warner Emissions Systems Spain S.L. Spain	Need for the services	Benefit Translation
F	Manufacturing Engineering Department:		
1.	New Project Reviews	Robust review process is required to closely monitor the New Projects and ensure that we hit the Customer Set Target/Deadlines.	The New Projects with both existing and the New Customers require high technical expertise to hit the Customer Targets. BorgWarner Spain & USA's robust reviews helped us to implement

			new Programs and Projects. The same improved the Revenue stream of the Company.
2.	Support for Finance	Furnace was newly installed during the Financial Year. Technical Expertise was required to run the Furnace without any Flaws.	The main item of our finished product is Exhaust Gas Recirculation Cooler. The Quality of the Coolers greatly depends on the Technically of the Heat Treatment Furnace. The Newly installed Furnace enhance the production capacity and also the quality of the output of EGR Coolers components. The Commissioning of the furnace required high Technical Expertise, the same was provided by BorgWarner, Spain.
3.	Manufacturing Engineering Signoff((MSOK)	Manufacturing Signoff shortly called as the MSOK for New Programs to be done. Only based on this signoff the Start of Production(SOP) will be executed.	The analysis of the Manufacturing process resulted in Quality Product Output and efficient Engineering Process. This resulted in Cost Effectiveness and cost savings.

Case of the appellant is that after absorbing intra group costs, the assessee has benefitted immensely, in terms of improved turnover and profitability, due to services rendered by the AEs. In this regard, reliance has been placed on the data put forth in the following table:

FY	Sales-Net(INR)	PBT(INR)	% PBT of the year
2015-16	1,22,08,37,465	22,07,95,659	18.09
2014-15	1,07,09,69,079	16,99,70,637	15.87
2013-14	1,06,01,63,277	18,39,03,116	17.35
2012-13	1,17,97,32,471	20,14,30,854	17.07
2011-12	58,33,66,087	9,35,73,107	16.04
2010-11	33,95,17,690	4,32,41,771	12.74

41. Ld. TPO, while dealing with this issue of Aggregate level approach and segregative level approach observed that preferred approach is segregative approach, and that only if a transaction cannot be benchmarked separately the aggregative level approach is to be adopted.

Ld. TPO went on to observe that the assessee had not been able to prove that its transactions of TSS, BSS and Royalty were so intertwined with other transactions that they cannot be benchmarked separately.

As regards Royalty, Ld. TPO observed that rates are available for other similar businesses, and as such royalty could be benchmarked looking at what other enterprises having similar FAR were paying.

Ld. TPO observed that the assessee had failed to demonstrate that in its case TSS, BSS or Royalty cannot be benchmarked separately. Ultimately, Ld. TPO was also of the view that the assessee having failed to prove receipt of any of the services, said transactions could not be closely intertwined.

42. Royalty means payment of any kind received as consideration for the use of or right to use any intangible property like copyright, design or model, secret formula or process, trademark, trade name or for information concerning industrial and commercial experience.

Determination of arm's length price in case of royalty payment for transfer of intangible property is not an easy exercise.

Provisions pertaining to arm's length price have been enacted to prevent tax evasion and also to ensure that intercompany or intra group transactions are conducted at fair market value.

Ld. AR for the assessee has contended that Revenue authorities are not empowered to question the commercial wisdom of the assessee, the reason being

that it is for the assessee to take such decisions which favour the assessee in advancement of its business in this regard reliance has been placed on decision in **CIT v. EKL Appliances Ltd**, 345 ITR 241(HC), Delhi.

In this regard, it would be relevant here to refer to the findings recorded by Co-ordinate Bench of the Appellate Tribunal in the order passed in the first round.

In the first round, it was observed by the Appellate Tribunal that in view of decision in Cushman's case, Ld. TPO should have verified and examined the aspect of benefit and need on the basis of commercial wisdom of the assessee while benchmarking the international transaction where ALP was determined at NIL.

43. As discussed in the earlier part of this Order, the assessee established actual rendering of services as per agreements arrived.

Having regard to the services availed of, it can safely be said that same were necessary for proper functioning of day to day business operations beneficial to the assessee.

44. In the given facts and circumstances, as regards TSS and BSS, Learned TPO was not justified in arriving at the conclusion that in this matter the assessee was not getting any real service and that it would not have paid anything if it were not controlled by the payee. Consequently, Learned TPO erred in opining that holding the arm's length price of TSS and BSS services to be NIL.

45. It is noteworthy that in the first round of litigation, the Appellate Tribunal also noticed that certain additional evidence was submitted on behalf of the assessee before Ld. DRP, but there was no finding recorded by Ld. DRP to suggest if said additional evidence was or was not considered.

46. Appellate Tribunal also observed that in the given facts and circumstances and in the interest of justice, it was necessary that the

issue with respect to determination of ALP of the international transaction of Business Support Services and Technical Support Services fee be remitted back to the file of Ld. TPO for determination of their ALP.

At the same, the assessee was also directed to produce relevant details with respect to rendition of services with credible and contemporaneous evidence for impugned assessment year and also to demonstrate as to how said transactions were required to be aggregated.

47. As noticed above, Learned DRP has not discussed in para 4.2.2 and 4.2.3 any of the objections raised by the assessee, what to say of any giving any reason for confirming the views expressed and observations made by Learned TPO.

48. From the order passed by Learned DRP, it transpires that one of the objections or contentions raised there on behalf of the assessee was that TPO had been unable to provide sufficient data of comparability in the case of TSS and BSS.

In this regard, Learned DRP simply observed in the order that the same was well taken, but, surprisingly, at the same time opted to direct the TPO to consider said contention raised by the assessee.

Firstly, Ld. DRP itself was to deal with and decide said contention raised by the assessee. The Panel had no jurisdiction to issue direction to the TPO to consider said contention.

Secondly, by simply mentioning that the panel had taken the contention well, it cannot be said that said contention was discussed or dealt with.

When there were specific directions from the Appellate

Tribunal to consider said contention in addition to the additional evidence, Learned DRP was required to consider and discuss the additional evidence.

But, as noticed above, learned DRP nowhere discussed any of the objections pertaining to TSS or BSS or even the contention that the TPO had not been able to provide sufficient data of comparability in the case of TSS and BSS.

Adoption of approach by the Revenue as regards the assessee, in the Previous years

49. One of the contentions raised on behalf of the appellant is that as regards payments of TSS, BSS and Royalty, TPO has passed orders ignoring the earlier orders pertaining to AYs 2011-12 and 2012-13, passed by the TPOs in the case of the assessee itself and as such the principle of consistency stands violated in this matter.

As regards payment of Royalty, contention raised by Learned AR for the assessee is that as regards AY 2018-19, Learned TPO has concluded the transactions to be at Arm's Length in entirety and has not drawn any adverse inference against the assessee. In this regard, reliance has been placed on pages 863 to 901(PB-II).

For the period from AYs 2014-15 to 2017-18, learned AR has submitted that the matters were not selected for TP assessment.

In support of his contentions, learned AR for the assessee has placed reliance on decision in **Radhasoami Satsang v. CIT**, 193 ITR 321.

50. On the other hand, Learned DR has submitted that the onus of establishing rendering of services is to be discharged by the assessee on year to year basis, and that this is a case where the assessee has

failed to establish rendering of services, and as such there is no merit in this contention raised on behalf of the assessee. On this point, learned DR has placed reliance on decision in **AT Kearney Ltd.’s** case (supra), wherein reliance was placed on a decision by Delhi Bench of ITAT, in the case of **Akzo Nobel India Pvt. Ltd.’s** case (supra).

In **Avery Dennison (India) Pvt. Ltd. V. ACIT**, reported in 145 taxmann.com 468, it was held that each year is a separate unit and governed by its peculiar facts. Even otherwise, assessee’s claim in respect of each assessment year has to be decided in view of the evidence produced regarding rendering or receipt of services to or from AE.

51. In the case of **Akzo Nobel India Pvt. Ltd.’s** case (supra) relied on by Learned DR, assessee could not prove receipt of Intra Group Services, by producing requisite documents, and further that each year is based on different facts and the issue involved is to be decided on the basis of evidence produced.

In **Safran Engineering Services India Pvt. Ltd.**, 1989 taxmann.com 77 (Bengaluru), referred to in **AT Kearney Ltd.’s** case (supra) relied on behalf of the Revenue, it was held that before the authorities below, the assessee had not discharged the onus of proving the receipt of services, and further that each assessment year is separate and distinct. Therein, on this point, reliance was also placed on decision in **Lintas India Pvt. Ltd. v. ACIT**.

It is settled law that the principles of res judicata have no application to income-tax assessment proceedings.

52. It is significant to note that when the matter came up before Co-ordinate Bench of ITAT in the first round, it was observed that

with respect to the transaction by transaction approach v. aggregation of the transaction for subsequent year as well as in the earlier year, Learned TPO had accepted the aggregation approach adopted by the assessee. Learned Co-ordinate Bench also observed that it was not disputed that for AY 2011-12 and 2013-14, Learned TPO had accepted the aggregation approach; and further that following the principle of consistency, where there is no change in the facts and circumstances of the case for this year, Learned TPO should have followed the same approach; and even further that if for any reason, Learned TPO wanted to deviate from the same, he should also give a detailed reason as to why he was deviating, but in the order passed by Ld. TPO, the Co-ordinate Bench did not find any such discussion.

Herein, Ld. TPO was of the view that the three type of transactions are to be benchmarked at segregate level. The main ground for arriving at this view was that the assessee had failed to prove factum of rendering of services.

53. As discussed above, the factum of rendering of said services stands proved. Therefore, there is merit in the contention raised on behalf of the assessee that TPO has passed orders ignoring the earlier orders pertaining to AYs 2011-12 and 2012-13, passed by the TPOs in the case of the assessee itself as regards payments of TSS, BSS and Royalty, and that the principle of consistency stands violated in this matter.

ALP as regards Royalty transactions

54. *As regards Royalty transactions*, in the first round, the Appellate Tribunal observed that Learned TPO had proceeded to benchmark the transaction related to Business Support Services, related to payment for Technical Support Service and payment

related to Royalty *separately*.

However, Ld. DRP had confirmed whatever ALP regarding said three transactions were determined by Ld. TPO.

Arm's Length price has been defined in section 92F(ii) of the Act. It means the price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions.

The factors and methods incorporated in this section are not exhaustive. CBDT has been empowered to prescribe further factors and methods. Most appropriate method is to be adopted in relation to an international transaction for determination of ALP.

In this regard, nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors, as prescribed by CBDT, may be taken into consideration.

Expression "other method" as provided under this provision may be used while taking into consideration the price which has been charged or paid or the price which would have been charged or paid for the same or similar uncontrolled transactions with or between non-associated enterprises, under similar circumstances.

In the first round of litigation, said issue was also remitted back to the file of Ld. AO with the direction to the assessee to show as to how payment of royalty was inextricably linked with the manufacturing activities and as to why it ought to be aggregated and benchmarked together with other international transactions under transactional net margin method.

On remand, ALP of royalty paid by the assessee was

determined at 1.24% of sales made by the assessee. The ALP of royalty was determined at Rs. 92,81,625/-and adjustment of Rs. 3,27,73,603 was made on this account. In so determining, Ld. TPO observed that the most appropriate method to determine ALP of royalty is the “other Method” mentioned in section 92C(1)(f) and rule 10B(1)(f), taking average of royalty rates paid by the comparables selected by the assessee in the transfer pricing study filed by the assessee.

Learned TPO was of the view that the assessee had failed to discharge its primary onus to file details in respect of differentiating the services for royalty from the technical support services.

Learned DRP upheld this view while taking into consideration that contention raised on behalf of the assessee regarding inclusion of 3 companies, which had not been paid any royalty, and then excluding said companies while arriving at average for the determination of ALP of royalty.

55. It has been contended on behalf of the assessee that the comparability analysis made by Ld. TPO without any appropriate basis, and that Aggregation approach deserves to be adopted for determining ALP.

56. It finds mentioned in para 15 of the order passed by Ld. TPO that there were six comparables (taken by the assessee for benchmarking at TNM method, and even as the original order by the TPO).

Ld. TPO determined ALP of royalty at 1.24% of sales made by the assessee, as described in the table available in para 11 of the order.

Notably, one of the contentions on behalf of the assessee is

that Ld. TPO incorrectly computed ALP as regards royalty, without taking into consideration landed cost of imported components in the case of comparables.

In the first round of litigation, same argument was put forth on behalf of the assessee before the Appellate Tribunal, and noticing this infirmity and others as pointed out by the assessee, the matter was remitted.

In those proceedings, in the first round, it was submitted that assessee had paid royalty in terms of the agreement where royalty was payable @ 5% of the net sales of licensed products in India, and @ 8% of net sales of licensed products outside India.

There, it was also submitted that in case of comparables, Ld. TPO had taken the rate of comparable @ 0.63 for both transaction. The assessee also stated that rate of 0.63% in case of comparables was incorrect calculation without considering the landed costs of imported components.

57. However, record does not reveal, nor any has been pointed out, to suggest that landed cost of imported components in the case of comparables was also taken into consideration in the 2nd round. Even Ld. DRP did not consider this aspect.

Therefore, there is merit in the contention raised on behalf of the assessee even on this point.

Result

58. In view of the above discussion and findings, the impugned assessment based on the observations and findings recorded by Ld. TPO and by Ld. DRP deserves to be set aside.

59. Consequently, this appeal is allowed.

File be consigned to the record room, after the needful is done by the office.

Order pronounced in the open Court on 29/08/2024

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**

sd/-

**[NARINDER KUMAR]
JUDICIAL MEMBER**

DATED: 29/08/2024

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar