

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'I': NEW DELHI.**

**BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
And
SHRI SUDHIR PAREEK, JUDICIAL MEMBER**

**ITA No.2327 & 7781/DEL/2018
(Assessment Years : 2013-14 & 2014-15)**

DCIT ,
Circle-1(1) (1),
International Taxation
New Delhi.

vs.

Continental Engineering Corporation
7th Floor, Tower B Signature Tower,
Sector 29, NH 8,
Gurgaon 122002

(PAN: AAACC6948C)

ASSESSEE BY : Sh. Sachit Jolly, Sr. Adv
& Sh. Sohun Dua, Adv
& Sh. Abhyudaya Shankar Bajpai, Adv
(virtual)

REVENUE BY : Sh. Dharm Veer Singh, CIT (DR)

Date of Hearing : 25.11.2025

Date of Order : 12.02.2026

ORDER

PER S. RIFAUR RAHMAN, ACCOUNTANT MEMBER :

1. These appeals are filed by the Revenue against the separate orders of Id. Commissioner of Income-tax (Appeals) 42, New Delhi (hereinafter referred to 'Id. CIT (A)') dated 19.01.2018 and 27.9.2018 relevant for Assessment Years 2013-14 & 2014-15 respectively.
2. Since the issues are common and the appeals are connected, hence the same

are heard together and being disposed of by this common order. First we take up the appeal of revenue in **ITA No.2327/Del/2018 for AY 2013-14**

3. Brief facts of the case are, Continental Engineering Corporation-Indian Project Office ("CEC PO" / "Assessee"), a project office of Continental Engineering Corporation, Taiwan ("CEC Taiwan") is engaged in the business of Civil Engineering Construction in the fields of Highways and Mass Rapid Transit System. It was duly registered with registrar of companies on 5th December 2005 as a project office and started its operations from April 2006.
4. The assessee was also engaged in certain joint ventures formed for the purpose of getting the orders from the third parties. During the assessment year, the assessee has entered into various international transactions with its related parties. The impugned transaction was in relation to the provision of construction services to "JVs" ("AEs)". JVs were formed with an objective to get the construction contract from Bangalore Metro Rail Corporation Limited ("BMRCL") / Delhi Metro Rail Corporation Limited ("DMRCL"). After receipt of contract, the work was allocated between JV partners in a specified manner as determined in the subcontracting agreements.
5. In order to benchmark the relevant international transaction, the assessee has applied Comparable Uncontrolled Price ("CUP") method based on back to back arrangements i.e. the entire construction received by JV was allocated

between JV partners on back to back basis. The entire revenue received by JV from BMRCL was allocated to JV members based on the work allocated to them.

6. The assessee has duly filed its income tax return for the relevant assessment year on 30th November, 2013 after declaring returned income of INR 14,38,24,439/- before adjustment of losses. The case was selected for scrutiny assessment. Based on the Form 3CEB, the case was subsequently referred to the transfer pricing officer ("Ld. TPO") for determining the arm's length price ("ALP") of the international transactions entered by the assessee with its associated enterprises ("AEs"). During the assessment proceedings, the information/documents as called for by the Deputy Commissioner of Income-tax ["Ld. TPO") were duly submitted by the assessee from time to time.
7. After considering the documents and submissions before the TPO, Ld. TPO rejected the TP study report submitted and benchmark determined by the assessee to determine Arms Length Price by applying 'CUP' as the most appropriate method, proceeded with 'TNMM' for benchmarking the international transactions based on the following observations:
 - i) TPO made reference to the TP study submitted by the assessee wherein it is mentioned that this income a charged on the basis of work allotted and no markup is charged since the India office carried out the project work allotted to it on behalf of JV, no markup is charged.
 - ii) The economic analysis carried by assessee is erroneous and devoid of

any logic. CCE PO are not a party to the contract entered into by the AE with third parties and are merely a sub-contractor of the AE.

iii) Assessee have been subcontracted the work of construction which is in the nature of technical services. It is evident that the losses arising out of the projects undertaken by the AE have been pushed to the assessee, since no rational and prudent business person would ever undertake a contract work on cost only. Further, nothing has been brought on record by assessee to demonstrate the rationale of value of project work undertaken.

iv) Moreover, it is pertinent to note that the decision to enter into a contract with a third party was taken by the AE alone and therefore any profit or loss arising as a result of such contract should only be borne by the AE. On the other hand the Assessee, being a captive sub contractor is expected to earn a markup on cost for the work undertaken by it for the project, since it had no role in deciding the third party contract amount or the decision to enter into such a contract. Moreover, no third party would have agreed to take a sub-contract from the main contractor on loss due to the reason that the ultimate receipts from the customer (to the extent of work sub contracted) will be passed on.

v) Assessee has not brought anything on record to justify its claim that the Assessee had charged a markup or the Assessee had a role while quoting the price to the customer (BMECL)

vi) Assessee has not given any details of the cost analysis for bidding the project and nor the Assessee has disclosed the markup percentage that it has charged while bidding for the project.

vii) Assessee has stated that the Assessee has incurred loss due to extraordinary circumstances, however, the Assessee has taken no pain to explain these circumstances

viii) Therefore, losses earned by the Assessee are due to the mismatch in the contract work allocated and apportionment of contract revenue, in case it is accepted that the Assessee had before and provided its inputs while JV was securing contract from the customer

ix) As mentioned by the Assessee, in its earlier reply that the Assessee has only one customer the related party JV companies. The contract for which the Assessee is working is not even in its name rather is in the name of JV.

x) Moreover, the Assessee has not provided any explanation/details/traits/ characteristics of the Assessee which are akin to an entrepreneur. Therefore, there is no basis to conclude that the Assessee is an entrepreneur since any entrepreneur would have at least taken a contract in its name would have been exposed to third party customer which would have acted in its favor in terms of marketing.

8. Based on the above observations, TPO had benchmarked the ALP adjustments of Rs.53,60,88,338/-.

9. Aggrieved with the above order, assessee preferred an appeal before Ld. CIT(A)-42 New Delhi and filed detailed submissions which are reproduced at page 5 to 20 of the impugned order. After considering the detailed submissions of the assessee, Ld CIT(A) allowed the appeal of the assessee by observing as under:-

“5.25 Before analysing the issue of service provider or entrepreneur, it may be relevant to note that the Indian employer say DMRC/BMRCL float global tender for execution of complex technical work. At times, the technical capability to perform such complex technical assignment does not vest with single entity and therefore, joint ventures (JVs) are formed to meet technical capability and financial capability to perform the complex assignments like setting up of Metro Rail system in Delhi/Bangalore. Once, JV is a successful bidder in a project, an agreement is entered into by the participating partners of JV to freeze the allocation of scope of work and corresponding contract value among the participating partners. However, as a matter of practice, the employer interacts with lead JV partner/JV. The JV entity is for the administrative convenience of the employer. There is no principle/agent relation between JV and its participating partners. As a matter of

practice, different participating partners of JV raise invoices to the JV, which in turn raises one combined invoice to the employer for convenience of employer. There is no other functional utility of JV entity which is acting as an intermediary between the participating partner and employer.

5.26 It is a fact that functions performed by the entities play very critical role in deciding the arm's length price in transfer pricing analysis. I find that core functions, key responsibilities, key decision making and level of individual responsibility for the key decisions are important factors to identify the party, which has control over the risks. The conventional wisdom is that if the core functions/main operations are located in India, which in turn require important strategic decisions by management and employees of Indian entity to provide such services and control over the operational and other risks. JV in this case has only administrative functions for which all participating units contribute for the functioning of JV. JV does not own any asset and risk is also not borne. Identification of risk and the party who bears such risks are important steps in comparability analysis. The conduct of the parties is key to determine whether the actual allocation of risk conforms to contractual risk allocation. Allocation of risk depends upon ability of the parties to the transaction to exercise control over risk. Accordingly, the project office has undertaken complete functions related to assigned scope of work of the contract and in the process of undertaking functions, it has owned assets (Tunnel Boring Machine) and borne core risks. Under these circumstances, it is wrong on the part of the AO/TPO to treat the Indian project office as risk free entity.

5.27 I find that the another argument of the TPO to reject CUP method is that its AE has pushed losses to the project office. However, it is interesting to note that the loss incurred during the year at the entity level in this case does not pertain to the project run by Joint venture. The table below shows the profit/loss incurred project wise for all projects during the year (Refer submission of the assessee vide letter dated 17.11.2017). It is noted that there is a profit of Rs. 6,22,76,903/- in respect of CEC-CICI-SOMA JV project where the international transaction of receipt of construction income of Rs.1,73,17,80,801/- has been reported. This international transaction was taken as basis for rejection of CUP method by the TPO. However, in such a situation

where the assessee has earned a profit in all JV run projects as shown in the table below, it is wrong on the part of TPO to hold that the loss has been pushed to the project office by AE.

Sl. No.	Projects	Contractor	Contract status	Profits/Loss	Remarks
1.	RJ7 – NHAI	CEC	No activity undertaken during the year. Already Completed	1,800,554	Profits
2.	ORR – HUDA	CEC	In progress	2,044,777	Profits
3.	AS21 – NHAI	CEC	No activity undertaken during the year. Already Completed	1,114,909	Profits
4.	AS22 – NHAI	CEC	No activity undertaken during the year. Already Completed	(360,406)	Loss
5.	Konkan Railway	CEC	No activity undertaken during the year. Already Completed	75,839	Profits
6.	C12 – NHAI	CEC	In progress	(99,265,225)	Loss
7.	C13 – NHAI	CEC	In progress	(10,021,705)	Loss
8.	BC16 – DMRC	CEC – SOMA JV	In progress	5,197,454	Profits
9.	UG02 – BMRCL	CEC – SOMA – CICI JV	In progress	62,276,903	Profits
10.	CC04 – DMRC	CEC – CICI JV	In progress	8,479,861	Profits

5.28 The table above shows that the loss has been incurred in 3 projects where CEC is the direct contractor and there is no AE involved in the contract. Further, it is noted that the international transactions during the year pertained only to 3 projects (refer table below) which were undertaken through joint venture.

Sl. No.	Projects
1.	BC16 – DMRC
2.	UG02 – BMRCL
3.	CC04 – DMRC

5.29 Since the transfer pricing adjustment is in respect of determining the arm's length price of the international transactions, therefore, it is important to analyse the aforesaid 3 projects.

5.30 It may be relevant to mention that the main objective of transfer pricing is to take advantage of differential taxation between countries, by structuring transactions such that the legal incidence for tax occurs in a jurisdiction with lower tax rates. Accordingly, the endeavour of various states, or more precisely, their tax administrators, through various transfer pricing enactments and judicial rules, is to ensure that such devices or mechanisms are not used to locate profits and income in such a manner as to shift to low tax regimes, with the tax payer's ultimate objective of reduced tax burden, when in reality the incidence of tax in the host jurisdiction should actually be higher. Transfer pricing laws thus seek to address the tension between these competing objectives. Crucially, in India, in balancing these objectives, the precise

limits of the methods and mechanics of calculating the arm's length price are provided for by the IT Act and the IT Rules made thereunder, so as to ensure certainty in these calculations rather than roving enquiries.

5.31 Specifically, the object behind introduction of Chapter X of the IT Act was to prevent assesseees from avoiding payment of tax by transferring income yielding assets to non-residents whilst at the same time retaining the power to benefit from such transactions i e. the income so generated. The Central Board of Direct Taxes ("the CBDT") by its Circular No. 14/2001 dated 12.12.2001 [2001 252 ITR (ST.) 65] spelt out the scope and effect of transfer pricing provisions. The rationale for substituting the existing Section 92 of the IT Act was explained in the following extract of the said Circular:

"Under the existing section 92 of the Income Tax Act, which was the only section dealing specifically with cross border transactions, an adjustment could be made to the profits of a resident arising from a business carried on between the resident and a non-resident, if it appeared to the Assessing Officer that owing to the close connection between them, the course of business was so arranged so s to produce less than expected profits to the resident. Rule 11 prescribed under the section provided a method of estimation of reasonable profits in such cases. However, this provision was of a general nature and limited in scope. It did not allow adjustment of income in the case of non-residents. It referred to a close connection? which was undefined and vague. It provided for adjustment of profits rather than adjustment of prices, and the rule prescribed for estimating profits was not scientific. It also did not apply to individual transactions such as payment of royalty, etc., which are not part of a regular business carried on between a resident and a non-resident. There were also no detailed rules prescribing the documentation required to be maintained

With a view to provide a detailed statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India, in the case of such multi-national enterprises, the Act has substituted section 92 with a new section, and has introduced new Sections 92A to 92F in the Income Tax Act, relating to computation of income from an international transaction having regard to the arm's length price,

meaning of associated enterprise, meaning of international transaction, computation of arm's length price, maintenance of information and documents by persons entering into international transactions, furnishing of a report from an accountant by persons entering into international transactions and definitions of certain expressions occurring in the said sections."

5.32 In the backdrop of the above discussion, I may now proceed to analyse the international transactions project wise in this case from transfer pricing perspective.

CEC-SOMA JV (Contract awarded by Delhi Metro Rail Corporation (BC-16))

5.33 CEC-SOMA JV worked on the Contract awarded by Delhi Metro Rail Corporation (BC-16). The letter of approval for this project was dated 18/12/2006 and the contract with JV was signed on 29/01/2007. The project duration was from February 2007 to July 2010. The scope of the work included Phase II of Delhi Metro. The appellant submitted that total profit of Rs. 51,97,454/- was earned out of this specific project based on percentage completion method.

5.34 During the year, the international transaction pertaining to this project is in the nature of recovery of construction income of 1.73 cr. by CEC- SOMA JV from the appellant due to negative variation in escalation. The recovery is triggered by DMRCL against CEC-SOMA JV and the same recovery without any mark-up has been passed on to the appellant against the IPC raised by the appellant. Minor operations related to this project got performed during the subject year. The recovery was in respect of work performed in preceding years.

5.35 As regard, the arm's length price of the same, the assessee submitted that the adjustment made by the Indian employer (DMRC) has been passed on completely to the assessee by the JV without any retention and therefore, the transaction effectively is between third parties. The appellant claimed that the colour of international transaction has come due to transfer of funds through JV due to the scheme of the contract. The transaction in this case is effectively uncontrolled because back to back, the payer is third party for the end payee.

5.36 The appellant clarified that "variation" is basically any amount charged which is over and above the original contract value. Variation could be positive or negative. Negative variation is the reversal of excess part of IPC (Interim Payment Certificate) issued on account of negative variation of material price/work. This reversal of excess IPC does not impact profit & loss account because the revenue is recognized in the Profit & Loss account as per the percentage of completion method. P&L Account has nothing to do with negative variation and the actual billing. The negative variation is therefore routed through the Balance Sheet. In totality, the IPC and the variations would equal to the revenue booked through Percentage of Completion method after completion of entire project.

5.37 It is important to note that negative variation in escalation is due to change in material cost or change in scope of work. Such changes are not under the control of project office or JV, and the JV project office as well as the JV merely gives effect to the same. In other words, this transaction is effectively not between JV and project office but between DMRCL and project office, which are independent parties.

5.38 I find that the JV is a pass through entity because its existence is for administrative convenience in managing JV run project. Therefore, the decision taken by the employer (DMRCL) related to cost variation has to be routed through JV office to finally pass it on to the participating partner of JV, for example, project office of CEC, in this case. There is no value addition made by the JV and no risk is borne by the JV. There is no dispute that the negative variation was pertaining to the appellant only.

5.39 Section 92(2) of the IT Act provides that where in an international transaction, the parties allocate or apportion or contribute any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided in connection with benefit, service or facility, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be. As discussed above, I do not find the transaction to involve any benefit, service or facility creation between JV and the project

office. Therefore, the provisions of section 92 are not applicable in this case. The transaction between JV & Project office is limited to the extent of administrative convenience. There is no other function/asset/risk involved between JV & Project office.

CEC-CICI JV (CC04-DMRC Project).

5.40 This JV received letter of approval on 29/12/2011 from DMRC. The project duration was from February, 2010 to January, 2015. The scope of work included Phase III of construction of Mukundpur-Yamuna Vihar corridor of Delhi MRTS design and construction contract. Following three international transactions pertain to this project.

CEC-CICI JV	Reimbursement Received For Expenses	11,622,850	Any other method
	Mobilization advance	110,000,000	Any other method
	Investment in JV	60,000,000	Any other method

5.41 During the year, the project was in the initial phase where investment of Rs. 6,00,00,000/- has been made in common pool of JV by the project office (appellant) as one of the JV constituents. It is seen that the fixed lumpsum contract price for CC-04 Contract was of Rs. 416.8 Crore. The share of JV office in the contract value is around 4 to 5% of the contract price for the administrative functions performed by JV office and the same has been frozen in the JV agreement signed amongst all partners of the JV. Therefore, the JV has taken initial investment from all the constituents to fund the JV office to kick start the project and in this regard, the share of the project office (appellant) for the subject year was of Rs.6 crores. The appellant submitted that the similar contribution has been taken by the JV from other partners of IV. Since JV has received contribution from all parties as per the agreement, therefore, the amount of transaction of contribution to JV is at arm's length. Further, on receipt of the funds from the Employer at a later stage, the JV settles the account as per the agreement between JV & participating partner.

5.42 Further, since, this is the first year of the project, therefore, the mobilization advance of Rs. 11,00,00,000/- for the project has been released by JV after receiving the same from the employer. As per the appellant, no major project activity related to scope of work took place during the year. Effectively, this investment and mobilization advance is

in the nature of advance, and it is not debited in P&L account for the subject year. The said transaction of advance and the initial investment is in line with the agreement between JV & Participating partner which is frozen at the start of the work. Further, similar transactions have also taken place vis-à-vis other partners of JV partner in accordance with the frozen share of respective party and therefore, the such transactions are at arm's length.

5.43 As regards the reimbursement of Rs.1,16,22,850/- received by the appellant from CEC-CICI JV, the appellant submitted that the entire work is allocated by JV between JV partners including assessee and at times, the partners incur expenses on behalf of each other; for which they reimburse each other on cost to cost basis. The appellant submitted that these transactions are occurred to facilitate the other party and no profit element is involved. During the year, the assessee claimed to have received reimbursement on cost to cost basis from JV for expenses such as bank guarantee charges, salaries and other miscellaneous expenses such as telephone, printing, stationary etc. on behalf of CEC-CICI JV

5.44 It may be relevant to take note of the findings of Hon'ble Delhi High Court in the case of Cushman and Wakefield. The HC ruled that even though the transaction involves only a recovery of cost, as the transaction is between two AEs, it is necessary to test whether an uncontrolled entity for the same or comparable services charges an amount less than or equal to or more than what was charged to the Taxpayer by the AEs. Application of Section 92(3), which does not permit application of ALP if it has the effect of reducing tax incidence, cannot be inferred merely because the AEs recover costs without a mark-up. A comprehensive transfer pricing (TP) analysis is required to test the appropriateness of the costs that are allocated as well as for determining applicability of Section 92(3).

5.45 As per ITS 2009 Transfer Pricing Guidelines accepted by the OECD, when an AEs is acting only as an agent or intermediary in the provision of service, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves, and, in such a case, it may be not appropriate to determine ALP as a mark-up on the cost of services but rather on the cost of agency function itself, or

alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than that would be appropriate for the performance of the services themselves.

5.46 However, it is noted that in this case, while incurring expenses in normal routine by the project office, there are situations where expenses of common nature for project office and JV are incurred and at a later date, the debit note is raised for recovery of the expenses incurred on behalf of JV. For example, particular resource has been engaged by project office and the same resource has also worked partly for JV, in such a situation, the salary for the part of work performed for JV is recovered. So effectively, there is no agency function performed by the project office (appellant) in this case for the JV and therefore, there is no case for charging mark up in this case.

CEC-SOMA-CICI JV (Contract awarded by Bangalore Metro Rail Corporation) (UG-2):

5.47 Contract was awarded on 10/03/2010 by BMRCL to CEC-SOMA CICI JV for the designing and construction of underground stations and tunnels in underground stretch. It is further important to note that during the year, the appellant had received a sum of Rs. 1,731,780,801/- from JV against IPC (Interim payment certificate) raised during the year. The interim payment certificate of Rs. 1,731,780,801/- has been raised based on completion of milestones as defined in the contract and its certification of the same by the engineer.

5.48 The total value of awarded contract amounting to INR 9,952,000,000 was divided into following parts with the percentage of amount payable to the total value of the contract:-

S.No.	Particulars	% payable on fixed	Amount(In INR)
	Preliminary and General Requirements	5%	497,600,000
	Design of permanent works	3%	298,560,000
	Open cut and cut tunnels section including ramps	6%	597,120,000
	Bored Tunnels	43%	4,279,360,000
	Station Boxes including station architecture work and water supply, plumbing and drainage	43%	4,279,360,000
	Total	100%	9,952,000,000

5.49 Out of the total works awarded by BMRCL as specified above; most of works related to construction of tunnel were allocated to the assessee and rest of the works were allocated between SOMA, CICI and JV in the following manner:

S.No.	Particulars	Total Value	CEC-PO	SOMA	CICI	CEC-SOMA-CICI JV
1.	Preliminary and General Requirements	497,600,000				100%
2.	Design of permanent works	298,560,000				100%
3.	Open cut and cut tunnels section including ramps	597,120,000			98%	2%
4.	Bored Tunnels	4,279,360,000	85.641%		11.973%	2.386%
5.	Station Boxes including station architecture work and water supply, plumbing and drainage	4,279,360,000		91.8324%		8.1676%
	Total Value of Contract	9,952,000,000				

5.50 As regard, the arm's length price of the same, the assessee submitted that the Interim Payment Certificate (IPC) raised by the assessee based on milestones as per the contract to the JV has been passed on completely to the Indian employer (BMRCL) by the JV without any mark up and therefore, the transaction effectively is between third parties. The JV had acted as pass through entity while receiving the IPC from project office as well as while passing on to BMRCL. There is no value addition made by the JV and no risk is borne by the JV. There is no dispute that the IPC has been raised as per the contract value assigned to project office. No benefit, service or facility is linked to the transaction between JV and the project office. The service connection is effectively between the project office and BMRCL. Therefore, the provisions of section 92 are not applicable in this case. The appellant claimed that the colour of international transaction has come due to transfer of funds through JV due to the scheme of the contract. Since JV has not retained even a single paisa out of the proceeds, therefore, as per the assessee, the transaction in this case is effectively uncontrolled because back to back, the payer is third party for the end payee.

5.51 The assessee stated that the price charged in uncontrolled transaction is same as the price charged in controlled transaction. Accordingly, the transaction is claimed to be concluded at arm's length using internal comparable uncontrolled price method. It is important to note that there is no dispute on the fact of back to back payment by JV to the assessee against the invoice raised by the appellant.

International Transactions with Head Office of the appellant:-

5.52 It is noted that the appellant company had made payment as well as receipt reimbursement from its head office payments. The appellant has received reimbursement of Rs 31,914,520/- and made payment of Rs.

62,036,694/- to its head office as reimbursement. The payment has been made for the following heads:

a) **General Office Expenses amounting to Rs. 6,712,575/-**

The appellant submitted that it has incurred some general expenses which is in the nature of payment towards SAP license taken by CEC, Taiwan and cost is allocated between group entities in the portion of licenses used. It is submitted that the expenses are incurred on back to back basis.

b) **Expenses pertain to related party amounting to Rs. 26,783,712/-**

The appellant submitted that these expenses pertain to reimbursement of salaries of Taiwan's expatriates working for Indian operations. These expenses are incurred on back to back basis

c) **Bank Guarantee charges amounting to Rs. 28,540,407/-**

In this regard, it is submitted that CEC Taiwan provided guarantees for Indian operations. These charges are the bank guarantee charges. These expenses pertain to related party (AE).

5.53 It is noted that the head office as well as project office have incurred expenses on behalf of each other and therefore, the reimbursements are from both sides i.e. inbound as well as outbound. No mark up has been claimed to be charged by both the sides in this case. Further, it is important to note that the reimbursements are in respect of such expenses (salary, information technology and bank guarantee charges) where the payment has been made to independent parties say for bank guarantee charges, the charges have been paid to bank and salary has been paid to employees etc. Therefore, the transactions of cost to cost reimbursements are bound to be at arm's length.

5.54 Further, the appellant has received a sum of Rs.30,40,04,184/ on account of capital infusion by the head office to the appellant. This contribution is capital in nature and does not impact profit & loss account. Therefore, the benchmarking of such transaction using TNMM method is factually incorrect

5.55 The appellant has received a sum of Rs. 19,86,013/- from CICI (related party). It may be added that CICI (CEC International Corporation (India) Pvt. Ltd.) is a company registered in India. In this regard, the appellant submitted that the assessee and CICI are JV partners and they incur expenses on behalf of each other and get reimbursements for the same. The appellant further averred that these transactions are occurred on cost to cost basis i.e. without charging any markup and there is no service element involved. No mark up has been claimed to be charged by CICI (related party in India) in this case.

5.56 After analysing all above discussed international transactions, I find that the international transactions can be broadly divided into following categories:

- a) Reimbursements,
- b) capital infusion,
- c) recovery of receipts due to negative variation,
- d) receipts against interim payment certificates (IPC)
- e) capital contribution to JV
- f) mobilization advance received from JV

5.57 All international transactions as discussed above have no impact on the profit & loss account because the P&L account is based on project completion method. Further, there is only one international transaction, which is the receipt of Rs. 1,731,780,801/- against services delivered by the project office. All other transactions are not against any provision of services.

5.58 The appellant relied on the decision of ITAT, Hyderabad in the case of DCIT, Hyderabad vs. M/s IJM (India) Infrastructure. Ltd, to claim that for the purpose of transfer pricing applicability, Indian project office of a foreign company should be treated as a domestic entity. Further, by extending this logic. the appellant claimed that a transaction between JV & Project office should be treated as a domestic transaction and not as an international transaction under section 92B of the Income-tax Act, 1961 (the Act).

5.59 Further, it is noted that the TPO has compared the appellant with

pure engineering service providers using TNMM as the most appropriate method. While doing so, the TPO has ignored the fact that the revenue recognition policy of the comparable company is different from the assessee because the revenue and costs in case of assessee are recognized in accordance with AS-7 as it is a construction company.

5.60 In the process of comparability; FAR analysis (i.e. analysis of functions performed, assets employed and risks assumed) plays very critical role in the acceptance or rejection of comparables. The appellant has highlighted that there is substantial difference in the ratio of Fixed Assets to Turnover of the company and of the assessee. Further, the appellant demonstrated the difference in the functions performed, fixed assets and inventory of the company and of the assessee.

5.61 The appellant pointed out that profit shifting is a way to shift funds from India to foreign entity intentionally. The assessee is a project office of CEC-Taiwan which carries out the allocated works related to construction carried out in India and whatever revenue the assessee generates from its Indian operations based in India is retained in India. CEC-Taiwan doesn't have any right to claim any share of revenue out of the total revenue generated from Indian business operations. It is noted that CEC-Taiwan is the only foreign entity with whom the assessee has entered into international transaction during the year. The transactions were in the nature of reimbursements and receipt of funds.

5.62 It is submitted that the concept of profit shifting is applicable where one party is situated outside India and another entity is based out of India and with intent to evade taxes in India; profits are shifted outside India. However in the relevant case, there cannot be any case of shifting since all the related parties who are the JV members are based in India. It is worth to note that SOMA (JV partner) is an unrelated party; accordingly, no shifting can be done in any transaction entered with third party.

5.63 In view of the above discussion, I find that the TPO has wrongly applied TNMM for benchmarking of arm's length price of international transactions. The transactions between JV & the appellant are international transactions only due to the specific arrangement of routing the invoices through JV office for administrative convenience.

Effectively, the transaction is between third parties. The international transactions in the nature of cost to cost re-imbursements is not against any service but for the expenses incurred on common basis in respect of third parties say salary, information technology, bank charges etc. Certain international transactions are in the nature of capital contribution and mobilization advances. Therefore, the arm's length price of such international transaction have been correctly benchmarked by the assessee. Moreover, the entire contract receipts pertaining to project office of CEC have been offered to tax in India, therefore, the profit shifting is not feasible. Accordingly, the ground of appeal is allowed.”

10. Aggrieved with the above order, the revenue is in appeal before us raising following grounds of appeal:-

1. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in law in not upholding the TNMM method applied by the AO/TPO?

2. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in law in not appreciating the fact that the assessee is a captive sub-contractor which has been sub-contracted the work of construction which is in the nature of technical services. The assessee is expected to earn markup on cost for the work undertaken by it for the project since it had no role in deciding the third party contract amount or the decision to enter into such contract?

3. The appellant craves leave, to add, modify, amend or alter any grounds of appeal at the time of, or before, the hearing of appeal.

11. At the time of hearing, Ld. DR submitted that entire amount executed by the Indian Office was passed on to the AE and he wondered how the assessee filed the TP Study Report and how the TP provisions will be applicable in this case where assessee has entered into huge international transactions. He

submitted that in the TP Study Report submitted by the assessee, it has applied internal CUP and it is not clear how the tested party can be its AE. In this regard he brought to our notice Page 33 of the Transfer Pricing Report submitted by the assessee, and he brought to our notice para 5.2 of the report relating to selection of tested party. He submitted that the assessee has taken CCE Taiwan as attested party. Based on the observation that costs incurred and the operating assets owned by the Indian Project Office of Continental Engineering Corporation are for carrying out routine business fundings that assumed clear risk and are generally segregated and identified. He objected to the above method of selection of tested party. He further submitted that there is no contract in the name of the assessee rather it was awarded in the name of the JV, there is no clarity with regard to the assets deployed and reward from the JV. A normal businessman would not indulge in any of such high risk assignment without there being any return. Ld. DR heavily relied on the findings of TPO.

12. On the other hand, Ld. AR submitted the detailed submissions at the time of hearing and also filed written submission, the same are reproduced below: -

1. The Assessee in AY 2013-14 has undertaken 6 contracts/projects (3 independently and 3 through JVs). In AY 2014-15 the Assessee has undertaken 9 contracts/projects (6 independently and 3 through JVs). CIT(A)'s order.
 - a. Para 5.4 of CIT(A) order for AY 2013-14, internal page. 21. For ease of reference, the same is reproduced hereinbelow –
5.4 During the year, the project office was working on 6 projects in all as per the transfer pricing study report. Out of the 6 projects, 3 projects (C12-NHAI,

C13- NHAI & ORR-HUDA) were undertaken directly as a contractor and other 3 projects (BC-16 with DMRC ,UG-2 project with BMRCL,CC04 with DMRC) were undertaken through above referred 3 separate joint ventures. The objective behind formation of joint venture is to extend and expand their capital, bonding capacity, or expertise by joining together with other competent contractors to perform work that is challenging either in terms of size or type. It is a most common practice of construction companies by making JVs. The scope of work is clearly demarcated between the participating partners of JV and participation ratio alongwith the responsibility of the respective parties to the joint venture is as per the agreement entered between them. JV as an entity handles the administrative matters and acts as single window for the main employer (DMRC/BMRCL.) for contract purpose.

- b. para 5.4 of CIT(A) order for AY 2014-15, internal page. 19. For ease of reference, the same is reproduced hereinbelow –

5.4 During the year, the project office was working on 8 projects in all as per the transfer pricing study report. Out of the 8 projects, 5 projects (C12-NHAI, C13-NHAI, ORR-HUDA, PWD & JMRCL) were undertaken directly as a contractor and other 3 projects (BC-16 with DMRC ,UG-2 project with BMRCL,CC04 with DMRC) were undertaken through above referred 3 separate joint ventures. As per the appellant, the objective behind formation of joint venture is to extend and expand their capital, bonding capacity, or expertise by joining together with other competent contractors to perform work that is challenging either in terms of size or type. The appellant added that it is a most common practice of construction companies by making JVs and the scope of work is clearly demarcated between the participating partners of JV and participation ratio alongwith the responsibility of the respective parties to the joint venture is as per the agreement entered between them. Further, it was submitted that JV as an entity handles the administrative matters and acts as single window for the main employer (DMRC/BMRCL) for contract purpose.

2. The Assessee is an independent entrepreneur and is capable of undertaking its own projects and performing its own functions directly as the contractor. It is primarily engaged for building tunnels and undertakes large infrastructure and construction projects. The details of independent contracts/ projects are mentioned in the CIT(A) order-
- a. Para 5.5, 5.6 and 5.7 of CIT(A) order for AY 2013-14, internal page. 21 & 22. For ease of reference, the same is reproduced hereinbelow –

5.5 Brief description of the projects undertaken by the Project office of CEC (appellant) is as under:

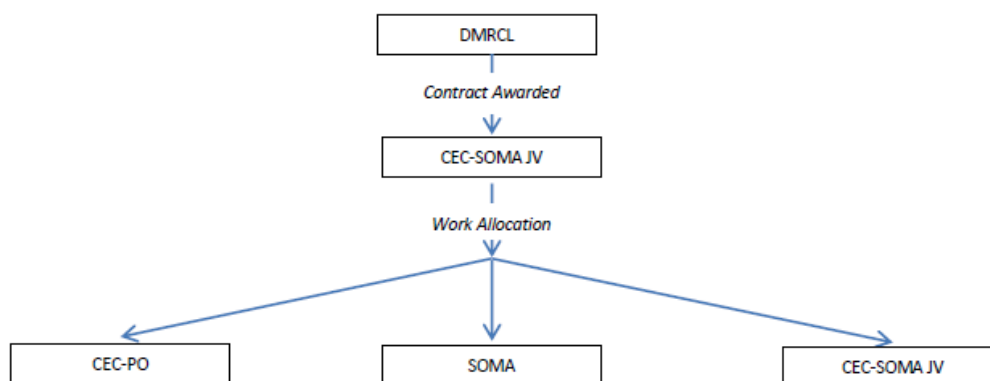
Hyderabad Bangalore National Highway (C-12 & C-13):

5.6 This project was undertaken directly by the appellant. The scope of work included construction of two sections of carriageway between Hyderabad & Bangalore. The project duration as per transfer pricing study report was from March, 2007 to November, 2010. The activity performed during the subject year were after the completion of the contract in November, 2010 on account of the “Defect Liability Period” clause of the contract. Loss of Rs. 9,92,65,225/- and Rs. 1,00,21,705/- were incurred in C-12 & C-13 respectively due to rectification activities performed after the completion of contract.

Hyderabad Outer Ring Road (ORR)

5.7 This project was undertaken by the appellant directly. The scope of the work included construction of section of 6/8 lane access to controlled expressway from 11 km to 24.38 km. of ORR to Hyderabad. The project duration as per transfer pricing study report was from July, 2006 to July, 2011. The project incurred profit of Rs. 20,44,777/- during the year.

CEC-SOMA JV (Delhi Metro Rail Corporation (BC-16)):



- b. Para 5.5 to 5.10 of CIT(A) order for AY 2014-15, internal page. 19&20. For ease of reference, the same is reproduced hereinbelow –

5.5 Brief description of the projects undertaken by the Project office of CEC (appellant) is as under:

Hyderabad Bangalore National Highway (C-12 & C-13):

5.6 This project was undertaken directly by the appellant. The scope of work included construction of two sections of carriageway between Hyderabad & Bangalore. The project duration was from March, 2007 to November, 2010. The activity performed during the subject year was on account of additional

scope of work/defect liability or both. Profit of Rs. 8,50,608/- and Rs. 49,81,074/- were incurred in C-12 & C-13 respectively due to rectification activities performed after the completion of contract.

Hyderabad Outer Ring Road (ORR)

5.7 This project was undertaken by the appellant directly. The scope of the work included construction of section of 6/8 lane access to controlled expressway from 11 km to 24.38 km. of ORR to Hyderabad. The project duration was from July, 2006 to July, 2011. The activity performed during the subject year was on account of additional scope of work/defect liability or both. The project incurred profit of Rs. 10,32,82,517/- during the year.

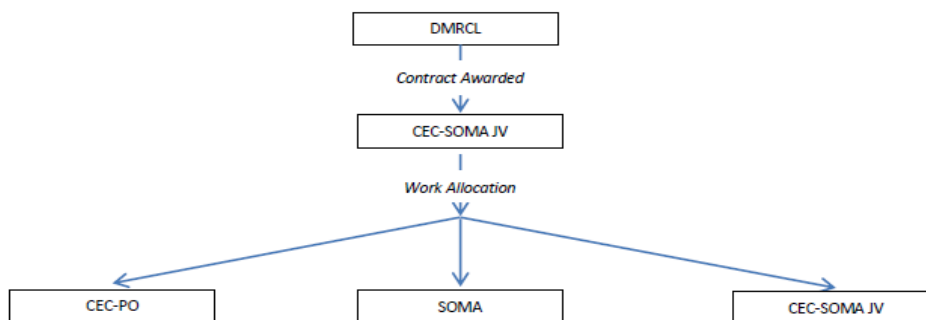
JMRCL Project

5.8 The Assessee has entered into an agreement with Jaipur Metro Rail Corporation Limited on 5th October, 2013, subsequent to receipt of LOA dated 9th September, 2013 to execute a project for Design and Construction of Tunnel between Candpole and BadiChouper and reversal line by Shield TBM, Underground Metro Stations as ChotiChouper by Cut and Cover Method on East-West Corridor of Jaipur Metro (Phase 1B) at Jaipur, Rajasthan. The project was in progress during the year and incurred loss of Rs. 5,27,35,443/- during the year.

PWD Project

5.9 The Assessee has entered into an agreement with Public Works Department ("PWD") on 21st May, 2013, subsequent to receipt of LOA dated 29th April, 2013 to execute a project for Comprehensive Development of Corridor (Outer Ring Road) between Mukarba Chowk to Wazirabad Chowk. State Highway C/o Flyover, Loops, Bridge across supplementary drain, FOBs, Footpath, Cycle Track, Widening of Road on embankment, Rain Water Harvesting Scheme, Electrical works and other allied works. The project incurred profit of Rs. 1,13,03,756/- during the year.

CEC-SOMA JV (Delhi Metro Rail Corporation (BC-16)):



5.10 Contract is awarded by DMRCL to CEC-SOMA JV for the designing and construction of tunnel by shield TBM and four stations by cut and cover

method. The project duration was from February, 2007 to July, 2010. The entire work is divided into three schedules A, B and C. The total value of awarded contract amounting to INR 8,135,100,000; divided into three schedules which is as follows:-

S.No.	Schedule	Amount	Work Involved
1.	Schedule A	7,462,200,000 (Refer Below)	Designing and construction of underground metro stations including construction of tunnels, drainage systems, reconstruction of roads etc.
2.	Schedule B	216,000,000	Diversion of uncharted utilities and other general items
3.	Schedule C	181,800,000	Civil and electrical works
	Gross Total	397,800,000	
	Add:- 3.5%	275,100,000	
	Total	8,135,100,000	

3. The fact that the Assessee undertakes so many independent contracts itself each year, substantiates the fact that the Assessee is an entrepreneur and has the ability to function independently.
4. It is the case of the Assessee that it is not a sub-contractor in respect of the 3 contracts/projects undertaken through the JVs as stated by the TPO.
5. The objective behind formation of JV is to extend and expand its capital, bonding capacity, or expertise by joining together with other competent contractors to perform work. This is a common practice in the construction industry. The scope/work/duties/responsibilities/risks are clearly demarcated. (This finding is at para 5.4 of CIT(A) order for AY 2013-14-internal page. 21 and at para 5.4 of CIT(A) order for AY 2014-15-internal page. 19 as stated above.)
6. The CIT(A) has given a detailed finding and has analysed the fact as to why the JVs are formed. The Indian employer like Bangalore Metro Rail Corporation Ltd. ('BMRCL') or Delhi Metro Rail Corporation Ltd. ('DMRCL') float tender for execution of big contracts. At times, the technical capabilities to perform the entire contract may not vest with one entity and hence JVs are formed for meeting the eligibility criteria. Once JV is allotted the project and is the successful bidder, there is due allocation of work and contract value. However, for administrative convenience, Indian employer like Bangalore Metro Rail Corporation Ltd. ('BMRCL') or Delhi Metro Rail Corporation Ltd. ('DMRCL') tends to interact with the JV entity only. All JV partners raise invoice to the JV which in turn raises one invoice to the Indian employer for his convenience.

- a. In para 5.25 and 5.26 of the CIT(A) order for AY 2013-14- internal page. 29 and 30. For ease of reference, the same is reproduced hereinbelow –

5.25 Before analysing the issue of service provider or entrepreneur, it may be relevant to note that the Indian employer say DMRC/BMRCL float global tender for execution of complex technical work. At times, the technical capability to perform such complex technical assignment does not vest with single entity and therefore, joint ventures (JVs) are formed to meet technical capability and financial capability to perform the complex assignments like setting up of Metro Rail system in Delhi/Bangalore. Once, JV is a successful bidder in a project, an agreement is entered into by the participating partners of JV to freeze the allocation of scope of work and corresponding contract value among the participating partners. However, as a matter of practice, the employer interacts with lead JV partner/JV. The JV entity is for the administrative convenience of the employer. There is no principle/agent relation between JV and its participating partners. As a matter of practice, different participating partners of JV raise invoices to the JV, which in turn raises one combined invoice to the employer for convenience of employer. There is no other functional utility of JV entity which is acting as an intermediary between the participating partner and employer.

5.26 It is a fact that functions performed by the entities play very critical role in deciding the arm's length price in transfer pricing analysis. I find that core functions, key responsibilities, key decision making and level of individual responsibility for the key decisions are important factors to identify the party which has control over the risks. The conventional wisdom is that if the core functions/main operations are located in India, which in turn require important strategic decisions by management and employees of Indian entity to provide such services and control over the operational and other risks. JV in this case has only administrative functions for which all participating units contribute for the functioning of JV. JV does not own any asset and risk is also not borne. Identification of risk and the party who bears such risks are important steps in comparability analysis. The conduct of the parties is key to determine whether the actual allocation of risk conforms to contractual risk allocation. Allocation of risk depends upon ability of the parties to the transaction to exercise control over risk. Accordingly, the project office has undertaken complete functions related to assigned scope of work of the contract and in the process of undertaking functions, it has owned assets (Tunnel Boring Machine) and borne core risks. Under these circumstances,

it is wrong on the part of the AO/TPO to treat the Indian project office as risk free entity.

- b. In para 5.26 and 5.27- internal page. 28 and 29 of CIT(A) order for AY 2014-15. For ease of reference, the same is reproduced hereinbelow –

5.26 Before analysing the issue of service provider or entrepreneur, it may be relevant to note that in a case where the Indian employer say DMRC/BMRCL float global tender for execution of complex technical work, the technical capability to perform such complex technical assignment may not vest with single entity and therefore, joint ventures (JVs) are formed to meet technical capability and financial capability to perform the complex assignments like setting up of Metro Rail system in Delhi/Bangalore. Once, JV is a successful bidder in a project, an agreement is entered into by the participating partners of JV to freeze the allocation of scope of work and corresponding contract value among the participating partners. However, as a matter of practice, the employer interacts with lead JV partner/JV. The JV entity is for the administrative convenience of the employer. There is no principle/agent relation between JV and its participating partners. As a matter of practice, different participating partners of JV raise invoices to the JV, which in turn raises one combined invoice to the employer for convenience of employer. As per the appellant, there is no other functional utility of JV entity, which is acting as an intermediary between the participating partner and employer.

5.27 It is a fact that functions performed by the entities play very critical role in deciding the arm's length price in transfer pricing analysis. I find that core functions, key responsibilities, key decision making and level of individual responsibility for the key decisions are important factors to identify the party which has control over the risks. The conventional wisdom is that if the core functions/main operations are located in India, which in turn require important strategic decisions by management and employees of Indian entity to provide such services and control over the operational and other risks. JV in this case has only administrative functions for which all participating units contribute for the functioning of JV. JV does not own any asset and risk is also not borne. Identification of risk and the party who bears such risks are important steps in comparability analysis. The conduct of the parties is a key to determine whether the actual allocation of risk conforms to contractual risk allocation. Allocation of risk depends upon ability of the parties to the transaction to exercise control over risk. Accordingly, the project office has

undertaken complete functions related to assigned scope of work of the contract and in the process of undertaking functions, it has owned assets (Tunnel Boring Machine) and borne core risks. Under these circumstances, I held that it is wrong on the part of the AO/TPO to treat the Indian project office as risk free entity.

7. The CIT(A) has analysed the business model of the Assessee at great length and concluded that core functions/main operations are located in India, which in turn require important strategic decisions by management and employees of Indian entity to provide such services. JV has only administrative role to perform and has no asset of risk. (In para 5.26 for AY 2013-14 and in para 5.27 for AY 2014-15 as stated above)
8. Thus CEC-PO has undertaken complete functions related to assigned scope of work of the contract and in this process it also owns assets and bears core risk (last 4 lines of para 5.26 for AY 2013-14 and 5.27 for AY 2014-15). Hence this is a factual finding of the CIT(A) in this regard that the Assessee is not a mere sub-contractor but is fully and is independently performing its part of the contractual obligation qua these projects.
9. The Assessee also wishes to state that it is not uncommon in today's modern era for companies to get together and form AOP/JVs/consortiums for the purpose of bidding for contracts. From a tax perspective aswell, this standard practice has been recognised in judgments such as Ishikawajma-Harima Heavy Industries Ltd. vs. DIT (288 ITR 408(SC)- para 17) and LINDE AG vs. DIT - W.P. (C) NO. 3914/2012- DHC and there are also CBDT Board Circulars and Instructions issued in this regard, which shows that such business models are well recognised in today's world.

Judgments on the point that CUP is preferred in case of back to back transactions

It is humbly submitted that the following judgments are on the direct proposition that CUP can be applied and is the preferred method in case of back to back transactions.

It is an undisputed fact that in the present case it's a back to back transaction. This is not denied by the TPO and also finds mention in the CIT(A) order (refer pg. 6,7,8 and 9 of CIT(A) order for AY 2013-14 and also para 5.8 to para 5. 15 (finding) of CIT(A) order for AY 2013-14) and (refer 5.10 to 5.17 of CIT(A) order for AY 2014-15) as stated above.

There are several judgments of Hon'ble ITAT which states that in back-to-back transaction, CUP method is to be applied. Some of the judgments are quoted hereinbelow-

1. Delhi ITAT – DCIT vs. Calance Software (P.) Ltd.- [2017] 82 taxmann.com 390 (Delhi - Trib.). held that- (Kindly refer Pg. 1-5 of Compilation)

“5. We find that, so far as the back to back transactions are concerned, the services rendered by the assessee to the AE are exactly the same as, in effect, rendered by the AE to the independent transaction. The price charged for the same service by the AE to the independent end customer is thus the best CUP input in respect of such a back to back transaction. If a unit sells a product to its AE for INR 100 and the AE sells the same product to an independent enterprise for INR 100, the intra AE transaction cannot but be termed as the arm's length transaction. The stand of the revenue however is that, as evident from FAR analysis, the functions performed by the Calance US are far more comprehensive, the assets employed Calance US are much more and risks assumed are much higher. What is, however, overlooked that this FAR analysis has to be with respect to the particular transaction, and when transaction is exactly the same, there cannot be any occasion for the FAR of the transaction being any different. In principle, thus, so far as back to back transactions at the same price are concerned-whether between the AEs or by the AE to the end customer independent enterprise, these are inherently arm's length transactions on the basis of CUP analysis. The distinction drawn by the TPO on the basis of FAR analysis of the enterprise rather than the transaction, which is sought to be justified before us by the learned Departmental Representative, is a distinction without any difference. It is also incorrect to proceed on the basis, as has been done by the TPO, that when TNMM inputs are available, the application of CUP can be rejected. CUP is not a residuary method. As a matter of fact, when perfect CUP inputs are available- as in this case in respect of back to back transaction, that is the best and inherently most suitable method, as it is a direct method and it hardly leaves any scope for distortion of results by extraneous factors. We reject the plea of the learned Departmental Representative on this point.”

2. Mumbai ITAT- Arkay Logistics Ltd. vs. DCIT (ITA No. 765/Mum/2018) held that- (Kindly refer Pg. 6-23 of Compilation)

“14. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. Undisputedly, for providing support/broker service to ESML, the assessee has hired six vessels on voyage charter basis from third party vendors and provided / hired them to its AE ESML on voyage charter basis. The Transfer Pricing Officer himself has admitted that the hiring of vessels by third party vendors to the assessee and by the assessee to the AE is on

back-to-back basis. No doubt, in the transfer pricing study report, the assessee has given precedence to TNMM as the most appropriate method in comparison to CUP method. The reason being, neither the assessee has provided same or similar service to third parties, nor the AE has entered into same or similar transaction with independent service provider and further, there is no publicly available information on price charged in independent transactions of similar or identical nature that are comparable to the transaction between the assessee and the AE. However, in the very same transfer pricing study report, the assessee did provide an alternative benchmarking under CUP method by applying the price at which the assessee has chartered ships from third parties as internal CUP to benchmark the price charged by the assessee to the AE for voyage charter of the very same vessels to the AE. A perusal of the impugned order of the Transfer Pricing Officer makes it clear that only because the assessee had treated TNMM as the most appropriate method over CUP, he has rejected CUP as the most appropriate method. No further reasoning has been provided by the Transfer Pricing Officer to strengthen his case that CUP cannot be applied as the most appropriate method. Undisputedly, CUP is a more direct method compared to TNMM. A reading of rule 10B(1)(a)(i) makes it clear that if the price charged or paid for property transferred or service provided in a comparable uncontrolled transaction or a number of such transactions can be identified and are available, it can be applied to determine the arm's length price of the transaction between the related parties. In the present case, admitted factual position is, the assessee has taken on hire six vessels from third party vendors and in turn has hired them to the AE on back-to-back basis. The Revenue has also not disputed that the price charged by the third party vendors to the assessee for hiring vessels is lesser than the price charged by the assessee to the AE on hiring the very same vessels on back-to-back basis. This difference in price suggests that the transaction between the assessee and the AE is at arm's length. Therefore, when a valid internal CUP is available in the shape of price charged by non-AEs for hiring vessels to the assessee, CUP method, in our view, is the most appropriate method to determine the arm's length price. The Co-ordinate Bench in Calance Software Pvt. Ltd. (supra), has held that in case of back-to-back transaction, CUP is the most appropriate method. Merely because in the transfer pricing study report, the assessee had selected TNMM as the most appropriate method, it cannot be estopped from contending that CUP is the most appropriate method to benchmark the transaction. Of course, assessee's case stands on a much better footing as in the transfer pricing study report, the assessee has also provided an alternative benchmarking applying CUP method. If the assessee applies a wrong method, it is open for him as well as the Transfer Pricing Officer to benchmark the transaction by applying a more appropriate method. In fact, in a number of cases we have noticed that the method adopted by the assessee in transfer pricing study report having found to be unsuitable / inappropriate, the Transfer Pricing Officer rejects such method and applies a more suitable method to benchmark the transaction. Therefore, the method applied by the assessee to benchmark the transaction in the transfer pricing study report cannot be considered to be sacrosanct as one has to analyse the nature of transaction and the available data to apply a particular method as the most appropriate method as provided under section 92C r/w

rule 10B. The decisions relied upon by the learned Authorised Representative also support this view. It is also relevant to observe, in assessee's own case in assessment year 2012-13, the Transfer Pricing Officer in order dated 28th January 2016, has accepted CUP as the most appropriate method to benchmark the international taxation with the AE relating to the provision of support/broker services. It is also submitted by the learned Authorised Representative that in subsequent assessment years also CUP has been accepted as the most appropriate method to benchmark the aforesaid transaction. Considering the above, we hold that CUP is the most appropriate method in the present case to benchmark the transaction with the AE relating to the provision of support/broker service. The internal CUP applied by the assessee being a valid CUP, no further adjustment can be made to the price charged to AE. The addition made should be deleted.”

3. Kolkata ITAT- AT & S India (P) Ltd. vs. DCIT- ITA No. 77/Kol/2017-
(Kindly refer Pg. 24-72 of Compilation)

“14. Aggrieved by the order of the ld. DRP/Assessing Officer, the assessee is in appeal before us. The ld. counsel for the assessee at the outset submitted before us that suitable method for the assessee company is only Comparable Uncontrolled Price (CUP) method. The CUP method for computing arm's length price of the assessee's sale of finished goods to its AE is suitable, as the specific characteristics of PCBs (indicated by product identification number) sold by the assessee to AT&S AG were exactly the same as the specific characteristics of PCBs sold by AT&S AG to independent customers in back to back transactions. The prices at which PCBs were sold by the assessee to AT&S AG were exactly equal to the prices at which PCBs were sold by AT&S AG to independent customers in back to back transactions. The quantities in which PCBs were sold by the assessee to AT&S AG were exactly equal to the quantities in which PCBs were sold by AT&S AG to independent customers in back to back transactions. The controlled transactions as well as uncontrolled transactions took place in Europe i.e. in the same geographical location as disclosed in the copies of back to-back invoices submitted to the TPO/DRP on sample basis. For administrative convenience, AT&S AG retained distribution commission and warranty expense out of the sale proceeds collected from the independent customers and remitted the balance to the assessee. Therefore, the CUP method is suitable for the assessee.

16. We have given a careful consideration to the rival submissions and perused the material available on record, we note that ld DR for the Revenue submitted before us about the applicability of Comparable Uncontrolled Price Method (CUP- Method) and explained the circumstances where the CUP method may not be applicable. He explained the internal CUP and external CUP and relied on certain judgments of the Tribunal, which are given in para 15 of this order. We note that all these are theoretical and academic exercise. The ld DR failed to bring on record any cogent evidence or material which can prove that CUP method is not suitable for the

assessee. Why and how the uncontrolled price does not exist in the assessee's case under consideration? The main focus of the ld DR for the Revenue is that since the assessee is a manufacturer whereas the associated enterprise (AE) is a distributor, hence, functions are different, therefore CUP method is not applicable to the assessee.

We note that under the Distribution Agreement, the assessee has grant to AT & S AG (AE), the exclusive right to market, distribute and sell the products manufactured by the assessee in the specified territory (Europe). The assessee, as a principal, has the full authority to sell the products manufactured by it as per own business decision, therefore, the assessee has functioned as a full-fledged manufacturer of its product and AT & S AG (AE) functioned as a distributor of the assessee. The AT& S AG (AE), with the prior written agreement of the assessee, can seek customers for the products manufactured by the assessee outside the specified territory or establish branch or maintain any distribution depot for the products of the assessee outside the specified territory in countries where the assessee has no exclusive distributors. The AT & S AG (AE) is entitled to get commission as per the Distribution agreement and from time to time the commission may be reviewed by the assessee. The assessee paid commission to AT&S AG (AE) @ 6% of gross distributor's price for carrying out distribution activities in the specified territory. As per the Distribution agreement, the AT & S AG (AE) further deducts preliminary warranty guarantee @ 2% of the gross distributor's price out of the aforesaid sale proceeds for the purpose of incurring warranty expenses arising from further sale of PCB's to independent customers. The AT & S AG (AE) remitted the sale proceeds collected by it from independent customers in the open market under uncontrolled conditions, to the assessee company, which was recorded in the books of accounts of the assessee company as "sales". Therefore, in the assessee's case under consideration there are independent customers, and the price is fixed by the Principal (Assessee), the product design and specification is decided by the assessee. The Associated Enterprise, the AT & S AG (AE) plays a limited role, that is, it collect the money on behalf of the assessee and remits the same to assessee, for that AE is paid commission. Even commission and warranty expenses are determined and decided by the assessee (Principal). The AT & S AG (AE) does not do any value addition in the goods manufactured by the assessee. Therefore, in this scenario, the stand of the ld DR that CUP Method is not applicable to the assessee, is not acceptable."

4. ITAT, Chennai'-B' in the case of Redington India Ltd. v. Addl. CIT [2013] 34 taxmann.com 279/59 SOT 152 (URO). For the sake of convenience we, extract para No. 12 of the order of ITAT and the same is reproduced hereinbelow-

"12. Leaving aside the merits and demerits of different methods used for ascertaining the ALP, in the given instance, what was bought by the assessee was 1250 items of Pentium IV processors from its Associate Enterprise in Singapore. A look at the invoice raised by M/s Intel Semiconductor Limited, on the said Associate Enterprise, clearly shows that these items though sold to the Singapore entity but, directly shipped to the assessee in India. The invoice mentions the unit price as 144 US\$. The said

invoice clearly shows that the price at which M/s Intel Semiconductor Limited supplied to Redington Distribution Pvt. Ltd, Singapore and price at which the latter sold to the assessee in India, was one and the same. We are of the opinion that when the Associate Enterprise had sold the items to the assessee at the same price at which it had purchased it, there cannot be any arm's length price adjustment done, unless and until the original vendor was also an Associate Enterprise. Here, admittedly, M/s Intel Semiconductor Limited was not an Associate Enterprise of assessee or its Associate Enterprise in Singapore. Therefore, we cannot say that the price at which M/s-Intel Semiconductor Limited sold to Redington Distribution Pvt. Ltd., Singapore, was not at arm's length price. In our opinion, when Redington Distribution Pvt. Ltd. sold the items to assessee at very same price at which it had purchased from M/s Intel Semiconductor limited, there cannot be any question of under pricing or over pricing. We are, therefore, of the opinion that the adjustment carried out by the lower authorities, based on list price, on the purchase of 1250 Pentium IV processors from Associate Enterprise was not called for. Such adjustment, therefore, stands deleted."

5. Teejay India Pvt. Ltd. vs. ACIT- [2021] 124 taxmann.com 562 (Visakhapatnam - Trib.)

8.5 From the above facts and law, it is observed that the assessee had purchased the raw material from its AE and the AE has supplied the raw material to the tax payer on back to back basis without marking up for any costs or expenses or profit. The AE has made purchases from third party vendor which is uncontrolled transaction and the supplies made by the AE to the taxpayer are controlled transaction. The price charged by the AE to the taxpayer is less or equal to the uncontrolled transaction. This fact was also demonstrated by the assessee in respect of purchases made from Saravana Spinning Mills by the assessee through the AE. The AO has not demonstrated that the price charged in controlled transaction is more than the uncontrolled transaction with any proof or evidence. The TPO also did not bring any material to show that the internal CUP is not acceptable or any restrictions are placed by the Income-tax Act to consider internal CUP as comparable. It is also undisputed fact that supplier of the material is not related party of the AE. Therefore, we do not see any reason to reject the transfer pricing study of the assessee and to accept CUP as most appropriate method in respect of purchases. Accordingly, we set aside the orders of the lower authorities and direct the AO to adopt CUP as most appropriate method for purchases.

Case laws on the point that CUP is preferred over TNMM and the TPO cannot arbitrarily reject the method adopted by the Assessee

1. CUP Method being preferred over the profit based methods. In this connection we rely on the decision of the Hon'ble Delhi Tribunal in the matter of Hughes Systique India (P.) Ltd vs. ACIT reported in [2013] 36 taxmann.com 41 (Delhi

- Trib.), wherein the Hon'ble Tribunal inter alia held that: - (Kindly refer Pg. 81-96 of Compilation)

"6.5 The CUP method provides the most direct comparison for the purpose of determining the arm's length price of international transactions and is to be preferred over the other profit based methods. Reliance is placed in this regard on the following decisions:

- *Aztec Software & Technologies Services Ltd. v. Asstt. CIT [2007] 107 ITD 141/162 Taxman 119 (Bang.) (SB)*
- *UCB India (P.) Ltd. v. Asstt. CIT [2009] 30 SOT 95 (Mum.)*
- *Gharda Chemicals Ltd. v. Oy. CIT [2010] 35 SOT 406 (Mum.)*
- *Intervet India (P.) Ltd. v. Asstt. CIT [2010] 39 SOT 93 (Mum.)*
- *Asstt. CIT v. Dufon Laboratories [2010] 39 SOT 59 (Mum.) 11"*

2. Reliance in this regard is also placed on the decision of Hon'ble Mumbai Tribunal in the case of *Serdia Pharmaceuticals (India) (P.) Ltd. v. Asstt. CIT* reported in [2011] 44 SOT 391/9 taxmann.com 13 wherein the Hon'ble Tribunal while dealing with the priority of applications of methods for the determination of ALP, has held as under:

"64... as long as CUP method can be reasonably applied in determining the arm's length price of an international transaction in a particular fact situation, and unless another method is proven to be more reliable a method vis-a-vis the fact situation of that particular case, the CUP method is to be preferred. The reason is simple. When associated enterprises enter into a transaction at such conditions in commercial and financial terms, which are different from commercial and financial terms imposed in comparable transaction between independent enterprises, the difference in these two sets of conditions in financial and commercial terms re attributed to inter relationship between the associated enterprises that is sought to be neutralized by the transfer pricing regulations. As long as CUP method can be reliably applied on the facts of a case, it does offer most direct method of neutralizing the impact of inter- relationship between AEs on the price at which the transactions have been entered into by such AEs."

3. *Mumbai ITAT- ACIT vs. Genom Biotech (P.) Ltd., [2012] 21 taxmann.com 315 (Mum.)*, the Court held that- (Kindly refer Pg. 73-80 of Compilation)

"10.2 We find that the TPO in his Order has not given any reason as to why he is rejecting the CUP method adopted by the assessee for determining the arms length price for reimbursement of business promotion expenses by the assessee to the AEs. It is well settled that no method can be rejected without giving cogent reasons. The TPO has to state why CUP method is not applicable in this case. After assigning reasons, then the TPO has to state as to how "TNMM" is the most appropriate method, to be applied on the facts and circumstances of this case. This is not done. There is no

whisper on these issues in the order of the TPO. Without giving any reasons for the rejection of "CUP" method, the TPO, applies the mean of percentage of expenditure incurred by 17 pharmaceutical companies on advertisement and marketing and terms the same as arm length price arrive by using "TNMM". This is not "TNMM".

10.9 Nevertheless as the TPO has not given any reason as to why the method adopted by the assessee i.e., CUP method is not acceptable as the most appropriate method and as the Assessing Officer has not adopted any of the methods prescribed under the Act and has method adopted by the TPO cannot be called TNMM prescribed under the Act and Rules, we have to necessarily uphold the Order of the first appellate authority, though for different reasons. Similar view is taken by the Pune Bench in Asstt. CIT v. Mss India (P.) Ltd. [2009] 123 TTJ 657/ 32 SOT 132”.

JV projects are profit making and hence the argument of the TPO that the AEs have passed on its losses to the Assessee is factually incorrect

1. Another reasoning given by the TPO is that AE pushed its losses to the project office. In para 5.27, 5.28 and 5.29 of the CIT(A) order for AY 2013-14 (internal page. 30 and 31), the CIT(A) has recorded a table which shows all profit/loss incurred for all projects during the year. From that it can be seen that all 3 AE transactions which are the JV projects (serial no. 8,9 and 10 have all incurred profits, which is offered to tax as this is a case of admitted PE and the Assessee on an entity level during the year under consideration has had a loss arising on account of direct/independent/third party contracts which is immaterial from a transfer pricing perspective.

2. For ease of reference, the same is reproduced hereinbelow-

S.No.	Projects	Contractor	Contract Status	Profit/Loss	Remarks
8.	BC16-DMRC	CEC-SOMA JV	In progress	51,97,454	Profits
9.	UG02-BMRCL	CEC-SOMA-CICI JV	In progress	6,22,76,903	Profits
10.	CC04-DMRC	CEC-CICI JV	In progress	84,79,861	Profits

3. Hence, the very base and premise of the TPO for AY 2013-14 is factually incorrect and hence the CIT(A) has rightly deleted the said addition and taken this into consideration.
4. For AY 2014-15, again the CIT(A) has in detail analysed this aspect factually. In para 5.28 (internal page. 29 and 30), the chart is reproduced and serial no. 5,6 and 7 are the JV/AE transactions. Out of 9 projects undertaken for this year, 3 are via the JV model, out of which 2 are in profit and in 1 only there is a loss.
5. For ease of reference, the same is reproduced hereinbelow-

S.No.	Projects	Contractor	Contract Status	Profit/Loss	Remarks
5.	CC04-DMRC	CEC-CICI JV	In progress	2,31,84,571	Profits
6.	UG02-BMRCL	CEC-SOMA-CICI JV	In progress	(10,37,80,407)	Loss
7.	CC04-DMRC	CEC-CICI JV	In progress	1,66,03,301	Profits

6. The loss making aspect in one project is also discussed at length in para 5.52 and 5.53 of CIT(A) order for AY 2014-15, internal page. 38 whereby it is stated that the same is converted to profits in next year and in earlier year also which is offered to tax. Detail discussion is there with respect to this project in the CIT(A) order.
7. Hence, the allegation of the TPO that AEs have passed on its losses to the Assessee is factually incorrect as substantiated before Your Honours.

The allegation of TPO that the decision to enter into the contract with the DMRC/BMRC was taken by the AE alone and the Assessee had no role to pay in that is again factually incorrect as all3 JVs were set up and the JV contract is entered into only after the bid is successfully won.

8. Furthermore, the allegation of the TPO that the decision to enter into the contract with the DMRC/BMRC was taken by the AE alone and the Assessee had no role to pay in that is again factually incorrect as it can be seen that in all

- 3 cases, the JV is set up and the JV contract is entered into only after the bid is successfully won.
9. CEC-SOMA JV was awarded the contract by DMRC on 18.12.2006 and JV contract was signed on 29.01.2007 and JV was set up on 08.02.2007.
 10. Similarly, CEC-SOMA- CICI JV was awarded a contract by BMRC on 24.12.2009 and the JV contract was signed on 10.03.2010 and the JV was set up on 05.03.2010.
 11. Even CEC-CICI JV received the approval from DMRC on 29.12.2011 and was setup thereafter on 29.12.2011. These dates and facts are mentioned in the TPO order and in the CIT(A) order as well.
 12. Hence, the allegation of the TPO is factually incorrect as substantiated before Your Honours.

Re-characterisation as done by the TPO is not permitted in law

It is also humbly submitted that it is a settled law that in transfer pricing, recharacterization is not permitted. Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd. [2012] 345 ITR 241(Del) has held the same and in a plethora of ITAT rulings, consistently this view has been taken. Hence, the action of TPO to attempt to recharacterize the transaction is illegal and bad in law.

The same proposition has also been upheld by Hon'ble Delhi High Court in Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT [2015] 374 ITR 118 (Del).

Detail project wise analysis undertaken by the CIT(A) qua the international transaction (para 5.32 to para 5.63 of CIT(A) order for AY 2013-14 and para 5.33 to para 5.53 of CIT(A) order for AY 2014-15)

BC16-DMRC	CEC-SOMA JV, contract by DMRC para 5.33 to 5.39
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Findings for AY 2013-14

1. CEC-SOMA JV was awarded the contract by DMRC on 18.12.2006 and JV contract was signed on 29.01.2007. The scope of work was Phase II of Delhi Metro and project duration was February 2007 to July 2010. A profit of Rs. 51,97,454/- was earned on percentage completion method.
2. The international transaction pertaining to this project is in the nature of recovery of construction income of Rs. 1.73 crores by CEC-SOMA JV. The recovery is triggered by DMRC against CEC-SOMA JV and the same recovery without any mark-up has been passed on to the Assessee (para 5.34)

3. The recovery is on account of negative variation which is basically any amount charged which is over and above the original contract value. Negative variation is the reversal of excess part of IPC(Interim Payment Certificate) issued on account of negative variation of material price/work (para 5.36).
4. The CIT(A) has given a categorical finding as regards the above.
5. The CIT(A) has also stated that this reversal of excess IPC does not impact profit and loss account because the revenue is recognised in the P&L account as per percentage of completion method. P&L account has nothing to do with negative variation and the actual billing. The negative variation is therefore routed through the Balance Sheet. In totality, the IPC and the variations would equal to the revenue booked through percentage of completion method after completion of the entire project. (para 5.36)
6. The CIT(A) has also appreciated that negative variation is due to change in material cost or change in scope of work which is beyond the control of the Assessee or the JV. The adjustment is made by DMRC and is directly passed on from the JV to the Assessee and hence effectively it is a transaction between DMRC and the Assessee only, who are independent parties. (Para 5.35, 5.37 and 5.38)
7. Similar finding is there for AY 2014-15 aswell. In this year it's a case of positive variation whereby Assessee has recovered the same from DMRC. DMRC paid it to the JV and the same amount has been passed on by the JV to the Assessee- hence same and detailed findings are there in this year also. (Para 5.34 to Para 5.40 of CIT(A) order for AY 2014-15, internal page. 31-33-)

CC04-DMRC

CEC-CICI JV, contract by DMRC para 5.40 to 5.46

Findings for AY 2013-14

1. CEC-CICI JV was awarded the contract by DMRC. The scope of work was
2. Phase III of Delhi Metro and project duration was February 2010 to January 2015. A profit of Rs. 84,79,861/- was earned. The letter of approval came on 29.11.2011.
3. Following 3 international transactions were undertaken pertaining to this JV and this project-

CEC-CICI JV	Reimbursement received for expenses	1,16,22,850
	Mobilization advance	11,00,00,000
	Investment in JV	6,00,00,000

4. In para 5.41, 5.42 and 5.43, these 3 transactions are discussed in detail. It is to be appreciated that all 3 are capital account transactions only.
5. Similar finding is there in AY 2014-15 also. In para 5.41 to 5.46, internal page. 34 to 36, the CIT(A) has given a detailed finding as regards the same international transactions qua this specific project.

UG-2-BMRC	CEC-SOMA-CICI JV, contract by BMRC para 5.47 to 5.51
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Findings for AY 2013-14

1. CEC-SOMA-CICI JV was awarded the contract by BMRC on 10.03.2010. The scope of work was for designing and construction of underground stations and tunnels in underground stretch. A profit of Rs. 6,22,76,903/- was earned.
2. The international transaction pertains to a sum of Rs. 1731780,801/- from JV against IPC(Interim Payment Certificate), which is raised as per the milestones mentioned in the contract. Para 5.47, 5.48, 5.49 and 5.50 of the CIT(A) order contains all factual details of the contract and the scope and allotment of work.
3. In para 5.50, the CIT(A) has noted that the IPC raised by the Assessee based on milestones as per the contract has been passed on completely from BMRC and is directly passed on from the JV to the Assessee and hence effectively it is a transaction between BMRC and the Assessee only, who are independent parties.
4. Similar finding is there in AY 2014-15 also. In para 5.47 to 5.53, internal page. 36 to 38, the CIT(A) has given a detailed finding as regards the same international transaction qua this specific project.

International transactions with the Head Office para 5.52 to 5.55

1. The CIT(A) has analysed the details and concluded that these are only reimbursements or capital infusion. Para 5.52 to 5.55 in CIT(A) order for AY 2013-14 and Para 5.54 to 5.59 in CIT(A) order for AY 2014-15.

After analysing all of the above, CIT(A) has concluded (in para 5.56 and 5.57 of the CIT(A) order for AY 2013-14, internal page 42) that these are all international transactions which are capital in nature and have no bearing on profit and loss account as P&L is based on project completion method and in any case profits earned in each year are already offered to tax since this is a case of admitted PE. Similar finding is there in para 5.60, 5.61 and 5.69 of the CIT(A) order for AY 2014-15.

Concluding Paras are reproduced below for ease of reference –

- a. Para 5.56 and 5.57 of the CIT(A) order for AY 2013-14, internal page 42
- 5.56 After analysing all above discussed international transactions, I find that the international transactions can be broadly divided into following categories: a) Reimbursements, b) capital infusion, c) recovery of receipts due to negative variation, d) receipts against interim payment certificates (IPC) e) capital contribution to JV f) mobilization advance received from JV*
- 5.57 All international transactions as discussed above have no impact on the profit & loss account because the P&L account is based on project completion method. Further, there is only one international transaction, which is the receipt of Rs. 1,731,780,801/- against services delivered by the project office. All other transactions are not against any provision of services.*

- b. Para 5.60, 5.61 and 5.69 of the CIT(A) order for AY 2014-15-

5.60 After analysing all above discussed international transactions, I find that the international transactions can be broadly divided into following categories: a) Provision of services b) Reimbursements, c) capital infusion, d) recovery of receipts due to variation, e) receipts against interim payment certificates (IPC) f) capital contribution to JV g) mobilization advance received from JV

5.61 All international transactions as discussed above have no impact on the profit & loss account because the P&L account is based on project completion method. Further, only two international transaction, (the receipt of Rs. 1,09,88,25,263/- Rs. 4,25,59,936/- in the case of CC-04 and Rs. 1,05,62,65,327/- in the case of UG2) are against the services delivered by the project office in the case of CC-04 and UG2. All other international transactions are not against any provision of services.

5.69 Further, certain international transactions are in the nature of capital contribution and mobilization advances. Therefore, the arm's length price of such international transaction has been correctly benchmarked by the assessee. Moreover, the entire contract receipts pertaining to project office of CEC have been offered to tax in India, therefore, the profit shifting is not feasible. Accordingly, the grounds of appeal no 1 to 11 are allowed.

Case-laws on the proposition that these transactions do not attract TP provisions

Mobilization advance

1. Hyderabad ITAT- DCIT vs. Lanco Infratech Ltd.- ITA No. 404/Hyd/2016, held that-

“9. We have considered the rival contentions. It is well accepted practice that the construction industry pay advances at a certain percentage of the contract value to mobilise various resources for the execution of contract and these advances are given in the regular course of business. As seen from the facts of assessee’s case, assessee is undertaking an EPC contract and has received mobilization advances as part of that. Like-wise, assessee has given some works to other parties on sub-contract basis and necessarily it has to provide mobilization advances to the parties. It is also noticed that assessee has advanced mobilization advances to both AEs and non-AEs and no interest has been charged from either party. Not only that assessee is also not required to pay any interest on the mobilization advances received, which are in fact more than the amounts advanced by assessee. Thus, there is complete uniformity in the act of assessee in not charging interest from both AE and non-AE and also not paying interest/claiming interest for the advances received. Following the principles laid down by the Hon'ble Bombay High Court in the case of Indo American Jewellery Ltd. Vs. CIT, Hon'ble Bombay High Court (ITA No. 1053 of 2012), we are of the view that there is no need for charging any interest on the amounts advanced as receivables. Since this amount is part of contract work, in our view it does not attract any adjustment under TP provisions. Moreover, advances given as part of contract work does not require any special addition, when the TPO was already examined and held that the transaction relating to ‘work contract expenses’ are within the ALP during the year. Thus, when the whole work contract is considered within the ALP, we are of the opinion that the advances given in the course of contract does not call for special adjustment.

Moreover, these business advances cannot be categorised as ‘loans and advances’ so as to consider them for adjustment. Relying on the various case law relied upon by the Ld. Counsel, we are of the opinion that since assessee-company is not charging any interest from the AEs and non-AEs and also not paying any interest on the amounts received by it from the main contractor, this adjustment is not warranted. Respectfully following the principles laid down in

various case law relied upon by assessee above, we have no hesitation in deleting the above adjustment”.

Capital contribution/Investment in JV

- Bombay High Court- Vodafone Services Pvt. Ltd. vs. Union of India reported in 268 ITR1
- Bombay High Court- PCIT vs. PMP Auto Components Pvt. Ltd.- ITA NO.1685 of 2016

Reimbursement of cost to cost expenses – Para 5.67 (14-15) and Para 5.63 (13-14)

- Pune ITAT in Emerson Climate Technologies (India) Ltd. [2018] 90 taxmann.com 125 (Pune-Trib.).
- CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi)
- Delhi ITAT in Danisco India Pvt. Ltd. ITA No.2846/Del/2016

The Assessee should be treated as a domestic entity and hence this is not an international transaction

The CIT(A) has captured that the Assessee, CEC-PO is a project office and is subjected to tax in India and this is a case of admitted PE and hence since JV is in India and all JV members are based in India, and CEC-PO is subjected to tax in India, it is not an international transaction.

- a. Para 5.58 of the CIT(A) order for AY 2013-14. For ease of reference, the same is reproduced hereinbelow –

5.58 The appellant relied on the decision of ITAT, Hyderabad in the case of DCIT, Hyderabad vs. M/s IJM (India) Infrastructure Ltd, to claim that for the purpose of transfer pricing applicability; Indian project office of a foreign company should be treated as a domestic entity. Further, by extending this logic, the appellant claimed that a transaction between JV & Project office should be treated as a domestic transaction and not as an international transaction under section 92B of the Income-tax Act, 1961 (the Act).

- b. Para 5.62 of the CIT(A) order for AY 2014-15. For ease of reference, the same is reproduced hereinbelow –

5.62 The appellant relied on the decision of ITAT, Hyderabad in the case of DCIT, Hyderabad vs. M/s IJM (India) Infrastructure Ltd, to claim that for the

purpose of transfer pricing applicability; Indian project office of a foreign company should be treated as a domestic entity. Further, by extending this logic, the appellant claimed that a transaction between JV & Project office should be treated as a domestic transaction and not as an international transaction under section 92B of the Income-tax Act, 1961 (the Act).

In this regard reliance has been placed on the following decisions-

1. Hyderabad ITAT- IJM (India) Infrastructure Ltd- ITA No. 1814/Hyd/2012, the Court held that-(Kindly refer Pg. 97-137 of Compilation)

“3.3 The AR submitted that the TPO had erroneously exercised the jurisdiction under the provisions of Chapter X even though there were no transactions, which are in the nature of the 'International Transaction' as defined under Sec. 92B of Income Tax Act, 1961 inasmuch as neither of the parties to the transaction is a non-resident. On bare reading of the provisions of Sec. 92B(1) of Income Tax Act, 1961, it is crystal-clear that in order to be characterised as international transaction, the following salient features must be present: (i) There should be a 'transaction.' (ii) Such 'transaction' should be between two or more AEs and either or both of whom should be nonresidents. (iii) Such transaction should be of the nature as referred to in Sec. 92B.

3.4 According to the AR, all the above three (3) conditions must be cumulatively satisfied so as to make a transaction an 'international transaction'. If there is a transaction between two AEs and such transaction is of nature as referred to in Sec. 92B of Income Tax Act, 1961, it will not become an 'international transaction' so as to fall within the domain of Chapter X, unless such transaction is between two or more AEs and either or both of them should be non-residents. He relied on the decision of the Delhi Special Bench of the Tribunal in the case of L.G. Electronics India (P) Ltd. & Ors. vs. ACIT (Del) (SB), 152 TTJ 273 (Del).

3.7 The AR submitted that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and it is assessed to income-tax in the status of domestic company and whereas the AEs with whom the assessee had transactions are IJM Corporation Berhad, Delhi Project Office (PE in India), has the place of business in India under the provisions of Sec. 592 of the Companies Act, 1956 w.e.f. 30th May, 2005.

3.14 The AR submitted that in the present case the transactions are between two resident parties only and there is no possibility of shifting of profits outside India or erosion of country's tax base. Therefore, its transactions with AEs are outside the purview of the transfer pricing regulations. This PE is assessed to income-tax in India in the status of foreign company in respect of its business profits.

5.8 *The assessee is a company incorporated under the provisions of the Companies Act, 1956 and is assessed to income tax in the status of domestic company and whereas the AEs with whom the assessee had transactions are IJM Corporation Berhad, Delhi Project Office (PE in India), established the place of business in India under the provisions of Sec. 592 of the Companies Act, 1956 w.e.f. 30th May, 2005.*

5.9 *By virtue of its registration under provisions of sec. 92 of Companies Act, 1956 and its affairs are managed and controlled in India. Further, one of the Directors of the Principal Company is nominated as Attorney for the purpose of undertaking the contract awarded by the Municipal Corporation of Delhi and National Highways Authority of India and is empowered to manage and operate entire operations in India and all the decisions in respect of operations in India are taken only in India and that nominated Director had been residing in India only. In other words, control and management of branch affairs were situated in India within the meaning of Sec. 6(3) (ii) of Income-tax Act, 1961. In this connection, it is pertinent to extract the observation made by the Hon'ble Calcutta High Court in the case of CIT vs. Bank of China (In Liquidation) - 154 ITR 617 vide Para 8: "Para 8: Under section 6(3) a non-Indian company is said to be resident in India in any previous year if during that year the control and management of its affairs is situated wholly in India. The determination as to what place or places the control and management of a particular company is situated is essentially a question of fact to be determined on the facts and in the circumstances of the particular case. A company can be simultaneously resident in more than one place but the question is whether the control and management is situated wholly in India during the relevant previous year. The expression 'control and management' signifies the controlling and directive power, the head and brain as it is sometimes called and 'situated' implies the functioning of such power at a particular place with some degree of permanence. The word 'wholly' as used in section 6(3) would indicate that seat of such power may be divided between two distinct and separate places. The expression 'control and management' means de facto control and management and not merely the right or power to control and manage. In order to hold that a non-Indian company is resident in India during any previous year, it must be established that such company de facto controls and manages its affairs in India. The principles are by now well settled. "*

5.10 *Vide paragraph 9 of the cited judgment, the Calcutta High Court has clarified that the word 'affairs' means affairs which are relevant for the purpose of the Act and which have some relation to the income sought to be assessed. It is not the bare possession of powers by the directors, but their taking part in or controlling the affairs relating to the trading, that is of importance in determining the question of the place where the control is exercised. They must exercise their power of control in relation to business or activity wherefrom the profit is derived. (See - Egyptian Hotels Ltd. v. Mitchell [1915] 6 TC 542 (HL.)). The Power of Attorney executed by the principal Company in favour of the Indian resident Director to manage the branch operations in India clearly goes to establish beyond any pale of doubt the fact that the*

entire control and management in relation to operations in India is situated in India only. Therefore, the PE should undisputedly be treated as resident in India

5.17 Further in the present case the transactions are between two resident parties as outlined at paras 3.18 and 3.19 of this order. There is no possibility of shifting of profits outside India or erosion of country's tax base. Therefore, its transactions with AEs are outside the purview of the transfer pricing regulations. This PE is assessed to income-tax in India in the status of foreign company in respect of its business profits. No shifting of profits outside India or erosion of taxes in India is involved, that is, there is no motive to shift the profits or evade the taxes in India inasmuch as its business profits are taxable as separate entity in India”.

2. Hyderabad ITAT-Swarnandhra IJMII Integrated Township Development Company Pvt. Ltd. - ITA No. 2072/Hyd/2011, (para 24.14 to 24.24 to para 28.7 and 28.8).

Also, domestic TP will not be applicable in view of retrospective amendment in Section 92BA and even otherwise, the conditions for invoking the same are not satisfied in the instant case.

Not a case of shifting of profits

The next argument of the Assessee which is rightly appreciated by the CIT(A) is that the entire contract receipts pertaining to the PO of CEC have been offered to tax in India, therefore profit shifting is not possible. All related parties who are JV members are based in India and even the JV is based in India. As regards, CEC-SOMA JV, SOMA is an unrelated party.

- a. Para 5.61 and 5.62 and 5.63 of CIT(A) order for AY 2013-14. For ease of reference, the same is reproduced hereinbelow –

5.61 The appellant pointed out that profit shifting is a way to shift funds from India to foreign entity intentionally. The assessee is a project office of CEC-Taiwan which carries out the allocated works related to construction carried out in India and whatever revenue the assessee generates from its Indian operations based in India is retained in India. CEC-Taiwan doesn't have any right to claim any share of revenue out of the total revenue generated from Indian business operations. It is noted that CEC-Taiwan is the only foreign entity with whom the assessee has entered into international transaction during

the year. The transactions were in the nature of reimbursements and receipt of funds.

5.62 It is submitted that the concept of profit shifting is applicable where one party is situated outside India and another entity is based out of India and with intent to evade taxes in India; profits are shifted outside India. However in the relevant case, there cannot be any case of shifting since all the related parties who are the JV members are based in India. It is worth to note that SOMA (JV partner) is an unrelated party; accordingly, no shifting can be done in any transaction entered with third party.

5.63 In view of the above discussion, I find that the TPO has wrongly applied TNMM for benchmarking of arm's length price of international transactions. The transactions between JV & the appellant are international transactions only due to the specific arrangement of routing the invoices through JV office for administrative convenience. Effectively, the transaction is between third parties. The international transactions in the nature of cost to cost reimbursements is not against any service but for the expenses incurred on common basis in respect of third parties say salary, information technology, bank charges etc. Certain international transactions are in the nature of capital contribution and mobilization advances. Therefore, the arm's length price of such international transaction have been correctly benchmarked by the assessee. Moreover, the entire contract receipts pertaining to project office of CEC have been offered to tax in India, therefore, the profit shifting is not feasible. Accordingly, the ground of appeal is allowed.

- b. Para 5.65 and 5.66 and 5.67 of CIT(A) order for AY 2014-15. For ease of reference, the same is reproduced herein below –

5.65 The appellant pointed out that profit shifting is a way to shift funds from India to foreign entity intentionally. The assessee is a project office of CEC-Taiwan which carries out the allocated works related to construction carried out in India and whatever revenue the assessee generates from its Indian operations based in India is retained in India. CEC-Taiwan doesn't have any right to claim any share of revenue out of the total revenue generated from Indian business operations. It is noted that CEC-Taiwan is the only foreign entity with whom the assessee has entered into international transaction during the year. The transactions were in the nature of reimbursements as receipt of funds and the reimbursement were also in respect of third party expenses.

5.66 It is submitted that the concept of profit shifting is applicable where one party is situated outside India and another entity is based out of India and with

intent to evade taxes in India; profits are shifted outside India. However in the present case, there cannot be any case of shifting since all the related parties who are the JV members are based in India. It is worth to note that SOMA (JV partner) is an unrelated party; accordingly, no shifting can be done in any transaction entered with third party.

5.67 In view of the above discussion, I find that the TPO has wrongly applied TNMM for benchmarking of arm's length price of international transactions. The transactions between JV & the appellant are international transactions only due to the specific arrangement of routing the invoices through JV office for administrative convenience. Effectively, the transaction is between third parties. The international transactions in the nature of cost to cost reimbursements is not against any service but for the expenses incurred on common basis in respect of third parties say salary, information technology, bank charges etc.

The comparables taken by the TPO are also incorrect

Detailed submissions in this regard were filed, which find mention in the CIT(A) order and the CIT(A) has given a finding on this respect aswell.

- a. Para 5.59 and 5.60 of CIT(A) order for AY 2013-14. For ease of reference, the same is reproduced hereinbelow –

5.63 Further, it is noted that the TPO has compared the appellant with pure engineering service providers using TNMM as the most appropriate method. While doing so, the TPO has ignored the fact that the revenue recognition policy of the comparable company is different from the assessee because the revenue and costs in case of assessee are recognized in accordance with AS-7 as it is a construction company.

5.64 In the process of comparability; FAR analysis (i.e. analysis of functions performed, assets employed and risks assumed) plays very critical role in the acceptance or rejection of comparables. The appellant has highlighted that there is substantial difference in the ratio of Fixed Assets to Turnover of the company and of the assessee. Further, the appellant demonstrated the difference in the functions performed, fixed assets and inventory of the company and of the assessee.

- b. Para 5.63 and 5.64 of CIT(A) order for AY 2014-15. For ease of reference, the same is reproduced hereinbelow –

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5.64 In the process of comparability; FAR analysis (i.e. analysis of functions performed, assets employed and risks assumed) plays very critical role in the acceptance or rejection of comparables. The appellant has highlighted that there is substantial difference in the ratio of Fixed Assets to Turnover of the company and of the assessee. Further, the appellant demonstrated the difference in the functions performed, fixed assets and inventory of the company and of the assessee.

PRINCIPLE OF CONSISTENCY QUA THE ASSESSEE

It is also humbly submitted that with the 3 JVs, these are not new contracts and the Assessee has been using this business model for the last many years which is accepted by the Department under Section 143(3) orders. Orders for AY 2008-09, AY 2010-11, AY 2011-12 and AY 2012-13 (all earlier years, assessment order and even TP orders) are on record wherein it can be clearly seen that the Department has accepted the same in earlier years. The relevant page numbers of the orders are as below-

CEC AY 2008-09 order	Pg. 138-141 of the Compilation
CEC AY 2010-11 order	Pg. 142-148 of the Compilation
CEC AY 2011-12 order	Pg. 149-153 of the Compilation
CEC AY 2012-13 order	Pg. 154-155 of the Compilation

In this regard, it is respectfully submitted that though principle of res-judicata does not apply to the income tax proceedings, it is well settled that if there being no change either in facts or in law, as compared to the earlier and subsequent years, the position accepted/ determined by the Department needs to be followed even on the principle of consistency. Reliance in this regard is placed on the following decisions:

- ✓ CIT v. Excel Industries Ltd.: 358 ITR 295 (SC)
- ✓ Radhasoami Satsang v. CIT: 193 ITR 321 (SC)
- ✓ CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.)
- ✓ CIT v. SewaBharti Haryana Pradesh: 325 ITR 599 (P&H)

BUSINESS MODEL ACCEPTED UNDER SECTION 143(3) FOR ALL 3 JVs AND FOR BOTH THE YEARS UNDER CONSIDERATION

It is also important to note that all 3 JVs for both the AYs under consideration have been assessed to tax under Section 143(3) (with TP assessment as well) and hence the contracts, JV model, and back to back transactions stands accepted. Once the same is accepted in the hands of the JV, there arises no occasion for the Department to dispute the same in hands of the Assessee. The orders of the JVs for both the years under consideration are on record. The relevant page numbers of the orders are as below-

CEC- CICI JV order for both AYs (AY 2013-14 and AY 2014-15)	Pg. 156-162 of the Compilation
CEC- SOMA-CICI JV order for both AYs (AY 2013-14 and AY 2014-15)	Pg. 163- 179 of the Compilation
CEC- SOMA JV order for both AYs (AY 2013-14 and AY 2014-15)	Pg. 180-186 of the Compilation

13. Considered the rival submissions and material placed on record. We observed that the assessee, a project office for the CEC Taiwan participated in the tenders to bid the government projects like BMRCL and DMRCL. As per the complexity and access to the big government projects, JVs are formed to execute the projects with efficiency and depend upon the individual strength of the each partners, they participated to the bid the projects in the JV formats and get the complex as well as high value projects. Accordingly, the CEC Taiwan entered JVs with Soma and CICI for BMRC project, similarly in DMRC project, it entered into JV with CICI. Depending upon the nature of work allocated between the JV partners, the work are allocated for example, in DMRCL project awarded to the CEC-Some JV, the work are allocated on the basis of individual strength of the JV partners, they apportioned the work exclusively to CEC, exclusively to Soma and other

common works are being allocated to CEC-Soma jointly. Depending upon the work allocation to each of JV partners, the total contract value is distributed between the partners. It is fact on record that the JVs are created to facilitate the work, it is nothing but pass through entity, all the contracts are executed based on the work allocated to the individual JV partners. The risk and benefits are passed on to the JV partners to the extent of work allocated to them. None of the other partners will share the burden of the other JV partners.

14. We observed that there is complete misunderstanding on the part of the TPO, who had not understood how the JV works particularly in the field of construction of highways and Mass Rapid Transit systems. The heavy projects are being awarded to bidders and as per the project requirements, various category of the specialized works requires expertise in the respective fields, therefore, two or three construction companies joint together to bid and participate in the auctions, particularly heavy projects like Bangalore Metro Rail Corporation Ltd and Delhi Metro Rail Corporation Limited, they specify the various expertise requirement in the policy document itself. The objective behind formation of joint ventures is to extend the capital requirement, sharing the expertise which is challenging in terms of size or complexity involved in such huge projects, they tend to pool the expertise and required capital and ear mark the scope of the work between them and

execute them efficiently for the mutual benefits. Accordingly, the corporations who have relevant expertise will join hands together and participate in the bidding. Accordingly, they also share the part of contract and execute the same. In this case, the assessee along with SOMA and CICI completed the contracts. We noticed that some projects are completed and some are still under construction. In our view, the projects undertaken by the JVs are basically split between the JV partners and they execute the work allocated to them. As far as assessee is concerned, the assessee being a Project office representing the CEC Taiwan, participated in the bidding process and to the extent of work allocated to it by the JV partners, the assessee had executed in India based on back to back contract. In our understanding, the processes are:

- a. Execution of the project in India based on the allocation of work between the JV partners namely CEC India (PO), SOMA and CICI. All the contract work executed by the JV partners, which is allocated on the basis of back to back contracts based on the type of work agreed between the partners depending upon their expertise. The JV agreements are executed before the process of bidding itself and each JV partner is aware of the respective work.
- b. Based on the above allocation of work, the assessee represented by the CEC Taiwan execute the work in Indian projects.

- c. Even though the project is executed by the CEC India, they do not have resources to execute the project. The main partner to the JV is the CEC Taiwan who had all the resources to back the assessee to execute the project.
- d. As far as JV is concerned, the JV partners are CEC Taiwan, SOMA and CICI.
- e. All the work are executed by the CEC Taiwan thru the project office in India and the relevant work allocated to CEC Taiwan was executed by CEC India representing CEC Taiwan.
- f. All the works executed by the JVs thru the JV partners are work completed in India and none of the works are executed outside India.
- g. The JVs are nothing but SPV for the execution of the projects and they are compensated with the administration expenses, and no profits are allocated to them, even otherwise, the profits are allocated to them which is enough to take care of the administrative expenses. They are only facilitators, beyond that they do not execute anything.
- h. All the project executed by the JV are domestic projects, therefore, the transactions are only executed in India.
- i. The transactions carried on by the CEC India with its AE i.e., CEC Taiwan alone will be considered as international transactions, which involves the following transactions:

- i) Reimbursements,
- ii) capital infusion,
- iii) recovery of receipts due to negative variation,
- iv) receipts against interim payment certificates (IPC)
- v) capital contribution to JV
- vi) mobilization advance received from JV

The above transactions are between the assessee at the project office and main contractor is CEC Taiwan. This transaction has nothing to do with JV. The TPO was expected to verify only to the extent of international transaction carried on by the assessee. The TPO had not commented anything on the transactions between the assessee and CEC Taiwan. Further we observed that there is no involvement of international transaction in the execution of the projects in India, which are awarded by the BMRCL and DMRCL. It is purely domestic projects. The project was carried out by the assessee, and all the transactions are recorded in the books of the assessee and the relevant tax are paid as per the declared result in the financial statements.

15. We noticed that Ld CIT(A) has analyzed the result, project wise and also noticed that the assessee is following the project completion method of accounting and the results are declared as per the above method. The allegation of TPO on the aspect of migration of losses of the JV to the assessee are addressed by him and also the assessee had brought on record

the results of 6 projects carried on by the assessee along with the other JV partners. The results declared by the assessee are found to be proper.

16. Coming to the issue of international transactions, these are only transactions between the assessee as project office and its AE, which is the main partner to the JVs. The AE had transacted with the assessee relating to capital infusion for the purpose of execution of project in India, mobilization of advances received from JV and reimbursement towards the expenses incurred by the assessee. The other type of reimbursement of expenses between the JV partners is related to domestic transactions which are reimbursed by the assessee, there is no involvement of AE. All these transactions that are carried out relating to JV are only in domestic currency. We noticed that Ld CIT(A) has rightly appreciated the facts and observed that concept of profit shifting is applicable where one party is situated outside India and another party based in India, in this case, the operations of JV are conducted only in India and all the JV partners are involved in the completion of the project within the territory of India. The work allocated to assessee ie., the ultimate JV partner is the CEC Taiwan, the assessee had represented them in the form of project office. The relevant financials are already offered to tax in India. There is absolutely no possibility of shifting of profit outside India.

17. As discussed above, the international transactions transacted between the assessee as project office and CEC Taiwan as the principal, can be considered as the internal transactions between them. The Job of the TPO is to verify whether the relevant expenses are reimbursed by the AE or not is the issue, apart from that there is no scope for TP study in the given case. He has exceeded his jurisdiction to go beyond the mandate, particularly the scope of functions performed by the assessee and JV partners are only domestic transactions.

18. The next issue is what should be the method to be applied to bench mark the transaction between the assessee and the AE, as discussed in the above paragraph that there is only services provided by the assessee to its AE as the project office, we noticed that the CEC Taiwan had given the project to be executed by the assessee on back to back basis. The result of the execution of the project is already declared in the books maintained by the assessee. The transaction with its AE is only between the project office and the principal. Therefore, the proper method to benchmark is only the CUP method. The courts have held that the proper method for bench marking purpose for the back to back transactions rendered by the assessee to its AE are like the services rendered by the AE, to its end customers or also involved execution of services in the similar line of business. We rely on the decisions of Calance Software (P) Ltd (supra), Arkay Logistics Ltd (Supra),

AT&S India (P) Ltd (supra) and Redington India Ltd (Supra). Further we observed that the CUP method is direct and profit based method apt to apply in the given case.

19. With regard to adoption of TNMM, as discussed above, the transaction between the assessee and its AE is nothing to do with the JVs, the results of execution of projects allocated to the JVs from BMRTS and DMRTS are already recorded in the books of the assessee and relevant taxes are already offered to tax, there is no room for the same profit to be analyzed in the transaction with the assessee and its AE.

20. After considering the detailed findings of Ld CIT(A), we do not see any reason to disturb the same. In the result, grounds raised by the revenue are dismissed.

21. In the result, appeal filed by the revenue is dismissed.

22. The facts in the appeal no 7781/Del/2018 are exactly similar to the facts in the ITA No. 2327/Del/2018, the findings in the ITA No. 2327/Del/2018 are applicable *mutatis mutandis* in ITA 7781/Del/2018 (AY 2014-15), accordingly the grounds raised by the revenue are also dismissed.

23. In the result, appeals preferred by the revenue are dismissed.

Order pronounced in the open court on this day of 12th February, 2026.

Sd/-

**(SUDHIR PAREEK)
JUDICIAL MEMBER**

Sd/-

**(S.RIFAUH RAHMAN)
ACCOUNTANT MEMBER**

Dated: 12.02.2026

Mitali Sr. PS

Copy forwarded to:

1. Appellant
2. Assessee
3. CIT
4. CIT(Appeals).
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI