आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.435/Ahd/2022
Assessment Year : 2012-13

Shell Energy India Pvt. Ltd. Office No.2008, Westgage Block-D, Makarba, SG Highway Ahmedabad 380051. PAN : AAACH 9143 C	Vs	The DCIT, Cir.2(1)(1) Ahmedabad.

ITA No.558/Ahd/2022
Assessment Year : 2012-13

The DCIT, Cir.2(1)(1) Ahmedabad.	Vs	Shell Energy India Pvt. Ltd. (Formerly known as M/s.Hqzira LNG P.Ltd.) Ahmedabad. PAN : AAACH 9143 C

(Applicant)		**(Responent)**

Assessee by :	Shri S.N. Soparkar, Sr.Advocate, Shri Vishal Kalra and SS Tomar, ARs.
Revenue by:	Shri (Dr.) Darsi Suman Ratnam, CIT-DR Shri Ashok Kumar Suthar, Sr.DR

सुनवाई की तारीख/**Date of Hearing** : 04/09/2024
घोषणा की तारीख /**Date of Pronouncement**: 17/10/2024

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

These are cross-appeals by the assessee and the Revenue against the order of the ld. Commissioner of Income Tax (Appeals)-13, Ahmedabad dated 23.09.2022 passed under section 250 of the Income Tax Act, 1961 ("the Act" for short) for the assessment year 2012-13.

2. The ld.Sr.Advocate, Shri S.N. Soparkar, appearing for the assessee in the Department's appeal mentioned at the outset itself that the issue raised in the said appeal stood covered in favour of the assessee by various decisions of the ITAT in the case of the assessee itself in several assessment years ,which were duly noted by the ld.CIT(A) and followed, while, the ld.counsel for the assessee in the assesses appeal, Shri Vishal Kalra, however stated that arguments were required to be made in the assessee's appeal.

Noting the above, it was first decided to deal with the assessee's appeal before us.

ITA No.435/Ahd/2022 (Assessee's appeal)

3. The grounds raised by the assessee read as under:

"1.That on the facts and circumstances of the case and in law, the Hon'ble CIT(A) vide impugned order dated September 23, 2022 (received on September 23, 2022) grossly erred in upholding the addition amounting to INR 5,76,79,229 made by the Learned Assessing Officer ("Ld. AO") to the income returned by the Appellant vide AO's order dated March 23, 2016, passed under section 143(3) read with section 144C of the Act.

2. The Hon'ble CIT(A) erred in passing a non-speaking order on grounds pertaining to the adjustment made by the AO with respect to the availing of services in relation to operations of LNG storage and re-gasification terminal from AE ("OSA services"), thereby ignoring the detailed objections and evidence placed on record by the Appellant. The Hon'ble CIT(A) also erred in resorting to upholding the findings of AO/ TPO without even examining them in light of the contentions of the Appellant.

3. The Hon'ble CIT(A)/ Ld. AO/ TPO have erred, by partially disregarding the Transfer Pricing documentation prepared and maintained under Section 92D of the Act, read with Rule 10D of the Income Tax Rules, 1962 ("Rules") by the Appellant in respect of availing of OSA services.

4. The Hon'ble CIT(A)/ Ld. TPO erred by not taking into consideration the Appellant's assessment history and that the transfer pricing documentation and position in respect of availing of OSA services has been accepted in all prior and future assessment years without drawing any adverse inference.

5. That on the facts and circumstances of the case and in law, the Ld. CIT(A)/ AO/ TPO have erred in:

i. making an addition of INR 5,76,79,229 in respect of international transaction pertaining to consultancy services received for OSA from its AE alleging the same to be not at arm's length in terms of the provisions of sections 92C(1) and 92C(2) of the Act read with Rule 10B of the Rules;

ii. rejecting the benchmarking analysis and CUP methodology adopted by the Appellant, for benchmarking its international transaction of payments under OSA to AE for receipt of consultancy services and further erred in determining the ALP of such transaction as 'Nil', which is not in accordance with the prescribed methodology under the Act;

iii. making TP adjustment in respect of the international transaction of payments made to AE under OSA for receipt of consultancy services, alleging that the Appellant had failed to establish receipt of such services, the man hour cost is higher, without appreciating the submissions/ evidence furnished by the Appellant in this regard;

iv. re-characterizing the consultancy services received in relation to operation of LNG storage and regasification terminal as regasification services, being based on conjectures and surmises;

v. inadvertently computing the addition on account of consultancy services received INR 5,76,79,229 adopting the fixed fee payment at INR 13,729,129 as against the correct fixed fee payment of INR 21,319,973.

vi. not providing the benefit of 5 percent range as provided by the proviso to section 92C(2) of the Act (as applicable for AY 2012-13).

Corporate Tax Grounds

6. That on the facts and circumstances of the case and in law, the Ld. AO erred in not granting credit of INR 43,99,774/- towards IDS amount as claimed by the Appellant vide letter dated 2nd February 2016.

Additional Ground of Appeal

7. That on the facts and circumstances of the case and law, the Hon'ble CIT(A) erred in not adjudicating on the Ld. AO's approach of initiating penalty proceedings against the Appellant under section 271(l)(c) of the Act.

Each of the above grounds is independent and without prejudice to the other grounds of appeal F referred by the Appellant.

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal.

4. The issue raised in Ground No.1-5 was stated to relate to the Transfer Pricing adjustment made to the international transaction of OSA services availed by the assessee from its Associate Enterprise (AE).

5. Ground no.1 to 3, it was stated by the Ld.Counsel for the assessee, were general in nature, and therefore are not being adjudicated by us.

Ground No.4 and 5, it was stated , raised the specific challenge to the transfer pricing adjustment made to the international transaction .The services received being in relation to operation of LNG storage and re-gasification terminal of the assessee.The amount of adjustment made by the Transfer Pricing Officer (TPO)/Assessing Officer(AO), being Rs.5,76,79,229/-.And the same stood confirmed by the ld.CIT(A). The ld.counsel for the assessee contended that vide Ground no.4 and 5 several aspects relating to the adjustment so made to the international transactions have been raised by the assessee.

In ground no.4, he pointed out, the adjustment has been challenged on the principle of consistency in view of the fact that identical transaction undertaken by the assessee with its AE in preceding and succeeding years has all along been accepted in assessment proceedings.

In the ground No.5(ii),he contended, the assessee has contested the rejection by the TPO of the bench-marking analysis undertaken by the assessee and the CUP methodology adopted by the assessee for bench-marking of the said international transaction.

In ground no.5(iv), it was pointed out that the issue of re-characterizing the services rendered by the AE, by the TPO ,while making adjustment to its arms length price ,was raised.

In ground no.5(v), the ld.counsel for the assessee pointed out , the assessee had pointed out the incorrect amount of fixed fee payment taken by the Revenue authorities for computing the adjustment to be made to the transaction, and in ground no.5(vi), the pleading raised was for providing the benefit of 5% range adjustment to the arms length price of the transaction, as provided under section 92C(2) of the Act.

6. Having stated so, the ld.counsel for the assessee began by making pleadings on ground no.5(iv) raised before us.

Arguments were made at length and reference was made to the several voluminous documents placed in paper-book before us, running to four volumes, filed on behalf of the assessee.

7. The primary contention of the ld.counsel for the assessee before us was that entire exercise carried out by the TPO for determining the arm's length price of the impugned transaction proceeded on an incorrect assumption of the nature of the services rendered by the AE, therefore leading to incorrect finding of the TPO, both with regard to the comparable selected by the assessee being not a correct comparable, and the finding by the TPO of the assessee not availing any services from its AE in the nature of optional services. Thus leading to disallowance of the payment made to the AE in respect of the said optional services, resulting in adjustment being made to the impugned transaction to the tune of Rs.5,76,79,229/-.

8. The emphasis of the ld.counsel for the assessee, therefore, was to the effect that the TPO had made adjustment for determining the ALP of the transaction on an incorrect understanding of the fact relating to the nature of services availed by the assessee, and therefore, entire exercise carried out by the TPO was of no consequence. His request before us was that the matter be restored back for fresh consideration by the TPO, after considering the correct facts relating to the issue.

9. In this regard, he first drew our attention to the order of the TPO, and pointed out therefrom the facts noted by him relating to the background of the assessee & the international transaction carried out by it with its AE, noted at para-3 and 4 of the order as under:

> **3.** Hazira LNG Private Limited ("HLPL" or "the Company" or "Assessee" in short) was incorporated in October, 2000, as a private limited company subsequent to an investment approval from the Foreign Investment Promotion Board, Government of India. Having been authorized by the Gujarat Maritime Board, HLPL develops, owns, operate and maintains terminal facilities of liquefied natural gas ("LNG") cargo at Hazira. The activities include development, reception, storage and re-gasification facilities at Hazira port. During the year, assessee, as a part of its distribution business, dealt in purchase and import of Spot Liquefied Natural Gas (LNG) Cargo from its Associated Enterprises and sold re-gassified LNG (R-LNG) to third party customers in India. HLPL is held by Shell Gas B.V ("SGBV") and Total Gaz Electricite Holdings ("Total"). The assessee has invested around Rs. 2000 crore in creating LNG handling infrastructure, storage and re-gasification facilities at Hazira near Surat in Gujarat. The assessee has capacity to store two standard size cargos in its storage tank of LNG.As per Form 3CEB the assessee has entered into the following international transactions with associate enterprises are as under :

S No.	*Description*	*Amount(Rs)*
1.	Purchase of LNG	1084,79,17,760
2.	Receipt of services related to operation of LNG storage and re-gassification terminal	7,14,08,358
3	Cost allocation expenses	4,10,76,886
4.	Reimbursement paid	5,05,313
5.	Reimbursement of retrials and others received	1,97,71,382
	Total	**1098,06,79,699**

4. The significant transactions relate to purchase of liquefied natural gas by the assessee from Shell and Total sources and its subsequent sale to Indian customers. The assessee is a joint venture of Shell Gas BV and Total Gaz Electricite Holdings (Total) and hence these two entities are related parties. The assessee submitted its Transfer Pricing Review of the above transactions prepared by BMR & Associates vide letter dated Nil received on 03.11.2014. The main transaction of purchase of LNG has been discussed at para 3 where the FAR analysis of the parties to the transaction have been discussed. The company has been selected as the tested party characterized as full risk trader. The assessee has stated that it does not have access to the financial information /profitability status of the associated enterprises. The assessee has selected PLI of Gross Profit Margin per MMBTU. It has selected two comparables- Petronet LNG Limited and Gas Authority of India Limited. The weighted average of last three years in respect of both these comparables has been used to benchmark the PLI of the assessee company.

10. Referring to the above, he pointed out that the assessee is a private limited company ,being a joint venture of **Shell Gas BV and Total Gaz Electricite Holdings (Total)**; that it was involved in the activity of developing, owning, operating and maintaining terminal facilities of liquefied natural gas (LNG) cargo at Hazira port, and the activities carried out included development, reception, storage and re-gasification facilities at Hazira Port. That during the impugned year, as part of its distribution business, the assessee had dealt in purchase and import of spot liquefied natural gas (LNG) Cargo from

its AE and has sold re-gasified LNG (R-LNG) to third party customers in India. The main international transaction carried out by the assessee withs its AE related to the purchase of LNG .Amongst the other international transactions was the transaction relating to the receipt of services pertaining to operation of LNG storage and re-gasification terminal, for which the assessee had made a payment of Rs.7,14,08,358/- to M/s Shell Gas BV and it was this transaction to which adjustment of Rs.5,76,79,229/- was made by the TPO

11. The ld.counsel for the assessee pointed out that in para-3 of the order, as reproduced above, the ld.TPO rightly reproduced the nature of services availed by the assessee from its AE **"**Receipts of services related to **operation of LNG storage and regasification terminal**"(emphasis made by Ld.Counsel for assessee before us). However, he pointed out that while carrying out its exercise of verification of bench-marking done by the assessee of the same, his entire assumption of incorrect nature of service began. He took us to para-11 of the order of the TPO, where he pointed out the TPO dealt with the impugned transaction, and drew our attention to the heading of the same as **"the issue relating to re-gasification at the rate of 7.14 crores paid to AE**". The ld.counsel for the assessee pointed out that this is the exact mistake in the nature of services understood by the ld.TPO to have been availed by the assessee from its AE, which resulted in entire exercise going off on an incorrect tangent. He pointed out, while the assessee had availed the services relating to the **"operation of the LNG Storage and regasification terminal"**, the TPO understood the services to be **re-gasification services**. He pointed out that during the TP proceedings, the assessee repeatedly pointed out to the TPO that the services availed from its AE was in relation to the **operation of re-gasification terminal", and not re-**

gasification services/charges". He drew our attention to the show cause notice issued by the TPO, which is reproduced at page no.82 of his order. Referring the same, he pointed out that the AO had not accepted the assessee's explanation that it had not paid any amount to its AE for regasification charges, and in the notice he directed the assessee to justify the ALP of the transaction carried out by its AE. The ld.counsel for the assessee thereafter drew our attention to the reply filed by the assessee in response to the show cause notice reproduced at para-12 of the order again pointing out that the TPO has failed to appreciate the dynamics and intricacies involved in the LNG industries, and had inadvertently confused regasification with services provided under OSA(Operation and Services Agreement) OSA of operation and maintenance of regasification terminal. He pointed out that it was explained as to what regasification services related to and what exactly was the nature of the services availed by the assessee under the OSA contract entered with its AE. He also pointed out that the assessee had proved Arms Length Price (ALP)of the transactions to the TPO with documentary evidence . The reply of the assessee at page no.83 of the order is as under:

As per the agreement between SGSI BV and HLPL, SGSI BV renders consultancy services in the following nature to HLPL:

- *Operations and maintenance matters*
- *Technology and engineering matters*
- *Health, safety and environmental matters*
- *Finance and administration matters*
- *Technical publications*
- *Technical conferences, meetings and workshops*
- *Supply HLPL with software, as available*
- *Arrange for training of HLPL's employees*
- *Arrange for expat employees for HLPL*
- *Provide optional services upon a written request from HLPL*

During the subject year, SGSI BV has amongst others undertaken feasibility studies in relation to capacity expansion of the LNG terminal. SGSI BV has also conducted a focussed asset integrity review which entails a health check-up, in-depth review, multi-disciplinary assessment and comparison with other work sites.

It is pertinent to note that Shell and Total are amongst the biggest oil and gas companies in the world. Given their experience in dealing in LNG, global branding and internal quality control and safety guidelines, the kind of technology used to build the LNG assets and general outlay on safety standards cannot be compared to any other similar infrastructure set-up in India.

The facilities at Hazira are particularly unique and world scale making it easily distinguishable from other LNG ports and jetty/terminals that have been set up in India. The high standards maintained by Shell worldwide have been specifically kept into consideration while setting up operations at Hazira.

Thus, given the uniqueness of its operations, HLPL requires specialized and high quality services in relation to operations & maintenance of the LNG jetty/terminal. As mentioned above, SGSI BV is a specialist in providing advice and services relating to oil and gas industry.

SGSI BV is engaged in providing research and technical services to a range of petroleum related industry segments including additive process industries; automotive and supply; exploration and production; chemicals; gas and LNG processing. Its services include chemical analysis, crude oil evaluation, engineering, energy optimization, gas-to-liquids conversion, gasification, hydro cracking, inspections, thermodynamics and water treatment.

Further, the assessee does not have in-house capabilities and expertise to self-sufficiently meet its requirements pertaining to said services. The knowledge and technical expertise received from SGSI BV enables the assessee to ensure quality assurance standards required to be maintained in the oil and gas industry.

In addition to the above, it is submitted that SGSI BV is taxable in India on a gross basis at a corporate tax rate less than that applicable to its associated enterprises in India. In consideration of sub-section (3) of Section 92 of the Act and Circular 14/2001 issued by Central Board of Direct Tax ("CBDT"), Transfer Pricing regulations would not apply to any case, where adoption of the arm's length price would lead to a decrease in the overall tax incidence in India.

The relevant extracts from the Act are quoted below:

> *"The provisions of this section shall not apply in a case where the computation of income under sub-section (1) or the determination of the allowance for any expense or interest under that subsection, or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into"*

Kindly note that HLPL has been receiving services under the said agreement from SGSI BV since long and based on information / documents submitted by the assessee, the department has accepted the genuineness of the same in its past assessments.

Further, while proposing ALP at Nil, your goodself has incorrectly stated that no documentary evidence has been provided by the assesse.

It is submitted that details of the said transaction have been appropriately captured in the transfer pricing study submitted to your goodself vide submission dated November 3, 2014 and November 16, 2015. Further, agreement, invoices and other supporting documentary evidences have also been submitted vide submissions dated December 16, 2015 and December 23, 2015.

Following is the list of other supporting documentary evidences submitted to your goodself vide submission dated December 23, 2015:

S No	Documentary Evidence	Benefit
1	Hazira Pre-assessment for FAIR+MS IPF	Health check review, assessment and benchmarking of systems and procedures
2	Hazira LNG Terminal Expansion (Send-out Pipeline Limit) Feasibility Study Report	Feasibility study for expansion of terminal by identifying capacity limit, evaluation of impact of a third tank addition, comparison of vaporizer and tank types
3	Focused Asset Integrity Review on Management Systems	Review of Pressure Equipment Integrity to assess the effectiveness of the asset integrity management systems.
4	Engineering Investigation of the Failure of SGT-300 Core Engine, Sl No RW0645 and comments on the report from SGSI BV personnel	Review of a real time situation at Hazira site where an emergency shutdown took place.

Decision to avail services – prerogative of the businessman

12. The ld.counsel for the assessee pointed out, thereafter, that despite the assessee repeatedly pointing out that the TPO had incorrectly appreciated the nature of services availed by the assessee, the TPO without dealing with this contention of the assessee, which were factually proved before him also by way of furnishing OSA agreement, he went on to assume the nature of services undertaken by the assessee to be the incorrect regasification services and so assuming he held that the comparable furnished by the assessee was not appropriate, since the assessee was involved in different activities. The ld.counsel for the assessee pointed out that the assessee had taken Brunie LNG Ltd. as comparable entity for comparability purpose, which was rejected by the TPO saying that Brunie LNG is involved in providing highly technical services for various units of Brunie LNG whereas the services provided by the AE to the assessee were only for its regasification unit. Thus, the TPO noted that there was a substantial difference between technical services required by

Brunie LNG and the assessee. Our attention was drawn to page no.89 of the TPO's order, point no.1 as under:

> (i) As per the agreement with B-LNG, dated 12/02/2009 the AE is providing certain advice and services with respect to technical and other support including training of personnel in connection with the Liquefaction Plant, BSP refinery and OCP unit of B-LNG. As per Appendix-1 of the agreement, the details of 'Plant' of B-LNG are provided as per which the 'Plant' of B-LNG is not a single unit but consists of acid gas renewal unit, dehydration unit and Liquefaction units. This shows that B-LNG is engaged in providing highly technical services for various units of B-LNG whereas the services provided by the AE to assessee were only for its re-gasification unit. Thus there is substantial difference between the technical support services required by the B-LNG and the assessee. The basic unit itself is different i.e. re-gasification in case of assessee and liquefaction in case of B-LNG. Due to this functional difference the services provided by the AE to B-LNG are not strictly comparable with the services provided to assessee.

That, accordingly the TPO rejected the internal CUP submitted by the assessee, finding the comparable to be different in functionality from the assessee-company.

13. He thereafter pointed out that the TPO went on to hold that the assessee had not furnished any evidences of "regasification services" availed by the assessee, and accordingly, he held that there were no services availed by the assessee, and the ALP therefore was to be treated as NIL. Ld.Counsel for the assessee pointed out that from the evidences submitted by the assessee, the TPO noted that the invoices of total fixed payments had been submitted by the assessee, which were found to be at arm's length and reducing the same from the total amount paid by the assessee of Rs.7.14 crores, he attributed the amount of Rs.5,76,79,229/- to regasification charges and held the ALP of these services to be NIL finding no services to have been received by the assessee.

14. The ld.counsel for the assessee, after having so pointed the factual assumption of the TPO to be incorrect, then went on to point the exact nature of services availed by the assessee from the Operation and Services Agreement(OSA) entered into with its AE. He drew our attention to the copy of the said agreement placed before us at PB page no.437 to 479 and also drew our attention to page no.1055 to 1112. The ld.counsel for the assessee pointed out that this contract was entered for the provision of services with respect to the operation of LNG Storage and regasification terminal at Hazira, Surat, India. That, under the contract, the assessee was entitled to avail services as outlined in Article 4.1 read with Appendix-1 of the agreement, and optional services as listed in Appendix-2 of the agreement. He drew our attention to the definition of the said services as contained at page no.1060 of the PB. Thereafter, he took us to Article 4 of the agreement dealing with services and operational services agreed to between both the parties, and from the same, he pointed out that there were some fixed services covered under Article 4.1 and optional services covered under Article 4.2. He pointed out that the charges paid by the assessee to its AE for the fixed services were held by the TPO to be at arms length. But for the charges paid for the optional charges, the TPO had held the ALP to be NIL finding no services to have been received by the assessee, as noted above. The ld.counsel for the assessee pointed out that as per the agreement, the optional services as listed in Appendix-2 were as under:

OPTIONAL SERVICES

Examples of optional advice and services

Typical examples of optional advice and services are:

1 Studies or in-depth investigations relating to alterations in or additions to the Terminal, which alterations or additions require capital budget proposals for their implementation. Examples of such studies or investigations are scouting and feasibility studies for debottlenecking the Terminal.

2 Design and engineering of alterations or additions referred to under paragraph 1.

3 Services in connection with the implementation of alterations or additions referred to under paragraph 1.

4 Development or provision of computer software packages specific to the Terminal.

15. He pointed out that it basically related to the study and in-depth investigation relating to the alterations in or additions to the terminal, design and engineering of alterations or additions and such related services; that primary nature of these services were in relation to any alteration or addition effected to the terminal i.e. LNG storage and regasification terminal; that these services as per the agreement had nothing to do with the regasification charges; that copy of the OSA agreement itself had nothing to do with regasification charges as assumed by the TPO. He pointed out that it was for these services availed by the assesse from its AE that optional service charges had been paid to the AE, and accordingly, evidence of availing these services were filed, being Hazira LNG terminal expansion feasibility study report, focused asset integrity review on management systems, engineering investigation of the failure of SGT 300 core engine, peer review to prepare for GAME-IPF, all listed in the communication to the TPO during TP proceedings. Pointing out so, the ld.counsel for the assessee contended that the entire exercise carried out by the

TPO, therefore, finding the ALP of the transactions to be NIL was not maintainable as it proceeded on an incorrect premise.

16. The ld.DR was unable to controvert all the above factual contentions made by the ld.counsel for the assessee. He unable to point out from the orders of the authority below, i.e. both TPO and even the ld.CIT(A), whether they had dealt with this anomaly pointed out by the ld.counsel for the assessee of the incorrect appreciation of the nature of services availed by the assessee from its AE. The ld.DR was also unable to point out any infirmity in the contention of the assessee that the TPO/CIT(A) had incorrectly appreciated the nature of services availed by the assessee.

17. In view of the same, there is no case for adjudicating the issue on merits at this stage, since it is abundantly clear that the TP assessment carried out by the TPO proceeded on the basis of incorrect appreciation of nature of services availed by the assessee from its AE as being regasification services while the assessee repeatedly pointed out with evidence that the services availed pertained to maintenance and operation of regasification terminal of the assessee. The entire exercise needs to be carried out by the TPO after understanding the nature of services availed by the assessee in the proper perspective. Therefore, this issue of determination of ALP of the transactions with the AE is restored back to the TPO for *de novo* consideration after providing due opportunity of hearing to the assessee.

18. In the other grounds raised before us, the ld.counsel for the assessee has pointed out that identical services were availed in the past also by the assessee from its AE and all accepted in TP assessments and applying the principle of consistency, they be allowed in the impugned year also. The assessee has also raised a

ground that the TPO had incorrectly computed the value of optional services availed by the assessee, the ALP of which was subjected to the adjustment by the TPO. Since we have restored the issue of determination of ALP of the transaction back to the TPO, the TPO is directed to take note of all the contentions of the assessee while dealing with the issue.

In view of the same, ground no.4 and 5 are allowed for statistical purposes.

19. Ground No.6 raised by the assessee reads as under:

> *"6. That on the facts and circumstances of the case and in law, the ld.AO erred in not granting credit of INR 43,99,774/- towards TDS amount as claimed by the appellant vide letter dated 2nd February 2016."*

As far as the issue of grant of TDS credit raised in the above ground is concerned, this issue is also restored to the file of the AO with the direction to grant TDS credit as per law.

20. The appeal of the assessee is allowed for statistical purposes in above terms

ITANo.558/Ahd/2022 (Department's appeal)

21. The ground raised are as under:

(a) The Ld. CIT(A) has erred in law and on facts in directing the rejection of CUP as the most appropriate method.

(b) The Ld. CIT(A) has erred in law and on facts in directing the selection of Petronet LNG Limited and GAS Authority of India Limited (GAIL) as comparables for RPM.

(c) The Ld. CIT(A) has erred in law and on facts in not appreciating the differences in FAR between the assessee and the two alleged comparables.

(d) The Ld. CIT(A) has erred in law and on facts in directing the selecting of Resale Prime Method as the most appropriate method for calculation of Arm's Length Price.

(e) The Ld. CIT(A) has erred in law and on facts in not carrying out suitable comparability adjustments in view of the different intensities of the functions-being carried out, use/non-use of certain assets and assumption/non-assumption of certain risks by the comparables vis-a-vis the assessee-company, even if RPM is to be considered as the most appropriate method.

(f) The Ld. CIT(A) has erred in law and on facts in accepting the PLI even if RPM is to be considered as the most appropriate method and no comparability adjustment is to be carried out.

(g) The appellant craves leave to add, alter and /or to amend all or any of the ground before the final hearing of the appeal.

22. This ground relates to the TP addition made by the AO/TPO amounting to Rs.25,22,59,720/- on account of purchase of LNG from AE.

23. The AO rejected the TP study by the assessee, where choosing RPM as the most appropriate method (MAP) the assessee had bench marked the transaction as being at arms length.The TPO selected external CUP as the most appropriate method and selected two comparables for arriving at the ALP.

24. Brief facts of the case are that the assessee (previously known as Hazira LNG Private Limited in short HLPL) is a full-risk distributor of R-LNG (Regasified liquified natural gas) in India. It owns, operates and maintains terminal facilities of LNG at Hazira. The activities include reception, storage and re-gasification facilities at Hazira. It purchases LNG from its associated Enterprises and sells R-LNG to customers in India. During financial year 2011-12, pertaining to the impugned assessment year before us A.Y 12-13,the assessee purchased 7 LNG cargoes from its AEs. The price payable for cargo purchased was determined in US dollars per million British thermal unit ("MMBTU"). Out of these total purchases, 4 cargoes were purchased as a part of string / formula linked forward contract mechanism/deal and 3 cargoes were purchased on spot basis. Considering the functional and risk profile of these transactions and examining the availability of comparable data, the assessee had selected Resale Price Method ("RPM"), using Gross Profit margin ('GPM') per MMBTU as the profit level indicator ("PLI") ,as the most appropriate methodology for benchmarking the transaction. A search for comparable companies by the appellant yielded a set of 2 companies that were broadly comparable to it. Based on three years' financial data i.e. financial years 2009-10, 2010-11 and 2011-12 of 2 broadly comparable companies undertaking activities similar to the assessee, the Gross Profit Margin (GPM) was found to range from INR 31.20 per MMBTU (For GAIL) and INR 35.68 per MMBTU (For PLL) resulting in an arithmetic mean of INR 33.44 per MMBTU. For the financial year ended 31.03.2012, the assessee had earned a GPM of INR 47.76 per MMBTU. Thus, it was concluded that it's international transaction relating to purchase of LNG for resale was at arm's length.

25. In respect of formula linked deals, Other Method was also used for supplementary analysis. With respect to cargoes purchased under formula linked deals, while the appellant acted as a trader, the deals were made on a back-to-back basis with same pricing formula after adding margin & custom duty and therefore, purchase price was treated as pass-through cost, i.e., only margin and custom duty was added to the purchase price to arrive at the sale price. Thus, since the pricing formula was considered by the appellant to be transparent, said cargo purchases (and hence the purchase price) were considered to be at arm's length by it.

26. The TPO rejected the methodology adopted by the assessee for benchmarking its international transactions pertaining to purchase of LNG. He rejected RPM as the most appropriate method to benchmark the primary transaction pertaining to distribution of R-LNG, on the following grounds:

- Comparables adopted by the assessee [Petronet LNG Limited ("PLL") and GAIL India Limited ("GAIL")J were found to be engaged in trading on a long term / government administered price basis and had high related party transactions; and

- After factoring marketing margin, the assessee was found to be left with no margin for its port and related handling activities.

27. The TPO adopted CUP as the most appropriate method to test the arm's length nature of the international transaction pertaining to distribution of R-LNG. He also rejected the technical opinion sought by the Appellant from Poten & Partners (an LNG industry expert) on price comparison of two spot cargos and why LNG was not a normal commodity, without providing any substantial rational reasoning and

justification to negate the technical advice. He finally concluded the following:

- Adjustment with respect to difference in credit period and L/C charges were allowed;
- No risk adjustment were provided for functions undertaken by them; and
- Adjustments for difference in other variables such as source location, discharge date etc. were denied.

28. It was brought to the notice of the ld.CIT(A) that the issue stood decided on identical facts in favour of the assessee by the ITAT right from Asstt.Year 2007-08 to 2011-12 by passing a speaking order on the same; that the ITAT had acknowledged RPM as the most appropriate method for the purpose of bench marking transaction of import of LNG and R-LNG in India with Petronet LNG Ltd., and GAIL Ltd., as correct comparable. It was also pointed out to the ld.CIT(A) that the ITAT had held CUP was not an appropriate method given the volatility surrounding spot LNG industries, and it was also brought to the notice of the ld.CIT(A) that in subsequent years from Asst.Year 201314 to 2015-16 RPM had been accepted by the TPO as the correct method and no TP adjustment was made. The ld.CIT(A) noting these facts deleted the adjustment of Rs.25.22 crores made to the purchase of LNG by the assessee from its AE . Relevant findings of the ld.CIT(A) are contained at para 8.5 to 8.7 of its order as under:

> *"8.5 The appellant has submitted that based on Principle of judicial discipline and propriety demand that the judges irrespective of their own views, must follow the decision of the superior courts to which they are judicially subordinate and given the relief provided by ITAT in earlier AYs which has been accepted by the TPO himself in subsequent AYs. the adjustment made for AY 2012-13 ought to be deleted since the facts and circumstances are similar vis-a-viz other years.*
>
> *8.6 It is specifically noted that the TPO/AO made some enquiries u/s 133(6) of the Act with PLL and GSPC Ltd (or comparing the purchase price paid by the appellant and these companies while doing his CUP analysis. The appellant has objected to the same and in case of GSPC Ltd it submitted that fhe*

said comparison is not tenable as GSPC purchases R LNG from the appellant and in the case of appellant it purchases LNG from AE. It is added that the LNG arm of GSPC Ltd was under development during the year in question wherein it was setting up an LNG terminal at Mundrai.

8.7 In view of the above discussion, respectfully following the order of the jurisdictional appellate tribunal in appellant's own case, the AO is directed to accept the resale price method as the most appropriate method for the purpose of benchmarking the international transaction of the appellant with respect to import of LNG and resale of R-LNG in India, It is also held that in view of the clear finding by the ITAT in the appellant's own case, GPM of GAIL and PLL are a good comparably for such benchmarking by RPM method. Since the GPM of the appellant is higher than the GPM of the comparables, therefore the transaction of the appellant with it's AEs is held to be at Arm's length. Accordingly, the TPO/AO is directed to delete the addition of the upward adjustment of Rs.25,22,59,720/- made on purchase of LNG from AE by the TPO/AO. Grounds of Appeal 1 to 8 are allowed."

29. Before us, the ld.DR fairly agreed that the issue was covered in favour of the assessee by the orders of the ITAT in the preceding years and that in succeeding years no TP adjustment had been made to the said international transaction by the TPO.

In view of the same, we see no reason to interfere in the order of the ld.CIT(A) deleting the adjustment made of Rs.25.22 crores to the international transaction of purchase of LNG.

All the grounds raised by the Revenue are accordingly dismissed.

30. In the result, the appeal of the assessee is allowed for statistical purposes and that of the Revenue is dismissed.

Order pronounced in the Court on 17th October 2024 at Ahmedabad.

Sd/-	**Sd/-**
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad, dated 17/10/2024