

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE I.C.SUDHIR, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.1313/Del/2015
(Assessment Year: 2011-12)

SIS Live
C/o. SRBC & Associates LLP,
Golf View Corporate Tower B,
Sector-42, Sector Road, Gurgaon
PAN:ABRFS4787L

(Appellant)

Vs. ACIT,
Central Circle-17, Room NO.
356, E-2,

(Respondent)

Assessee by :	Sh. Deepak Chopra, Adv
Revenue by:	Smt. Rashmi Chopra, Adv
Date of Hearing	Shri NC Swain, CIT DR (OSD)
Date of pronouncement	15/11/2016
	13/02/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is remanded by honourable Delhi high court to ITAT vide order dated 9.5.2016 to adjudicate ground no. 16 to 23 of the appeal of the assessee filed against the order of the Assessing Officer dated 30.01.2014 for the Assessment Year 2011-12.
2. This appeal was first decided by the order of coordinate bench dated 02.12.2015 [65 Taxmann.com 10] as under :-

"4. Briefly stated, the facts of the case are that the assessee is a non-resident partnership firm based in the United Kingdom (UK). In December, 2009, the assessee came into existence through two partners, namely, Satellite Information Services Ltd. (70%) and SIS OB Ltd. (30%), for the purpose of carrying out a Common Wealth Games (CWG) 2010, New Delhi, contract which was awarded by Doordarshan (a constituent of Prasar Bharathi, India) for producing and providing the coverage of the CWG 2010 to the Host Broadcaster, Prasar Bharathi. This contract for Rs. 246 crore allotted by Prasar Bharathi, was further sub-contracted by the assessee to M/s Zoom Communications Ltd., for Rs. 177 Crore on back-to-back basis. The assessee did not file any return of income for the year in question. In response to notice u/s 142(1), the assessee initially filed its return on

30.9.2011 declaring a loss of Rs. 6,01,46,503/-, which was revised to a loss of Rs. 45,06,99,539/- on 28.9.2012. The assessee did not report any international transaction nor filed Form No. 3CEB along with these returns of income. During the course of assessment proceedings, the assessee declared some international transactions at the instance of the Assessing authority. The AO made reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. The TPO, vide his order dated 30-1-2014, rejected the assessee's contention that the transfer pricing provisions were not applicable. He recomputed the ALP of international transactions of Technical service, Reimbursement of profession fee etc. and Hiring of equipments at Nil. The TPO also found that interest chargeable from inter-company loan was below its arm's length rate. The AO vide his draft order dated 10.3.2014 made several additions including an addition on account of transfer pricing adjustment amounting to Rs. 135.83 crore. The assessee objected to the draft order before the Dispute Resolution Panel (DRP) who, vide its Direction dated 30.12.2014, allowed certain reliefs from the additions proposed in the draft order. That is how, the final assessment order was passed computing the total income at Rs. 32,81,66,430/-. In making the additions, the AO took note of the fact that a high-powered committee, known as Shunglu Committee, was constituted by the Government of India to report on the allegations of irregularities in the conduct of CWG, 2010. The Committee reported on various aspects relating to CWG, 2010 and concluded, inter alia, that actual cost of the contract awarded to SIS Live (i.e., the assessee) was at best about Rs. 111 crore, thus, resulting in an overall combined profit of at least Rs. 135 crore (Rs. 246 crore minus Rs. 111 crore) to the assessee and Zoom Communications Ltd. The report also suggested that the assessee secured the contract for Rs. 246 crore; assigned it to Zoom Communications for Rs. 177 crore; provided no service and made a neat profit of the difference between the contracted price and the assigned price, i.e., Rs. 69 crore. Keeping in view the observations of the Shunglu Committee report, the AO made various disallowances.

5. The ld. AR, in support of the deletion of the transfer pricing adjustment, argued that the AO was unnecessarily carried away by the Shunglu Committee Report. He submitted that Shunglu Committee Report was made without giving an opportunity of hearing to the assessee and, further, the AO ignored the fact that the Central Bureau of Investigation (CBI) had already filed a closure report in the criminal cases arising out of Shunglu Committee report and such closure report was accepted by the CBI Court. In the light of these arguments, it was submitted that the additions made by the AO, including the transfer pricing adjustment, were not called for. On a specific query from the Bench about the current status and fallout of the Shunglu Committee report, the ld. AR submitted that all the charges of financial irregularities leveled against the assessee have been dropped and the matter is now lying in arbitration proceedings. The ld. DR opposed this contention and submitted that the matter has not been finalized as has been stated on behalf of the assessee.

6. After considering the rival submissions and perusing the relevant material on record about the transfer pricing adjustment, we find that there is an elaborate discussion in the final assessment order about the order passed by the TPO recommending the transfer pricing adjustment. However, the total income of the assessee has been computed by the AO in the final assessment order at Rs. 32.81 crore without making any addition towards transfer pricing adjustment. It, therefore, becomes vivid that albeit there is a discussion in the assessment order about the transfer pricing adjustment, but eventually no addition has been made by the AO on this score. In the absence of any such addition, we fail to find any cause of grievance to the assessee insofar as the discussion is contained in the final assessment order about the transfer pricing adjustment. When this position was confronted, the ld. AR submitted that the AO inadvertently omitted to make an addition of Rs. 36.65 crore in the computation of total income on the last page of his assessment order and the rectification proceedings have been set in to motion to make good such deficiency left in the assessment order. We are not impressed with the contention of the ld. AR about his right to argue against the transfer pricing adjustment of Rs. 36.65 crore as no such addition has been eventually made in the assessment order and consequently this issue cannot be termed as arising from the impugned order. It is only if the AO, in any subsequent proceedings, makes such addition that the assessee will acquire a right to challenge the addition as per law against the outcome of such later proceedings. Since no addition on account of the transfer pricing adjustment has been made in the final assessment order, which has been impugned before us, we desist from adjudicating on the merits of the addition. The grounds challenging this issue, therefore, fail.”

3. Against the order of the coordinate bench the appellant filed an appeal u/s 260A of the Income Tax Act contending that the issue concerning the transfer pricing adjustment was not adjudicated by the ITAT in the impugned order on the ground that no addition has been made in the assessment order on account of transfer pricing adjustment in computing the total income of the assessee. Admittedly no addition was made on transfer pricing issues in assessment completed u/s 144C read with Section 143(3) of the Act dated 06.02.2015, however, the ld AO vide order u/s 154 of the Act dated 26.11.2015 made an addition on account of transfer pricing of Rs. 366574271/-. Therefore, appellant approached honourable High court against the order of the coordinate bench. Consequently, Hon'ble High Court passed the order in ITA No. 148/2016 dated 09.05.2016 as under:-

“6. In view of the facts the ITAT had declined to adjudicate the Transfer Pricing issue because no addition has been made by the AO and considering that the AO passed a rectification order on 26th November 2015 making an adjustment on the Transfer

Pricing issue, the court set aside the impugned order of the ITAT dated 2nd December 2015 and remands the appeal being ITA No. 1313/Del2015 to the ITAT for a fresh adjudication on the transfer pricing adjustment in accordance with law.

7. *The appeal will now be listed before the ITAT on 1st June 2016. The ITAT is requested to dispose of the appeal within a period of three months thereafter.”*

4. Consequently ground Nos. 16 to 23, which were earlier not decided by the coordinate bench, are required to be decided now. Grounds of appeal of the assessee on transfer pricing issues are as under:-

“Transfer pricing

16. *That in the absence of any international transaction entered into by the Appellant, the reference made by the AO to the TPO under section 92CA(3) was bad in law and void ab-initio.*

17. *That the TPO/DRP grossly erred in not appreciating that no international transaction was reported by the Appellant for the relevant period since the Appellant had followed the cash system of accounting and there was no impact on the profit and loss account of any such alleged international transaction and hence the TPO could not have assumed jurisdiction to bench mark such alleged transactions.*

18. *That the order of the DRP is contradictory to that extent since the cash system of accounting has been accepted by it and in terms of section 92 of the Act, there being no impact on the profit and loss account, no bench marking exercise could have been initiated.*

19. *That the AO/ DRP grossly erred in making/ sustaining the additions which have not even been claimed by the Appellant in its return of income.*

20. *That in terms of section 92CA of the Act, TPO is not empowered to propose an adjustment in respect of a transaction that may be reported for some other assessment year.*

21. *That the AO/DRP grossly erred in law in not appreciating that the TPO was not competent or empowered to question the commercial expediency of any alleged transaction and hence was not competent to take the value of any international transaction at Nil.*

22. *That the TPO/DRP erred in making/sustaining an adjustment of Rs. 31,87,60,236 on account of alleged international transactions entered into by the Appellant.*

23. *That the AO/DRP grossly erred in law in making/upholding adjustment in respect of (a) reimbursement of expenses; and (b) imputed interest; for which. no adjustment was made by the TPO in his assessment order under section 92CA(3) of the Act.”*

5. The Id Assessing Officer vide u/s 154 of the Act dated 26.11.2015 has made the addition of Rs. 366574271/- on account of international transaction with Associated enterprises and interest on such amount. The main

argument of the assessee before the Id TPO/ Ld AO since the assessee follows cash basis of accounting, no expenses arising out of the international transactions was accounted for by the assessee during the subject assessment year and consequently, no deduction of the same was claimed by the assessee in its return of income. Since the expense in respect of international transactions was not claimed by the assessee in its return of income, the provisions of section 92 of the Act, dealing with transfer pricing, were not applicable in the assessee's case. In this regard reliance may be placed on the decision of Hon'ble Bombay High Court in the case of Vodafone India Services Private Limited v. Union of India (WP No. 871 of 2014) wherein it is held that transfer pricing provisions' are machinery provisions and are not attracted on an independent basis, unless there is some income chargeable to tax in India.

6. However, the Id Assessing Officer rejected the argument the argument of the assessee as stated in paragraph No. 13 of his order as under:-

“13. CONCLUSION

13.1 Thus, the argument of the assessee that the 'Transfer Pricing Provisions are not applicable in the present case, has also been found to be contrary to the law and also on facts.

13.2 In view of the above facts and discussions, it is held that the payments made/ required to be made by the Firm to its AEs i.r.o the international Transactions are not to be allowed and the Arm's Length Price of such transactions is taken as NIL for the transactions with SIS OB and Fatpipe. For the interest to be charged by the Firm from SIS Holdings on intercompany receivables, the rate of interest charged is not at arm's length. For the present year, interest required to be charged by the Firm has been determined to be less than the arm's length price of the international transaction, which will require suitable adjustment for FY 2012-13. The Assessing Officer will have to accordingly make adjustments in the relevant years as discussed above.

13.3 Since, the aggregate value of international transactions exceeds Rs. 1 crore, in terms of clause (2) of Rule 1QD of the Income Tax Rules, 1962, the assessee was required to maintain prescribed documents. The Assessee Officer may initiate penalty proceedings u/s 271AA for failure of keep and maintain information and documents i.r.o international transaction as also penalty proceedings u/s 271BA for failure to furnish report u/s 92B within the stipulated time and penalty proceedings u/s 271G for failure to furnish information or documents u/s 92D of the Income Tax Act, 1961.

13.4 Without prejudice to the above finding in this case, since, the Firm is following Cash System of accounting, no payment i.r.o the international Transactions w.r.t. SIS OB and Fatpipe as discussed above, shall be allowed in subsequent years also, since the Arm's Length Price of such transactions has been determined at NIL. Interest payment i.r.o the international Transactions w.r.t. SIS Ltd. shall be determined using interest rates for rupee denominated loans for the relevant period, as discussed above".

Hence, as per the recommendation of the TPO-U(2)_f New Delhi and in conformity to the order of Hon'ble DRP-III, the computation of International Transaction to be added in the total income of the assessee is as follows:- .-

Name of the AE	Amount transacted	Ownership linkages	Brief business description of the associated enterprises
SIS Ltd	Rs.23,66,572/-	Associated Enterprises as defined u/s 92 A (I)(a) of the Act	Provision of satellite news gathering and ancillary transmission services to broadcasters.
SIS OB	Rs,10,94,50,616/-	Associated Enterprises as defined u/s 92A (I)(a) of the Act	SIS OB is a company engaged in the business of provision of outside broadcast television production units including sound support and communication.
Fatpipe	Rs.20,69,43,048/- (including Rs.83,37,929/- paid to Alfacam ,NV on behalf of Fatpipe &, also includes Rs.3,25,14,964/- being expenses on withholding tax disallowed)	Associated Enterprises as defined u/s 92A (I)(b) of the Act	Fatpipe is engaged in the business of installation of manufactured hardware and provision of satellite broadband services.
Total	Rs.31,87,60,236/-		

A show cause dated 10.02.2014 was issued to the assessee and was asked as to:-

"why all the transactions as shown by you against international transactions may not be added back to the total income of M/s SIS Live for the A.Y. 2011-12.-." . In its reply dated 19.02.2014, the assessee has submitted that:-

"since no payment or receipt in respect of the said transaction has taken place during the relevant assessment year, therefore the aforesaid adjustment to the total income cannot be made in the subject year and should be made only in subsequent years"

The assessee has also contended as above since it is following Cash System of Accounting. The assessee has a/so relied on extracts of the various pronouncements of various authorities. However, the issues and context in those cases are not applicable in the present case, hence any judicial or authoritative order shall be looked upon in its totality and it is further to be seen that whether those issues squarely cover the issues in present case. When we look into these issues the answer to the aforementioned question arrives in

negative. Hence, this contention of the assessee based on extract of the order of AAR is not acceptable.

M/s SIS Live has maintained its books of accounts on cash basis. The books of accounts for the F.Y. 2010-2] of the assessee analysed during post search proceedings were, therefore, reflective of the actual payments and receipts only, and do not give the real position of the profitability of the assessee from the CWG contracts. The non-resident partnership firm M/s SIS Live is formed with the specific and exclusive purpose of executing the media broadcasting and coverage contract for CWG 2010, New Delhi. Other than the media broadcasting and coverage contract, it has not undertaken any project either in respect of CWG or otherwise. It is, therefore, seen that the activities of the assessee are not earned forward from one accounting period to the next.

The books of the assessee should, therefore, be in the nature of venture account only, and the correct profitability and the truthfulness as well as tax liability of the assessee can only be arrived at by following the accrual method of accounting. The books of account of the assessee on cash basis, therefore, deserve to be rejected and the profits and other national and international transactions in case of the assessee needs to be determined on accrual basis.

The TPO-II(2), New Delhi has also recommended that:-

"Without prejudice to the above finding in this case, since, the Firm is following Cash System of accounting, no payment i.r.o the international Transactions w.r.t. SIS OB and Fatpipe as discussed above, shall be allowed in subsequent years also, since the Arm's Length Price of such transactions has been determined at NIL, Interest payment i.r.o the international Transactions w.r.t. SIS Ltd. shall be determined using interest rates for rupee denominated loans for the relevant period, as discussed above".

In this regard, the Market rates for corporate loans in Indian rupee domination ranges between 15% to 21%, hence the interest of 15% being minimum of this range amounting to Rs.4,78,14,035/- (15% of 31,87,60,236) is being calculated and is liable to be added back to the total income of the assessee for the A.Y. 2011-12. Hence, an addition of Rs.36,65,74,271/- (31,87,60,236 + 4,78,14,035), Addition: (Rs.36,65,74,271/-)

7. Therefore, from the above facts it is clear that there is an addition in the hands of the assessee to the extent of Rs. 366574271/- on account of transfer pricing adjustments where in ALP of the International transaction of provision of services and renting of equipments is determined at Nil. Assessee has according to Ld TPO has entered in to following 'International transactions':-

S.No.	International transaction	Name of the AE	Value (in INK)

1.	Availing of technical services from AE	SIS Outside Broadcasts Limited ('SIS OB')	109,450,616
2.	Availing of equipment on hire from AE	Fatpipe Satcom Limited ('Fatpipe')	166,090,155
3.	Reimbursement of expenses to AE	Satellite Information Services Limited ('SIS Limited')	2,366,572
4.	Inter-company receivables	Satellite Information Services (Holdings) Limited ('SIS Holdings')	210,029,760

8. The Id AO/ Id Transfer Pricing Officer has proposed an adjustments of Rs. 318760236/- being the total sum of international transaction holding the ALP as NIL and further as such sum is given as a loan he calculated the interest thereon @ 15% on the amount of Rs. 3018760236/- calculated at Rs. 47814035/- as interest and thereby made a total addition of Rs. 366574271/-. Therefore, assessee is aggrieved by this addition on account of transfer pricing issues and hence, submitted that ground No. 16 to 23 of the appeal needs to be adjudicated.
9. The Id Authorised Representative has made submission on each of the above issues before us by way of written submission as under:-

"A description of each of the above transactions is provided as under:

• Availing of technical services from AE (INR 109,450,616):

In order to render broadcasting services for CWG 2010, SIS Live required highly technical knowledge, skills and expertise. In the absence of such necessary skills and resources to manage the magnitude of work, SIS Live availed such services from its AE, SIS OB, for a consideration of INR 109,450,616.

SIS Live deducted and paid withholding tax of INR 15,694,873 on this transaction. Further, out of the total service fee, INR 31,253,538 was recorded in the current account of SIS OB. However, the entire service fee of INR 109,450,616 was not paid by SIS Live to SIS OB during the said year and thus, SIS Live did not claim a deduction of the same in its ROI for the said year. Moreover, the amount of withholding tax paid by SIS Live (INR 15,694,873) was suo-moto disallowed in its ROI.

In view of the fact that the said transaction did not have a bearing on SIS Live's tax liability for the said year, SIS Live took a position that provisions of Section 92 did not apply to the said transaction.

• Availing of equipment on hire from AE (INR 166,090,155):

During the said year, SIS Live also took on rent certain equipment from its AE, Fatpipe, to render broadcasting services for CWG 2010, for a total value of INR 166,090,155.

SIS Live deducted and paid withholding tax of INR 16,820,091 on this transaction. However, the said rental charges were not paid by SIS Live to Fatpipe during the said year.

Separately, during the said year, SIS Live erroneously made payment of EUR 136,000 (INR 8,337,929) to Alfacam NV ('Alfacam'), a third-party entity company based in UK, even though Fatpipe's invoice for equipment on hire already included the charges for equipment provided by Alfacam. Instead of recovering the sum erroneously paid to Alfacam, SIS Live adjusted the said amount against the equipment rental payable to Fatpipe. Further, the said amount of INR 8,337,929 was also not claimed as a deduction by SIS Live.

Apart from this, no amount was paid towards equipment rental to Fatpipe by SIS Live during the said year and SIS Live did not claim a deduction for the same. Moreover, the amount of withholding tax of INR 16,820,091 was also disallowed by SIS Live in its ROI.

In view of the fact that the said transaction did not have a bearing on SIS Live's tax liability for the said year, SIS Live took a position that provisions of Section 92 did not apply to the said transaction.

• **Reimbursement of expenses to AE (INR 2,366,572):**

During the said year, SIS Limited, an AE of SIS Live, incurred certain expenses pertaining to SIS Live (in the nature of professional fee, charges for notarization and charges from Royal Bank of Scotland in respect of guarantee for the contract of SIS Live) amounting to INR 2,366,572. Such expenses were recorded in the current account of SIS Limited.

The said amount was not paid by SIS Live during the year and also not claimed as deduction in its ROI. In view of the fact that the said transaction did not have a bearing on SIS Live's tax liability for the said year, SIS Live took a position that provisions of Section 92 did not apply to the said transaction,

• **Inter-company receivables (INR 210,029,760):**

As a policy of SIS group, all transactions relating to currency conversions are carried out by SIS Holdings with the bankers to the group. In October 2010, SIS Live required conversion of Indian Rupees in its bank account in UK into Great Britain Pounds ('GBP'). Accordingly, SIS Live transferred INR equivalent of GBP 12 million to SIS Holdings, out of which SIS Holdings transferred GBP 9 million into SIS Live's bank account and balance GBP 3 million was still held with SIS Holdings (as is in the normal course of balances held by SIS group entities). The said balance was reflected as inter-company receivables from SIS Holdings in Balance Sheet of SIS Live as on 31 March 2011 (at an INR equivalent value of INR 210,029,760). SIS Live did not receive any interest on said amount of receivables during the said year, and in view of cash basis of accounting, no income chargeable to tax had arisen.

In view of the fact that the said transaction did not have a bearing on SIS Live's tax liability for the said year, SIS Live took a position that provisions of Section 92 did not apply to the said transaction.

Further, capital/current account transactions with the partners (i.e. SIS Limited and SIS OB) were in the nature of capital transactions and did not have an impact on income/expenses of SIS Live during the said year. In view of the fact that TP provisions do not apply in the absence of any tax liability, it was concluded that TP provisions were not applicable in the instant case.

Notwithstanding the same, on a conservative basis, SIS Live maintained comprehensive information and documents in support of arm's length nature of above transactions (as mandated by the provisions of section 92D of the Act). Further, in view of provisions of section 92E of the Act, SIS Live obtained

and furnished Accountant's Report (in Form 3CEB) with the Assessing Officer ('AO') as a measure of abundant caution (even though TP provisions were not invoked in the instant case). Further, SIS Live filed its ROI reporting a taxable loss of INR 450,699,536.

At the outset, it is respectfully submitted that the financial statements of the Appellant have been prepared on a cash basis of accounting. During the TP Audit Proceedings, the Appellant took a stand that provisions of Section 92 of the Income Tax Act, 1961 (the Act) were not applicable in respect of the international transaction during the year since no payments were made in respect of these transactions by the Appellant and no deductions were claimed in its return of income. It is important to mention here that the cash system of accounting has been confirmed by the DRP and the revenue has not filed an appeal against this finding (Kindly refer internal Pg. 4 and 5 of DRP Directions, Finding Pg. 9).

The first legal issue which requires consideration of the Hon'ble Tribunal is whether in the instant facts, the AO was justified in making reference to TPO despite noting that Appellant is following cash system of accounting and there is no bearing on the profits, income, losses or assets as far as the transactions with AE is concerned during the relevant period. Reliance is placed, on CBDT Instruction No. 3 / 2016 which clarifies that before making reference to TPO, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income arising and / or being affected on determination of arm's length price of an international transaction before seeking approval of Principal Commissioner of Income Tax. This view is also fortified by the Hon'ble Delhi High Court in the Sony Ericson Mobile Communications India Pvt. Ltd.(374 ITR 118) in the following words:

"44. On careful analysis of sub-section (2B) to Section 92CA of the Act, the following position emerges:

- (a) There should be reference under sub-section (1) to Section 92CA by an Assessing Officer to the TPO in respect of an international transaction.
- (b) The reference should be with prior approval of the Commissioner.
- (c) Satisfaction of conditions (a) & (b) gives jurisdiction to the TPO.
- (d) If during the course of the proceedings, a TPO comes to a conclusion that there was an international transaction for which the said assessed has not furnished a report under Section 92E, the TPO can go into the question of arm's length price and apply the provisions of Chapter X. No specific reference in respect of such hidden/unknown international transaction is required under sub-section (1) to Section 92CA of the Act.

45. The conditions and requirements referred to above are fairly stringent. The TPO has to record a finding on satisfaction of the said conditions to evaluate transfer price of an undeclared and unreported international transaction. The TPO must justify and establish that there was an international transaction. Satisfaction of the conditions can be also inferred from the findings recorded by the TPO. Only when these conditions are satisfied, the TPO would exercise his jurisdiction. Whether or not the said conditions are satisfied in a given case, would first depend upon the factual matrix and also possibly on the appropriate and applicable legal principles. Wrong assumption of jurisdiction by recording an erroneous finding, deciding whether there was a hidden or unknown international transaction or whether a report in respect of the said international transaction under Section 92E

was not furnished, are matters that can be argued and adjudicated in appeal".

In the instant facts, it is apparent that during the relevant period there is no impact on profitability in respect to the international transactions with AE. Thus, the reference by AO to TPO is bad in law. The Hon'ble Apex Court in the case of *Deepak Agro Foods v State of Rajasthan* (2008) 7 SCC 748, has held "...where and authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non-est and void ab initio as the defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties."

The TPO disregarded the submissions of Appellant that since in the present matter the transaction with the AE did not have any bearing on the profits, income, losses or assets of the Appellant during the relevant assessment year, for the purposes of Transfer Pricing provisions under Chapter X of the Act, the said transactions cannot be an international transaction. (Kindly refer the internal page 19 to 22 of TPO order). A plain reading of S. 92(1) of the Act which specifies that 'Any income arising from an international transaction shall be computed having regard to the arm's length price' implies that the potential income, if any, should arise from the impugned international transaction which is before the TPO for consideration and not out of a hypothetical international transaction which may or may not take place in the future. It is respectfully submitted that the facts in the instant case are similar to the ratio laid down by Hon'ble Pune ITAT in the case of *Eaton technologies Pvt. Ltd. v DCIT, ITAT Pune, ITA No. 1621/Pn/2011, Order dated 11.01.2013.*

Reliance is placed on the following judgements:-

1. *Bharti Airtel Ltd. v Addl. CIT, 63 SOT 113, ITAT Delhi*
2. *Ciena India Pvt Ltd. v ITA, ITA No. 1453/Del/2014, order dated 24.04.2015, IT AT Delhi*
3. *Honda Motorcycle and Scooters India Pvt Ltd. v ACIT, ITA No. 1379/Del/2011, order dated 13.04.2015, ITAT Delhi*
4. *Marico Ltd. v ACIT, (2016) 70 taxmann.com 214, ITAT Mumbai*
5. *Topsgrup Electronic Systems Ltd. v ITO, 157 ITD 1123, ITAT Mumbai*
6. *Shell India Markets Pvt. Ltd. v ACIT, 369 ITR 516, High Court of Bombay*
7. *Vodafone India Services Pvt Ltd. v UOI, 368 ITR 1, High Court of Bombay*

At this juncture it is relevant to mention that now it is a settled position of law, that the onus is on the revenue authorities to demonstrate that the transaction is of such a nature as to have "bearing on profits, income, losses or assets" of the enterprise. Such an impact on profits, income, losses or assets has to be on real basis. In the instant case there was not even an effort to discharge this onus. The revenue authorities have miserably failed to discharge this onus and hence on this ground also the TP adjustment is to be struck down. Reliance is placed on the recent decisions of the Hon'ble Delhi High Court in the cases of *Maruti Suzuki India Ltd. v CIT, (2016) 381 ITR 117* and *CIT v Whirlpool of India Pvt. Ltd., (2016) 381 ITR 154.*

The basic flaw in the approach of the TPO is that despite accepting the fact that the Appellant is following cash system of accounting and the fact that the Appellant had suo-moto not claimed expenses in respect of the said international transactions during the relevant assessment year, he proceeded

to determine the arm's length price of the international transactions to determine the year in which the transaction could be benchmarked. (Kindly refer internal page 22 of TPO order). A plain reading of S. 92CA(1) shows that the purview of the reference to TPO and consequential benchmarking can only be done for that relevant previous year for which the reference is made by AO to TPO by seeking necessary approval of Principal Commissioner or Commissioner to compute the arm's length price of the international transaction. Reliance is placed on settled legal principle that "where a statute requires to do a certain thing in a certain -way, the thing must be done in that way or not at all - A.R. Antulay vs R.S. Nayak (1984) 2 SCC 500 (SC Constitutional Bench 5 Judges)]

The other jurisdictional issue which immediately springs up is that by recasting the P&L account and concluding that the arm's length price of said transactions with SIS OB and Fatpipe be taken at Nil and further charging notional interest in respect of the transaction of inter-company receivables with SIS Holdings, the TPO could not have proceeded since the impact of this conclusion gets hit by the bar contained in S. 92(3). What the TPO completely missed was that by recasting the P&L account, it had the necessary effect of reducing the taxable income of the assessee. This is impermissible. Hence all action of the TPO is bound to be struck down.

The TPO benchmarked the transaction with Fatpipe Satcom Ltd. and SIS OB by taking the Foreign AE as the tested party and benchmarked the same at Nil value (kindly refer the internal page 5 of TPO order). As far as the transaction with SIS Holdings of Inter Company Receivables is concerned, the TPO held that the rate of interest charged is not at arm's length and determined the same by using interest rates for Rupee denomination loans for the relevant period. (Kindly refer internal page 31 of the TPO order). Though, the TPO did not draw any adverse inference in respect of international transaction with SIS Ltd., however, the Assessing Officer while passing the final Assessment Order made an addition of Rs.23,66,572/- (Kindly refer internal Pg. 73 to 82 of Draft Assessment Order). Even otherwise, Revenue authorities failed to appreciate that in respect of transaction of intercompany receivables, the first interest payment would be due only in assessment year 2013-14 and if without prejudice, in any subsequent period it is to be benchmarked than LIBOR rate ought to be applied. On applicability of LIBOR, reliance is placed on decision of Hon'ble Delhi High Court in CIT vs Cotton Naturals India Private Limited [2015] 276 CTR 445 (Delhi).

At this juncture it would be relevant to re-iterate that the appellant is following cash system of accounting and as far as the transactions with AE are concerned they do not have any bearing on the profitability during the relevant AY, thus any adjustment on account of transfer pricing issues on notional basis are strictly barred.

The assessing authorities, as is a settled position of law in terms of the Delhi High Court decision in the case of CIT v EKL Appliances Ltd., (2012) 345 ITR 241, are not permitted to re-characterise a transaction. Further this view has been re-affirmed in the case of CIT v Cotton Naturals (I) Pvt. Ltd., (2015) 276 CTR 445.

Further the Hon'ble Delhi High Court in the case of CIT v Cushman and Wakefield India Pvt. Ltd., 367 ITR 730, has held that the TPO's jurisdiction post reference is only limited to determining the arm's length price of the

transaction and is barred from going into the commercial expediency by taking the value of transaction at Nil.

Hence in view of the above arguments, no addition with respect to Transfer Pricing issues was warranted and the same needs to be deleted.”

10. The Id Departmental Representative supported the contentions raised by the Id Transfer Pricing Officer and vehemently requested for confirming the addition made by the Id TPO.
11. We have carefully considered the rival contention. The brief proceedings in the present case till now have already been recorded in para no. 4 of the order of the coordinate bench. The contention of the assessee is that no reference could have been made by the Id Assessing Officer u/s 92CA of the Act to the Id Transfer Pricing Officer in absence of any ‘international transaction’ as assessee has not claimed this expenses as deduction and it has not impacted income, profit, loss, or assets of the assessee. As assessee follows cash system of accounting, hence, the year in which the assessee actually receives the income or pays the expenditure the same is recorded in the books of account and only in that year the provisions of section 92B applies.
12. The provisions of section 92B are as under:-

“Section 92B of the Income Tax Act, 1961

(1) For the purposes of this section and sections 92, 92C, 92D and 92E, “international transaction” means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be “deemed to be an international transaction” entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise ; or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise “where the enterprise or the associated enterprise or both of them are non-residents irrespective of whether such other person is a non-resident or not”.

*Explanation For the removal of doubts, it is hereby clarified that—
(i) the expression “international transaction” shall include—*

- (a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing ;
- (b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature ;
- (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business ;
- (d) provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service ;
- (e) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date ;
- (ii) the expression “intangible property” shall include—
- (a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos ;
- (b) technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how ;
- (c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings ;
- (d) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters ;
- (e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation ;
- (f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders ;
- (g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements ;
- (h) human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts ;
- (i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights ;
- (j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value ;
- (k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data ;
- (l) any other similar item that derives its value from its intellectual content rather than its physical attributes.”

13. According to the provisions of 92B(1) 'International transaction' has following ingredients:-
- a. There has to be a 'transaction' as defined u/s 92F(v)
 - b. One of the party to the transaction is a non-resident
 - c. The nature of the transaction is
 - i. Purchase, sale or lease of tangible or intangible property
 - ii. Provisions of services
 - iii. Lending or borrowing money
 - iv. Any other transaction having a bearing on the profits, income, losses or assets of such enterprises
 - v. Mutual agreement or arrangement for allocation or apportionment or any contribution to any cost or expenses in connection with benefit, service or facility.

Further the Finance Act 2012 with retrospective effect from 01.04.2002 has introduced an explanation which further clarifies the nature of transaction which shall also be considered as 'international transaction'. In view of this definition the transaction entered into by the assessee are required to be examined whether they are covered by the definition of 'international transaction' or not.

14. The first international transaction is with respect to services provided by SIS Outside Broadcast Ltd. of Rs. 10940616/-. These services were required in absence of necessary skill and resources to manage the scale of work. The total service fee of Rs. 31253538/- was recorded in the current account of the recipient however, the entire service fee was not paid by the assessee to that party. Apparently, the same was not claimed as deduction by the assessee. According to us the above transaction falls into the nature of transaction of "provision of services" u/s 92B(1) of the Act and as the condition of bearing on profit income and loss of the assessee applies to any other transaction only. Therefore, according to us this transaction is covered in the definition of 'international transaction'.
15. Coming to the second transaction of Rs. 2366572/- which is reimbursement of expenses to Satellite Information services ltd. in connection with professional fees etc of Royal Bank of Scotland. These expenses were not paid by the SIS Live during the year and admittedly, no claim of deduction

of these expenditure was also made. According to us this transaction is also falling into the provisions of services and it is not required that such transaction should affect the profitability of the assessee. Therefore, it is also according to us an international transaction.

16. The next transaction was availing of equipment on hire from M/s. Fatpipe Satcom Ltd of Rs. 166090515/-. This transaction is with respect to rent of certain equipment to render broadcasting services. The assessee has admittedly not claimed the deduction of this sum. However, the availment of equipment on hire falls into the category the nature of the transaction as purchase, sale or lease of tangible or intangible property. Therefore, according to us irrespective of the fact whether the transaction impact profit, income, losses or asset of the assessee, these are international transaction.
17. The last transaction was with respect to inter-company receivable from SIS Holding no interest has been charged by the assessee. Therefore, it was the contention of the assessee that in view of the cash basis of accounting no income has arisen to the assessee. We are of the view that as it is transaction of lending or borrowing money it falls into the definition of international transaction u/s 92B(1) of the Act.
18. One of the contention raised by the assessee is that the assessee is maintaining books of account on cash basis and therefore, these transactions are required to be benchmarked only in the year in which the assessee claims deduction of these expenditure. Therefore it was also contended that as no deduction has been claimed by the assessee the provisions of section 92B(1) to those expenditure income do not apply. We do not subscribe to the view expressed by the assessee and we explain it by a simple example. Suppose an Indian entity advances a loan of Rs. 100 crore to its AE and it does not charge any interest on such advances, and it maintains its books of account on cash basis. Accordingly, at no point of time, the assessee will recognize income from these advance and as per argument of the assessee these transaction cannot be benchmarked as international transaction. According to us the provisions of section 92B(1) provides that any income arising from an international transaction shall be computed having regards to the Arms Length price. In the present case, the income shall arise from interest free advances given by the assessee to its

AE by benchmarking interest amount receivable for the previous year irrespective of the method of accounting followed by the assessee. Therefore in views of this we reject the argument of the assessee that as the assessee has not accounted for such expenditure in its books of account on account of method of accounting and has also not claimed deduction of such expenditure the provisions of Chapter X does not apply. Ld AR has heavily relied up on the decision of Honourable Bombay high court in case of Vodafone India Services P Limited V UOI & Others 368 ITR 1 (Bom). According to us, such reliance on that decision is misplaced because it dealt with the last category of transaction being issue of share capital i.e. “ other transactions , which impacts profit, Income, loss or assets of the assessee. In the present case, the impugned transactions are covered under lease of tangible assets and provision of services. The assessee has relied upon the decision of coordinate bench in case of Bharti Airtel Vs. Addl CIT 161 TTJ 428 (Del). The facts of this case are with respect to corporate guarantee issued which was falling into the definition of any other transaction having a bearing on the profit, income, losses or assets of enterprise. In the present case the international transaction of the assessee are falling into the lease of property or provisions of services or lending and borrowing money. Therefore, the reliance placed upon by the assessee on this decision is incorrect. The other decision relied upon by the assessee is pertaining to Toppsgrup Electronic Systems Ltd Vs. ITO 157 ITD 1123 (Mumbai). In that case, the transaction was investment in a private company, which was also falling into the category of any other transaction, which affects the profit, income, losses, or assets of the assessee. Therefore, reliance placed by the assessee on this case is also not correct.

19. In view of this, we dismiss ground Nos. 16 to 20 of the appeal of the assessee holding that the transactions benchmarked by the ld TPO are ‘international transaction’ u/s 92B of the Income Tax Act despite the method of accounting followed by the assessee and not claiming such expenditure as deduction.
20. On ground No. 21 to 23 of the appeal of the assessee, its pleading is that ld. TPO was not empowered or competent to question the commercial expediency of any alleged transaction and hence was not competent to take the value of any international transaction at Nil. The ld Transfer Pricing

Officer has computed the arms length transaction of the provision of services and rent of equipment as Nil. The main reasons that the services actually performed by the AEs and same is actually received by the assessee. As per the survey conducted by the revenue u/s 133 A of the Act has also thrown light that the assessee has secured the contract for Rs. 246 crores and assigned it to the Zoom Communication for Rs. 177 crores provided no services and made a profit of Rs. 69 crores. On this basis, the Transfer Pricing Officer determined the Arms length price of the service and equipment rent as Nil. Before us, the Id AR submitted that during the assessment proceedings the assessee produced following details to the Id Transfer Pricing Officer.

- a. Comparison of man-day rates for various grades of personnel charged by SIS OB form SIS Live and independent third parties.
 - b. Companies of invoices raised by SIS OB on SIS Live
 - c. Copies of invoices raised by SIS OB on unrelated parties
 - d. Details of technicians providing such services
 - e. Copies of passports of such technicians
 - f. Intercompany agreement with the AE
 - g. Comparison of per day rates charged in the said transaction
 - h. Copy of invoice raised by Fatpipe Satcom Ltd on the assessee
 - i. Copies of sample cards and invoices based on which per day rates of equipment provided to SIS Live was determined.
 - j. List of equipment hired by the assessee and its AE from third parties.
 - k. Details of breakup of the said reimbursement
 - l. Copies of invoices raised by third parties on the AE for such expenses
 - m. Copies of loan statement
 - n. Copies of bank books
 - o. Intercompany agreement
 - p. Details of interest received by the assessee in FY 2012-13
21. Ld Assessing Officer has not examined the above information of the assessee and merely on the basis of other information and other reports has determined the arms length price of international transactions at Rs. Nil. We do not subscribe to the view of Id Transfer Pricing Officer that Arms Length price of these services can be arrived at Nil without examining the details of various information provided by the assessee and relying on the

other reports etc. According to us for deriving the arms length price the ld Transfer Pricing Officer need to examine all these evidences and then determine whether the services were rendered or not and then derive at the ALP of such transaction in accordance with law. According to us, the ld Transfer Pricing Officer as well as ld DRP did not appreciate the evidence produced by the assessee for receipt of services in proper perspective. Therefore, it is imperative for the ld Transfer Pricing Officer/ Assessing Officer to verify these evidences. In view of this we set aside the grounds No. 21,22 and 23 of the appeal of the assessee on transfer pricing issues to the file of ld Transfer Pricing Officer/ ld Assessing Officer to examine the evidences produced and then determine ALP of the transactions after granting proper opportunity of hearing to the appellant, who may raise all the issues including the legal issues. In the result the ground No. 21 to 23 of the appeal of the assessee are allowed for statistical purposes accordingly.

22. In the result appeal of the assessee with respect to ground No. 16 to 23 are allowed for statistical purposes.

Order pronounced in the open court on 13 /02/2017.

-Sd/-

(I.C.SUDHIR)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 13/2/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi