IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I' BENCH, NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 7923/DEL/2019 [A.Y. 2012-13]

Imsofer Manufacturing India Pvt Ltd [Now Known as Ferrerro India Pvt Ltd World Trade Center. 8th Floor Tower -3 Kharadi, Pune, Maharashtra	Vs.	The A.C.I.T Circle - 12(1) New Delhi
PAN – AABCI 6450 N		
(Applicant)		(Respondent)

Assessee By : Shri Ajit Jain, AR
Ms. Nagma Gupta, AR

Department By : Shri Reuben Mathew Jacob, Sr. DR

Date of Hearing : 21.08.2024
Date of Pronouncement : 14.11.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the ld. CIT(A)- 44, New Delhi dated 31.07.2019 pertaining to A.Y. 2012-13.

2. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

3. The assessee has raised the following grounds of appeal:

> "1. On the facts and in circumstances of the case and in law, the Ld. Transfer Pricing Officer ('TPO')/AO has erred and the Hon. CIT(A) has further erred in upholding/confirming the action of the Ld. TPOI AO by making a transfer pricing addition to the Appellant's income based on the provisions of Chapter X of the Act.
>
> 2. Transfer Pricing Adjustment to the Manufacturing Segment:
>
> On the facts and in circumstances of the case and in law, the Ld. TPOIAO has erred and the Hon. CIT(A) has further erred in upholding/confirming the action of the Ld. TPOI AO by:
>
> 2.1 disregarding the benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data in the transfer pricing study report maintained as per Section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('the Rules').

2.2 following inconsistent approach while selecting the comparable during the current year vis-a-vis previous assessment year and rejecting the functionally comparable companies without considering the judicial precedents submitted by the Appellant.

2.3 rejecting comparable companies selected by the appellant in its TP Study on inappropriate grounds although the same are functionally comparable and also rejecting the filters applied by the Appellant and inappropriately applying fresh filters.

2.4 incorrectly rejecting the additional comparables submitted by the Appellant to benchmark the international transactions of the Appellant.

2.5 incorrectly classifying provision/liabilities no longer required amounting to INR *12,047,716/-* as non-operating income and considering the impairment loss amounting to INR 198,347 as a part of operating expense, while calculating the operating margin of the Appellant without considering the commercial reasons submitted by the Appellant.

2.6 not allowing the economic adjustments as provided in Rule 10B of the Rules, to reduce the difference while comparing the Appellant, being in its initial phase of operations, with already established companies.

2.7 rejecting the use of multiple year data i.e. contemporaneous data in the transfer pricing study report maintained as per Section 92D of the Act read with I Ol) of the Rules used for determining the arm's length price of the international transaction of Appellant.

3. Transfer Pricing adjustment on the international transaction of receipt of services-On the facts and in circumstances of the case and in law, the Ld. *TPO/AO* has erred and the Hon. CIT(A) has further erred in upholding/confirming the action of the Ld. *TPOI* AO by:

3.1 making an adjustment with regard to receipt of services transaction of the Appellant as the same cannot be benchmarked separately since it is inextricably linked with the main function i.e. manufacturing function of the Appellant.

3.2 violating the "Rule of Consistency" while making the adjustment to the receipt of service transaction, as the same was considered to be at arm's length in the TP assessment proceedings for earlier years.

3.3 not granting the benefit of *+1-*5 percent as per the proviso to section 92C(2) of the Act.

3.4 not providing any valid reason to reject the alternative benchmarking carried out by the Appellant wherein the Associated Enterprise *CAE')* is considered as tested party for arm's length price.
3.5 holding that the Appellant failed to justify the mark-up of 5% on cost with respect to the services which were actually rendered by the AEs

3.6 not considering various evidences and justifications submitted in order to justify the mark up charged on the receipt of services.

3.7 disallowing mark-up of 5% on the receipt of services transaction without identifying any comparable uncontrolled transactions and without cogent reasons and thereby disregarding Rule 10 B of the Rules.

3.8 ignoring the fact that the AE has paid tax on such services rendered to the Appellant and disallowance of such payment for the services received by the Appellant will lead into double taxation of the same amount.

4. Other Grounds

4.1 On the facts and in circumstances of the case and in law, the Ld. AO has erred and the Hon. CIT(A) has further erred in upholding/confirming the action of the Ld. *TPO/AO* by proposing to initiate penalty proceedings under section 271 (1)(c) of the Act without considering the facts of the case and legal provisions of the Act.

4. At the outset, the ld counsel of the assessee stated that the assessee would like to argue only Ground no. 2.3,2.4,2.5,2.6 and ground 3.1 to 3.8 only. In view of the same the ground no. 1.1,2.1,2.2,2.7 and ground 4 of the assessee are dismissed.

5. Briefly stated, the facts of the case are that the assessee company is a wholly owned subsidiary of Ferrero S.P.A with ultimate holding company being Ferro International SA, European Company. It is engaged in the business of manufacturing and trading in all types of confectionary products such as chocolates, toffees, cocoa, candies, biscuits, mints, chewing gums and medicated candies, toys and chocolates, etc.

6. The assessee company filed its return of income on 30.11.2014 declaring total loss of Rs. 1,00,02,180/-. As the assessee company has entered in international transaction during the year under consideration, the Addl. CIT (Transfer Pricing Officer), New Delhi determined the Arm's Length Price of such transactions u/s 92CA(1) of the Income Tax Act, at Rs. 19,68,45,064/-. Consequently, the total income was determined at Rs 18,68,42,880/- u/s 143(3) r.w. 144C of the Act.

7. The international transactions entered into by the assessee are as under:

No.	Nature of transaction	Method	Value of transaction
1	Import of raw materials, semi finished goods and packing material or manufacturing purposes	TNMM	581467502
2	Export of finished products	TNMM	672110492
3	Import of fixed assets	TNMM	636880151
4	Export of fixed assets	TNMM	7676756
5	Receipt of services	TNMM	407316605
6	External commercial borrowing (ECB) received	-	2113177000
7	Provision of interest on ECB	CUP	101832776
8	Share application money received	-	192836000
9	Outstanding balance payable as on 31st March 2012	-	561058435
10	Outstanding balance receivable as on 31st March 2012	-	398187822

The operating profit margin (OP/OC) computed in the submissions is as below:

8. The AO observed that the main international transaction of the assessee is the import of raw material, semi-finished product, packing material. The assessee has used TNMM as the method and OP/OR as the PLI. The assessee has arrived at a set of 7 companies with an average margin of 1.54%. The assessee has used multiple year data. The assessee's own margin is worked out to be (3.87%). Based on the analysis, the assessee has concluded that its international transactions are at arm's length.

9. The TPO rejected 6 out of 7 comparable companies selected by assessee in the TP report, considered provisions/liabilities written back as non-operating in nature, impairment loss as operating in nature, disregarded economic adjustments i.e. custom duty adjustment and capacity adjustment and further disallowed mark up on receipt of services. The TPO made a total transfer pricing adjustment of Rs. 16,90,85,442/- for import of raw material and other transactions and Rs. 2,03,65,830/- for availing of consultancy services.

10. Aggrieved, the assessee went in appeal before the ld. CIT(A). After considering the facts and submissions, the ld. CIT(A) directed for inclusion of Lotus Chocolate Company Limited, thereby reducing the transfer pricing adjustment to Rs. 10,96,71,595/- (Rs. 8,93,05,765/- for import of raw material and other transactions and Rs. 2,03,65,830/- for availing of consultancy services).

11. Aggrieved, the assessee is in appeal against this order of the ld. CIT(A).

12. The ld AR of the assessee argued that Ground Nos. 2.3 and 2.4 pertain to rejecting comparable companies selected by the assessee in its TP study, rejection of filters applied by the assessee and inappropriately applying fresh filters. It is the say of the ld AR that the TPO incorrectly rejected the additional comparable submitted by the assessee, namely (i) Priya Foods Limited, ii) Veeramani Biscuits Industries Limited and iii) Perfetti Van Melle India Private Limited in the final set of comparable companies.

13. The ld AR stated that the TPO rejected Priya Foods Limited and Veeramani Biscuits Industries Limited on the basis of functionality whereas the above companies are also engaged into manufacturing of biscuitswhich is a part of the confectionary industry and is functionally comparable to the assessee. It is further submitted that the TPO has himself in subsequent years considered companies engaged in manufacture of biscuits as comparable to the appellant for AY 2014-15 A.Y 2017-18, AY 2018-19 and AY 2020-21.

14. The ld AR also submitted that the TPO also rejected Perfetti Van Melle India Private Limited on the ground that the company was rejected on the basis of non-availability of financials on the public

domain in the accept/reject matrix. The ld. counsel for the assessee contended that since the TPO not specifically questioned the functional comparability, it would have to be concluded that the said company was functionally comparable to the assessee company. The ld. counsel for the assessee further submitted that the company is engaged in manufacturing and marketing of confectionery which is functionally comparable to the assessee company. The financials of the company were not available during the Transfer Pricing analysis. However, the same were available in public domain subsequently. It was further submitted that the said company was accepted by the TPO as comparable in A.Ys2017-18, 2018-19 and 2020-21.

15. Per contra, the ld DR could not controvert the factual matrix on the comparable accepted by the TPO in subsequent years.

16. We have heard the rival submissions and have perused the relevant material on record.After hearing the rival representatives, we find that the three companies namely i) Priya Foods Limited, ii) Veeramani Biscuits Industries Limited and iii) Perfetti Van Melle India Private Limited are engaged in manufacturing and marketing of confectionery,similar to the assessee,which includes toffees and chewing

gums. With respect to Perfetti Van Melle India Private Limited, we find that the AO has not contested the functional comparability with that of the assessee. With regard to the financial of Perfetti Van Melle India Private Limited, the same were not available during the time the Transfer Pricing analysis was carried out but subsequently the same became available in the public domain. We also note that the TPO himself has accepted the above three companies as comparable in subsequent years which was not disputed by the Revenue. In view of the above arguments, we are of the considered view that the three companies namely i) Priya Foods Limited, ii) Veeramani Biscuits Industries Limited and iii) Perfetti Van Melle India Private Limited be considered by the TPO in the final set of comparable companies. We accordingly set aside the issue of comparable to the file of the TPO to consider the above three companies as comparable. The grounds 2.3 and 2.4 are allowed.

17. Ground No. 2.5 relates toincorrectly classifying provisions/liabilities written back as non-operating in nature and impairment losses as operating in nature. The ld AR submitted that the TPO and the ld. CIT(A) considered provisions written back as non-operating and the CIT(A) further held that the issue is also not covered

as operating item, as per the CBDT notification SO No. 2810 (E) dt. 19.09.2013.

18. The ld AR of the assessee submitted that write back of the excess provision/liabilities are on account of the amounts which were payable to the AE and the same has been offered for tax in the return of income. It was argued that treating the same as non-operating in nature would amount to double taxation. The ld AR further submitted that the safe harbour rules are optional in nature and the assessee has not opted for the same. Further, without prejudice basis, it is mentioned that CBDT notification SO NO. 2810 (E) is not applicable in assessee's case for A.Y 2012-13 as it came into effect from 19.09.2013. The ld AR of the assessee relied on the case of Bilcare Limited [ITA No.1693/PUN/2018] and Tetra Pak India Pvt Ltd [TS-573-HC-2023(BOM)-TP].

19. Per contra, the ld DR relied strongly on the orders of the AO and the CIT(A).

20. We have heard the rival submissions and have perused the relevant material on record. After hearing the rival representatives, we find thatthe assessee has claimed that the write back of the excess provision/liabilities are on account of the amounts which were payable to the AE pursuant to international transaction during the previous year. However, the TPO has considered it as non-operating when this liability has been written back in the impugned assessment year relying on ***Telcordia Technologies***(supra), ***DHL Express India PLtd*** (supra) and CBDT notification dated 19.09.2013. We find that the case of ***Telcordia Technologies*** was on the issue of provisions for doubtful debts and Advances being non-operating and in ***DHL Express*** the ITAT dealt with items which have nothing to do with main operations.Therefore these cases do not help the Revenue case. The reliance placed by the assessee in the case of ***Pr. CIT vs. Tetra Pak India Ltd*** (supra), however,supports the assessee case wherein in para 8 of its order, the Hon'ble Bombay High Court has held as follows:

> ***"8. As regard the credit to profit and loss account on account of liabilities written back amounting to Rs. 6,15,59,011/- the details of the liabilities written back were made available to CIT(A) as well as ITAT. Both, on facts, and having considered those details, have come to conclusion accepting the Assessee's contention that those liabilities belong to earlier years and are directly relatable to the***

regular business operations of the assessee and since these liabilities were no longer payable to business creditors should be allowed to be written back in the AY under consideration and the same was rightly offered to tax as business income U/s. 41(1) of the Act. Therefore, on facts it was accepted that these liabilities written back were arising out of normal business operations and hence form part of operating income of the assessee."

21. Further, we are of the considered opinion that in accounting principles a liability in the form of provision shall be created in the books of accounts in the year of accrual of expenses until the actual payment is made. Since this liability was no longer required, it was written back and considered as income in the impugned AY. Respectfully following the ratio laid down by the Hon'ble Bombay High Court in the case of ***Pr. CIT vs. Tetra Pak India Ltd*** (supra), we direct the Ld. AO to include the liabilities written back in the impugned assessment year as operating income. Ground 2.5 is allowed.

22. With regards to the impairment loss, the ld. counsel for the assessee submitted that impairment loss arises during the use/sale of a capital asset which is a balance sheet item and it is not recurring in nature and is not related normal business operation. The ld. counsel for the assessee relied on assessee's own case for A.Y 2009-10 and A.Y

2010-11, wherein the coordinate Delhi Bench of ITAT directed the Assessing Officer/ TPO to exclude provision of impairment of assets as operating expenditure. The ld AR argued that the impairment loss to be treated asnon-operating in nature.

23. Having heard the rival submissions, we find that the co-ordinate bench in assessee's own case [supra] has held as under:

> ***"7. We have carefully considered the orders of the authorities below. There is no dispute that the machinery purchased by the assessee was lying in capital work in progress. It is also not in dispute that the treatment given by the assessee is in line with the accounting standard issued by the ICAI. In our considered opinion a provision for impairment of assets is not a depreciation charge nor amortization of fixed assets but it is a provision made to the carrying amount of the fixed assets which is reversible in nature. Moreover section 92 (1) of the Act requires that any income arising from an international transaction / allowance for any expenses shall be computed having regard to arms length price. In our considered view impairment of assets cannot be related as international transaction of the assessee. Further the provision for impairment of assets is not regular business expenditure since it is not recurring in nature and is not related normal business operation and hence not in the nature of operation expenses, therefore, in our considered opinion the same cannot be***

treated as operating expenditure for the calculation of PLI of the assessee. We accordingly direct the AO/TPO to exclude provision of impairment of assets as operating expenditure. This ground is accordingly allowed".

24. Respectfully following the decision of the co-ordinate bench, we direct the Assessing Officer to exclude provision of impairment of assets as operating expenditure. Ground No. 2.5 is allowed.

25. Ground No. 2.6 relates tonot allowing economic adjustments as provided in Rule 10B of the Income Tax Rules, 1961 being assessee's initial year of operations.

26. At the very outset, the ld. counsel for the assessee contended that in assessee's own case for A.Y 2009-10 and A.Y 2010-11 on similar facts and circumstances, Co-ordinate ITAT Delhi Bench directed the Assessing Officer/TPO to allow the adjustment for import duty.The TPO had held that import duty adjustment cannot be given to the assessee as there is no reliable accurate data for all the comparable companies. The CIT(A) came to the conclusion that reliable data was not provided by the assessee and therefore, no comparability adjustment can be allowed.

27. We have heard the rival submissions and have perused the relevant material on record. The co-ordinate Bench of ITAT Delhi Bench in the case of Imsofer Manufacturing India Pvt Ltd in ITA No. 5158/DEL/2015 & 1049/DEL/2016 vide order dated 21.08.2020 has held as under:

"24. The next issue relates to the adjustment on account of custom duty.

25. The appellant company claimed custom duty adjustments since the year under consideration is the first full year of operation, the assessee did not procure any raw material locally and imported 100% of raw material and finished products.

26. Before us the counsel for the assessee vehemently stated that the comparable companies are not dependent on imports whereas the assessee has 100% imports of raw materials. It is the say of the counsel that in the light of the peculiar facts custom duty adjustment need to be given.

27. The DR strongly supporting the findings of the CIT(A) stated that no reliable datas are available.

28. We have carefully perused the orders of the authorities below. The undisputed fact is that the assessee has imported 100% of its raw material whereas the average import in the case

of the comparable companies is only 0.56% as can be seen from the following chart :-

XXXXX

29. The coordinate bench in the case of Terex India Private Limited in ITA No.6775 and 6783/Del/2015 has held as under :-

3.8.3 We have considered the rival submissions and perused the order passed by the authorities below. The Ld. DRP has rejected this contention of the assessee company on the ground that custom duty does not have any impact on the net profit level of the assessee. While deciding the issue of the capacity adjustment, we have held that in terms of Rule 10B (3) all the adjustments which are materially affecting the transaction being compared need to be eliminated. Thus, in case non-cenvat-able custom duty on import made by the assessee company is materially affecting the transaction vis-à-vis the comparables being considered by the TPO then the same needs to be eliminated. Since, this issue has not been considered by the TPO and considering the fact that we have remitted the matter back to AO for allowing adjustment on account of capacity utilization, we deem it fit to restore this issue also to the TPO. The TPO will examine whether non-cenvat-able custom duty on imports paid by the assessee is materially affecting the PLI of the assessee company and if he finds that this payment of non-cenvat-able custom duty is materially affecting the transaction with that

of Assessment year 2011-12 the comparables then he will suitably make adjustment thereof."

30. Considering the factual matrix as discussed here in above in the light of the decision of the coordinate bench (supra) we direct the AO/TPO to allow the adjustment of custom duty.

28. Respectfully following the judicial pronouncements and decision of the co-ordinate bench in assessee's own case, we direct the Assessing Officer/TPO to allow the adjustment of custom duty. Ground No. 2.6 is allowed.

29. With respect to the issue of capacity adjustment, the ld AR submitted that the TPO and the CIT(A) held that reliable data is not provided by the Assessee and therefore no comparability adjustment can be allowed. It is further stated that in Appellant's own case for AY 2009-10 and AY 2010-11 (with similar fact pattern), Hon'ble Delhi ITAT directed the AO/TPO to allow the capacity adjustment (Imsofer Manufacturing India Pvt. Ltd vs DCIT (ITA No.5158/DEL/2015 & ITA No. 1049/Del/2016 order). It is further stated that the data for computing capacity adjustment is available in the annual reports of the comparable companies.

30. Per contra the ld DR strongly defended the orders of authority below.

31. We have heard the rival submissions and have perused the relevant material on record. The co-ordinate Bench of ITAT Delhi Bench in the case of Imsofer Manufacturing India Pvt Ltd in ITA No. 5158/DEL/2015 & 1049/DEL/2016 vide order dated 21.08.2020 has held as under:

> ***31. The next issue relates the adjustment on account of capacity utilisation. Before us the counsel for the assessee vehemently stated that since this year is the first full year of operations hence, the assessee could not utilise its installment capacity to the fullest and could utilise only 45.34% of it capacity in relation the production of finished goods whereas the average capacity utilisation of the comparables is 71%. It is the say of the counsel that the CIT(A) disregarded this adjustment on the basis that there was practical difficulty in finding out the relevant data for carrying out the capacity adjustment of the comparables. The counsel prayed for the allowance for adjustment of capacity utilisation.***
>
> ***32. The DR strongly supporting the findings of the CIT(A).***

33. We have carefully perused the orders of the authorities below. At the very outset we do not agree with the findings of the CIT(A) who stated that there is a practical difficulty in finding out relevant data.

34. In our considered opinion the financial report of every company contains the details relating to the capacity utilisation and the same are available in the public domain also. The financial reports of the comparable 14 companies used by the TPO do contain the capacity utilisation details and the same can be used for giving the benefit of under utilisation of capacity by the appellant company. We accordingly direct the AO /TPO to allow adjustment of capacity utilisationby comparing the data of the comparable companies in so far as capacity utilisation is concerned with that of the assessee. In alternate the assessee shall furnish the relevant data and the AO / TPO shall examine the same after giving a reasonable opportunity of being heard to the assessee."

32. Respectfully following the decision of the co-ordinate bench in assessee's own case, we give similar direction to the Assessing Officer/TPO to allow the adjustment of capacity adjustment by comparing the data of the comparable companies in so far as capacity utilisation is concerned with that of the assessee. In alternate the assessee shall furnish the relevant data and the AO/TPO shall examine

the same after giving a reasonable opportunity of being heard to the assessee. Ground No. 2.6 is allowed.

33. The ground no. 3.1 to 3.8 relates to disregarding the aggregation approach for receipt of services with the manufacturing function and disallowing the mark up on receipt of services. The ld AR of the Appellant submits that receipt of services has been accepted by the TPO and the CIT(A) and thus the markup charged on receipt of services should not be disallowed. The ld AR argued that further, no third party would render these services on cost tocost basis in third party scenario. Accordingly, the ld AR submits that the markup of 5% is reasonable for receipt of services and should be allowed. The ld AR relied on the judicial precedent wherein it was held that disallowance of markup cannot be upheld while rendition of services has been accepted:

Humboldt Wedag India Pvt. Ltd. (TS-68-ITAT-2023(DEL)-TP)

BMW India Financial Services Pvt Ltd (TS-68-ITAT-2023(DEL)-TP)

Corning Technologies India Pvt Ltd (TS-427-ITAT-2021(DEL)-TP)

34. We have heard the rival submissions and have perused the relevant material on record. The co-ordinate Bench of ITAT Delhi Bench in the case of ***Humboldt WedagIndia Pvt Ltd***(supra) has held as under:

"Ground No. 1.1 to 1.5 pertaining to transfer pricing adjustment of Rs. 1,56,78,332

7.1 Our attention was drawn to the order of the Hon'ble Tribunal for the assessment years 2014-15 and 2016-17 in assessee's own case wherein similar issue arose for consideration and the Hon'ble Tribunal keeping in view the entire facts and circumstances of the case deleted the entire adjustment made on this account by allowing the mark-up charged by the AEs in the services provided to the assessee. The relevant extract of the order of the Hon'ble Tribunal for the assessment years 2014-15 and 2016- 17 in ITA No. 8119/De/2018 and ITA No. 475/Del/2021 respectively dated 18.08.2021 is reproduced below:-

"4. The assessee paid Rs.8.28 lacs for supervising charges, and Rs.14.25 Crores for central services. On supervision services, the AE charged a net profit mark-up of 4% on the internal cost incurred on the basis of number of hours spent by its personal in providing such services. On the central services, the AE charged 5% profit mark-up on internal cost while third party costs are charged on cost to cost basis.

5. The mark-up of 4% and 5% has been disallowed by the TPO and accordingly enhanced the income of the assessee based on the id. DRP observations for the year 2010-11. For the sake of ready reference, the same is reproduced as under:

"3.3.2. In the assessee's case, the intra- group services relate to general administration, finance and accounting, coordination, general management, corporate and project financing, recruitment and education. It is noted that the assessee is an entrepreneur in its own right and is engaged in engineering, procurement and commissioning projects for the third party clients. It procured orders on independent basis and also carried out the project on its own. It is hardly operating as an extension of AE or catering exclusively to the AE. It virtually undertakes all the risks associated with rendering services, marketing and performs various complex roles. Therefore, the ratio of Supreme Court decision in the case of Morgan and Stanley & Co. hardly applies on the facts of the assessee's case. The assessee has also provided substantial evidence in form of e-mails and correspondence with the AE in respect of the services rendered by the AE. On going through the same, it clearly comes out that the AE was rendering services which were beneficial for the assessee in conducting its business. No doubt, some benefit of the services may have accrued to overall group also. But the primary beneficiary was definitely the assessee. Under these

circumstances, it would not be proper to term the services rendered by the AE as stewardship activity.

3.3.3. Corning to the quantum of payment for the services, it is seen that from the total cost of services, cost of stewardship activity services/duplicate services is first removed. The remaining cost is allocated to different organizations of the group. The assessee pays the cost of services allocated to it plus ore-agreed mark up. In the course of hearing, the assessee was asked to justify the mark up. However, no detailed justification was provided in this regard. It was only stated that since the AE was providing the services, it was entitled to earn some margin on the same. However, as discussed earlier, while the primary beneficiary of the services is the assessed, there are also some incidental benefits accruing to the group. The parent company gets benefited by better synergies, scale of economy, better coordination and reporting. Considering this, the AE, in our opinion, was not justified in charging any mark up on the cost of services. The arm's length price of the services is therefore decided at the actual cost. The adjustment is therefore sustained to the extent of mark up only. The TPO is directed to reduce the adjustment accordingly."

6. The main argument of the Id. AR was that these transactions are benchmarked by using TNMM and furnished that TP documentation whereas the TPO did not follow any

prescribed method and the entire mark-up is disallowed without giving any reasons. The observation of the revenue that the parent company gets benefited by better synergies, scale of economy, better coordination and reporting cannot be accepted.

7. While the assessee avails supervision services from its AEs and pays mark-up charges, it also provides such services to the AEs for their third party contracts and receives mark-up charges. The pricing basis and the results arising from the same have been accepted by the TPO. Disallowing the markup on receipt of services while in-principle accepting the provision of similar services rendered having similar intent and basis of pricing cannot be valid ground to disallow the mark-up. It is not out of contest to note that no such disallowance has been made on the mark-up in the case of the assessee AY 2007-08 to 2012-13 and AY 2015-16.

8. Hence, keeping in view, the entire facts and circumstances, the contention of the revenue that the AE invariably derives some benefit and hence no mark-up should be charged, cannot be accepted."

7.2 Keeping in view the rule of consistency and more so the position that the facts for the assessment year 2017-18 remain the same as that of assessment year 2014-15 and 2017 in respect of the impugned transactions with its AE, we respectfully following the order of the

Hon'ble Tribunal (supra) direct the Ld. AO to delete the addition of Rs.1,56,78,332/-. Ground No. 1.1 to 1.5 pertaining to the adjustment of Rs. 1,56,78,332 to the total income of the assessee on account of difference in ALP of its international transactions with its AEs relating to availment of supervision services, SAP services and Central services are thus allowed."

35. Further, the co-ordinate bench of ITAT Delhi Bench in the case of ***BMW India Financial Services Pvt Ltd*** ITA No. 478 & 562/DEL/2022 vide order dated 03.02.2023 held as under:

"Hence, in view of the observations above, it cannot be said that the software/IT support services cannot be charged at par. A markup of 5% policy for the IT services rendered is an acceptable markup by international guidelines and as per EU Joint Transfer Pricing Forum. It cannot be expected that the parent organization supply support services without charging anything for such services rendered. Hence , we hold that the markup o f 5% is sufficient to recoup the expenditure involved by the AE in exploration, inspection, testing and finalization of ITA Nos. 478 & 562/Del/2022 BMW India Financial Services Pvt. Ltd. 12 the suitable software . Accordingly, we direct that no other expenses other than 5% markup be allowed on the support services rendered by the AE."

36. Respectfully following the decision of the co-ordinate bench in ***Humboldt Wedag*** and ***BMW India Financial Services*** (supra) case, we direct the TPO to allow mark-up on receipt of services. Ground no. 3.1 to 3.8 is allowed.

37. In the result, the appeal of the assessee in ITA No. 7923/DEL/2019 is allowed.

The order is pronounced in the open court on 14.11.2024.

Sd/-	**Sd/-**
[CHALLA NAGENDRA PRASAD]	**[NAVEEN CHANDRA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14th November, 2024.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	