IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C", KOLKATA

BEFORE SH. J.SUDHAKAR REDDY, ACCOUNTANT MEMBER AND
SH. A.T.VARKEY, JUDICIAL MEMBER

ITA No.515/KOL/2016, 974 & 975/KOL/2017
[Assessment Year: 2011-12, 2009-10, 2010-11]

DCIT, Circle-11(1), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.	**vs**	M/s. AT & S Pvt.Ltd., 12A, Industrial Area, Nanjangud, Mysore, Karnataka-741251. **PAN-AAECA2930J**
(Appellant)		**(Respondent)**

Appellant by	Sh.G.Mallikarjuna, CIT & Sh. Sanjay Paul, Addl. CIT Sr. DR
Respondent by	Ms. Rituparna Sinha & Sh. Anup Sinha, AR
Date of Hearing	07.08.2018
Date of Pronouncement	05.10.2018

ORDER

PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

These three appeals are filed by the Revenue and are directed against the order of DRP-2, New Delhi dated 21.12.2015 for AY 2011-12; order of CIT(A)-22, Kolkata dated 14.02.2017 for AY 2009-10; and order of CIT(A)-22, Kolkata dated 14.02.2017 for AY 2010-11.

2. All the issues raised in these three appeals are common and hence for the sake of convenience, they are heard together and disposed off by way of this common order.

3. The facts of the case are brought out by the Dispute Resolution Panel (in short "DRP") in para 1 to 1.4 as follows:-

> *1.0. "The assessee, AT & S India Private Ltd., ('AT & S India'), has been incorporated in India under the Companies Act, 1956. The assessee is a wholly owned subsidiary of AT &S Austria Technologie & Systemtechnik Aktiongesellschaft ('AT &S Austria') and is primarily engaged into the*

business of manufacture and sale of printed circuit boards. AT &S Austria undertakes distribution of PCB manufactured-by AT &S India and earns commission for distribution functions.

1.1 The assessee filed e-return of income for the previous year relevant to the assessment year 2011-12 on 29th November, 2011 declaring total loss of INR 74,11,66,860/-. During FY under consideration, the assessee reported international transactions representing payment made towards CCA for services, purchase of raw material and sale of finished goods.

1.2 For purposes of benchmarking international transactions of purchase/ sale, the assessee adopted AT &S Austria as tested party and TNMM as MAM with OP/Sales as PLI. Using AMADEUS database, the assessee selected certain companies as corn parables based in different jurisdictions in Europe and worked out average profit margin of 2.79% as against profit margin of 2.57% in case of AT &T Austria, thereby demonstrating that foreign AE has drawn less profit from Indian entity. For benchmarking amount paid/received under CCA, the assessee applied CUP method.

1.3 TPO however rejected economic analysis done by the assessee, treated the assessee as tested party, computed average profit margin of 8.75 % in case of comparables selected by him as against profit margin of (-) 25.63% in case of the assessee, thereby proposing an adjustment of Rs. 6,79,85,673 in respect of export of finished goods and an adjustment of Rs. 1,05,37,266 in respect of import of raw materials. Further, treating intra group services as shareholder/stewardship activities, TPO determined ALP of amounts paid under CCA as NIL thereby proposing an adjustment of Rs. 3,30,94,000.

1.4 The AO in his draft assessment order incorporated these TP adjustments and also made certain additions on corporate tax matters. Aggrieved the assessee filed objections before DRP. Hence, the present proceedings."

4. The nature of services is under Cost Contribution Agreement (in short "CCA") are as follows:-

"Under the Cost Contribution Agreement ('CCA'), five AT&S group companies (including the assessee) combined together and contributed to a common fund for financing global IT services from independent IT companies such as IBM, Microsoft and so forth. The costs incurred under the CCA was allocated to the

group companies (including the assessee) using appropriate allocation keys (number of desktop / SAP end-user points / relation of cost for national WAN lines) without adding any profit element to the said costs. The assessee reimbursed its due share of cost for a sum of INR 3,30,94,000/- to the associated enterprise (administrator of CCA) during the relevant financial year.

(A) <u>Agreements with Microsoft and IBM (on sample basis)</u>

AT&S Austria Technologie & Systemtechnik Aktiengesellschaft (hereinafter referred to as 'AT&S Austria), being the ultimate holding company of the AT&S group, entered into agreements with IBM, Microsoft, SAP and other independent IT companies under the CCA.

a) <u>Agreement with IBM (sample)</u>

The agreement entered into between AT&S Austria with IBM (Austria) on sample basis is summarised below. In a nutshell the nature of IT products and related services secured by the AT&S Group (including assessee) from IBM based on the said agreement (Part documented in English language).

Table No. 1 - Nature of IT products and related services secured from IBM

Sl.No.	*Nature of IT Products*	*Particulars*
1.	*IBM e-business Hosting and e-business Hosting Centers provide the Web hosting services to the AT&S group worldwide (including the assessee). For the purpose receiving the aforesaid service, IBM installs various information technology products (hardware and software) at the premises of the group companies.*	*List of IBM products installed (Windows, i5/OS, AIX) as mentioned in page no. 317 of the paperbook*
		List of software and other information technology products installed (Worldwide Tool Set, Operating System, back-up and recovery media services, media and storage extension, Performance Tools Manager, Application Development Manager, etc.) as mentioned in page no. 318 of the paperbook.
2.	*IBM helps manage and monitor the IBM products, SAP products and Microsoft products installed at AT&S group companies (including the assessee)*	*List of information technology products [SAP enterprise, BW (SAP), SCM (SAP), DB2.90 (IBM), Windows 2003 Server (Microsoft)] managed and monitored by IBM as mentioned in page no. 319 of the paperbook.*
3.	*IBM System Software Products installed*	*A detailed list of IBM System Software products installed is provided in page no. 320 of the paperbook.*
4.	*Interfaces installed by IBM*	*A detailed list of IBM Interfaces along with technical description is provided in page no. 322 of the paperbook.*
5.	*Controls*	*IBM provides very important controls for the information technology infrastructure of the AT&S group companies (including the assessee) which are described in page no. 329 and 330 of the paperbook. These controls are exercised through installation of various information technology products at the premises of AT&S*

		group companies (including the assessee) and remote servers. *1. Administration and Organization: To ensure constant monitoring of IT systems of AT&S group companies by IBM employees.* *2. Physical Security: To ensure that physical access to computer equipment and storage media is restricted to properly authorised persons.* *3. Environmental Controls: To ensure that information technology facilities are protected against environmental threats.* *4. Change Management: To ensure that changes to the existing software and implementation of new system software are authorised, tested and approved.* *5. Problem Management: To ensure that processing issues are adequately* *documented, resolved in timely manner or escalated when necessary.* *6. Computer Operations ebHS: Computer operation procedures used within IBM USF provide for reliable processing environment.* *7. Computer Operation SO: To ensure that computer operators are following procedures, processing is appropriately authroised and scheduled and the deviations from scheduled processing are identified, documented and resolved.* *8. Client Service Delivery ebHS: To ensure that service level objectives are established and measured.* *9. Client Service Delivery ebHS SO: To ensure that service level agreements are established and measured.* *10. Logical Security ebHS: To ensure that logical access to system resources is restricted to properly authorised individuals.* *11. Logical Security SO: To ensure that logical access to system resources (i.e. OS/390, OS/400, Unix, Windows) is restricted to properly authorised individuals as agreed to in GSD331 (IBM internal standards relating to IT , Security).* *12. GSD331 Process Control: To ensure that processes to establish, maintain, implement and review security controls defined in GSD331 exist.*

b). <u>Agreements with Microsoft (Austria)</u>

The Microsoft Premier Support Agreement (sample) and Microsoft Volume Licencing Agreement (sample) and the nature of support received under the aforesaid agreements for the group companies (including the assessee) are described in nutshell below:

Table No. 2 - Nature of IT Support secured from Microsoft

Sl.No.	*Particulars*	*Paperbook page reference*
Microsoft Premier Support Agreement		
1.	*Support Account Management Software*	*386*
2.	*Premiere Online Website: AT&S group companies are Microsoft Premier Online user.*	*389*
3.	*Support Webcast Software: Operations guide for Microsoft Windows Server Update Services*	*389*
4.	➢ *Infrastructure Support Assistance Software* ➢ *Development Support Assistance Software for training programmes, workshop and laboratories*	*390*
5.	*Customer Support manager*	*394*
6.	*System Management/Security Software*	*394*
7.	*Preferred support team from Microsoft*	*395*
Microsoft Volume Licencing Agreement		
1.	*The select licensed program*	*399 (Simple Google Translation Enclosed)*
2.	*Licensing-What accession companies can make use of*	
3.	*What product use rights find application*	
4.	*Ordering product licence*	
5.	*Production of product copies and re-imaging*	
6.	*Transfer and renewal of licence*	

B). Nature of support received from SAP

AT&S Austria has entered into 'SAP Business Suite License Contract' with SAP. 'SAP Business Suite' is a bundle of business applications that provide integration of information and processes, collaboration, industry-specific functionality and scalability. SAP Business Suite is based on SAP's technology platform called Net Weaver. AT&S Austria has also entered into 'Standard Software Maintenance Contract' with SAP which involves payment of maintenance fee for SAP standard software licence. AT&S Austria has entered into 'Non-standard Software Agreement' (including SAP Support Agreement for Non-standard Software) which involve payment of maintenance fee for SAP non-standard or specialised software licence.

C) Nature of support received from T-Systems:

Building 'Data Network' and 'Voice Network' at various business locations: T-Systems have built up global infrastructure of data network and voice network for AT&S group. T- Systems operate for them the information and communication systems which comprise of unified communications and voice over IP on the basis of public and proprietary networks. A voice over IP network allows reduction in network operating costs and improves both flexibility and customer service.

D) Nature of support received from Blackberry:

This category of service includes configuration and operation of mobile devices including 'Push E-MaIJs'. Push e-mail is an email system that provides an always-on capability in which new email is actively transferred (pushed) as it arrives by the mail delivery agent (commonly called e-mail server) to the mail user agent.

E) Nature of support received from Kapsch:

- *Local Area Network (LAN) Management: LAN networking comprises cables, switches, routers and other components that let users connect to internal servers, websites and other LANs via wide area network.*
- *IP Telephony: This category of services includes operation of telecommunication solution under considerations regarding the service levels of the supporting applications and proactive monitoring of the telecommunication solution to assure that the requirements for availability, security, data consistency and performance would be met. In spite of proactive management, occurring problems were documented, analysed and solved. Call-charges are charged to the cost centre. The charging unit was IP Phone.*
- *Video Conferencing Facility: This category of service includes provision of video conferencing facility at the office premise.*

F). Help Tickets

The assessee under the CCA received IT services from independent service-providers viz., Siemens and ATOS during the relevant financial year. The AT&S AG, in order to resolve day- to-day IT related problems (e.g. Lotus Note related problems, SAP related problems etc.), entered into service contracts with Siemens (for example, 'SAP Application Management Framework

Contract' signed with Siemens) and ATOS. The assessee enclosed sample copies of help tickets.

Independent Auditor's Certificate

The assessee enclosed independent auditor's certificate on benefit received and allocation of cost under the CCA. The independent auditor PwC Wirtschaftsprufung GmbH certified that the allocation keys used for distributing total costs to the individual AT&S subsidiaries adequately reflect the benefits obtained by the individual AT&S subsidiaries from the underlying services."

5. The DRP-2, New Delhi vide its order dated 21.12.2015 on para 9 to 9.2 held as follows:-

9.0. Finding:

9.1. "DRP has duly examined the issue. The TPO has determined ALP of payments made under CCA at NIL by observing that services are in nature of stewardship activity for which an independent enterprise shall not make any payment.

9.2. The panel has noted that AT &S Austria has arranged IT services from IBM, Microsoft and T-Systems etc. which shall be available to various group companies and charged as per allocation keys mentioned in CCA itself. TPO has not commented upon appropriateness of allocation keys but has observed that services are in nature of stewardship activity. The panel is not inclined to buy the argument of the TPO that IT services are in nature of stewardship activity. In modern era, it is not possible to administer the business without using IT services. Therefore, it can not be denied that IT services utilised by the assessee are for its own business purpose and an independent enterprise would have asked and paid for such services. Therefore, DRP directs the TPO/AO to delete the addition on this account. The objection is allowed."

6. Similarly, Ld.CIT(A) at para 13 at page 25 of his order held as follows:-

13. "I have carefully considered the entire gamut of the facts and circumstances of the case and the submissions filed by the authorised representative of the appellant against the action of the Ld. AO/TPO in making the impugned additions. I have also considered the case laws cited by the Ld.

A.Rs for the appellant in favour of his contention. I have recorded my findings in details hereinabove. It is pertinent to mention that the appellant submitted detailed nature of IT services received during the relevant financial year and various documentary evidences of receipt of IT services on sample basis in support thereof. The appellant substantiated the arm's length nature of the international transaction under consideration by applying the CUP Method. On the other hand, the TPO had determined the arm's length price of the international transaction under consideration at 'NIL' value solely based on benefit analysis. Further, nothing was found in the TPO's order which was indicative of the existence of any of the circumstances prescribed under clause (a) to (d) of section 92C (3) of the Act which would necessitate intervention of the AO/TPO for determination of arm's length price of an international transaction. It is further pertinent to mention that the TPO had not applied any of the methods prescribed under sub-section (l) read with sub-section (2) of section 92C of the Act for determining the arm's length price of the aforesaid international transactions at NIL value. My aforesaid view has been confirmed by the Hon'ble Kolkata Tribunal in the case of NLC Nalco (India) Ltd (supra)."

7. Aggrieved, the Revenue is in appeal before us on the following grounds:-

1) "Where the Ld DRP has erred in law and in facts in concluding that the intra-group services provided by the AE under the head of IT services are not in the nature of stewardship activities, ignoring the details of IT services provided by the AE, which clearly indicate that the services were meant for exercising overall control and supervision over the assessee company and in the nature of stewardship activities.

2) Whether the Ld. DRP has erred in law and in facts in concluding that the payment for intra-group services was at arm's length without examining the cost of such services if the same was procured from any independent services provider and without examining mark-up element incorporated in the quantum of service fee charged by the AE.

3) The appellant craves leave to add, alter or modify the grounds of appeal."

8. Ld.DR, Sh. G. Mallikarjuna submitted that the Ld. DRP as well as Ld.CIT(A) was wrong in coming to the conclusion that the services in question are not stewardship services. He relied on the order of the Transfer

Pricing Officer (in short "TPO") and submitted that TPO has applied benefit test to the international transaction for coming to the conclusion that the Arm's Length Price (in short "ALP") of the international transaction under the review should be NIL. Ld.CIT DR could not controvert the findings of Ld.CIT(A) as well as Ld.DRP that benefit test, as in the US Transfer Pricing Regulations, cannot be applied under the facts and circumstances of the case and that the ALP cannot be determined as NIL.

9. Nevertheless, Ld.CIT DR vehemently contended that the TPO, as argued by the assessee, has not followed any of the methods prescribed under the Act for determination of the ALP of these inter-group services. He submitted that the cost contribution agreements and the allocation keys have not been examined by the TPO and hence the issue should be set aside to the file of the AO/TPO for determination of the ALP. He relied on certain case law including the judgment of the Hon'ble Delhi High Court in the case of Cushman & Wakefield (India) Pvt.Ltd. 46 taxmann.com 317 (Del.) which we would be referring as and when necessary and emphasised that in case if the Bench concludes that the activity in question is not stewardship activity and determination of ALP at NIL by the AO/TPO has rightly been reversed by the Hon'ble DRP and the Ld.CIT(A), then the case should be restored to the file of the AO/TPO for fresh determination of the ALP.

10. Ld. Counsel for the assessee on the other hand relied on the order of Ld.CIT(A) as well as Ld.DRP and submitted that

(a) The TPO has wrongly placed reliance on foreign regulations and decisions of the foreign Courts. Stewardship activity has not been defined under

the Income Tax Act, 1961 and the TPO placed reliance on US Transfer Pricing Regulations. Reliance was placed on the judgement of the Hon'ble Supreme Court in the case of *CIT vs A.Gajapathy Naidu [1964] 53 ITR 114* and *M.C.Mehta vs Union of India AIR 1987 SC 1086 (SC)* for the proposition that Indian Income Tax Act, 1961 (in short "Act") should be construed on its terms, without drawing any analogy from foreign statues and from the decision of foreign Courts.

(b) The TPO has not complied with the relevant provision of Chapter X of the Act and specifically to sub-section 1,2,3 of section 92CA r.w.s. sub-section (3) of section 92C. It was submitted that the TPO is authorised to proceed to determine the ALP in relation to the international transactions, only when any circumstances mentioned in Clause (a) to (d) of section 92C(3) of the Act is satisfied. Reliance is placed on the following decisions:-

(i) NLC Nalco (India) Ltd. vs DCIT, Circle-10, Kolkata [2016] 71 taxmann.com 57 (Kolkata Tirb.)

(ii) CIT vs EKL Appliances [2012] 24 taxmann.com 199 (Delhi)

(c) Reliance was also placed on the judgement of Hon'ble Delhi High Court in the case of *CIT-I vs Cushman & Wakefield (India) P.Ltd. [2014] 46 taxmann.com 317 (Delhi)* and it was argued that the authority of the TPO is to conduct a transfer pricing analysis to determine the arm's length price and not to determine as to whether the services in question is for the benefit of the assessee or not and that such an exercise would fall within the domain of the AO u/s 37(1) of the Act.

(d) That the assessee has furnished all the documentation including the agreements, copies of the IT agreements on sample basis, copies of IT

help tickets on sample basis and cost allocation certificate issue by independent statutory auditors.

(e) That the DRP has specifically noted that the TPO had not disputed the cost allegation keys used for determination of the amount payable by the assessee to its Associate Enterprise (in short "AE") under the cost contribution agreement and that the TPO has also not rejected the CUP method applied by the assessee for determination of the international transaction.

(f) That the Ld.CIT(A) has given a finding that TPO's order has not indicated the existence of any of the circumstances described under clause a to d to section 92C(3) of the Act so as to necessitate intervention by the AO/TPO for determination of the ALP. Thus it was submitted that the issue cannot be set aside to the file of the TPO for fresh adjudication.

(g) That the Tribunal in the assessee's own case for the AY 2002-03 and subsequent AYs, under the same facts and circumstances, confirmed that the payment made by the assessee was reimbursed of actual cost and hence the assessee was not liable to deduct tax at source on the aforesaid payments. Thus it was argued that the amount paid as cost contribution is at arm's length as it was re-imbursement of cost only

11. Having heard the rival contentions and on a careful consideration of the facts and circumstances of the case and the material available on record, we find that the issue that has to be determined is, Whether the DRP for AY 2011-12 and Ld.CIT(A) for AY 2009-10 & 2010-11 are right in holding that, the determination of ALP of the international transaction of payments made under CCA, at NIL by the TPO is bad in law, as well as on facts.

12. In the case of hand, Ld.CIT(A) in his order for the AY 2009-10 held as follows:-

6. Finding & Decision

1. "It is observed that the appellant AT&S India Private Limited ("appellant") is engaged in the business of manufacture and sale of printed circuit boards ('PCBs'). Ground No.1 to ground no. 6 are interlinked grounds relating to the adjustment made by the AO/TPO in respect of the international transaction involving payment of shared IT service cost (Rs.4,31,39,000/-) by the appellant to its associated enterprise AT&S HK.

2. The appellant, along with other companies belonging to the AT&S group, entered into the 'Cost Contribution Agreement' ('CCA') the detailed terms and conditions of which are mentioned in the Ld. TPO's order. On perusal of this agreement, it is noted that all the parties to the aforesaid agreement combined together and contributed to a common fund for financing the object of arranging various services including the information technology ('IT') services for all the parties to the said agreement. It is further noted that the price of the globally rendered services under the CCA was calculated on the basis of the total costs of each service on actual basis divided by applicable allocation keys as agreed under the CCA and no profit element was added to the costs incurred under the CCA for the purpose of allocation of the same to the parties of the agreement. As per the CCA, AT&S HK, having been one of the parties to the CCA, acted as administrator to the periodical cost allocation process agreed under the CCA and collected payments from the contributing companies that received services under the CCA.

3. I have carefully noted that the appellant submitted the detailed nature of IT services to the Ld. TPO along with evidences of receipt of services on sample basis (e.g. service agreements with global IT giants for securing IT services for CCA participators, order for service placed on global IT giant, IT service requests, organisational chart under the CCA and debit notes raised for payments). The Ld. TPO' examined the aforesaid submissions / evidences and primarily held that the IT services rendered under the CCA were stewardship services. I have further noted that the appellant submitted before the Ld. TPO a cost allocation certificate dated 6th April, 2009, provided by the independent auditor named PwC Wirtschaftsprufung GmbH. This independent auditor recorded its findings that the allocation keys used for distributing total costs to the individual AT&S subsidiaries adequately reflected the benefits obtained by the individual AT&S subsidiaries from the underlying services and the

costs included in AT&S Austria's cost centre analysis were complete and were adequately charged to the cost pool. It was further recorded that the amounts of costs allocated to the assessee and other group companies, recipients of services, were mathematically correctly derived from the underlying calculations.

4. On further perusal of the CCA, it is to be observed that no unrelated business enterprise was party to the CCA and hence, the IT services were arranged under the CCA only for the companies belonging to the AT&S group.

5. It has been mentioned in the Ld. TPO's order that the appellant applied the TNMM Method (overall) for determining the arm's length nature of the international transaction under consideration. I have noted that the Ld. TPO determined the arm's length price of the international transaction at 'NIL' value solely based on the allegation that the said services fell into the category of stewardship activity. Accordingly, the impugned adjustment / addition were made by the Ld.AO. It is also noteworthy that the Ld. TPO did not apply any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Income-tax Act, 1961 for determining the arm's length price of the aforesaid international transaction at 'NIL' value.

6. The appellant's contention is that the Ld. TPO in his order determined the arm's length price of the international transaction under consideration at 'NIL' based on benefit test drawing reference to the US Transfer Pricing Regulation, various judicial precedents in the USA and OECD guidelines/reports/commentaries. In this connection, the appellant placed reliance on the decision of the Hon'ble Supreme Court in the matter of Hon'ble Supreme Court of India in the matter of CIT v. A. Gajapathy Naidu reported in [1964] 53 ITR 114 wherein the Court interalia held that the provisions of the Indian Income-tax Act shall be construed on their own terms without drawing any analogy from English statutes whose terms may superficially appear to be similar but on a deeper scrutiny may reveal differences not only in the wording but also in the meaning a particular expression has acquired in the context of the development of law in that country. The appellant had placed reliance on the decision of the Hon'ble Supreme Court in the case of World Wide Agencies Pvt. Ltd. And Anr. Vs. Mrs. Margarat T. Desor And Ors. [1990 AIR 737] wherein the Court interalia held that the decision of the English Courts are not binding in the courts of India.

7. In this connection, the appellant further placed reliance on the decision of the Ahmedabad Tribunal in the matter of Micro Ink Ltd vs. Additional Commissioner of Income-tax, Vapi Range, Vapi, reported in [2015] 63 taxmann.com 353 (Ahmedabad - Trib.). The Tribunal, placing reliance on the order of the Hon'ble Supreme Court in the matter of Smt. Tarulata Shyam v. CIT reported in [1977] 108 ITR 345 (SC), has confirmed that there is no scope for importing into the statute the words which are not there. Such importation would be not to construe but to amend the statute. It has been further held that the benefit test, which is set out in the OECD Guidance and which finds its place in the international best practices, does not find its

place in the main definition of international transaction, even though there is a reference to the expression 'benefit' in the context of cost or expense sharing arrangements but that is a different aspect of the matter altogether.

8. Based on the aforesaid decisions, it was the contention of the appellant that in the instant case, the TPO had caused injustice to the appellant by determining the arm's length price of the international transaction under consideration at 'NIL' value based on the provisions of the US Regulations, judicial pronouncements in the US Court and OECD guidelines /reports /commentaries which are not binding in the courts of India.

9. It was further the contention of the appellant that the determination of arm's length price of the said international transaction at 'NIL' value without application of any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Act leads to non-compliance by the TPO with the provision of sub-section (3) of section 92CA read with sub-section (3) of section 92Cof the Act. The appellant contended that nothing was recorded in the TPO's order which was indicative of the existence of any of the circumstances prescribed under (a) to (d) of sub-section (3) of section 92C of the Act which would necessitate intervention of the AO/TPO for determination of arm's length price of an international transaction. Hence, the TPO's computation of the arm's length pace of the aforesaid international transaction at 'NIL ' value as aforesaid had no valid basis. In this connection, the appellant placed reliance on the decision of the Kolkata Tribunal in the matter of N L C Nalco (India) Ltd vs DCIT reported in [2016] 71 taxmann.com 57 (Kolkata - Trib.).

10. In rebuttal of the allegation that the intra-group activity performed under the CCA constituted 'stewardship activity', the Ld A.R for the appellant further submitted as under:

> *"Your kindself may please note that the TPO wrongfully applied the principle enunciated Group) is one of the world's largest diversifying financial services companies. Morgan Stanley and Co., USA (hereinafter referred to as 'MSCo ') is an investment bank engaged in the business of providing financial advisory services, corporate lending and securities underwriting. One of the group companies of Morgan Stanley, namely, Morgan Stanley Advantages Services Pvt Ltd. India (hereinafter referred to as "MSAS') entered into an agreement with MSCo for providing certain support services to the MSCo. MSCo sent its own employees (stewards) to MSAS for monitoring the activities performed by MSAS in India. The Hon'ble Supreme Court interalia held that stewardship activities involved briefing of the MSAS staff to ensure that the output met the requirements of MSCo. These activities included monitoring of the outsourcing operations at MSAS. The object was to protect the interest of the MSCo. These stewards were not involved in day to day management or in any specific services to be undertaken by MSAS. The Hon'ble Supreme dour further held that since the stewards did not render any services whatsoever in favour of MSAS and they merely monitored the workings of MSAS with a view to ensuring that the deliverables of MSAS met the quality requirements of MSCo, there was no question of a service PE (i.e, 'permanent establishment') being created by the stewards. In this connection, your kindself may please note that:*
>
> > ** In the instant case, the CCA was formed by AT&S group companies Including the appellant with common needs for certain services, one of them having been IT services. The said services were centralised with a view to avoid duplication of services and to ensure cost saving for the CCA participants. The costs incurred under the CCA were allocated to the CCA participants (including the appellant) based on appropriate allocation keys. However, in the aforesaid case, MSAS was incorporated in India with a view to providing back office functions for MSCo and MSCo sent some of its employees to*

MSAS to ensure that the deliverables of MSAS met the quality requirements of MSCo, thereby protecting the business interest of MSCo.

* *Unlike MSAAS, the appellant was an independent company and functioned as a full-fledged manufacturer of printed circuit boards selling its products directly or indirectly to third party customers only. The appellant did not perform back office functions for any of its associated enterprises during the relevant financial year and hence, the question of monitoring the performance of the appellant by any of its associated enterprises did not arise.*

* *As explained in the 'Submissions on Merits' below, the IT services were pro video through the CCA for regular maintenance and upgrading of the IT infrastructure of the CCA participants including the appellant. Further, the CCA team resolved the IT related problems faced by the personnel of the appellant on regular basis in their day to day activities. However, as held by the Hon'ble Supreme Court in the aforesaid decision, the stewards were not involved in day to day management or in any specific services to be undertaken by MSAS.*

In view of the above, your kindself may please appreciate that the aforesaid decision of the Hon'ble Supreme Court does not apply on the facts of the appellant's case and hence, the services rendered under the CCA cannot be termed as stewardship activities."

11.It was further the contention of the appellant that the AO/TPO allowed the payment made by the appellant for receipt of shared IT services under the CCA for the previous year relevant to the assessment year 2008-09. Thus the AO/TPO violated the 'principle of consistency' enunciated by the Hon'ble Supreme Court of India in the case of Radhasoami Satsang v. CIT reported in [1992] 193 ITR 321/60 Taxman 248 and DIT (International Taxation) v. Morgan Stanley and Co. Inc. reported in [2007] 292 ITR 416 (SC) and also in the case of Commissioner of Income Tax, Delhi-IV, Appellant (s) versus M/s. Dalmia Promoters & Devels. (P) Ltd Respondent(s) reported in [2015] 5 ITR-OL 277 (SC). The consistency principle has been confirmed by the Hon'ble Kolkata

Tribunal in the matter of AT&S India (P.) Ltd vs. DCIT reported in[2016] 72 taxmann.com 324 (Kolkata - Trib.).

12.It was further the contention of the appellant that the Dispute Resolution Panel ("DRP') deleted the adjustments made by the AO for the AY 2011-12 and 2012-13 in respect of the international transaction involving payments made by the appellant under the CCA for receipt of shared IT services based on the TPO's computation of the arm's length price of the international transaction at 'NIL' value based on the benefit analysis. The aforesaid deletion was made by the DRP on the merits of the case after examining the nature of services received by the appellant and the documentary evidences of receipt of services filed by the appellant in this regard. The appellant submitted that the facts and circumstances of the case for AY 2011-12 and 2012-13 were the same as those prevailing for AY 2009-10.

13.An extract of the further technical submissions made by the authorised representative of the appellant is given below:

*"**Reimbursement of Cost***

It may please be noted that the payment made by the appellant to its associated enterprise constituted its due share of costs incurred under the CCA for arranging global IT for the appellant. It is pertinent to note that no profit element was added to the cost incurred under the CCA when the same was allocated to the appellant and other parties to the CCA using appropriate allocation keys ....

In view of the above. it may please be appreciated that the aforesaid payment constitutes reimbursement of cost made by the appellant to its associated enterprise. In this connection, attention is invited to the decision of the Hon'ble Calcutta High Court in the case of CIT v Dunlop Rubber Co Ltd reported in 142 ITR 493 wherein the Hon'ble Calcutta High Court has interalia held that if the foreign company is recovering the actual expenses from the Indian company then the same would not constitute income in the hands of the foreign company in India.

Attention is further invited to the decision of the Hon'ble Delhi High Court rendered in the case of CIT v Industrial Engineering Projects Pvt Limited reported in 202 ITR 1014, therein the Hon'ble Delhi High Court by taking the

cue from the Hon'ble Supreme Court decision in the case of CIT v Tejaji Farasram Kharawalla Ltd (67 ITR 95) has held that the reimbursement of actual expenses would not be taxable in the hands of the person receiving the reimbursements.

Reference is invited to the recent decision of the Hon'ble Bombay High Court in the case of Director of Income Tax vs. A.P. Moller Maersk reported in [2015] 59 taxmann.com 105 (Bombay). The assessee was a foreign company engaged in shipping business. It had three agents in India to book cargo. In order to help them in the business, the assessee had procured and maintained a global telecommunication facility called Maersk Net against some payments by agents which were treated as reimbursement of expenses. The Assessing Officer field that the amounts paid by these three agents to the assessee were considerations / fees for technical services rendered by the assessee and, accordingly, held them to be taxable in India. The Hon'ble High Court interalia held that there was no profit elements in the pro rata costs paid by the agents of the assessee to the assessee and accordingly, the amounts paid by the agents to the assessee could not be brought to tax.

Attention is further invited to the decision of the Hon'ble Chennai Tribunal in the case of Cairn Energy India (P) Ltd. vs ACIT (ITA. Nos. 208 to 211 (Mds.)/2006, Assessment Year 1996-97 to 1999-2000), wherein it was Interalia held that no income accrued or had arisen to the parent company from the payments made by way of reimbursement of expenses. Hence, the provision of section 195 was not applicable since the reimbursement of expense was not chargeable to tax in India. Consequently, the assessee was not required to deduct the tax at source. Hence, the Assessing Officer was not justified in disallowing the payments made by the assessee to its parent company by way of reimbursement of expenses.

Attention is further invited to the decision of the Hon'ble Mumbai Tribunal in the case of JCIT vs. Krupp Uhde GmbH reported in [2009] 28 SOT 254 (Mum.), wherein it was Interalia held that that reimbursement of expenses did not involve element of income and, therefore, could not be taxed.

It may please be further noted that the Hon'ble Kolkata Tribunal in AT&S India vis-a-vis AT&S Austria's own case for the assessment years 2002-03. 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08, by taking cue from the decision of the Hon'ble Calcutta High Court in the case of CIT v Dunlop Rubber

Co. Ltd. (supra), has held that in case of reimbursement of IT cost, no income could be said to have generated in the hands of the AT&S Austria (foreign company) and as such there was no requirement of deduction of tax at source. The Hon'ble Tribunal ultimately deleted the disallowance made by the Assessing Officers in respect reimbursement of IT cost.

In view of our above submissions, it may please be appreciated that the reimbursement of cost made by the appellant to its associated enterprise was not chargeable to tax in India in the hands of associated enterprise since no profit element was added to the cost by the associated enterprise while recovering from the appellant its due share of shared IT service cost under the CCA.

In this connection, attention is invited to the decision of the Hon'ble Bombay High Court in the matter of Vodafone India Services (P.) Ltd. v. Union of India reported in [2014] 50 taxmann.com 300/228 Taxman 25/[2014] 368 ITR 1 (Bom.). The Hon'ble Bombay High Court has interalia held that Chapter X of the Income-tax Act is a computation provision /machinery provision to arrive at the arm's length price. The income arising from an international transaction must satisfy the test of income under the Income-tax Act, 1961 and must find its home in charging provisions. In the event the charging provisions are not applicable, then computation provision / machinery provision would not be attracted. Computation provision / machinery provision cannot replace or substitute the charging provisions. It is pertinent to note that the Income Tax Department did not file any appeal against the decision rendered by the Hon'ble Bombay High Court in the higher forum. In the instant case, since the costs recovered by the associated enterprise from the appellant did not constitute income chargeable to tax in India in the hands of the associated enterprise, the same had not attracted the computation provision / machinery provision contained in Chapter X of the Income-tax Act, 1961, for determination of arm's length price of an international transaction.

In view of this, we humbly pray to your kindself to delete the adjustment of INR 4,31,39,000/- made by the AD in respect of the international transaction involving payment of shared IT service cost by the appellant to its associated enterprise.

Principle of Mutuality

Attention is invited to the decision of the Hon'ble Supreme Court in the case of CIT vs. Bankipur Club Ltd reported in [1997] 92Taxmann 278 (SC), wherein the Hon'ble Apex Court, by taking a cue from Halsbury Laws of England, has enunciated the following principle:

> *"Where a number of persons combine together and contribute to a common fund for the financing of some venture or object and will in this respect have no dealings or relations with any outside body, then any surplus returned to those persons cannot be regarded in any sense as profit. There must be complete identity between the contributors and the participators. If these requirements are fulfilled, it is immaterial what particular form the association takes. Trading between persons associating together in this way does not give rise to profits which are chargeable to tax. "*

The Hon'ble Delhi High Court in the matter of CIT v. Delhi Gymkhana Club Ltd reported in [2011] 10 taxmann.com 114 (Delhi) referred to the judgement given by the Hon'ble Supreme Court in the matter of Chelmsford Club v. CIT reported in [2010] 109 Taxman 215 and held that:

"There are three conditions for applicability of the principle of mutuality, which are discerned from the aforesaid are as follows:

> *(a)Where a number of persons combine together contribute to a common fund for the financing of some venture or object;*
>
> *(b)They have no dealings or relation with any outside body; and*
>
> *(c)Surplus generated are not spent for any other purpose accepting for the welfare of the principles. "*

In the instant case, it may please be noted that the appellant and its group companies combined together under the CCA and contributed to a common fund for the financing of the object of arranging certain services (including information technology services) globally for the benefit of all the parties to the CCA. There was complete identity between contributors and participators in relation to the aforesaid agreement. Your kindself may please note that all the parties to the aforesaid agreement belonged to the AT&S

Group. No independent party participated in the services arranged globally under the CCA. The actual costs incurred under the CCA were allocated only to the group companies who were recipient of services under the CCA and no surplus / profit element was added to the costs while the same was recovered from group companies (including the appellant) using appropriate allocation keys. The fund contributed by the group companies was not spent for any purpose which was not within the scope of the aforesaid agreement. As mentioned hereinabove, the cost allocation process was certified by the independent auditor of the parent company of the appellant, namely, PwC Wirtschaftsprufung GmbH for the relevant year.

In view of our above submissions, it may please be appreciated that in the instant case, the three conditions for applicability of the principle of mutuality, as directed by the Hon'ble High Court of Delhi in the case of Delhi Gymkhana Club Ltd (supra), are satisfied. Hence, the sum of INR 4,31,39,000/- paid by the appellant for receipt of IT shared services satisfies the above principle of mutuality and the same does not constitute income chargeable to tax in the hands of the associated enterprise in India. Since the aforesaid receipt does not attract any of the charging sections, the relevant computation provision / machinery provision contained in Chapter X of the Act for determination of arm's length price would not be attracted. In view of this, we humbly pray to your kindself to delete the adjustment made by the AO in respect of the international transaction involving payment of shared IT service cost by the appellant to its associated enterprise.

13. At para 14 at page 25, he concluded as follows:-

14. "I have considered the entire gamut of the facts and circumstances of the case and the submissions filed by the Ld. A.Rs for the appellant against the action of the Ld. AO/TPO in making the impugned additions. I have also considered the case laws and judicial precedents relied upon by the appellant / Ld. A.Rs in favour of their contention. I have recorded my findings in details hereinabove. It is pertinent to mention that the appellant submitted detailed nature of IT services received during the relevant financial year and various documentary evidences of receipt of IT services on sample basis in support thereof. The appellant substantiated the arm's length nature of the international transaction under consideration by applying the TNMM (overall). On the other hand, the Ld. TPO had determined the arm's length price of the

international transaction under consideration at 'NIL' value solely based on benefit analysis. Further, nothing was found in the Ld. TPO's order which was indicative of the existence of any of the circumstances prescribed under clause (a) to(d) of section 92C (3) of the Act which would necessitate intervention of the AO/TPO for determination of arm's length price of an international transaction. It is further pertinent to mention that the Ld. TPO had not applied any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Act for determining the arm's length price of the aforesaid international transactions at NIL value. Such a view of the matter has been confirmed by the Hon'ble Jurisdictional Kolkata Tribunal in the case of NLC Nalco (India) Ltd, discussed above. In view of the above, the Ld. AO is directed to delete the addition of Rs.4,31,39,000/-. The aforesaid grounds of appeal are allowed."

14. The findings of the Ld.CIT(A) for AY 2011-12 and the finding of the Hon'ble DRP for AY 2011-12 have been extracted by us in para 5 and para 6 of this order. The factual finding concur with the conclusion drawn by the Ld.CIT(A) for AY 2009-10.

15. The factual findings of the Ld. DRP that I.T. services were utilized by the assessee for its own business purpose and any independent enterprise would have to ask and pay for such services is not disputed. We agree with the view of the Ld.CIT(A) that there services are not stewardship services. The arguments and facts have been analysed in details. We do not find any infirmity on the same. Services were rendered and the assessee received benefits. Hence, we hold that the order of Ld.CIT(A) for AY 2009-10 & 2010-11 and Ld. DRP of AY 2011-12 are upheld.

16. Coming to the submissions of the Ld.DR that the issue should be remanded back to the file of the TPO for fresh adjudication, we find that the payment in question was admittedly reimbursement of cost. When the issue of deduction of tax at source on the very same payments had come up before the Tribunal in the assessee's own case for AY 2002-03 and the subsequent years, it was held that

these were reimbursement of actual cost and hence no tax may be deducted at source on these payments.

17. Moreover, the conditions specified in section 92CA r.w.s 92C(3) are not complied with the TPO. Hence, no purpose could be served in restoring the issue back to the file of TPO for fresh adjudication for determination of ALP.

18. Section 92CA r.w.s 92C(3)of the Act is extracted for ready-reference:-

> *3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that-*
>
> *(a) the price charged or paid in an international transaction for specified domestic transaction] has not been determined in accordance with sub-sections (1) and (2); or*
>
> *(b) any information and document relating to an international transaction or specified domestic transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or*
>
> *(c) the information or data used in computation of the arm's length price is not reliable or correct; or*
>
> *(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub- section (3) of section 92D."*

19. The Co-ordinate Bench of the Tribunal in the NLC Nalco (India) Ltd. held as follows:-

> *19. "We have gone through the data as well through the details filed by assessee in its paper book and the TPO himself mentioned in his order that the assessee performed arm's length analysis in respect of all the international transactions entered into by assessee with its associated enterprises under section 92C of the Act read with rule 10B and 10C of the Rules. And that nothing was found in the TPO's order which was indicative of*

the existence of any of the circumstances prescribed under (a) to (d) of section 92C (3) of the Act which necessitates intervention of the AO/TPO for determination of arm's length price. But TPO, determined the arm's length price of the international transactions under review at 'NIL' value, based on his main allegation that the benefits claimed to have been received by the assessee from Nalco Pacific under the agreement would not be ones for which an independent enterprise would be willing to pay. In this connection Ld. Counsel referred to the decision of the Hon'ble Delhi High Court in the case of CIT v. EKL Appliances [2012] 24 taxmann.com 199 (Delhi), wherein the Hon'ble High Court has examined the issue as to whether the TPO has power to restrict the value of an international transaction to nil when he was supposed to have determined the arm's length price of the international transaction. The Hon'ble High Court after examining the facts of the case held as under:

> *"19..... 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.*
>
> *22. Even Rule 10B(1)(a) does not authorize 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 un-remunerative 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 l0B. Whether or not to enter into the transaction is for the assessee to decide..... 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 ..."*

20. Ld. Counsel also relied on the case of CIT v. Walchand& Co. etc. [1967] 65 ITR 381, the Hon'ble Apex Court has held 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. The essence is that a businessman himself is the best judge in determining the reasonableness / usefulness / benefit of an expenditure which is wholly and exclusively laid out for the purpose of business. The Revenue has no role to play in determining the reasonableness / usefulness / benefit of a business expenditure. However, in the instant case, the TPO had judged the reasonableness of the aforesaid intra-group service charge (regarding which there was no dispute that the same was incurred wholly and exclusively for the purpose of business) from his own point of view and computed the arm's length price of the international transactions under review at 'NIL' value based on his main allegation that the benefits claimed to have been received by the assessee from Nalco Pacific under the aforesaid agreement would not be ones for which an independent enterprise would be willing to pay. Hence, the first ground for confirming the disallowance by CIT (A) will not stand. Ld. Counsel also referred to the case of CIT v. EKL Appliances (supra), the Hon'ble Delhi High Court has held that rule 10B of the Rules does not authorize 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 un remunerative. The Hon'ble High Court has further held that the quantum of expenditure can be examined by the TPO as per law and 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. But in the present case before us, the TPO judged the reasonableness of the aforesaid intra-group service charge and computed the arm's length price of the international transactions under review at 'NIL' value based on his main allegation that the benefits claimed to have been received by the assessee from Nalco Pacific under the aforesaid agreement would not be ones for which an independent enterprise would be willing to pay. The CIT (A) also confirmed his order.

21. Attention was further invited to the decision of Hon'ble Delhi Tribunal of McCann Erickson India (P.) Ltd vs. Addl. CIT [2012] 24 taxmann.com 21 (Delhi), wherein the Tribunal, following the aforesaid decision of the Hon'ble Delhi High Court, has interalia held that:

> *"9. We have heard both sides and have also gone through the orders of the AO, TPO and DRP.... The evidences have been submitted before the*

authorities below showing rendering of the certain services against the payments made to the associated enterprises. In the arena in which the assessee company is functioning, it will be difficult to imagine a successful business entity in the global environment without receipt of the services which carries huge intrinsic and creative value. In our considered view, it is only a particular business expert who can evaluate the true intrinsic and creative value of such services. In view of these facts, it shall be just to avoid any guesswork to evaluate or judge value of these services in isolation or individually. In any case, the value of these services cannot be taken at nil which the AO as well as TPO originally sought to do..... The term "benefit" to a company in relation to its business has a very wide connotation. It is difficult to accurately measure these benefits in terms of money value separately. Therefore, we find no justification to sustain any addition in this regard on this issue. We direct to delete the addition and this ground is allowed."

22. We have gone through the case of McCann Erickson India (P.) Ltd. (supra), the Delhi Tribunal has held that it is only a particular business expels who can evaluate the true intrinsic and creative value of intra-group services and in any case, the value of these services cannot be taken at nil. However, in the instant case, the TPO judged the reasonableness of the aforesaid intra-group service charge and computed the arm's length price of the international transactions under review at 'NIL ' value based on his main allegation that the benefits claimed to have been received by the assessed from Nalco Pacific under the aforesaid agreement would not be ones for which an independent enterprise would be willing to pay. The CIT(A) accepted the valuation of the intra-group services made by the TPO at 'NIL ' value. We have observed from the facts of the case that in the instant cage, the TPO determined the arm's length prices of the intra-group services claimed to have been received by assessed from Nalco Pacific at 'NIL' value without applying any of the transfer: pricing methods prescribed under section 92C of the Act read with rule 10B and 10C of the Rules. In this connection, Co-ordinate bench decision of Mumbai Tribunal in the matter of Dy. CIT v. Diebold Software Services (P.) Ltd. [2014] 48 taxmann.com 26/151 ITD 463 was referred, wherein the principle laid down by Tribunal along with brief facts are as under:

** The assessee received information technology (in short, 'I.T.') services from its associated enterprise and paid service charge to the latter. The assessee clubbed the aforesaid international transaction together with other international transactions, applied the TNMM as the most appropriate method and selected a set of external comparables. As per this analysis, the international transactions covered under the TNMM, were at arm's length. The aforesaid analysis by assessee was not disputed by the TPO.*

** The assessee was called upon by TPO to provide the basis of pricing of these transactions. The assessee was also required by the TPO to provide necessary details along with allocation keys and basis of calculation of payment made for I.T. support services. According to TPO, the assessee, however, failed to comply with these requirements and the ALP of the relevant transactions therefore was determined by TPO at 'nil ' value.*

** The CIT(A) held that the action of TPO in arriving at the ALP of the relevant international transactions at "nil" was without any basis and accordingly he deleted the addition made on account of the transfer pricing adjustments made by A.O./TPO holding the same to be unsustainable.*

** The Tribunal observed that the exercise of benchmarking made by the assessee to show that the price charged by its associated enterprise for providing IT support services was at arm's length had not been disputed by TPO. It was also observed by the Tribunal that the arm's length price of the international transaction under review was determined by the TPO at "nil" without applying any of the prescribed methods and the entire payment made by the assessee for availing the IT support services from its associated enterprise was added as TP adjustment.*

** In view this, the Tribunal had given the decision that the addition made by A.O./TPO on account of TP adjustments in respect of the international transactions of the assessee company with its AE involving availing of IT support services was not sustainable either in law or on the facts of the case. The Tribunal upheld the order of CIT(A).*

23. According to assessed the aforesaid decision is squarely applicable to the case of assessed. In the instant case, TPO computed the arm's length price of intra-group services received by assessed from Nalco Pacific under the aforesaid agreements at 'nil' value without applying any of the transfer pricing methodologies prescribed under section 92C of the Act read with idle IOB and IOC of the Rules. Accordingly, the action of the TPO in arriving at the arm's length price of the relevant international transactions at 'nil ' value without application of any transfer pricing methodology, was without any basis and hence, was not sustainable. In the instant case, TPO was authorised to determine, by order in writing, the arm's length price of an international transaction in accordance with section 92C (3) of the Act. The TPO mentioned in his order that during the course of hearing in response to notice issued under section 92CA (2) of the Act, assessee had attended the office of the TPO from time to time and filed details as requisitioned by the TPO which were placed on records. The TPO had examined the details filed by assessee and based on such examination, he held in his order that the pacing of the aforesaid agreements was justified by assessed on the basis of the TNMM. We find that the TPO did not make any adverse comments in his order upon the arm's length analysis carried out by assessee under the TNMM as per section 92C of the Act read with rule IOB of the Rules. Accordingly, we feel that TPO made proper enquiry and applied his mind to the details brought on record by assessed. He had agreed with the assessed that the international transactions covered by the TNMM analysis (including the intra-group service change paid/payable to Nalco Pacific) adhered to the arm's length principle Transfer Pricing Regulation.

24. Further, it is also a fact that the aforesaid intra-group service charge was allowed as deduction by TPO for the assessment years 2005-06, 2006-07, 2007-08 and 2008-09. In this connection, Ld. Counsel referred to the decision of the Hon'ble Calcutta High Court in the case of CIT vs Britannia Industries Ltd. [2002] 257 ITR 225/[2003] 132 taxman 16, wherein Hon'ble Calcutta High Court has held that the Department cannot take a. contrary view in respect of any issue which has been accepted by the Department for succeeding assessment year based upon the similar set of facts. Thus, by following the above principle laid down by the Hon'ble Calcutta High Court, we feel that the action of TPO in making disallowance of the intra group service charge paid/payable by assessee to Nalco Pacific for the assessment year

2004-05, after allowing the same for the assessment years 2005-06, 2006-07, 2007-08 and 2008-09 based on the same facts, has no leg to stand. Ld. Counsel referred to the relevant information in the tabular format:

Intra-group Service Charges

Assessment Year	*Associated Enterprise*	*Intra-group Service Charge allowed as deduction(Rs. '000)*
2005-06	*Nalco Pacific Pte Ltd.*	*19,543*
2006-07	*Nalco Pacific Pte Ltd.*	*31,128*
2007-08	*Nalco Pacific Pte Ltd*	*27,157*
2008-09	*Nalco Pacific Pte Ltd*	*28,120*

We also find 6om the records that assessed submitted various evidences of receipt of intra-group services to the TPO which are enclosed in page no 71-79, 103-124, 129-132, 133-138, 139-140, 143-144 and 157- 162 of the assessee's paper book. The assessed also furnished explanation in regard to the nature of the aforesaid services in page no. 9, 11 and 12 of its first submissions. Further, in appeal before CIT(A) also assessed submitted a certificate of services dated 01.09.2008, issued by Liaw Hin Hao, Finance Director, Namco Pacific. Copy of the certificate was also submitted before us and marked the same as Annexure No.1. The certificate contains the nature of services rendered by Nalco Pacific to Nalco Asia Pacific group of companies including, the personnel/department engaged in rendering service, expenses incurred by various personnel/departments in rendering services from the year 2002 to 2004(separately for each year) and the intra-group service fees charged (billing) by Namco Pacific to various group companies including the assessed company from the year 2002 to 2004 (separately for each year), The assessed also submitted various evidences of receipt of intra-group services to CIT(A) which are enclosed in page no 195-216, 243, 249-252 of the assessee's paper book. The assessed also filed explanations in regard to the nature of the aforesaid services in page no. 10 of its first submissions.

25. In the instant case, Nalco Pacific operated as the regional headquarters company in relation to Nalco Asia Pacific group of companies including assessed. It functioned as a group service centre and recruited regional employees, though located in Singapore, exclusively for the purpose of rendering services to Namco Asia Pacific group of companies including assessed. Nalco Pacific incurred expenses for the payment of salaries & other benefits to the regional employees. We find that the services rendered by

Nalco Pacific to assessee under the agreement were similar to the services mentioned in paragraph no.7.14 of the OECD Guidelines. In view of this, we appreciate that the services rendered by Nalco Pacific to assessee were intra-group services for which independent enterprises would have been willing to pay for or to perform in-house for themselves and hence, the value of the aforesaid services in comparable uncontrolled transactions could not be 'nil'. The paragraph no. 7. 12 of the OECD Guidelines provides that there are some cases where an intra-group service perforated by a group member such as a shareholder or coordinating centre relates only to some group members but incidentally provides benefits to other group members. Examples could be analysing the question whether to recognise the group, to acquire new members, or to terminate a division. These activities may constitute intra-group services to the particular group members involved, for example those members who will make the acquisition or terminate one of their divisions, but they may also produce economic benefits for other group members not involved in the object of the decision by increasing efficiencies, economies of scale, or other synergies. The incidental benefits ordinarily would not cause these other group members to be treated as receiving intra-group services because the activities producing the benefits would not be ones for which an independent enterprise ordinarily would: be willing to pay. But in the instant case no such benefits such as those mentioned in paragraph no. 7. 12 of the OEC]) Guidelines accrued to assessed under the agreement and hence, no incidental benefits accrued under the agreement.

26. Accordingly, We are of the view that the first ground for confirming disallowance by CIT(A) that no independent documentary evidence had been furnished by assessed to show that the fact of actual services having been rendered to assessed and Nalco Pacific too could not substantiate the claim 6or provision of actual services with documentary evidence, has no leg to stand."

20. The Mumbai Bench of ITAT in the case of *DCIT vs Diebold Software Services (P.) Ltd. [2014] 48 taxmann.com 26 (Mum.-Trib.)* at para 5 held as follows:-

5. "We have beard tile arguments of both the sides and also perused the relevant material available on record. It is observed that the assessee's international transactions with its AE involving the availing of IT support

services were bench-marked by the assessed in the TP study report by adopting the TNMM as the most appropriate method and selecting a set of external comparables. As noted by the Id. CIT(A) in his impugned order, this exercise of bench-marking made by the assessed to show that the price charged by its AE for providing IT support services was at arm's length had not been disputed by the TPO and this position clearly evident from the order of the TPO has not been disputed even by the Id. D.R. at the time of hearing before us. It is also observed that the ALP of the said transactions was determined by the TPO at "nil' without applying any of the prescribed methods and the entire payment made by the assessed for availing the IT support services from its AE was added as TP adjustment. In the case of Merck Ltd. V. Dy. CIT [2014] 148 ITD 513/[2013] 37 taxmann.com 433 (Mum. Trib.) cited by the Id. Counsel for the assessee, similar facts were involved inasmuch as the assessed had applied TNMM to show that the margin earned by it from the relevant transactions with its AE was higher than the comparable companies. The TPO, however, did not accept the TP analysis made by the assessed without giving any reasons and made TP adjustment without applying any prescribed methods. The TPO also did not make any Charts to determine the market value of services received by the assessee from its AE in order to show that the assessee had paid more to its AE as compared to any independent party for the same services. In these facts and circumstances, the coordinate bench of this Tribunal held that the addition made by way of TP adjustment was not sustainable as it was not permissible under Transfer Pricing Regulation to make TP adjustment on account of any international transaction without applying any one of the prescribed methods. Reliance on this regard was placed by the Tribunal on the case of Mccan Ericson (India) (P.) Ltd. V. Addl. CIT [2012] 24 taxmann.com 21 (Delhi) wherein the TP adjustment made by the A.O./TPO by taking value of certain services at "nil" was held to be unsustainable by the Tribunal. Keeping in view these decisions of co-ordinate Bench of this Tribunal and having regard to all the relevant facts of the case as summarized by the Id. CIT(A) in his impugned order, we hold that the addition made by the A.O./TPO on account of TP adjustments in respect of the international transactions of the assessed company with its AE involving availing of IT support services was not sustainable either in law or on the facts of the case and the Id. CIT(A) was fully justified in deleting the same. We, therefore, uphold the impugned order of the Id. CIT(A) giving relief to the assessed and dismiss this appeal filed by the Revenue."

21. Similar is the decision of ITAT, Ahmedabad Bench in the case of *Schneider Electric India (P.) Ltd. Vs DCIT [2017] 82 taxmann.com 364 (Ahmedabad-Trib.)* at para 9 & 10 held as follows:-

> *9. "We are in considered agreement with the views so expressed by the coordinate bench and the impugned addition must stand deleted for this short reason alone. In our considered view, the facts of the case before us are materially similar inasmuch as the services are indeed rendered by the SEl-F, as evident from the documentary evidences on record and yet its arm's length value is held to be NIL only because. According to the authorities below, these services were worthless, these services were not required by the assessee, the assessee could have performed these services on its own and the services were not rendered by the group entity. The TPO has rejected the determination of arm's length price on the basis of TNMM, at entity level, but then he has not adopted any other permissible method for determination of arm's length price. Such a course of action, as noted above, is not permissible in law. Just because these services are worthless in the eyes of the revenue authorities, the arm's length price of these services cannot be held to be NIL. Similarly, the findings that no services were rendered and that the assessee could have performed these services on its own are contradictory. If no services were rendered, which services the authorities below hold that the assessee could have performed on its own. There is also evidence for visits by the representatives of the group entity, i.e SEl-F, for rendition of these services The cost allocation agreement and detailed documentation support for the services availed under the cost contribution arrangement were placed before us at pages 106 to 258, and. upon perusal of the same, we have no doubts about the actual rendition of services and bona6tdes of arrangement. As for the TPO's observation that ""if the services are in the nature of stewardship activities or shareholder activities, the same need not be charged by the AEs of the assessee", OECD Transfer Pricing Guidelines indeed state that "Stewardship activities covered a range of activities by a shareholder that may include provision for services to other group members, for example services that would be provided by a coordinating centre", that "These latter type of non-shareholder activities could include detailed planning services for particular operations, management or technical advice (trouble shooting) or in some cases assistance in day to day management" but make it clear that*

while shareholder activities, i.e. the activities which are performed solely on account of ownership interests, "would not justify a charge to the recipient entities", in other words, consideration is not required to be charged for the shareholder activities, while other stewardship activities can, and must, be compensated. Nothing, therefore, turns in favour of the revenue on account of the services rendered by the SEl-F being in the nature of stewardship activities which is a temp of much broader connotation than shareholder activities. Not chalking for the rendition of shareholder activities can be justified but not for all the stewardship activities. Coming to the question of business expediency, which has been questioned by the authorities below, in our considered view it was also not 6or the TPO to bother about business expediency of these services; all he was to see was what would be arm's length services of these servicing in an uncontrolled situation. That has to be done on the basis of a permissible method of ascertaining the arm's length price. It cannot be open to the TPO to reject a method of ascertaining the arm's length price without fining a legally permissible method to substitute for the method of ascertaining ALP as adopted by the assessee. To hold that the arm's length price of these services was NIL under the CUP method. the TPO had to necessarily to demonstrate that the same services. whatever be its intrinsic worth. were available for NIL consideration in an uncontrolled situation: that is not. and that cannot be. the case. It is also not the case of the authorities below that the arm's length price of these services, under any other legally permissible method is, NIL There is thus no legally sustainable foundation for the impugned ALP adjustment.

10. We have also noted that the managerial services, availed by the assessed under the same cost contribution arrangement. have been allowed all these years and have been accepted to be at an arm's length transaction. While there is indeed no res judicata in tax proceedings, its important to bear in mind the observations of Hon'ble Supreme Court in the case of Radhasoami Satsang v CIT [1992] 193 ITR 321/60 Taxman 248, to the effect that "where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and panics have allowed that position to be sustained by not challenging the order. it would not be at all appropriate to allow the position to be changed in a subsequent year". For this reason also, the stand of the authorities below is unsustainable in law. In the light of these discussions, as also bearing in mind entirety of the case, we

uphold the plea of the assessee and direct the Assessing Officer to delete the impugned ALP adjustment of Rs.1,51,83,140. The assessee gets the relief accordingly."

22. The proposition of law laid down in these case laws apply to the facts of this case. Hence, in view of the above finding, order of Ld.CIT(A) in the AY 2009-10 & 2010-11 and the order of DRP for AY 2011-12 are hereby upheld.

23. In the result, all three appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 05.10.2018.

Sd/-	**Sd/-**
(A.T.VARKEY)	**(J.SUDHAKAR REDDY)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 05.10.2018
Amit Kumar

Copy forwarded to:

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2. Respondent- M/s. AT & S Pvt.Ltd., 12A, Industrial Area, Nanjangud, Mysore, Karnataka-741251.
3. CIT-Kolkata
4. CIT(Appeals)-Kolkata
5. DR: ITAT-Kolkata Benches

Sr.P.S./H.O.O
ITAT, KOLKATA