

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: '1-2', NEW DELHI**

**BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 1078/Del/2014
Assessment Year: 2009-10

M/s. Tractebel Engineering Pvt. Ltd., 10-A, Shivaji Marg, New Delhi	Vs.	DCIT, Circle-16(1), New Delhi
PAN : AABCT1757B		
(Appellant)		(Respondent)

And

ITA No. 456/Del/2014
Assessment Year: 2009-10

DCIT, Circle-16(1), New Delhi	Vs.	M/s. Tractebel Engineering Pvt. Ltd., 10-A, Shivaji Marg, New Delhi
PAN : AABCT1757B		
(Appellant)		(Respondent)

Assessee by	Sh. Gaurav Gupta, CA
Department by	Sh. H.K. Choudhary, CIT(DR)

Date of hearing	24.10.2017
Date of pronouncement	23.11.2017

ORDER

PER O.P. KANT, A.M.:

These cross appeals by the assessee and the Revenue respectively are directed against order passed by the Deputy Commissioner of Income-Tax, Circle-16 (1), New Delhi (hereinafter referred as the Assessing Officer) for assessment year 2009-10 in pursuant to the direction of the Ld. Dispute Resolution Panel (DRP). Both

the appeals being connected with the same impugned order, same were heard together and disposed off by way of this consolidated order for the sake of brevity and convenience.

2. The grounds raised in the appeal of the assessee having ITA No. 1078/Del/2014 are reproduced as under:

“That, on the facts and circumstances of the case and in law,

1. *The Assessing Officer OAOO/Dispute Resolution Panel ('DRP') has erred in making an addition of Rs.3,59,92,632 to the total income of the appellant on account of adjustment in the Arm's Length Price (ALP) of the international transactions related to project management services and technical services provided by the appellant to its associated enterprise (referred to as 'outbound international transactions').*
2. *In respect of outbound international transactions in the nature of project management services, the AO/Transfer Pricing Officer (TPO) has erred in:*
 - (a) *Rejecting the Internal Comparable Uncontrolled Price ('CUP') method as the most appropriate method for project management services provided to an associated enterprise by the appellant and instead adopting Transactional Net Margin Method (TNMM) as the most appropriate method.*
 - (b) *In not appreciating that the transaction with GAIL India Limited (GAIL) a Public Sector Enterprise was considered as CUP by the appellant since the entire amount received from GAIL by the Associated Enterprise was paid to the appellant who did 100% work on back to back basis under a sub-contract.*
 - (c) *Concluding that appellant has not earned any margin on such project management services provided to the associated enterprise.*
3. *In respect of outbound international transactions in the nature of project management services and technical services, the AO/TPO has erred in:*

- (a) *rejecting the Internal Cost Plus Method ('CPM') as the most appropriate method for services provided to associated enterprise by the appellant.*
 - (b) *carrying out the search for external comparables and thereby selecting certain companies which are not comparable to the appellant.*
 - (c) *considering TNMM as the most appropriate method over CPM.*
 - (d) *treating certain non-transactional/non-operating provisions and/or cost as transactional and/or operating expenditure while applying TNMM.*
4. *The AO/DRP has also erred in making an addition of Rs. 1,49,94,743 to the total income of the appellant on account of adjustment in the ALP of the international transactions related to Technical Management Services received by the appellant from its associated enterprises (referred to as 'inbound international transactions').*
5. *In respect of inbound international transactions, the AO/TPO has erred in:*
 - (a) *disregarding the fact that the appellant had received technical management services from its associated enterprise.*
 - (b) *determining the ALP at NIL*
 - (c) *not computing the ALP himself where the appellant had failed to find appropriate comparables.*
6. *The DRP has erred in concurring with the findings of the AO/TPO and in disregarding, without appropriate justification, the economic analysis undertaken by the appellant for establishing the ALP of the outbound and inbound international transactions.*
7. *That the appellant, in the interest of justice, may be allowed to adduce additional evidence as may be necessary in support of the grounds raised hereinabove after following due procedures laid down in the Income Tax (Appellate Tribunals) Rules, 1963.*

8. *That the appellant may be allowed to add, supplement, revise, amend or withdraw any of the grounds raised herein above at or before the time of hearing.”*
3. The grounds raised in the appeal of the Revenue having ITA No. 456/Del/2014 are reproduced as under:
1. *On the facts and in the circumstances of the case and in law, Ld. DRP, Panel-II New Delhi erred in deleting the addition of Rs.1,68,77,406/-(5,28,70,038 - 3,59,92,632) made by the AO u/s 92CA of the Act.”*
 2. *The appellant craves for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of appeal”.*
4. The facts in brief of the case are that the assessee company is a wholly-owned subsidiary of Suez Tractebel SA Belgium and was engaged in providing engineering and project management consultancy services for gas projects, laying cross-country pipelines, city gas distribution and thermal and hydropower projects. For the year under consideration, the assessee filed return of income declaring total income of Rs.1,57,91,260/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ~~the Act~~) was issued and complied with. The Assessing Officer noted the assessee entered into the international transactions with its Associated Enterprises (AEs). He referred the matter to the Ld. Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) of those international transactions.
- 4.1 During the year under consideration, the assessee earned Revenue of Rs.30,84,01,107/- from technical/consultancy services provided to the Associated Enterprises (AEs) and to independent third parties (non-AEs). In addition to the income from such services the

assessee also had other income amounting to Rs.1,96,14,975/-. The breakup of the revenue and other income between AEs and non-AEs, was given by the assessee as under:

Amount in Rupees

Particulars	Income earned from		Others	Total
	AE	Non AE		
Technical/consultancy services	13,82,58,923	17,01,42,184	-	30,84,01,107
Other Income	14,81,820		1,81,33,155	1,96,14,975
Total	13,97,40,743	17,01,42,184	1,81,33,155	32,80,16,082

4.2 The international transactions entered into by the assessee with its Associated Enterprises (entity wise) are extracted from the order of the Ld. TPO and reproduced as under:

AEs	Description of the Transaction	Amount (in Rs.)
	Purchase of spare parts	388,322
Corys Tess S.A	Provision of technical services	1,477,331
	Expenses incurred on behalf of the associated enterprise by TE India	4,891,575
Suez-Tractebel S.A	Purchase of software licence	98,286
	Receipt of Technical Services	14,994,743
	Provision of Project Management services	100,847,069
	Expenses incurred on behalf of the associated enterprise by TE India	363,564
	Expenses incurred on behalf of TE India by the associated enterprise	4,779,536
Coyne ET Bellier	Provision of technical services and charges for office space and support	3,091,593.77
	Expenses incurred on behalf of the associated enterprise by TE India	482,798
Fabricom GTI Major Projects	Provision of technical services	59,381,458
	Expenses incurred on behalf of the associated enterprise by TE India	2,285,156
Tractebel Al Khaleej	Provision of technical services and charges for office space and support	3,669,795
Tractebel Engineering	Provision of technical services	44,547,639

	Expenses incurred on behalf of the associated enterprise by TE India	1,462,670
Suez-University	Expenses incurred on behalf of the associated enterprise by TE India	715,469

4.3 The transaction-wise summary of the above international transaction given by the assessee in the synopsis is extracted as under:

Amount in Rs

<i>Transaction</i>	<i>Amount</i>	<i>Transaction in dispute</i>	<i>Nature</i>
<i>Purchase of spare parts & software from AEs</i>	<i>4,86,608</i>		<i>Inbound</i>
<i>Project Management services provided to AE</i>	<i>10,08,47,069</i>	<i>10,08,47,069</i>	<i>Outbound</i>
<i>Technical services provided to AEs</i>	<i>11,21,67,817</i>	<i>11,21,67,817</i>	<i>Outbound</i>
<i>Technical assistance and support received from AE</i>	<i>1,49,94,743</i>	<i>1,49,94,743</i>	<i>Inbound</i>
<i>Reimbursements received</i>	<i>1,49,80,768</i>		<i>Inbound</i>

4.4 The project management services of Rs.10,08,47,069/- provided to the AE (~~Suez Teactebel SA~~) was benchmarked by the assessee on Comparable Uncontrolled Price (CUP) method as according to the assessee, the ~~AE~~ had subcontracted the contract to the assessee on back-to-back basis on the price received from the customer i.e. Gas Authority of India Ltd. (GAIL), by the AE, in entirety. The learned TPO was of the view that the assessee did not earn any remuneration for services rendered by the assessee to ~~GAIL~~ and therefore, he rejected the CUP method.

4.5 Regarding the technical services provided to the AEs amounting to Rs.11,21,67,817/-, the assessee submitted that the services rendered to the ~~AE~~ were comparable to the services provided to other independent parties. For the purpose of benchmarking, the assessee bifurcated the

profit and loss account into two segments . ~~income~~ earned from AE and ~~income~~ earned from non-AE. The Ld. TPO has reproduced the segmentation carried out by the assessee in this order. It is observed from the segmentation that the margin earned from services to the AE is 59.04% and the margin earned from services to non-AE is 38.89%. The assessee used the Cost Plus Method (CPM) as the most appropriate method for benchmarking. According to the assessee, the margin earned from the AE was more than the margin earned from the non-AE and thus, the assessee concluded that the transaction with AE was at arm's length.

4.6 The Ld. TPO disregarded the segmentation carried out by the assessee. According to the Ld. TPO, the services performed in AE and non-AE segment were dissimilar. According to him, the CPM bases its analysis upon a strict comparability of transaction involved and therefore, it was difficult to benchmark transaction between AE and non-AE on application of CPM .

4.7 The assessee company alternatively submitted segmental accounts for AE and non-AE and applying TNMM submitted that in the non-AE segment, the margin earned was 3.28%, while the margin earned in AE segment was 17.14% , therefore the transactions of the AE were prima-facie at arm's length. The learned TPO rejected this alternative benchmarking by the assessee also on the ground that segmental accounts drawn between AE and non-AE were not found based upon actual cost incurred for the two sets of transaction and allocation of the cost was also not based on any scientific method having defined criteria. The Ld. TPO noted that allocation of man-hours based in the two segments was also not based upon any defined criteria and appear to be ad-hoc.

4.8 The Ld. TPO considered Transactional Net Margin Method (TNMM) at entity level as the most appropriate method. For the purpose of arm's length margin, the learned TPO relied upon 14 external comparable companies, which are extracted as under:

No.	Company Name	DP/OC%	Remarks
1	Archohm Consulta	29.79	Similar functions as that of the assessee company.
2	Engineers India	59.16	Similar functions as that of the assessee company.
3	IBI Chematur	20.66	Similar functions as that of the assessee company.
4	Indus Technical & Financial Consultants Ltd.	6.78	Similar functions as that of the assessee company.
5	L&T Ramboll Construction	41.79	Similar functions as that of the assessee company.
6	Mahindra Consulting Engineers Ltd.	25.75	Also used in set of the assessee company. However, margins calculated are different
7	MN Dastur	7.42	Similar functions as that of the assessee company.
8	Rites	24.83	Similar functions as that of the assessee company.
9	Semac Ltd.	25.22	Similar functions as that of the assessee company.
10	T C E Consulting Engineers Ltd.	27.20	Similar functions as that of the assessee company.
11	WAPCOS Ltd	25.57	Also used in set of the assessee company. However, margins calculated are different
12	Zipper Trading Enterprises Ltd.	34.11	Similar functions as that of the assessee company.
13.	Kitco Limited	1.27	Also used in set of the assessee company.
14.	Indo Canadian Consultancy Services Ltd.	6.54	Also used in set of the assessee company.
	Average	24.06%	

4.9 The Ld. TPO considered the total cost of operations after excluding following expense items:

- provision for bad and doubtful advances
- donation
- exchange fluctuation loss
- interest expenses

and included following expenses as transaction costs:

- provision for contingencies Rs. 3, 01, 71, 276/-
- ideal manpower and related administration costs Rs. 3, 01, 99, 201/-
- provision for doubtful debts Rs. 1, 58, 40, 181/-

4.10 Based upon the average margin of the comparables and operating cost of Rs.34,42,19,042/- at entity level, the arm's length price of the technical and project management services was computed as under:

<i>Operating Cost shown by the assessee</i>	<i>Rs. 28,39,28,565</i>
<i>Add: Idle manpower cost claimed as non-operating as operating</i>	<i>Rs. 3,01,99,201</i>
<i>Add: Contingencies</i>	<i>Rs. 3,01,71,276</i>
<i>Total Operating Cost</i>	<i>Rs. 34,42,99,042</i>
<i>Arm's length margin</i>	<i>24.06%</i>
<i>Arm's length margin for the assessee company</i>	<i>Rs. 8,28,38,349</i>
<i>Arm's length price</i>	<i>Rs. 42,71,37,391</i>
<i>Total Price disclosed</i>	<i>Rs. 30,98,82,927</i>
<i>Difference</i>	<i>Rs. 11,72,54,464</i>
<i>% of Income shown in international transaction in total transaction</i>	<i>45.09%</i>
<i>Adjustment in respect of international/ AE transactions</i>	<i>Rs. 5,28,70,038</i>

4.11 Thus, in the services rendered by the assessee, the Ld. TPO proposed an adjustment of Rs.5,28,70,038/-.

4.12 The Ld. TPO also made adjustment towards technical assistant and support services from the AE. During the year under consideration, the assessee claimed to have received certain services from its AE, amounting to Rs.1,49,94,743/-. The assessee claimed that services were the nature of general assistance, accounting/finance, system support, risk assessment, IT assistance, training etc. The Ld. TPO observed that payment has been made toward providing routine advisory function, which are duplicate in nature and also in the nature of shareholders activities and for which no such payment was justified and accordingly determined the arm's length price of such services at nil and proposed an addition of Rs.1,49,94,743/- on this account.

4.13 On the basis of the finding of the Ld. TPO the Assessing Officer included following addition in the draft assessment order dated 27/02/2013:

	<i>Adjustment towards rendering project management and technical services to the AE</i>	<i>Rs.5,28,17,038/-</i>
	<i>Adjustment towards management fee considering the arm's length price as nil</i>	<i>Rs.1,49,94,743</i>
	Total	Rs.6,78,11,781

4.14 The assessee filed objections against the draft assessment order before the Ld. DRP. The finding of Ld. DRP vides its order dated 31/10/2013 are summarized as under:

“(a) Use of Transactional Net Margin Method as segmental analysis carried out by the assessee cannot be considered as reliable for the reason that services rendered to AE and Non-AE's were different, allocation of costs between AE and non-AE were not accurate and non-allocation of idle man hour costs was not correct. Further as regards rejection of CUP method for project management services provided to AE, the DRP concurred with the view of the TPO that since similar services were provided to AE and non-AE's, it was not possible for the TPO and the assessee to allocate costs for services rendered to GAIL and accordingly considered TNMM method as most appropriate.

- (b) *DRP partly upheld the objection of the assessee that a sum of Rs 3,01,71,276 should not be considered as part of operating cost as they were in the nature of either provision for unascertained liabilities or abnormal costs. As a result, the addition made by the TPO earlier of Rs 5,28,70,038 was revised to Rs 3,59,92,632.*
- (c) *As regards treating the idle man power costs as part of operating costs by the TPO, the DRP concurred with the views of TPO and held such costs as being directly related to the operations of the Assessee and could not be considered as extra-ordinary in nature.*
- (d) *As regards objections raised by the Assessee for 5 comparables chosen by the TPO that the companies were not comparable, the DRP held that the comparable companies are engaged in similar line of activity as that of the assessee which is of providing technical services and accordingly should be retained as comparables.*

<i>Name of the Company</i>	<i>Reason for objection</i>
<i>Archohm Consults Private Limited</i>	<i>Characteristics of the services provided by the Company is different</i>
<i>Engineers India Limited</i>	<i>Characteristics of services provided by EIL is not comparable</i>
<i>L&T Ramboll Construction</i>	<i>Unique Intangibles and access to technology owned by Ramboll</i>
<i>Rites Limited</i>	<i>Company is well diversified and operating in four different segments</i>
<i>Zipper Trading Enterprises Limited</i>	<i>Very low turnover and company is into construction management</i>

- (e) *In regard to technical and management services availed by the assessee, the DRP declined to interfere with the addition made by the TPO by holding that the services provided by the AE are of generic nature and form part of shareholder services and that the assessee failed to establish the cost benefit analysis of the services availed and to provide the necessary documentation.”*

4.15 On the direction of the Ld. DRP, the learned TPO re-computed that adjustment on the account of project and technical services to AE to Rs.3,59,92,632/- as under:

Particular	Amount (In Rs.)
Total Cost	344299042
Less: Compensation Claim	(20000000)
Less: Provision for service tax	(5000000)
Less: Provision for termination	(5171276)
Revised operating cost(A)	314127766
Arm's Length Margin(B)	24.06%
Arm's Length Profit(C=A*B)	75579140
Revised Arm's Length Price(D=A+C)	389706906
Actual Service Revenue(E)	309882927
Variation(D-E)	79823979
% of AE transaction	45.09%
Addition on account of services to AE	35992632

4.16 Thus the Ld. DRP gave relief of Rs.1,68,77,406 (Rs.5,28,70,038 . Rs.3,59,92,632) in respect of adjustment on account of project and technical services but no relief is granted in respect of adjustment on account of management services availed by the assessee.

4.17 Pursuant to the order of the Ld. DRP, the Assessing Officer passed final assessment order on 31/12/2013. Aggrieved with the order of the Assessing Officer, both the assessee and the Revenue are in appeal before the Tribunal, raising respective grounds.

5. The ground No. 1 of the appeal of the assessee is general in nature therefore we are not required to adjudicate it specifically.

6. The grounds No. 2(a), 2(b) and 2(c) of the appeal of the assessee relate to rejection of internal CUP in relation to project management services amounting to Rs.10,08,47,069/-.

6.1 The Ld. counsel submitted that transaction between the ~~AE~~ and ~~GAIL~~ is uncontrolled transaction between two independent parties and price charged by the AE is a CUP. Further, he submitted that in same set of facts, the Ld. DRP in its direction for assessment year 2010-11, directed the learned TPO/AO to consider the CUP as most appropriate

method and observed that transaction is at arm's length. He further submitted that direction of the Ld. DRP was accepted by the Ld. TPO and the Assessing Officer and no further appeal has been preferred against the order of the Ld. DRP. He further submitted that in assessment year 2011-12, the learned TPO has also accepted the CUP as most appropriate method for benchmarking the transactions of project management services.

6.2 On the other hand, Ld. CIT(DR) relied on the finding of the lower authorities and submitted that selection of CUP method was not appropriate as no two unrelated parties would raise Bills on cost to cost basis.

6.3 We have heard the rival submission and perused the relevant material on record. We find that the Ld. DRP in subsequent assessment year 2010-11 in same set of circumstances has found the CUP method is the most appropriate method for benchmarking the transaction of project management services. In assessment year 2010-11 also, the project management services have been provided by the assessee in relation to GAIL. The Ld. DRP accepted the contention of the assessee in assessment year 2010-11. The relevant extract of the order of the Ld. DRP is reproduced as under:

“4.2 The TPO has rejected the CUP and CPM method used by the assessee. The assessee is rendering services to the project office of its AE. Suez Tractebel S.A. has project offices executing work for GAIL (India) Ltd. - a Government of India undertaking. The assessee bills on Suez Tractebel S.A. on the services rendered and the same amount is billed by Suez Tractebel S.A. on GAIL (India) Ltd.. This means, as per the admission of the assessee, the project office works on a zero percent margin for the services rendered by the assessee, since it does not retain on what it receives from GAIL (India) Ltd. The invoices received from the assessee are passed on to GAIL (India) Ltd. The transaction between GAIL (India) Ltd. and Suez Tractebel S.A. are independent uncontrolled transactions. Therefore, DRP is of the view that an independent CUP is available for comparison and therefore, this being the direct method for comparison, CUP should be used as the most appropriate method. This covers approximately 75% of the transaction.”

6.4 The Ld. CIT(DR) has not disputed the fact that no appeal has been filed against the order of the Ld. DRP. We also find that in assessment year 2011-12, the learned TPO himself has accepted the CUP as the most appropriate method. In our opinion, when in subsequent assessment years, the Revenue itself has accepted, the CUP as the most appropriate method for benchmarking the international transaction of project management services, contesting the same issue in the year under consideration by the Revenue is not justified. In view of the Rule of Consistency, the action of the Ld. TPO/AO and Ld. DRP cannot be sustained. On merit also the transaction between the GAIL and the AE, is an independent and uncontrolled transaction and therefore, it is an appropriate CUP for benchmarking of the transaction. Accordingly, we set aside the direction of the Ld. TPO/AO and Ld. DRP on the issue in dispute and direct to accept the transaction between the AE and GAIL as CUP for benchmarking the international transaction of project management services. The grounds of appeal are accordingly allowed.

7. Ground No. 3 of the appeal of the assessee relates to rejection of internal CPM and TNMM for benchmarking project management and technical services provided to the AE and application of external TNMM by the learned TPO.

7.1 The Ld. counsel of the assessee submitted that the technical services provided to the AEs amounting to Rs.11,21,67,870/- alongwith the project management services provided to the AE amounting to Rs.10,08,47,069/- were benchmarked by the assessee using internal CPM and TNMM as corroborative method. He submitted that the assessee prepared segmental results of AE and non-AE and stated that the margins on transaction with the AE was higher both in CPM and TNMM. The Ld. counsel further submitted that in subsequent

assessment year 2010-11, the approach followed by the assessee was accepted by the Ld. DRP. Further, in assessment year 2011-12 and assessment year 2012-13 the learned TPO himself accepted this methodology, and thus as a Rule of Consistency, being identical facts in the year under consideration, the approach of the assessee should be accepted.

7.2 In the written submission filed, the Ld. counsel alternatively also objected to comparables chosen by the learned TPO after applying external TNMM.

7.3 On the other hand, the Ld. CIT(DR) relied on the finding of the lower authorities and submitted that the assessee did not provide appropriate justification for distribution of the cost between the AE and non-AE segment and thus the internal TNMM cannot be accepted.

7.4 We have heard the rival submission and perused the relevant material on record. We find that in identical set of circumstances, in assessment year 2010-11, the Ld. DRP has accepted the internal TNMM as the most appropriate method for benchmarking the transaction of project management and technical services. The relevant finding of the Ld. DRP is reproduced as under:

“4.3 For the balance approximately 25% of the transaction with the AE, CUP cannot be used. Therefore, assessee has used internal CPM which is nothing but internal TNMM since all costs and all receipts are included in arriving at the margin. The assessee has rendered services to non-AEs also which constitutes 55% of its revenue. The income earned from the AE is to the extent of 41% of the total revenue. The nature of services rendered to the AE as well as to the non AE are comparable services. The client-wise details of the bills are provided to show that the nature of services rendered to related parties and unrelated parties are similar. The TPO has not made any adverse comment on this issue. The assessee had given the breakup of financial in respect of AE and non AE segment. It is important to mention that the entire receipt from the AE for the services rendered to GAIL (India) Ltd. is also included in the internal TNMM purpose. The only challenged to this financial presentation was mentioned in the show cause notice at Para 5 which is quoted below:

"5. But in your calculation you have mentioned Rs. 17,24,09,690.88 as your income from AE, whereas you have earned Rs. 20,83,84,977 from your AEs for the provision of technical & project management services. Thus your segments are doubtful; therefore I purpose to reject this segmentation and will use your entity level margin to benchmark with external comparables."

However, on receipt of reply to the show cause notice the TPO has made the following observation on Page 11.

"5.3. Contention on operation income of the assessee

The assessee has submitted that the actual income recognized by the company with AE is Rs.17,24,09,691 and not the invoicing amount of Rs.20,83,84,977 as reflected in Form 3CEB and accordingly taken by the TPO in SCN. The contention of the assessee is accepted and correction is made in this order accordingly."

From this, it is clear that there is no substantial objection on the presentation of the financial bifurcating AE and non AE transaction and making comparison at the net margin level of operation. The presentation of the financial is given on page 3 to 5 of the TPO order. For the sake of brevity, it is not reproduced again. The manner of allocation of cost to the AE and non AE segment is given by the assessee which is as follows:

- *Assessee has provided segmental analysis, wherein all the expenditure incurred has been identified into different cost centers, which can be categorized as follows;*
 - ✓ *Directly identifiable to services to AEs*
 - ✓ *Directly identifiable to services to Non-AEs*
 - ✓ *Indirect or common expenditure*
 - ✓ *Abnormal or non-operating expenditure*
- *The accounting system allows the identification of direct cost incurred on two sets of transactions.*
- *Further, the total costs consist of direct cost for the project (such as cost of the sub consultant, travel and other related expenses) and the man hours costs. Man hour costs are allocated based on actual time spent by the employees on various projects which is input directly by the employee of the assessee in the "TECPL Timesheet Software".*

As the Assessee is providing comparable services to associated enterprises and non-associated enterprises, margin earned from the services provided to associated enterprises should be compared with margin earned from services provided to non-associated enterprises. The DRP relies on the following case laws:

- *Honeywell Electric Devices And Systems India Ltd. Vs. Assistant Commissioner Of Income Tax* [ITA No. 2152/Mds/2011 (for segmental information)]
- *Cable & Wireless (India) Ltd.* [ITA No.822/Mum/2013]
- *Birlasoft (India) Ltd. Vs DCIT* [2011, 44 SOT 664 (Delhi)]
- *Destination of the World (Subcontinent) P. Ltd. Vs. ACIT* [2011, 47 SOT 1, Delhi]
- *DCIT vs. T, Two International P. Ltd.* [ITA No.7331/Mum/2011]

In view of this, DRP is of the view that internal TNMM is available in this case and therefore there is no need to go for external comparables and external TNMM. Since the margin earned in the AE and non AE segment are 15.02% and 15.05% respectively there is no justification for making any adjustment in this case. The objections filed by the assessee are accepted and TPO/AO is directed to delete the addition made in TPO order.

7.5 From the finding of the Ld. DRP, it manifests that in assessment year 2010-11 the Ld. TPO has not objected on the presentation of the financial bifurcated between AE and non-AE transaction and comparing of the net margin level of operation. In view of the fact the Ld. DRP observed that once internal TNMM is available, there was no need to go for external TNMM and external comparables. The Ld. DRP further observed that the margins in the AE segment was more than non-AE segment and found no justification for making adjustment in assessment year 2010-11.

7.6 Before us, the learned counsel submitted that principle adopted for bifurcations of the AE and non-AE segment in the year under consideration are identical to the principles followed for bifurcations made in the assessment year 2010-11. The Ld. CIT(DR) could not controvert this fact.

7.7 We find that in subsequent assessment years 2011-12 and 2012-30, the learned TPO himself has accepted the internal TNMM and bifurcations of the AE and non-AE segment, on line similar to what has been followed by the assessee in the year under consideration. In view of the above facts, we do not find any justification by the Revenue in litigating the issue, when they have accepted the methodology adopted

by the assessee in subsequent assessment years. In view of the Rule of Consistency, we set aside the direction of the Ld. DRP in the year under consideration and direct the Assessing Officer to accept the approach of the assessee in benchmarking the project management and technical services rendered to the AE followed in AY 2010-11. The other arguments of the assessee related to selection of external comparables are rendered infructuous in view of rejection of external TNMM by us. The ground of the appeal is accordingly allowed.

8. The ground No. 4 and 5 of the appeal of the assessee are related to fee amounting to Rs.1,49,94,743/- paid to the AEs against technical and managerial services claimed to have been availed by the assessee.

8.1 The assessee submitted to the Ld. TPO a list of services claimed to have been provided by the AE to the assessee. The Ld. TPO has extracted list of all such services in his order. The services include general assistance, accounting/financial systems, risk assessment, IT assistance, training, coaching KAM etc. The Ld. TPO asked the assessee to provide detail of the benefits received by the assessee by availing the said services. The assessee contended that it was not necessary that each and every expense would result into a benefit and the pricing of the services was dependent on several factors like cost of manufacture or service providers, availability of close competitor in the market and demand and supply relationship etc. The assessee also submitted that there was a service agreement with the AE which was originally entered on 23/09/2004 w.e.f. 01/01/2004 specifying the hourly rates for various categories of persons involved in providing services to the company and the said agreement was revised w.e.f. 01/01/2008 and which was in force during the year under consideration. The assessee also submitted that AE being a global giant and word leader in

engineering services sector, the assessee got benefit of the expertise professionals employed by the AE.

8.2 The learned TPO referred OECD guidelines in respect of intragroup services and summarized that the essential information required for examining the arm's length price of such services as under:

"1. Whether the assessee has actually received intra group services or services received are duplicative in nature or fall in the nature of shareholder's activities?"

2. What are the economic and commercial benefits derived by the recipient of intra group services?"

3. In order to identify the charges relating to services, there should be a mechanism in place which can identify (i) the cost incurred by the AE in providing the intra group services and (ii) the basis of allocation of cost to various AEs.

4. Whether a comparable independent enterprise would have paid for the services in comparable circumstances?"

5. The cost of intra group services should be benchmarked using either CUP or Cost Plus Method."

8.3 The assessee submitted emails in support of contention of receiving such services from the AE. The learned TPO examined the emails and invoices and found that many of the services are of general nature and not required assistance from the AE or the services are in the nature of the shareholders advice. He has given his remarks on each services claimed to have been availed by the assessee. The learned TPO observed that assessee had not furnished contemporaneous documentary evidence as to the receipt of very services and only furnished general documents.

8.4 The Ld. TPO observed that the assessee failed to provide cost benefit analysis of the services and the services were in the nature of duplicate services. The Ld. TPO referred to various international judicial

pronouncement and practice followed internationally. Accordingly, the Ld. TPO applying the CUP, determined the arm's length price of the transaction payment of service fee at nil as against Rs.1,49,94,743/- determined by the assessee.

8.5 The Ld. DRP observed that the assessee failed to establish cost benefit analysis of the services and in absence of justification by supporting proper documentation, the stand of the learned TPO was sustained.

8.6 Before us, the learned counsel submitted that the assessee received those services from the AEs and payment has been made in terms of the service agreement effective during the year under consideration. He submitted that Ld. DRP has sustained the addition with very general direction without going into details. The Ld. counsel placed reliance of the decision of Delhi bench of Tribunal in the case of CIT versus EKL Appliances Ltd in ITA No. 1068/2011 and ITA No.1070/2011.

8.7 Ld. CIT(DR), on the other hand, submitted that the assessee failed to substantiate the receipt of services and also cost benefit analysis of services. The learned CIT(DR) submitted that assessee failed to controvert the finding of the learned TPO that services are either duplicate or in the nature of shareholders activity and supported the finding of the TPO that no independent party would have made a payment in uncontrolled circumstances particularly in view of nature of services being duplicate or shareholders activity.

8.8 We have considered the rival submission and perused the relevant material on record. We find that the Assessing Officer has discussed the issue of the intragroup services availed at length and summarized finding in para-22 of his order, which are extracted as under:

22.1 On the basis of the above following points are noticed:

- *The assessee has not been able to prove the benefits that it had derived from the services purportedly provided by the AE. No independent entity would pay for such services without any cost benefit analysis.*
- *The assessee has not furnished any evidence as to the cost benefit analysis with regard to the independent suppliers. No third party would like to avail services without any cost benefit analysis with regard to AE vs. independent supplier.*
- *The documentation produced by the assessee to support its claim for the receipt of management services is too generic*
- *The benchmarking done by the assessee is not in accordance with the law and therefore CUP method is required to be applied in this case.*

22.2 *As per the comments above it can be seen that none of the benefits are tangible or real. A mere facade has been raised to give an impression that some vital benefit has passed to the assessee, which is actually not the case. Related parties are quite likely to give a form that will give an impression that a real service is being rendered by one to another. But the necessity to look beyond the veil is recognized across tax jurisdictions. In the above circumstances the payment of service fee is only an arrangement to change tax base without any economic substance in the transaction. This is internationally not accepted as evident from the following judgments:*

In Saviano VS Commissioner 765F. 2d 643,654 (7th Cir. 1985) it was observed, "the freedom to arrange one's affairs to minimize taxes does not include the right to engage in financial fantasies with the expectation that the Internal Revenue service and the Courts will play along."

In Frank Lyon Co. Vs US 435,US 561,573(1978) the Hon'ble US Supreme Court observed, "In applying the doctrine of substance over form, the court has looked to the objective economic realities of a transaction rather than to the particular form the parties employs."

"In the field of taxation administrators of law and the courts are concerned with substance, relations and formal written documents are not rigidly binding." {Helvery Vs Lazanus & Co. 308 US (252)}.

22.3 *The OECD also recognizes this reality in its guidelines of 2010. The relevant portions are reproduced below*

[Quote]

Associated enterprises are able to make a much greater variety of contracts and arrangements than can independent enterprises because the normal conflict of interest which would exist between independent parties is often absent. Associated enterprises may and frequently do conclude arrangements of a specific nature that are not or are very rarely encountered between independent parties. This may be done for various economic, legal, or fiscal

reasons dependent on the circumstances in a particular case. Moreover, contracts within an MNE could be quite easily altered, suspended, extended, or terminated according to the overall strategies of the MNE as a whole, and such alterations may even be made retroactively. In such instances tax administrations would have to determine what the underlying reality is behind a contractual arrangement in applying the arm's length principle.

In addition, tax administrations may find it useful to refer to alternatively structured transactions between independent enterprises to determine whether the controlled transaction as structured satisfies the arm's length principle. Whether evidence from a particular alternative can be considered will depend on the facts and circumstances of the particular case, including the number and accuracy of the adjustments necessary to account for differences between the controlled transaction and the alternative and the quality of any other evidence that may be available.”

8.9 We find that the assessee has failed to produce any evidences to controvert the finding of the learned TPO, either before the Ld. DRP or before us. The Ld. counsel of the assessee has placed reliance on the decision of the Tribunal in the case of CIT Vs. EKL Appliances Ltd. (supra). The Tribunal observed as under:

*“Transfer pricing guidelines” laid down by the OECD make it **clear that barring exceptional cases, the tax administration cannot disregard the actual transaction or substitute other transactions** for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. The guidelines discourage re-structuring of legitimate business transactions except where (i) the economic substance of a transaction differs from its form and (ii) the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. The OECD guidelines should be taken as a valid input in judging the action of the TPO because, in a different form, they have been recognized in India’s tax jurisprudence. **It is well settled that the revenue cannot 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 (Eastern Investment Ltd 20 ITR 1 (SC), Walchand & Co 65 ITR 381 (SC) followed). Even Rule 10B(1)(a) does not authorise disallowance of expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same.”***

8.10 In the instant case, the assessee has failed to establish with documentary evidence as to what amount any independent party would

pay towards the kind of services claimed to have been availed by the assessee. According to the learned TPO the services are either of the duplicate nature or in the nature of shareholders activity. In our opinion, the shareholders activities are the activities that a group member (i.e. the parent company or a regional holding co.) perform solely because of its ownership interest in one or more group members and this type of activity would not justify a charge on the receiving company. The receiving company would not be willing to pay for it, if they were unrelated companies. The Id. TPO has specifically described the convergence committee, general assistance expenses etc. as shareholder activity.

8.11 Further, according to the Id. TPO, the assessee has not substantiated the Cost Benefit Test. According to the section 92(2) of the Act, the Arm's Length Price of the transaction in the nature of cost or expense allocation or apportioned to an enterprise or contributed by an enterprise shall be determined having regard to Arm's Length Price of such benefit, service facility. Therefore, the benefit test was a necessary part of determining the Arm's Length Price of the transaction of any intra group services. In the instant case, the Id. TPO has determined the ALP at NIL keeping in view of the factual position that whether in a comparable case, similar payment would have been made or not in terms of the agreement. The ratio of the decision in the case of EKL Appliances Ltd. (surpa) is thus, not applicable over the facts of the instance case. The Id. Transfer Pricing Officer is empowered only to view the benefit mentioned in section 92(2) of the Act from perspective of the assessee. The ITAT, Delhi Bench in the case of GE Financial Services Pvt. Ltd., ITA No. 5882/Del/2010, 5816/Del/2011 & 6282/Del/2012 clarified that mere profitability alone could not be criterion for benefit and there are several non-monetary terms other than profitability, like

usefulness, enhancement in value, sustainability and enhancement of business interest, which are required to be seen while judging the benefit test.

8.12 In our opinion, the Ld. AO/TPO has not examined the benefit test in this perspective. In the circumstances, we feel it appropriate to restore the matter to the file of the AO/TPO to decide afresh in accordance with law, particularly examine the benefit test from perspective mentioned by the Tribunal in GE Financial Service Pvt. Ltd. (supra). We order accordingly. It is needless to mention that adequate opportunity of being heard shall be provided to the assessee. The ground of the appeal is accordingly allowed from statistical purposes.

9. Other ground raised being general in nature, we are not required to adjudicate specifically and same are dismissed as infructuous.

10. The ground No. 1 of the appeal of the Revenue relates to exclusion of certain expenses towards provision for an ascertained liabilities or extraordinary expenses, amounting to Rs.3,01,71,276/- while calculating the operating expense of the assessee.

10.1 The Ld. CIT(DR) supported the order of the learned TPO and submitted that the Ld. DRP was not justified in excluding following expenses as operating expenses:

"i) Compensation claim of Rs. 20,000,000 made by an ex-employee in a suit filed against the company and an ex-key managerial personnel;

ii) Provision of Rs. 5,000,000 towards service tax on taxable services that the company may be called upon to discharge based on an audit carried out by the service tax department;

iii) Provision of Rs. 5,171,276 towards compensation likely to be paid to key managerial personnel upon termination of the contract subsequent to the close of the year based on best estimates."

10.2 The Ld. counsel of the assessee, on the other hand, submitted that the expenses being in the nature of an ascertained liability or extraordinary expenses, the Ld. DRP was justified in excluding those expenses from operating expenses.

10.3 We have heard the rival submission and perused the relevant material on record. We find that selection of external TNMM for benchmarking the project management and technical services has already been rejected by us while dealing with the ground No. 4 of the appeal of the assessee and thus issue of excluding expenses in dispute out of the operating expenses is rendered infructuous, accordingly the ground of the appeal of the Revenue is dismissed.

11. In the result, appeal of the assessee is allowed partly for statistical purposes whereas the appeal of the Revenue is dismissed.

The decision is pronounced in the open court on 23rd Nov., 2017.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Dated: 23rd November, 2017.
RK/(D.T.D)

Copy forwarded to:

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

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi