

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

**BEFORE SH.R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.5097/Del/2011
Assessment Year: 2007-08

Knorr Bremse India Pvt. Ltd., 14/6, Mathura Road, Faridabad (PAN AAACK4739H)	Vs	ACIT Circle . 1 Faridabad
(APPELLANT)		(RESPONDENT)

Appellant by	Shri Ved Jain, Advocate, Sh. Ashish Goel, CA
Respondent by	Sh. Yogesh Verma, CIT DR

Date of hearing:	18/05/2018
Date of Pronouncement:	31/05/2018

ORDER

PER R.K. PANDA, AM:

The appeal filed by the assessee is directed against the order dated 03.10.2011 passed u/s. 143 (3) r/w section 144 C of the IT Act by the ACIT, Circle-1, Faridabad relating A. Y. 2007-08.

2. The grounds raised by the assessee are as under :

On the facts and in the circumstances of the case and in law, the Learned Assessing Officer based on directions of DRP :

Not providing sufficient opportunity

1. *erred in not providing sufficient opportunity and order passed in violation of principles*

natural justice and is otherwise arbitrary and is thus bad in law and is void ab-initio;

General

2. *erred in assessing the total income at Rs. 62,565,161/- as against total income of Rs. 17,164,832/- computed by the Appellant;*

Segregation of closely linked transaction and

3. *erred in rejecting the Transactional Net Margin Method ('TNMM'), wherein closely linked transactions were benchmarked together and instead segregating the closely linked transactions for the purpose of benchmarking such transactions thereby making an adjustment of Rs. 56,157,877 by determining the arm's length price ('ALP') of the following international transactions of the appellant as NIL;*
 - i. *Payment of management fee;*
 - ii. *Payment of professional fee; and*
 - iii. *Payment of SAP implementation fee.*

Selection of method

4. *erred in rejecting the transfer pricing documentation maintained by the Appellant and upholding the non-acceptance of Transactional Net Margin Method ('TNMM') adopted by the Appellant for determination of its arm's length price in connection with its international transaction;*
5. *erred in upholding the adoption of Comparable Uncontrolled Price ('CUP') determining the arm's length price in respect of Appellant's international transaction without providing any comparable uncontrolled transaction(s) for the computation of the ALP;*

Scope of transfer pricing adjustment

6. *erred in not following one of the prescribed methods for computing the arm's length price in relation to international transaction, without appreciating that the scope of transfer pricing adjustment is restricted to computing the arm's length price for the international transaction with associated enterprises;*
7. *erred in misinterpreting and ignoring the information provided by the Appellant during the course of proceedings to substantiate the receipt of services and benefits and thus reaching at an inappropriate conclusion that the arm's length value of the impugned transactions should be Nil;*

SAP Implementation charges

8. *The Learned TPO erred in determining the ALP of the SAP implementation transactions as Nil by ignoring the factual details wherein the benefits from receiving services from AE at lower rates was clearly evidenced by the appellant. Further, the AO/TPO erred in the facts and circumstances of the case, by not complying with the directions provided by the Hon'ble DRP with regard to recomputation of the ALP of the SAP implementation charges as the same were found to have met the benefit test by the DRP.;*

Benefit of +-5%

9. Without prejudice to above grounds, erred in not providing the benefit of +-5% under proviso to Section 92C of Act for purposes of computing the arm's length price in respect of international transaction;

The above grounds are independent and without prejudice to each other unless mentioned specifically.

The Appellant prays for leave to add, alter, amend, the grounds mentioned herein above at or before the time of hearing.

3. Facts of the case, in brief, are that the assessee is a Private Limited Company and is a wholly owned subsidiary of M/s. Knorr Bremse Far East Limited and is engaged in the business of manufacturing air brake sets of passenger cars and wagon coaches, shock absorbers for passenger cars and locomotives, distributor valves, computer control brake system, tread break unit and other brake accessories. It is filed its return of income on 31.10.2007 declaring total income of Rs. 1,71,64,832/-. Since the assessee had undertaken international transaction with its AE, the Assessing Officer referred the matter to the TPO to determine the ALP in respect of its international transaction with the AE.

4. The TPO during the TP assessment proceedings observed that assessee has entered into the following international transaction with its AE's.

Professional consultancy	15,207,206
Management fee for support services	14,056,800
SAP consultancy charges and other expenses	26,893,871
SAP License Fees	14,064,063
Software	2,678,406
Total	72,900,346

5. He observed that the assessee in its TP report has stated that transaction has been aggregated under TNMM and thus these transactions are at arms length. It was stated that as the service transaction is closely linked with other

transactions, the same are aggregated under TNMM. It was argued that TNMM was used to justify the payment of business services. It was accordingly submitted before the TPO that the transactions are at arms length.

6. However, the TPO was not satisfied with the TP study undertaken by the assessee. He observed that under the provisions of the Act and Rules each class of transaction has to be examined having regard to the ALP by applying the most appropriate method. He, therefore, analysed the said transactions separately under the CUP method. Rejecting the various explanations given by the assessee, the TPO proposed adjustment of the whole Rs.5,61,57,877/- being professional consultancy of Rs.15207206/-. Management fee for support service Rs.14056800/- and SAP Consultancy charges and other expenses Rs.26893871/- stating that no independent enterprise would be able to pay out a portion of its profits before it knows what is the cost incurred by the service provider and the assessee has failed to follow the basic tenet of independent behavior.

7. The Assessing Officer in the draft order proposed adjustments of Rs.5,61,57,877/-. The assessee filed its objections before the DRP who vide order dated 30.09.2014 issued certain directions u/s 144(4) of the IT Act. With regards to the TPO having rejected the assessee's approach of aggregating the closely linked transaction, the DRP found the reasoning of the TPO to be logical and agreed with him. With regards to the TPO having used the CUP method for benchmarking, it observed that the SAP license and MS Office had been purchased at lower rates benefitting the assessee and to that extent the benefit test for the assessee was clear and the assessee must be given benefit.

8. The Assessing Officer accordingly passed the order vide order dated 03.10.2011 making addition of Rs. 2,92,64,006/- on account of professional consultancy and management fee and Rs. 1,61,36,323/- on account of SAP charges after giving benefit of depreciation on the same. The assessee went in

appeal before the ITAT. The Tribunal vide order dated 31.10.2012, partly allowed the appeal of the assessee. The Tribunal found that the SAP license and MS Office had been purchased at a lower rate as per the finding given by the DRP and hence deleted the addition to that extent and all other additions were confirmed. Against the order of the Tribunal, both the assessee as well as the department went in appeal before the Hon'ble Punjab and Haryana High Court. The Hon'ble High Court vide order dated 06.11.2015, in ITA No. 182/172 of 2013 (O&M) restored the matter back to the Tribunal to decide the matter afresh in view of their various observations.

9. Hence, this is the 2nd round of litigation before the Tribunal.

10. Ld. Counsel for the assessee submitted that the assessee selected TNMM as the most appropriate method for benchmarking and for doing so divided its operations into manufacturing and distribution segments. The observation of the TPO was that each class of transaction has to be examined having regard to the Arm's Length principle by applying the most appropriate method. By applying CUP method on all the transaction separately he proposed the adjustment. After analyzing the various contention at Para 36 onwards, Hon'ble High Court sent the matter back to the Tribunal.

11. So far as selection of method is concerned, the Ld. counsel for the assessee referring to the decision of the Tribunal in assessee's own case for AY 2008-09, in ITA No.5886/Del/2012, dated 23.08.2016 drew the attention of the Bench to para 18 of the order of the Tribunal where in the Tribunal in the background of similar facts and after having the benefit of the order of the Hon'ble High Court, for the relevant assessment year has held that TNMM was most appropriate method and not Cup method.

12. So far as professional consultancy and management support service is concerned the Ld. Counsel for the assessee referring to paper book pages 285A

and 285 B submitted that the TPO analysed each transactions separately under CUP method and asked the Assessee to submit necessary documents, evidencing the receipt of services and the benefits derived therefrom, in respect of each of the transaction entered into by the Assessee vide show case notice dated 29.09.2010. Referring to paper book pages 286-461 he submitted that the Assessee Company, filed detailed reply exhibiting the nature of services rendered by the associated enterprises, receipt of such services and also the benefits derived by the Assessee Company from the use of such services.

13. He submitted that the TPO on perusing the documents submitted by the Assessee Company, rejected the claim of the assessee stating that the assessee has not been able to substantiate that the payment for these services has actually resulted in the increase in profits of the assessee. According to him that the regular increase in profits are a normal incidence in business. As a result, the TPO reduced the ALP of the abovementioned transactions to NIL without identifying prices paid in comparable uncontrolled scenarios, which has been upheld by the DRP.

14. The Ld. Counsel for the assessee referring to para 19 to 21 of the order of the Hon'ble High Court drew the attention of the Bench to the same and submitted that Hon'ble High Court in the said decision has categorically held that whether a transaction is at arms length. Price or not is not dependent on whether the transaction result in an increase in the assessee's profit. It has been held that business decisions are at times good and profitable and at time bad and unprofitable. Business decisions may and, in fact, often do result in a loss.

15. Referring to paper book page 466, Ld. counsel for the assessee he submitted that in the present case the export of the assessee increased by 196% for the year ending 31.03.2007 and gross margin at Rs.20,99,61,271/-. It further increased by 59% in March 2008 and the gross margin to Rs. 32,95,95,310/-. This according to Ld. AR clearly shows that the assessee was

benefited by getting the services from its AE. He submitted that in the present case, the expenses incurred by the assessee for availing the services were at Rs. 1,52,07,206/- while the increase in the export was of Rs. 5,47,02,313/-. Since the assessee achieved increase in the export as well as in gross margin, therefore, the decision of availing the services from the AE was correct decision for betterment of the business. Further in the present case, nothing was brought on record to substantiate that the assessee incurred the expenses on the services received from the AE at a higher rate than the similar facilities available from other persons. The AE had not earned any mark-up and the cost paid by the assessee in relation to these services was nothing but the cost of improvement of its production processes and what had been incurred was almost the same which could have been incurred for availing the similar services from a third party.

16. Referring to para 23 of the order of the Hon'ble High Court the Ld. Counsel for the assessee drew the attention of the Bench to the same which reads as under.

“23. Enterprises, businessmen and professionals constantly experiment with different business models, theories and ventures. The aim indeed is to further the business, to enhance their profits. So long as that is the aim, it is sufficient for the purpose of the Income Tax Act. In a given case, profit may not even be the motive. Even so it would not indicate that the transactions in question are not at an arm's length price. Whether a transaction is entered into at an arm's length price or not must depend upon the facts of each case relating to the transaction per se, i.e., the transaction itself. Profit is only a possibility and a desired result with or without the aid of an international transaction. Every business venture is not necessarily profitable or successful. All business ventures do not succeed equally or uniformly. Indeed, if an assessee is able to establish financial or other commercial benefits arising from a transaction, it would further strengthen its case. But if it cannot do so, it does not weaken it. ”

17. He accordingly submitted that the assessee having established the financial and commercial benefits arising from the transactions, the ALP of the

same cannot be said to be NIL. Therefore, the adjustment on account of professional consultancy and management support service should be deleted.

18. He submitted that the facts in the present case are *pari-materia* to the facts of AY 2008-09 wherein the Tribunal in ITA No. 5886/Del/2012 dated 23.08.2016 in assessee's own case has deleted the addition.

20. Referring to various pages of the paper book he submitted that copy of e-mails substantiating the impartment of Management support service details of increase in export and gross margin, copy of task sheet in respect of vendor's visit, copy of salary records of Ms. Rita Ricken and computation of management fee were filed before the Assessing Officer/ TPO/ DRP to substantiate the cost of the services rendered by the AEs. He accordingly submitted that in view of the above, the adjustment on account of professional consultancy and management support service should be deleted.

19. So far as SAP Implementation and other charges are concerned, he submitted that the TPO erred in determining the ALP of the SAP implementation transactions as NIL by ignoring the factual details wherein the benefits from rendering services from AE at lower rates was clearly evidenced by the assessee. Further, the AO/TPO erred in the facts and circumstances of computation of the ALP of the SAP implementation charges as the same were found to have met the benefit test by the DRP.

20. Referring to the reply given to the TPO copy of which is filed in the paper book pages 289-290, he submitted that during the year under consideration SAP systems have been implemented in the Assessee Company in place of the legacy system i.e. FoxPro. For this purpose, the Assessee Company has obtained services of its AEs viz Knorr-Bremse GmbH, Austria ("Knorr Austria") for studying the legacy data, consultancy with respect to data migration and overall responsibility of data migration, and Knorr-Bremse Systeme Fur Schienenfahrzeuge ("KBSFS") for rolling out and licensing of SAP system and MS Office in the Assessee Company, in terms of the service agreement dated

01.07.2005 (PB Page No. 379-385).

21. He submitted that while determining the ALP of SAP implementation service as NIL, the TPO has not considered any comparable information on cost incurred by comparable uncontrolled enterprises on similar service. Referring to para 5 of page 16 of the TPO's order he submitted that the TPO has framed his opinion by observing as under :

“No independent enterprise would be able to pay out a portion of its profits, big or small, before it knows what is the cost incurred by the service provider. The assessee has failed to follow this basic tenet of independent behavior, in any case, while India is the hub of the global IT-ITES, it is not believable when the assessee states that there are certain problems that the AE solves and it would not have been able to do so. It is true that if it had done so it would have done so on its own, it would have incurred a cost. Hence, the assessee need not have made any payment on account of this service. ”

22. Referring to the order of the Hon'ble High Court he drew the attention of the Bench to para 47-49 of the order which reads as under :

“47. That, however, in our view, cannot be a ground for rejecting a claim for deduction. Nor can that be a ground for assuming that the consideration paid for the same is not the genuine arm's length price. Absent any law, an assessee cannot be compelled to avail the services available in India. It is for the assessee to determine whose services it desires availing of and whose goods it intends purchasing. It is certainly understandable if the assessee prefers to deal with its group entities/AEs. This is for a variety of reasons which are far too obvious to state. So long as there is no bar in law to the assessee availing the services of a particular party, the authorities under the Act must determine whether the consideration paid for the same is at an arm's length price or not.

48. The TPO also held that no independent enterprise would pay out a

portion of its profit big or small before it knows the cost incurred by the service provider. The TPO held that the assessee had failed to follow this basic tenet of independent behaviour.

49. *A purchaser of goods or of services is not concerned with the price at which its vendor of goods or supplier of services in turn acquired the same. This, at the highest, would be a factor while negotiating the purchase of goods or the acquisition of services. Even if the vendor or supplier acquired the assets or the know-how as a gift, it would be irrelevant as far as the onward sale thereof is concerned. The purchaser determines the price it is willing to pay for the goods or services independent of what the same cost its vendor/service provider. The TPO, therefore, proceeded on an entirely erroneous basis while computing the arm's length price. ”*

23. He submitted that DRP in its findings at para 3.3 at page 5 of the order had also opined that the SAP license and MS Office have been purchased at a lower rate benefiting the assessee and to that extent benefit test for the recipient is clear and assessee must be given benefit.

24. He submitted that this issue was decided in favour of the assessee by the Tribunal in first round of appeal. The basis was the findings given by the DRP that the assessee was benefitted by acquiring SAP license at a lower rate. He drew the attention of the Bench to the observations of the Hon'ble High Court at para 54 and 55 of the order which reads as under:

“54. This brings us to the appeal filed by the Revenue/respondent in ITA-182- 2013. The Revenue is aggrieved by the decision of the Tribunal directing the AO to delete the addition with respect to the SAP Consultancy charges in the sum of f 2,68,93,871/- to the assessee's income. The Tribunal found that the DRP had recorded a finding that the SAP Licence and MS Office had been purchased at a lower rate and to that extent the benefit test for the recipient is clear and the assessee must be given the benefit. The Tribunal further noted that in the same breath the DRP upheld the conclusion of the TPO and decided not to interfere with the order of the TPO. The Tribunal held that since the DRP had reached a finding that the SAP

Licence and MS Office had been purchased at a lower rate and had benefited the assessee, it was not proper to uphold the conclusion of the TPO for adding the said amount to the assessee's income. The Tribunal held that the assessee had discharged the onus that the international transactions had been benchmarked at an arm's length price in respect of the SAP Licence and, accordingly, directed the AO to delete the addition.

55. Had the matter rested only on the question of appreciation of facts, we would not have and indeed could not have interfered in appeal. However, in view of our findings on the questions of law in the assessee's appeal, it would be necessary for the authorities to consider this matter afresh in the light of those observations as well, it would be necessary upon remand for the authorities under the Act to consider whether the transactions ought to be separately benchmarked or whether the TNM Method ought to be adopted in respect of the same as well."

25. He accordingly submitted that the Hon'ble High Court preferred not to interfere in the findings given in the earlier round. However, in order to decide the method to be adopted for benchmarking all transactions including SAP license, the case was sent back. He accordingly submitted that in view of the facts that in AY 2008-09, the Tribunal has held TNMM as the most appropriate method, which was also adopted by the assessee itself, and in view of finding of fact given by the DRP and ITAT in earlier round, the adjustment on account of SAP may kindly be deleted.

26. Ld. DR on the other hand submitted that from a perusal of the details and record available it cannot be concluded as to whether actual services have been rendered or not. There is no evidence on record that services were rendered by the AE in general and whether matching expenses were incurred by the AE while rendering such service with or without mark up. The assessee has not proved with abundant proof of evidence regarding the rendering of the services. The benefit of the services rendered have also not been established by giving cogent evidence. It has not been established as to whether assessee actually needed such services So far as professional consultancy payment of Rs. 1,52,07,206/- is concerned Ld. DR submitted that the assessee has claimed towards receipt of

professional consultancy services from Mr. Daniel Schwestermann, Ms. Rita Ricken, Mr. George Moll, Mr. Geroge Moll. However, there is no evidence to show that there were some formal training sessions for the employees and the cost accruing to the AE on this account would not be much. Further, the supporting documents provided by the assessee do not provide evidence of a formal training. The assessee has attached a few invoices which however, do not bring forth the true nature of services provided by such professional. The detailed description of the services has not been mentioned in those invoices. E.g in the invoice dated 22-11-2006, the description mentioned is 'professional consultancy'. In invoices dated 15/12/2006 and 28/07/2006, the description mentioned is 'project support'. In invoice dated 20-12-2006, the description mentioned is 'task force'; which is misleading and not conveying the true nature of services provided to the assessee. The assessee has also attached some minutes of the meetings and monthly detailed reports of Ms. Rita Ricken. In submission dated 19-10-2010, the assessee has supplied two pages of tasks sheets, which neither prove the delivery of services nor any benefit derived from the claimed services. The assessee had not been able to provide any evidence that its employees have actually benefitted from this. It is pertinent to mention here that as no TP proceedings are pending for ASSESSMENT YEAR 2007-08 with the TPO, it is difficult to seek further details and clarifications from the assessee.

27. So far as management fee for support services of Rs.14,056,800/-is concerned, he submitted that the assessee has failed to establish that the tangible benefits had occurred from business development services provided by the AE. Further, the services provided in respect of the Human Resource services are for the group only and the assessee cannot be expected to make a payout for the same. The service can be classified as an incidental service. The assessee has not been able to provide any evidence by way of emails or otherwise that the AE is providing any tangible assistance to it. The assessee had spent Rs.8,16,90,480/ as its employee cost and the employees were providing all the necessary support that the assessee needs for its operations in India.

28. So far as SAP consultancy charges and other expenses of Rs.2,68,93,871/- is concerned, he submitted that the reply filed before the Assessing Officer/ TPO is very general in nature. The assessee had not submitted the basis of quantification of these charges. The invoices are not able to quantify the basis of charge. The assessee has not been able to show that any tangible benefit has passed to it following the payment of these service charges. Further, no separate bench marking was done by the assessee for the payments of these services. Thus, the assessee has failed to follow the basic tenet of independent behavior. Relying on the order of the TPO/ DRP he submitted that they have given cogent reasons as to why the assessee need not have paid any payment on account of these services. He accordingly submitted that the order of the Assessing Officer/TPO/DRP be upheld and the grounds raised by the assessee be dismissed.

29. We have considered the rival arguments made by both the sides, perused the material available on record and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the present case made the payments to its AE for the services on account of professional consultancy, management fee for support services and SAP consultancy charges. We find the assessee also purchased raw material and consumable, finished goods and imported capital items. The TPO proposed the adjustment on account of Arm's Length Price in professional consultancy, management fee for support service and SAP consultancy charges. The claim of the assessee was that the service charges were paid in respect of the services availed from the AE which were the actual expenditure incurred by the AE and no element of profit was involved. The assessee furnished the various details justifying the transactions to be at ALP which was not accepted by the TPO. We find the Tribunal gave some part relied and on further appeal by both sides, the Hon'ble High Court restored the matter to the Tribunal for fresh adjudication. We find after considering the observations of the Hon'ble High Court, the Tribunal in assessee's own case vide ITA No. 5886/Del/2012 for A. Y. 2008-09 has decided the issue in favour of the assessee by observing as under :-

“14. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is not in dispute that the assessee made the payments to its AE for the services on account of professional consultancy management fee for support services. The assessee also purchased raw material and consumable, finished goods and imported capital items. The TPO proposed the adjustment on account of Arm's Length Price in professional consultancy and management fee. The claim of the assessee was that the service charges were paid in respect of the services availed from the AE which were the actual expenditure incurred by the AE and no element of profit was involved. The assessee furnished the various details relating to segmental account, detail of recovery of expenses, valuation of capital assets purchased from the AE, Justifications of technical assistance service, management and other service and professional consultancy services (copy of which are place at page nos. 251 to 365 of the assessee's paper book). The assessee explained the various issues raised by the TPO during the course of hearing before him and furnished the evidences in support of professional as well as management services availed by it from its AE which is evident from the various documents placed in the assessee's paper book at page nos. 44 to 168.

15. An identical issue was a subject matter of adjudication before the Hon'ble Jurisdictional High Court in assessee's own case in ITA No. 182/2013 for the assessment year 2007-08 wherein vide order dated 06.11.2015, their lordships in paras 20 to 23 observed as under:

“20. A reading of the orders of the TPO, the DRP and of the Tribunal makes it clear that one of the main reasons for not accepting the assessee's case was that the assessee had not been able to substantiate that the payment for the services had actually increased its profits. As we noted earlier, the TPO, in fact, further held that the assessee should have been able to show the level of increase in profit post the said transactions.

21. We are unable to agree with this finding. The answer to the issue whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the

assessee's profit. This would be contrary to the established manner in which business is conducted by people and by enterprises. Business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into bona fide or not or whether it was sham and only for the purpose of diverting the profits.

22. The TPO observed that regular increase in profits is a normal incidence in business. This is entirely incorrect. All businesses are not profitable. All decisions do not enhance profitability. Losses are also an incidence of business. Many are the failed business ventures of people and enterprises.

23. Enterprises, businessmen and professionals constantly experiment with different business models, theories and ventures. The aim indeed is to further the business, to enhance their profits. So long as that is the aim, it is sufficient for the purpose of the Income Tax Act. In a given case, profit may not even be the motive. Even so it would not indicate that the transactions in question are not at an arm's length price. Whether a transaction is entered into at an arm's length price or not must depend upon the facts of each case relating to the transaction per se, i.e., the transaction itself. Profit is only a possibility and a desired result with or without the aid of an international transaction. Every business venture is not necessarily profitable or successful. All business ventures do not succeed equally or uniformly. Indeed, if an assessee is able to establish financial or other commercial benefits arising from a transaction, it would further strengthen its case. But if it cannot do so, it does not weaken it.

16. From the above observation it is clear that as to whether a transaction is entered into at an Arm's Length Price or not must depend upon the facts of each case relating to the transaction per-se, that is the transaction itself and the profit is only a possibility of the desired result with or without the aid of international transaction. In the present case, the export of the assessee increased by 196% for the year ending 31.03.2007 and gross margin at Rs.20,99,61,271/-. It further increased by

59% in March 2008 and the gross margin to Rs.32,95,95,310/-. Thereafter, for the year ending on 31st March, 2009, the increase in export turnover was 50% while the gross margin increased to Rs.38,47,34,647/- which clearly shows that the assessee was benefited by getting the services from its AE. In the present case, the expenses incurred by the assessee for availing the services were at Rs.1,62,06,494/- while the increase in the export was of Rs.7,22,50,646/-. Since the assessee achieved increase in the export as well as in gross margin, therefore, the decision of availing the services from the AE was correct decision for betterment of the business. In the present case, nothing was brought on record to substantiate that the assessee incurred the expenses on the services received from the AE's at a higher rate than the similar facilities available from other persons. The submissions of the assessee that the AE had not earned any mark-up and the cost paid by the assessee in relation to these services was nothing but the cost of improvement of its production processes and what had been incurred was almost the same which could have been incurred for availing the similar services from a third party had not been rebutted. The Hon'ble Punjab & Haryana High Court in the aforesaid referred to case of the assessee vide para 23 of the order dated 06.11.2015 held that if an assessee is able to establish financial or other commercial benefits arising from a transaction, it would further strengthen its case but if it cannot do so it does not weaken it.

17. In the present case, the assessee had established that there had been an increase in the export sales from the financial year 2007-08 to 2009-10 and the gross margin of the assessee had also increased and almost doubled during that period. The assessee had maintained the minutes of the meeting to substantiate the involvement of Mr. George Moll an employee of the AE and the services provided by him (copy of the said minutes was furnished by the assessee before the TPO). The assessee company has explained the services it has obtained from its Associated Enterprises in respect of its projects with Indian Railways and Metro. It was explained that the assessee company does not have any in house research team and does not have the requisite knowhow and accordingly sought support of its Associated Enterprises in respect of following:-

- a) To avoid derailing of rails which was a challenge being faced by the India Railway.
- b) Oil free compressor project which it has obtained from its Associated

Enterprises for Indian Railways.

The assessee company has also submitted evidences substantiating receipt of localization support and the allocation of the cost. Therefore, the internal data was very helpful particularly when the allocation key was based on cost accounting system. The assessee explained that there was strong co-relation between the creation of the profit and the time spent by the employees of the AE. The assessee also furnished task sheets to the TPO to substantiate that the services were provided by the AE with a vision to decrease direct purchases cost of the assessee which is evident from the submissions of the assessee dated 04.08.2011 (copies of which are placed at page nos. 76 to 166 of the assessee's paper book). The employees of AE, namely Mr. George Moll and Ms. Rita Ricken helped the assessee in material development, development of the product as per European standard, maintenance of CNG machines and technical support to the assessee. For that purpose the AE charged only the salary and related costs of the employees but no mark-up had been charged by the AEs on the said transaction. Therefore, eventually the payment made by the assessee traveled back to the employees who were a third party. As such, the transaction was in the nature of reimbursement of expenses. In the present case, the AE provided the employees to the assessee without any charge or profit accruing to the AE itself. Therefore, the expenses incurred by the assessee were its business expenses. It is well settled that the transfer pricing provisions can be inferred only if there is a related party payment, but in the present case, the expenses incurred by the assessee were paid to the third party employees although those employees were the employees of the AE. In the instant case, the assessee was in need of employees which were provided by its AEs, without any charge of profit accruing to the AE itself. Therefore, it should have been treated in the nature of third party business expenses incurred by the assessee. Moreover, the revenue was earned by the assessee through joint contribution of all the resources and personnel employed by an organization. Therefore, it was not possible to attribute revenues to each and every employee to demonstrate the cost benefit of each employee. In the present case, the employee of the AE provided on job training to the staff of the assessee and they were also engaged in knowledge sharing with the existing employees during the meetings, minutes of which were furnished by the assessee before the authorities below. The AE charged the actual cost of services rendered by the specific

employee and to substantiate the same, the assessee furnished invoices as documentary evidences. In the instant case the TPO placed his reliance on para 7.24 of the OECD Guidelines which states that “to satisfy the arm’s length principal, the allocation method chosen must lead to a result i.e. consistent with what comparable independent enterprises would have been prepared to accept”. In the present case, the TPO was unable to provide any cogent reason for the determination of arm’s length value of professional consultancy at Nil. On the contrary, the assessee explained the benefits received by it on account of the services received from AE.

18. As regards to the application of method for determining the Arm’s Length Price, we are of the view that the method to be used to determine arm’s length price for intra-group services should be in accordance with the guidelines in Chapter-I, II & III of the “OECD Transfer Pricing Guidelines” which provides the various methods to be applied and the CUP method is likely to be a most appropriate method where there is a comparable service provided between independent enterprises in the recipient² market or by the AEs providing the services to an independent enterprise in comparable circumstances. In the present case, the TPO although applied the CUP method but nothing was brought on record to substantiate that the AE provided the similar services to an independent enterprise in comparable circumstances. He also did not bring on record any instance where comparable services were provided to an independent enterprise in the recipient market. Therefore, in our opinion, in the assessee’s case the CUP method was not the most appropriate method. On the contrary, the assessee rightly applied the TNMM method as most appropriate method because it was difficult to apply the CUP method or the cost plus method. Therefore, the TNMM was the most appropriate method in the absence of a CUP which is applicable where the nature of the activities involved, assets used, and risk assumed are comparable to those undertaken by an independent enterprise.

19. In the present case, the assessee divided its operation in the manufacturing and distribution segment. In the manufacturing segment, the net profit margin (OP/Sales) was disclosed at 9.26%, assessee has selected 5 comparable companies and using three years financial data margin of comparables had been computed at 8.40%. In the distribution segment, the assessee has selected TNMM as most appropriate method

and the tested party margin had been computed at 15.21% as compared to average margin of 6 comparables using 3 years financial data at 3.96% and the international transactions were claimed at arm's length. We, therefore, keeping in view the aforesaid discussion are of the view that the impugned addition made by the AO on account of the adjustment made in the receipt of professional consultancy services and management support services rendered by the employees of the AE, was not justified. In that view of the matter we delete the impugned addition.

30. Since the facts of the present case are identical to the facts of the case decided by the Tribunal after considering the various observations made therein, therefore, we hold that TNMM is the most appropriate method in the facts of the present case and that the Assessing Officer/ TPO/DRP are not justified in making any adjustment in the ALP of the international transactions entered into by the assessee on account of professional consultancy, management fee for support service and SAP consultancy charges. We, therefore, direct the Assessing Officer/ TPO to delete the addition. The grounds raised by the assessee are accordingly allowed.

31. In the result, the appeal filed by the assessee is allowed.

Pronounced in the open court on 31.05.2018.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

NEHA

Date:- 31.05.2018

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

		Date	
1.	Draft dictated on	02.05.2018, 30.05.2018 & 31.05.2018	PS
2.	Draft placed before author		PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk		PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		