

3. For the sake of convenience and clarity the facts relevant to the appeal bearing ITA No. 02/Coch/2021 for AY 2012-13 are stated herein.

4. The brief facts of the case are that the appellant is a company incorporated under the provisions of Companies Act, 1956. It is engaged in the business of providing software services. The return of income for AY 2012-13 was filed on 30.11.2012 declaring total income of Rs. 37,70,47,100/-. The appellant company also reported the following international transactions: -

Sr. No.	Name of the AE	Nature of international transaction	Total amount	Method adopted
1	Nest GmbH	Provisions of Services	Rs.1,74,47,726	Cost plus method
2	Nihon Nest Corporation		Rs.29,68,24,261	Cost plus method
3	Nestrices Co. Ltd.		Rs. 19,75,212	Cost plus method
4	Nest Technologies Inc		Rs.1,36,91,978	Cost Plus method
5	Operna AM		Rs. 70,74,489/-	Cost Plus method
6	SFO Technologies Corp		Rs. 1.06,21,995	Cost Plus method
7	Nest GmbH	Advances	Rs. 2,82,60,841/-	CUP
8	Nihon Nest Corporation	Commission	Rs.12,09,19,144	CUP
9	Nihon Nest Corporation	Post Support Services	Rs, 6,04,59,572	CUP
10	Nihon Nest Corporation	Reimbursement of Expenses	Rs. 80,56,963	CPM
11	Nest Technologies Inc		Rs. 8,91,01,229	CPM

5. On noticing the above international transactions the DCIT, Corporate Circle-2(1), Kochi (hereinafter called "the AO") referred the matter to the Transfer Pricing Officer (TPO) u/s. 92CA(3) of the Income Tax Act, 1961 (the Act) for the purpose of benchmarking the above international transactions. The TPO, vide order dated

29.01.2016 pass u/s. 92CA of the Act suggested upward adjustment in respect of commission on post services offered paid to Nihon Nest Corporation of Rs. 14,27,86,929/-. On receipt of the TPO's order the AO passed the assessment order dated 31.03.2016 u/s. 143(3) r.w.s. 144C of the Act at a total income of Rs. 53,52,54,016/- While doing so the AO made several disallowances, which includes the disallowance u/s. 14A of Rs.1,59,40,787/-.

6. Being aggrieved, an appeal was filed before the CIT(A), who vide the impugned order restricted the adjustment to Rs. 1,93,79,686/- and directed the AO to delete the addition made u/s. 40a(i) of the Act. Thus, partly allowed the appeal.

7. Being aggrieved, the appellant is in appeal before this Tribunal in the present appeal.

8. Ground of appeal No. 2 challenges the decision of the CIT(A) deleting the addition made u/s. 14A of the Act. The CIT(A), on examination of the factual details of investments made a categorical finding that reserve funds far exceeds the investments made by the assessee. Therefore, no disallowance of interest can be made u/s. 14A of the Act. The decision of the CIT(A) is in consonance with the well settled position of law. Therefore, we do not find any reason to interfere with the findings of the CIT(A). Ground of appeal No. 2 dismissed.

9. Ground No. 3 challenges the decision of the CIT(A) upholding the addition u/s. 40(a)(i) of the Act in respect of payments of royalty and technical services. The factual background of the case is that the appellant had paid money towards services rendered by Nihon Nest Corporation, Japan. There is no dispute about the fact that the appellant had paid the money in consideration of services rendered by Nihon Nest Corporation to Toshiba Medical Systems, which is a customer of the appellant in Japan. Services have been rendered in Japan, therefore, the amount does not become chargeable in India. He does not have Permanent Establishment in India. The services fall under Article 12 of DTAA entered into by India and Japan. Therefore, there is no obligation of deduct tax at source. We do not find any illegality in the findings of the CIT(A) in deleting the addition of Rs. 18,13,78,717/-. Ground of appeal No. 3 stands dismissed.

10. Ground No. 4 challenges the findings of the CIT(A) deleting the addition made u/s. 36(1)(iii) of the Act. The CIT(A), after examining the submission made before him confirmed the disallowance in respect of the advance made aggregating to Rs. 11.41 lakhs. Accordingly, restricted the disallowance to Rs. 72,427,823/-. The finding of the CIT(A) is based on the factual submissions made on behalf of the respondent assessee. Therefore, we do not find any illegality. Ground of appeal No. 4 stands dismissed.

11. Ground of appeals Nos. 5,6,7 & 8 challenge the restriction of TP adjustment of Rs. 1,93,79,686/-. The relevant finding of the CIT(A) is as under: -

*“However, the Appellant submission by itself stipulates that they follow an 85:15 model with respect to the business done through the AE. The commission and post support service incurred by the appellant is 15% commission and 7.50% post support service based on the calculation submitted. However, the appellant himself has made a 5% suo-motto disallowance. We still find that the amount paid to the AE in Japan is more by 2.50% as compared to transaction with other AE's where the transactions have already been determined as arms length by the assessing officer. Accordingly, I confirm that the disallowance of commission to the extent of 2.50% of the total commission paid and delete the disallowance made on post support services. The total commission paid by the appellant @ 15% is Rs.11,62,78,120/- and accordingly, the disallowance under transfer pricing on such commission shall be restricted to Rs.1,93,79,686/- (11,62,78,120 *2.5/15). Accordingly I confirm that the transfer pricing disallowance be restricted to Rs. 1,93,79,686/-, The Grounds of Appeal is Partly Allowed.”*

However, the CIT(A) ignored the order passed by this Tribunal in assessee's own case for preceding year on the same issue. Therefore, we remand this issue back to the file of the CIT(A) to benchmark the international transactions of commission and post support taking into consideration the order passed by this Tribunal for AY 2008-09. This issue is restored to the file of the AO/TPO to consider the issue afresh after affording reasonable opportunity of hearing to the appellant. Appeal stands partly allowed.

12. Since identical issues and facts are involved in Revenue's appeal ITA No. 03/Coch/2021, our findings in ITA No. 02/Coch/2021 shall apply mutatis mutandis to this appeal also.

13. In the result, the appeals filed by the Revenue stand partly allowed.

Order pronounced in the open court on 27th June, 2025.

Sd/-
(PRAKASH CHAND YADAV)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Cochin, Dated: 27th June, 2025

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin