

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

IT(TP)A No.725/Bang/2011
(Assessment year: 2005-06)

M/s. 3M India Ltd.,
No.48/51, Electronic City,
Hosur Road,
Bangalore-560 100.
PAN:AAACB 5724H

... Appellant

Vs.

Addl. Commissioner of Income-tax (LTU),
Bangalore.

... Respondent

AND

IT(TP)A No.727/Bang/2011
(Assessment year: 2005-06)
(by the revenue)

Assessee by : Shri Mukesh Bhutani, Advocate
Respondent by : Ms. Neera Malhotra, CIT(DR)

Date of hearing : 05/04/2016
Date of pronouncement : 13/05/2016

ORDER

Per INTURI RAMA RAO, AM :

These are cross appeals filed by the assessee as well as the revenue directed against the order of the CIT(A)-LTU, Bangalore, dated 03/05/2011 for the assessment year 2005-06.

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2. Briefly, facts of the case are that assessee is a company duly incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacturing, conversion and trading in diversified products for sale in domestic and overseas market. Its parent company is 3M Company, US [3M US]. Its parent company has operations in more than 60 countries. One of its group companies viz., 3M Asia Pacific Pte.Ltd., a company incorporated in Singapore, undertaking provision of certain services to and for the benefit of 3M's affiliated subsidiary in APAC region. Further it also undertakes coordination of certain services from other companies in 3M group for the benefit of various 3M subsidiaries in APAC region. 3M India is a purchaser of certain services. Key services provided are as follows:

- Information Technology Support services
- Marketing and sales support services.
- Laboratory and technical support services.

The assessee-company filed return of income for the assessment year 2005-06 and 31/3/2005 declaring income of Rs.49,84,33,067/-. After processing return of income under the provisions of sec.143(1)of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short], the case was selected for scrutiny by issuing statutory notice u/s 143(2) of the Act.

3. During the course of assessment proceedings, Assessing Officer (AO) noticed that the assessee-company had reported the following international transactions:

<i>Import of raw materials ...</i>	<i>Rs.30,53,79,366</i>
<i>Export of manufactured products ...</i>	<i>Rs. 45,75,095</i>
<i>Import of finished products for Resale ...</i>	<i>Rs.61,03,51,199</i>
<i>Provision of administrative and business support services by 3M Singapore ...</i>	<i>Rs. 6,08,67,243</i>
<i>Import of Assets</i>	<i>Rs. 6,76,64,858</i>

Hence, AO after obtaining necessary approval from the CIT, made a reference to the Transfer Pricing Officer [TPO] for the purpose of determining the arm's length price [ALP] in respect of the above transactions. The TPO, vide order dated 30/10/2008 u/s 92CA of the Act, in respect of transactions of import of raw materials, export of manufactured goods, import of finished goods, held that the transactions were at arm's length and the TPO accepted the Transactional Net Margin Method [TNMM] applied by the assessee-company in respect of above four transactions and held that the method adopted by the assessee-company is correct and the transactions were held to be at arm's length. However, the TPO held that in respect of administrative business support service fee of Rs.6,08,67,243/- paid by it to 3M Singapore were not at arm's length. The TPO held that ALP in respect of administrative business support fee at nil after making the following observations:

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- Services did not result in any tangible benefit and profit margins have declined after the Appellant started paying administrative and business support service fee.
- Even after the provision of the so called valuable services by 3M Singapore the appellant's profitability had declined by 300 basis points instead of improving which was a clear indication that the decline in profitability was mainly due to the payment of administrative and business support services.
- Though the service fee paid by the appellant had increased by almost 4 times as compared to the earlier year i.e. AY 2005-06, sales had increased by only 14% as compared to the earlier year.
- Cost benefit analysis is not done by the Appellant.
- The expected benefit must be sufficiently direct and substantial so that independent recipient in similar circumstances would be prepared to pay for it and
- Decline in profitability and increase in payments by four folds clearly indicated that the Appellant did not get the benefit that is expected by paying service charges to 3M Singapore.
- No evidences were furnished by Appellant, duplication of services etc.
- Accordingly ALP was determined as NIL and amount of INR 60,867,243 was adjusted.

and finally determined the ALP in respect of business administrative support service fee at of nil. The AO passed the assessment order dated 26/12/2008 incorporating the above transfer pricing adjustments of Rs.46,08,67,243/-.

4. Being aggrieved, an appeal was preferred before the CIT(A). During the course of proceedings before the CIT(A), the assessee-company classified the services rendered by 3M Singapore broadly into information technology services,

administrative business support service fees (marketing and sales support services), laboratory and technical services. It was also stated that the assessee-company filed certain evidence in support of the above services rendered by 3M Singapore Co. The CIT(A) called for remand report from the TPO on the additional evidence filed by the assessee-company. However, the TPO, vide letter dated 29/12/2009 held that the evidence filed does not conclusively prove that the services are rendered and subsequently the CIT(A) had called for certain additional information based on the remand report of the TPO. The CIT(A) also made an analysis of administrative and business support services fee paid by the assessee-company as under:

Particulars	Amount in INR (In Crores)			
	FY 2002-03	FY 2003-04	FY 2004-05	FY 2005-06
Value of administrative and business support services received from 3M Singapore	1.54	1.70	6.09	6.73
Total Revenue	216.16	228.64	284.26	410.47
% Growth in revenue		5.78%	24.33%	44.40%
Total costs	184.32	189.77	242.57	350.17
% Growth in costs		2.96%	27.82	44.38%
Profit before Interest and Tax	31.84	38.87	41.69	60.31
% of PBIT to total revenues	14.73%	17.00%	14.67%	14.69%
% of transaction value on total costs	0.84%	0.90%	2.51%	1.92%
% of transaction value on total revenues	0.71%	0.74%	2.14%	1.64%

5. After considering the above material, the CIT(A) had come to the conclusion that decline in profitability is on account of the following reasons:

- The decline in the profitability is attributable on account of various reasons detailed below
 - Decline in export sales from Rs.2.09 crores to 45.75 lakhs.
 - Decline in revenues of electra & telecom business (divested) from Rs.5.04 crores to 12.82 lakhs.
 - Decline in margins of Consumer market segment.
 - The total costs of the appellant has increased from 189 crores to 242 crores.
 - Even after reducing the entire payment made for business support services the profitability of the appellant still declined by 100 basis points.
 - This was a clear indication that the decline in profitability was not solely on account increase in administration and business support service fee paid by 3M India but due to other factors.

and made observation as follows:

"Before discussing the specific facts pertaining to this case, I believe some general observations, in this context, are in order. It is quite well recognised that in the case of multinational corporate groups such as the one to which the appellant belongs, there are generally incurred a set of expenses either at the level of the principle group company or set of companies, that provide tangible and intangible benefits to all the

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companies of the group. Clearly, these sort of expenses need to be apportioned, in some manner, across the group companies. It is often not possible to obtain direct evidence linking the expenses to specific companies to which the expenses is apportioned and the benefits that accrue to such companies from the expenses so incurred. Such circumstances cannot provide justification to doubt the expense or consider their payment to be beyond what is justified as an arm's length payment."

After making the above observations, the CIT(A) held that there was sufficient evidence in respect of information technology services. However, in respect of other services, the CIT(A) was not convinced about the services rendered and therefore, disallowed it. The department is in appeal before us in IT(TP)A No.727/Bang/2011 challenging the direction of the CIT(A) allowing information technology related expenses and the assessee-company is in appeal in IT(TP)A No.725/Bang/2011 challenging the directions of the CIT(A) confirming the addition on account of other services, marketing and sales support, Laboratory technical support services.

6. Before us, learned counsel for the assessee had filed a Note on the description of services provided by 3M Singapore Co. and also evidence to say that services have been rendered by 3M Singapore in the form of chart. It is stated that 3M Singapore

Co., had provided Information Technology Support Services as under:

S. No	Description of Service	Explanation on the type of services	Mode of receipt of service	Benefits Derived	Backups available/Submitted on sample basis
1.	Information technology Support services	<p>3M Asia Pacific SSEA has established a regional database for the purpose of providing IT Support and services to 3M Subsidiaries in the group. The services are broadly classified into three main categories.</p> <p>a)COFS/DM Project Implementation b) ICAP & application support c) IT Support Services</p> <p>For the period under consideration, 3M India has upgraded its system to an advanced level to increase the operational efficiency and to align the business with global standards. During the Financial Year 2004-05, 3M India decided to implement the COFS/DM Project to overcome all the operational inefficiencies and ensure an efficient it</p>	Online access and remote assistance	<p>The implementation of the new IT Systems will help 3M India improve the operational efficiency by focusing and addressing key areas such as productivity gains Processing accuracy, efficiency and visibility, customer focus, inventory and warehouse management This is achieved through integration of systems to enable systematic order entry, tracking, web enabled order entry and enquiry.</p>	<p>Submission dated 30th November 2010 explaining the IT Services in detail, need for the services, benefits from the services(</p> <p>Submission dated 22nd February 2010 explaining the IT Services in detail</p> <p>Service level Agreement for IT Support and services</p> <p>COFS/DM implementation charter manual</p> <p>Service level agreement for the FY 2005-06 to FY 2008-09 showing no charges paid for subsequent years (</p> <p>ICAP and other IT related services.</p>

	<p>tool to standardize the platforms of the 3M Group and provide a uniform platform for customers and distributors/suppliers resulting in an effective supply chain management from sales order, sourcing to final delivery which was essential for the business operation of 3M India .The COFS is required for sales order processing, commencing from customer order creation to the dispatch of the goods to customer. It is a web based application for tracking the status of the order at different locations .DM is required for effective supply chain management, which is integrated with the inventory module and COFS for procurement of goods. International Common Application Portfolio is a globally centralized IT tool which is responsible in handling IT Matters across the globe. The ICAP</p>	<p>Automated pricing, ease of tracking customer order processing, providing customer and product history minimizing gaps between demand and supply chains. The ICAP Applications are very useful and are necessary to carry out the day to day operations of the enterprise. These systems provide comprehensive solutions to manage the business right from procurement to sales, financial accounting and reporting system solutions.3M India benefits from these</p>	
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		<p>provides a common interface/Platform between 3M and customers. The COFS/DM was part of the international Common Application Portfolio (ICAP).The architecture consists of Demand Management (DM), Customer Order Fulfillment Systems, Financial Systems, manufacturing Systems and procurement. 3M India carries out data processing activities on software platform developed by the 3M Group. It also receives periodic updates on software, antiviruses, management tools etc by means of patches developed regularly by the 3M Group.3M India also receives maintenance support on such applications and is accorded access to global servers which facilitate carrying out its day to day operations.</p>		<p>services by having a safe and secure data processing platform, develop appropriate internal check and control procedure, gain faster connectivity to global servers, effective intra company telecommunication and networking and thus consequently reducing travel costs, developing new software platforms and sharing the best practices, maintenance support by an expert team, effective monitoring of the IT assets, website management etc.</p>	
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2.	Marketing and sales support services	3M India, being global brand, significant branding and marketing support services received by 3M India also include information on potential business opportunities arising out of activities of other activities of other 3M entities and assistance in pursuit of such opportunities. The overall broad business enhancement strategies and objectives of 3M India are deliberated and determined by the 3M Group global management team. 3M being a global brand receives benefits by from significant branding activities carried on outside India. Marketing persons from other countries come and meet prospective customers to market the products, create awareness. 3M India carries on the follow up activities of these meetings.	Client visit and presentation, Flyers of SD connectors - products developed and training material used for training employee.	Based on the research conducted, new products are launched in the market which are also sold by 3M India after receiving due expertise through proper training. Due to the marketing efforts and the meeting with prospective clients the customer base will increase thereby increasing the sales which cannot be measured directly.	<p>Submission dated 30th November 2010 explaining the marketing Services rendered in detail, need for (pg.nos.16-18 of PB1)</p> <p>Mails from Lee kheng cher explaining the services rendered by him to 3M India. (pg.no.118 of the paper book 1)</p> <p>Flyers developed by Lee for various products to be launched in the market. (pg.nos.106-111 of paper book 1)</p> <p>Detailed Trip report of Mr. Freddie Yong meeting with various prospective customers and presentation made by him for creating awareness among customers for the products. (Page nos. 112-117 of paper book 1)</p> <p>Presentation materials used by Freddie Yong during the product training provided to certain employees. (Page nos. 119-212 of paper book 1)</p>
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It was further submitted that by incurring these expenses, assessee-company had access to network, expertise, skill, knowledge and information etc., that was available with the group and the copy of invoices raised by 3M Singapore and the working for cost allocation sheet were also filed. It was further submitted

that by availing the above services, there was a growth in revenue which is 25% compared to 5% of the previous year and the growth continued at a higher rate. It was submitted that similar services were received by the assessee-company in the preceding years which were held to be at arm's length by the TPO. Finally, learned counsel for the assessee submitted that it was not open to the TPO or the income-tax authorities to question the business wisdom of the assessee-company. All these business decisions have to be considered from the point of view of a prudent businessman and it is not expected of an assessee to maximize his profits. Revenue cannot sit on the business decision of the assessee. In this connection, reliance was placed on the following decisions:

- **CIT VS EKL Appliances. [2012]345ITR241(DEL HC)**
- **Knorr - Bremse India Private Limited vs ACIT(ITA No.182/2013)(P&H HC)**
- **AWB India Pvt Ltd vs DCIT(ITA No.6480/12)(DEL ITAT)**
- **McCann Erickson India Private Limited vs ADCIT (ITA No 5781/2011)(Delhi ITAT)**
- **Hero Cycles (P.) Ltd vs CIT [2016] 236 Taxman 447(SC)**

Learned counsel for the assessee finally submitted that since similar expenditure was allowed in earlier years, and since there was no change in facts and circumstances, following the principle of consistency, same should be allowed in the year under consideration. In support of this, he relied on the following decisions:

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- **Essentra India Private Limited vs DCIT(ITA No.1308/2011)(Bang ITAT)**
- **Dresser Rand vs Additional CIT (2011) 47 SOT 423(MUM ITAT)**
- **Ingersoll rand (India) Ltd vs DCIT(ITA No.228/2015)(Bang ITAT)**
- **DCIT vs Payne (India.) Pvt Ltd(ITA No.446(B)/2012)(Bang ITAT)**
- **TNS India Pvt. Ltd vs ACIT(ITA No.944/07,194&74/08, 793/09, 654,655/10 AND 7/2012)**

7. On the other hand, Id.CIT(DR) has vehemently opposed the submissions of the learned counsel for the assessee and submitted that the TPO was justified in adopting ALP at nil as the assessee-company could not produce evidence in support of the services received from its AE and she further added that in absence of evidence in support of the cost incurred by the AE, it cannot be said that the transactions are at arm's length as 10% mark up was added on the actual cost incurred. She has placed reliance on the orders of the lower authorities.

8. We heard rival submissions and perused material on record. A perusal of the TPO's order reveals that the ALP in respect of intra-group services was determined at 'nil' as, in his perspective, no benefits were derived by the assessee-company out of such services and there was no need of such services and there was no proof in support of rendition of such services to the assessee- company. The TPO has neither challenged the keys applied for allocation of cost by AE nor the TPO has disputed the actual cost incurred by the AE.

9. Now, we shall analyze each of the above reasons assigned by the TPO for determining ALP at 'nil'. The law is now quite well settled that it is beyond the scope and powers of the AO/TPO to question the necessity of incurring expenditure. The Hon'ble Delhi High Court in the case of *CIT vs. EKL Appliances Ltd.* (345 ITR 241), after considering the judgment of the Apex Court in the case of *CIT vs. Walchand & Co. P.Ltd.* (65 ITR 381)(SC), *Sassoon J.David & Co. Pvt. Ltd. vs. CIT* (118 ITR 261)(SC) held that the TPO cannot determine ALP at nil by holding that there was no need to incur such expenditure. While coming to this conclusion, the Hon'ble High Court has referred to the judgment of the Apex Court in the case of *Eastern Investments Ltd. vs. CIT* (20 ITR 1)(SC) and *CIT vs. Rajendra Prasad Moody* (115 ITR 519)(SC). It has been held by the Hon'ble High Court that :

“It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In *Eastern Investment Ltd. v. CIT*, (1951) 20 ITR 1, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In *CIT v. Walchand & Co. etc.*, (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the

purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in *Hughes v. Bank of New Zealand*, (1938) 6 ITR 636 that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in *CIT v. Rajendra Prasad Moody*, (1978) 115 ITR 519, and it was observed as under: -

"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income."

It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section 37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.

20. In the case of *Sassoon J. David & Co. Pvt. Ltd. v. CIT*, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

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21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised. It has been held by our courts

that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In *Eastern Investment Ltd. v. CIT*, (1951) 20 ITR 1, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In *CIT v. Walchand & Co. etc.*, (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in *Hughes v. Bank of New Zealand*, (1938) 6 ITR 636 that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in *CIT v. Rajendra Prasad Moody*, (1978) 115 ITR 519, and it was observed as under: -

"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income."

It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section 37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.

20. In the case of *Sassoon J. David & Co. Pvt. Ltd. v. CIT*, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that *inter alia* finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part

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thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorized.

The ratio of the above decision was followed by the co-ordinate benches of the Tribunal in several cases. Some of them are:

- i. *Dresser-Rand India Pvt. Ltd. v. ACIT* [2012] 13 ITR (Trib.) 422 (Mum)
- ii. *Ericsson India (P) Ltd. v. DCIT* [2012] 146 TTJ 708 (Del)
- iii. *AWB India Pvt. Ltd. v. ACIT*: ITA No.4454/Del/2011 (Del-ITAT); AY 2007-08
- iv. *SC Enviro Agro India Ltd. v. DCIT* [ITA No.2057-2058/Mum/2009]
- v. *Abhishek Auto Industries Ltd. v. DCIT*: ITA No.1433/Del/2009 – AY 2004-05
- vi. *McCann Erickson India Pvt. Ltd. v. ACIT*: ITA No.5871/Del/2011 – AY 2007-08
- vii. *DSM Anti- Infectives India Ltd. v. ACIT*: ITA Nos. 1139/Chd/2011 and 1290/Chd/2012 – AY 2007-08; 2008-09

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- viii. *TNS India Pvt. Ltd. V. ACIT:* (2014)
32 ITR (Trib.) 44 (Hyd.) –AY 2003-04; 2004-05; 2005-06
- ix. *Atotech India Ltd. v. ACIT:*
ITA No.104/Del/2012 –AY 2007-08
- x. *Nippon Leakless Talbros v. ACIT:*
I.T.A. No. 5931/Del/2012 – AY 2008-09
- xi. *Nippon Leakless Talbros v. ACIT:*
IT(TP)A No. 475/Del/2015 – AY 2010-11
- xii. *Hughes Systique India P. Ltd. v. ACIT:*
[2013] 25 ITR (Trib) 556 (Delhi) - AY 2007-08, 2008-09
- xiii. *Knorr-Bremse India (P.) Ltd. v. ACIT:*
[2013] 56 SOT 349 (Delhi) - AY 2007-08
- xiv. *Thyssen Krupp Industries India (P.) Ltd. v. ACIT:* [2013] 55 SOT 497 (Mumbai) - AY 2007-08
- xv. *LG Polymers India P. Ltd. v. ACIT:*
[2012] 16 ITR (Trib) 240 – AY 2006-07

Thus, in the light of above legal position, though ALP of services by AE cannot be determined at 'nil' by questioning the necessity, the benefits of expenditure incurred, such expenditure can be allowed only after proving conclusively that there was actual rendition of services by AE. The onus lies on the assessee to prove that the services are actually rendered by the AE. In this context, we may point out to the decision in the case of Hon'ble Supreme Court in the case of *Laxmi Narayan Madanlal vs. CIT* (86 ITR 439) wherein it was held as follows:

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Thus, for allowability of this kind of expenditure, condition *sine qua non* is proof of actual services rendered. The co-ordinate bench of the Tribunal, to which one of us i.e. the Accountant Member is the author of the order, in the case of *M/s.B Fouress Pvt. Ltd. vs. DCIT* in ITA Nos.847 & 847/Bang/2014 dated 30/12/2015 held as follows:

.....Thus, the assessee failed to discharge the burden of proving that the expenditure laid out were incurred wholly and exclusively for the purpose of business. We may further add that the Honøble Supreme Court in the case of CIT Vs Imperial Chemical Industries (Ind.) Pvt. Ltd (1969) 74 ITR 17 has unequivocally held that the burden of proving that a particular expenditure had been aid out or incurred wholly and exclusively for the purpose of business entirely lies on the assessee. The discharge of the burden had to be effective and meaningful and not to cover up by merely book entries and paper work. The mere fact of payment of commission by account payee cheques and compliances with the TDS provisions shall not alone enable the assessee to claim deduction unless and amount has been expended wholly and exclusively for the purpose of business.

11. A Co-ordinate Bench Tribunal of Delhi in the case of Kanu Kitchen Kulture (P)Ltd Vs DCIT (2013) 28 ITR (T) 49 (Del.-Trib.) held that whether the assessee failed to demonstrate the services rendered by the commission agent, the commission was disallowed. The relevant paras of the judgment are reproduced below;

õ22. Thus the assessee as utterly failed to demonstrate the nature and extent of service rendered by the agent and availed of by the assessee for its business of modular kitchen. In this scenario what appears on record is merely

book entries coupled with TDS the amount which will be claimed as a refund by the recipient being a loss making concern. In our considered view the assessee has produced only skeletal paper work of the arrangement without any iota of evidence about actual business services rendered.

23. The assessee's claim for allowing similar commission payment in subsequent year carries no merit inasmuch as the learned DR has rightly pleaded that each and every year of assessment is separate and independent unit and principles of resjudicata do not apply. The assessment for the assessment year 2009-10 is under section 143(1) and for the assessment year 2010-11 there is no mention of the commission at all. Therefore, we are unable to give evidenced to the facts whose record is not before us and not referred to before the lower authorities.

12. Similarly, the Honøble Delhi High Court in the case of Schneider Electric (Ind.) Ltd Vs CIT (21008) 304 ITR 360 (Del.) held that in the absence of material on record suggesting that the commission agents had procured the sale orders, no commission should be allowed. The relevant para of the judgment is reproduced below;

õ13. We agree with the Tribunal that there is absolutely no material on record to suggest that M/s Ram Agencies had procured any sale orders for the assessee. The production of a few bills or payment having been made by account payee cheques cannot by itself show that M/s Ram Agencies had procured sale orders for the assessee. Apart from an internal note, there is no evidence of any correspondence or any personal; meetings etc. between the assessee and M/s Ram Agencies to suggest that there was any relationship on the basis of which M/s Ram

Agencies procured some orders for the assessee for which it was entitled to receive commission. Moreover, we find that the understanding between the parties was an oral understanding and it appears to be doubtful that such an oral understanding can be arrived at without any long standing relationship having been established between the assessee and M/s Ram Agencies. It seems a bit out of place that the parties entered into an oral business relationship involving such huge amounts of money over a period of time.

13, The Co-ordinate Bench of Delhi in the case of Printer House Pvt.Ltd. Vs DCIT (Del.) authored by Accountant Member, after referring to the above precedence on this issue held as follows:

“Thus, having regard to the ratio laid down in the above cases that in the absence of proof in support of the services rendered by the commission agent, no commission can be allowed as a deduction. Therefore, we dismiss the appeal filed by the assessee and allow the appeals filed by the revenue”.

14. In the present case, the learned CIT(A) had not examined any evidence to show that the agents have actually rendered their services. The learned CIT(A) had totally misdirected himself by examining the issue from the angle of tax deducted at source and he had failed to examine whether the services are actually rendered by the commission agents or not. Therefore, we are unable to sustain the order of the learned CIT(A) and hold that the commission payments in question are not allowable keeping in view the ratio laid down in the cases cited supra. The assessee company had miserably failed to demonstrate the actual services rendered by the agents to whom the commission payments were made, despite ample opportunity granted by this Tribunal to furnish

evidence in support of service rendered by commission agent.

10. In light of the ratio laid down in the cases cited supra we hold that the condition of rendition of services should be satisfied by the assessee so as to allow the same as expenditure. In the present case, assessee-company had not produced any evidence in support of rendering of services before the TPO. It is only before us, by way of additional evidence, assessee-company has filed some material, in support of the actual services rendered by the AE. The CIT(A) had no occasion to examine this evidence as it was claimed that this evidence was filed for the first time before us. Therefore, the CIT(A), without examining the aspect of actual rendition of services by the AE in respect of IT services, had directed the allowance of expenditure. Therefore, in interests of justice, we restore this issue to the file of the AO for purposes of verification of this evidence and come to conclusion whether the services are actually rendered by the AE or not and direct the TPO/AO to bench mark the transaction of rendering of services of market management support services, after being satisfied himself that the services are actually rendered by the AE.

11. On the principle of consistency, we hold that each assessment year is separate and distinct. The principles of *res judicata* have no application to income-tax assessment proceedings. Simply because in the preceding year, this

expenditure came to be allowed without any probe or enquiry it does not preclude the AO from making the enquiries on these issues.

12. In the result, both the appeals filed by the assessee-company as well as the revenue are partly allowed for statistical purposes.

Order pronounced in the open court on this 13th May, 2016

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Place : Bangalore
D a t e d : 13/05/2016

srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore