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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 1057/Del /2016
Assessment Year: 2011-12

ACIT, **Circle-11(2),** **C.R. Building,** **New Delhi-110002**	**vs**	**Humboldt Wedag India Pvt. Ltd.,** **Mehtab House, A-36,** **Mohan Co-op Estate,** **Mathura Road,** **Delhi-110044** **(PAN: AAACH7474G)**
(Appellant)		**(Respondent)**

ITA No. 567/Kol /2015
Assessment Year: 2010-11

DCIT, **Circle-8(1),** **Kolkata.**	**vs**	**Humboldt Wedag India Pvt. Ltd.,** **Mehtab House, A-36,** **Mohan Co-op Estate,** **Mathura Road,** **Delhi-110044** **(PAN: AAACH7474G)**
(Appellant)		**(Respondent)**

ITA No. 494/Kol /2015
Assessment Year: 2010-11

Humboldt Wedag India Pvt. Ltd., **Mehtab House, A-36,** **Mohan Co-op Estate,** **Mathura Road,Delhi.** **Delhi-110044**	**vs**	**DCIT,** **Circle-8(1),** **Kolkata.**
(Appellant)		**(Respondent)**

ITA No. 1154/Del /2016
Assessment Year: 2011-12

ITA No. 3207/Del /2016
Assessment Year: 2011-12

Humboldt Wedag India Pvt. Ltd., **Mehtab House, A-36,** **Mohan Co-op Estate,** **Mathura Road,Delhi.** **Delhi-110044**	**vs**	**ACIT,** **Circle-11(2),** **C.R. Building,** **New Delhi-110002**
(Appellant)		**(Respondent)**

Appellant by : Shri Sanjay I. Bara, CIT DR
Respondent by : Shri Rajneesh Verma, CA

Date of Hearing : 21 03 2018
Date of Pronouncement: : 11 06.2018

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

ITA No. 494/Kol/2015 is assessee's appeal against the final assessment order passed subsequent to the directions of the Ld. DRP in assessment year 2010-11, whereas ITA 567/Kol/2015 is the department's cross appeal for the same year. ITA No. 1057/Del/2016 is the department's appeal against the final assessment order passed subsequent to the directions of the Ld. DRP for assessment year 2011-12. ITA No. 1154/Del/2016 is the assessee's cross appeal for assessment year 2011-12 and

ITA No. 3207/Del/2016 is also assessee's appeal for assessment year 2011-12 wherein order u/s 154(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') passed by the Transfer Pricing Officer (TPO) has been challenged. All these appeals were heard together and for the sake of convenience, they are being disposed of through this consolidated order.

2. At the outset, the Ld. CIT DR submitted that the department's appeal for assessment year 2010-11 and bearing ITA No. 567/Kol/2015 was delayed in filing by a period of ten days due to the file being on transit movement through the proper channel. He drew our attention to the delay condonation application and the affidavit in this regard and prayed that the delay be condoned.

2.1 The Ld. AR opposed the prayer for condonation of delay and submitted that the appeal should be dismissed.

2.2 Having heard both the parties and after having gone through the affidavit as well the delay condonation

application, we are of the considered opinion that in the interest of justice, the delay deserves to be condoned. We, accordingly, condone the delay.

3. Brief facts of the case are that the assessee is a wholly owned subsidiary of KHD Humboldt Wedag International GmbH (Humboldt Austria). The company is primarily engaged in designing, supplying of equipment, supervision of installation, erection and commissioning activities for the cement industry on a turn-key basis (non-civil). The return of income for assessment year 2010-11 was filed at a total income of Rs.77,56,15,890/-. Subsequently, after processing of the return u/s 143(1) of the Act, the return was selected for scrutiny through CASS. Reference was also made to the Transfer Pricing Officer (TPO) u/s 92CA of the Act for determination of the Arms Length Price (ALP) in respect of the international transactions entered into with its Associated Enterprises (AE). During the assessment year 2010-11, the assessee had entered into the following international transactions with its AE:-

SNo	Associated Enterprise	Description of transaction	Class of transaction	Amount paid (Rs.)	Amount received/	Method used
1.	Humboldt Wedag GmbH. Koln	Contract revenue	Services		300,180,209	TNMM
		Technical services revenue	Services		8,413,345	TNMM
		Purchase of spare parts	Import of raw materials	8,090,549		TNMM
		Purchase of fixed assets	Reimbursement	3,199,540		CUP
		Supervision expenses	Services	1,241,805		TNMM
		Bank guarantee expenses	Services	3,768,492		CUP
		Repair & maintenance expenses	Reimbursement	4,846,213		CUP
		Travelling conveyance	Reimbursement	1,517 445		CUP
		Insurance	Reimbursement	14 789,301		CUP
		Seminar expense	Reimbursement	58,778		CUP
		Staff welfare expenses	Reimbursement	782,451		CUP
		Training expenses	Reimbursement	494,423		CUP
		Recovery of expenses	Rec very of expenses		35,901,653	CUP
2.	KIID Humboldt Wedag International Gmbh	Payment for royalty	Royalty	36,666,003		CUP
		Bank guarant e exp ns s	Services	35,992,003		CUP
		Legal & pro essional ex enses	Services	32,589,168		TNMM
		Recovery of expenses	Reimbursement		530,066	CUP
3.	Humboldt Wedag Inc. USA	Supervision expenses	Services	1,743,454		TNMM
4.	Reimbursement of expenses		Reimbursement	377,054		CUP
	HumboltWedag Coal & Mineral Tech Gmbh	Purchase of Spare parts	Import of raw materials	231,661		TNMM

3.1 As per the Transfer Pricing Study (TP Study), the Profit Level Indicator (PLI) had been calculated at 8.27% by taking OP/TC and the assessee had selected 8

comparables at the entity level. The TPO, however, conducted a fresh search for determining the companies which were performing similar functions. In the process, he identified 21 comparables with an average margin of 16.51%. Thereafter, after taking the objections of the assessee into consideration, the TPO selected a list of 22 companies as comparable having an average margin of 16.77%. The TPO proceeded to make a transfer pricing adjustment of Rs. 5,15,14,950/- on account of the difference in ALP on the price charged by the assessee to its AE. The TPO also allowed a downward pricing adjustment of Rs. 22,80,898/- by giving benefit in respect of operating cost with respect to the international transaction as compared to the operating cost of the assessee as a whole. The TPO also made an upward adjustment of Rs. 3,25,89,168/- with respect to the ALP of the intra- group services received by the assessee.

3.2 The AO also made some other disallowances/additions in the final assessment order which pertained to liquidated damages, addition in

respect of advances and deposits written off and addition relating to provision for warranty

3.3 Aggrieved, the assessee approached the Ld. Dispute Resolution Panel (DRP) and the Ld. DRP, after considering the objections of the assessee, directed the TPO to re-compute the determination of ALP by directing the re-computation of profit level indicator for upward and downward adjustment. The Ld. DRP, however, upheld the adjustment of Rs. 42,50,763/- with respect to legal and professional services received by the assessee under intra group services The Ld. DRP, however, gave relief to the assessee in respect of liquidated damages, addition in respect of advances and deposits written off and addition relating to provision for warranty

3.4 Now, the assessee has approached the ITAT challenging the directions of the Ld. DRP and the subsequent order of the Assessing Officer (AO) in making an adjustment of Rs.42,50,763/- (including mark up) towards receipt of intra group services.

3.5 The Department is also before the ITAT and is challenging the directions of the Ld. DRP in deleting the disallowance pertaining to liquidated damages, addition in respect of advances and deposits written off, deletion of addition relating to provision for warranty as well as for giving relief in respect of transfer pricing adjustment *vis-a-vis* intra group services.

3.6 The respective grounds raised by both the parties are as under:-

3.6.1 <u>ITA No.567/Kol/2015 (Department's appeal):</u>

> *" 1. That the DRP has erred in law and in facts, in disallowing the addition of provision for liquated damages, without examining the issue involved and the findings of the A.O.*
>
> *2. That the DRP has erred in law and in facts in disallowing the addition of advances & provisions written off, without allowing the AO to examine whether the entries were actually written off in the books and ledger of the assessee.*
>
> *3. The DRP has erred in law and in facts, in disallowing the addition of provision for warranty, as the assessee has failed to maintain a scientific and consistent method for estimation of/determination of its provision for warranty.*
>
> *4. Whether the Ld DRP has erred in concluding that the services offered by the AE was not stewardship service, whereas the purpose of management services*

agreement, between the KHD Humboldt, and the assessee company, resulting in payment for legal & professional charges under consideration, was to exercise control and supervision of the assessee's activities to fit the same, into the overall plan of the entire group with sole purpose for maximization of group profitability and parent company's return, indicating the services rendered by KHD Humboldt, AE was of stewardship in nature and in the form of shareholder activity."

3.6.2 ITA No.494/Kol/2015 (Assessee's appeal):

General Ground

1. *That on the facts and circumstances of the case the Hon'ble DRP, Learned Transfer Pricing Officer ('Ld. TPO') and accordingly the Learned Assessing Officer ('Ld. AO') have erred in making an adjustment of Rs. 42,50,763 to the international transactions of the appellant with its Associated Enterprises (hereinafter referred to as 'AEs').*

Specific Grounds

2. *That on the facts and circumstances of the case, the Hon'ble DRP has erred in disallowing mark-up charged by the AE in providing Intra Group Services ("IGS") to the Appellant by considering that the same is not charged by following arm's length principle.*

3. That on the facts and circumstances of the case, the Appellant calculated the mark-up charged by the AE on the basis of a benchmarking analysis. However, the Hon'ble DRP erred in not considering the benchmarking analysis undertaken by the Appellant and subsequently disallowing the mark-up charged by considering it not at arm's length.

4. That on the facts and circumstances of the case, the Ld. TPO and accordingly the Ld. AO have erred in disallowing Rs. 42,50,763 as mark-up charged by the

AE on Appellant for providing IGS. The amount represents withholding taxes (Rs.32,58,919) and mark-up (Rs. 9,91,844).

5. That on the facts and circumstances of the case, the Ld. TPO and accordingly the Ld. AO has erred in considering withholding tax (Rs.32,58,919) as mark-up and subsequently disallowing it from the income of the appellant as part of mark-up charged by AE. Further, the Ld. TPO and consequently the Ld. AO have erred in not appreciating the fact that the Appellant has already paid Rs. 32,58,919 as withholding tax.

6. Without prejudice to the above ground, assessee would like to put forward that had the assessee taken such services from a third party, it would have charged a mark-up for such services. Hence, on reasonable facts and circumstances, the Hon ble DRP erred in giving direction for adjustment to the extent of mark-up charged by the AE for providing intra-group services.

7. Without prejudice to all the above Grounds, the assessee craves leave to add to and to alter, amend, rescind or modify the grounds raised hereinabove before or at the time of hearing of the appeal.

Corporate Tax Related:

8. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in proposing and the Hon'ble DRP has erred in confirming the disallowance of provision for loss on suspended contracts of Rs. 9,00,00,000 by treating the same as contingent or disputed liability.

9. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in proposing and the Hon'ble DRP has erred in not appreciating that,

(i) Provision is in respect of advance bank guarantee actually encashed by the customer in respect of suspended/ terminated contract, resulting in actual

business loss to the appellant;

(ii) It is an allowable deduction in accordance with the principles laid down by the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd Vs CIT [2009] 180 Taxmann 422 (SC) i.e. reliable estimation, outflow of resources, fulfils matching concept;

(iii) Without prejudice to the above, the Ld. AO should be directed to allow the deduction in the next assessment year [i.e. Assessment Year 2011-12] as per directions of the Hon'ble DRP."

4. The Ld. AR submitted that ground nos. 1 and 3 in the department's appeal pertaining to provision for liquidated damages and provision for warranty respectively were considered by the ITAT in assessee's own case for assessment year 2008-09 also. It was submitted that ITAT Delhi Bench in assessee's own case for assessment year 2008-09 in ITA No. 2295/Del/2013 had held that provision for liquidated damages was deductible if the assessee, while writing back the provisions, had paid tax on the excess provision. With respect to the provision for warranty, it was submitted that if the provision has been made based on actual expenditure incurred on warranty, no disallowance could be made. It was submitted that likewise provision for liquidated damages had been held to be deductible by the aforesaid order of the ITAT.

4.1 With respect to ground no. 2 of the department's appeal pertaining to advances and provisions written off, it was submitted that the Ld. DRP had given directions for giving relief to the assessee in view of the various detailed evidences filed before the Assessing Officer in respect of this issue. Reliance was placed on the directions of the Ld. DRP in this regard.

4.2 With respect to ground no. 4 of the department's appeal, it was submitted that this ground was identical to ground nos. 2 to 6 of the assessee's appeal. It was submitted that the KHD Group has adopted a 'global services cost allocation arrangement' wherein an entity operated as a central services provider for a particular service for the group. It was submitted that the assessee was also a central service provider for marketing services. It was also submitted that the KHD Group has a proper cost allocation methodology to remunerate a central services provider wherein a charge or cost related to shareholder activities has already been deducted from the cost base. It was also submitted that detailed evidences had been submitted regarding the services rendered but the TPO had made only selective observations while making the transfer pricing adjustment. It was also submitted that while making the adjustment, the TPO

had grossly overlooked the voluminous evidences furnished by the assessee in this regard and, further, that the TPO cannot question the business expediency of an expenditure incurred by the assessee. It was further submitted that had these services i.e. legal and professional services not been received from the AE, the assessee would have had to perform the functions in-house or hire experienced and trained service providers. It was also submitted that the TPO had not pointed out any specific instance but had made a general statement to conclude that these services were in the nature of stewardship services. It was submitted that the CUP method applied by the TPO was incorrect as the TPO himself had not brought out any comparable uncontrolled transaction to justify the ALP at nil. It was also submitted that the department had not followed the rule of consistency while making this adjustment as these payments had been duly accepted by the department in the earlier assessment years as well as in subsequent assessment year 2012-13 and the impugned adjustment had been made without bringing on record any material to bring out the difference between the facts of the year in which they were accepted and in the present year under consideration. The Ld. AR also submitted that the TPO had

passed a rectification order on 18/04/2017 which has resulted in reduction of total adjustment from Rs. 42,50,763/- to Rs. 9,91,844/- only which represents the disallowance of mark-up charged by the AE. It was also submitted that the Final Assessment Order subsequent to the rectification by the TPO was still awaited. The Ld. AR submitted that and if the assessee's ground was accepted in principle, the adjustment with respect to the mark up will not be contested by the assessee

4.3 With respect to ground nos. 8 and 9 relating to corporate tax issues in the assessee's appeal, the Ld. AR submitted that the assessee had received an advance of Rs. 15.908 crore in assessment year 2008-09 from certain customers for executing a contract and these customers had cancelled these contracts in assessment year 2009-10. It was further submitted that the assessee had credited the entire advance to the profit and loss account and had treated the same as income in assessment year 2009-10 by forfeiting the advance. It was further submitted that the customers approached the Hon'ble High Court for a refund of the advance and the Hon'ble Delhi High Court, vide order dated 24.09.2009 relevant to assessment year 2010-11 i.e. the year under consideration, had directed the assessee to furnish a bank

guarantee of Rs. 9 crore and this amount was reflected as provision for loss on suspended contracts in assessment year 2010-11. It was further submitted that the customers had en-cashed this bank guarantee in assessment year 2011-12. It was submitted that the disallowance had been made for this provision for loss on suspended contracts amounting to Rs. 9 crore although the bank guarantee had actually been en-cashed by the customers resulting in actual business loss to the assessee and, therefore, this was an allowable deduction.

5. In response, with respect to the department's appeal, the Ld. CIT DR placed extensive reliance on the findings and observations of the TPO. With respect to the assessee's appeal, the Ld. CIT DR placed reliance on the findings of the TPO as well as the directions of the Ld. DRP and vehemently argued that no further relief was allowable to the assessee.

ITA Nos. 1057/Del/2016, 1154/Del/2016 and 3207/Del/2016 for AY 2011-12

6. Brief facts relevant to this assessment year are that in this year, the return of income was filed showing total income of Rs. 27,51,23,720/-. After a reference being made to the Transfer Pricing Officer, the TPO proposed an adjustment of Rs. 8,28,95,238/- in respect of difference in ALP of international

related party transactions. Apart from this, an addition was also made on account of liquidated damages amounting to Rs. 9 crore. Another addition was made with respect to disallowance of provision for warranty amounting to Rs. 18,76,87,197/- and an addition of Rs. 1,12,667/- towards advances and deposits written off. Another disallowance was made in respect of advertisement expenses amounting to Rs. 25,34,649/- u/s 40(a)(ia) of the Act. Similar to AY 2010-11, loss on suspended contracts was also disallowed.

6.1 The assessee filed objections before the Ld. DRP and the Ld. DRP reduced the transfer pricing adjustments in respect of the international transaction with related parties to an amount of Rs. 3,06,96,810/- against Rs. 8,28,95,238/- proposed by the TPO by restricting the adjustment to legal and professional services only. The Ld. DRP also directed the deletion of additions pertaining to liquidated damages, provision for warranty, advances and deposits written off, provision for loss and disallowance with respect to advertising expenses. The Ld. DRP, however, directed that the disallowance in respect of suspended contracts be maintained.

6.2 Now, the assessee is in appeal against the directions of the Ld. DRP in not allowing the deduction of provision for loss on suspended contracts and the department is in appeal challenging the directions of the Ld. DRP in restricting the transfer pricing adjustment to legal and professional charges only as well as in directing the deletion of addition with respect to liquidated damages, provision for warranty, write off of advances and deposits.

6.3 The grounds taken by both the parties are as under:-

6.3.1 ITA No.1154/Del/2016 (Assessee's appeal):

"1. On the facts and in the circumstances of the case and in law, the Ld AO has erred in not allowing the deduction of provision for loss on suspended contracts of Rs. 9,00,00 000 recovered by the customer during AY 2011-12 by not appreciating that,

(i) *The Hon'ble Dispute Resolution Panel ("DRP") in its directions for AY 2010-11 has itself stated that liability of Rs. 9,00,00,000 with respect to provision for loss on suspended contracts created during AY 2010-11 crystalized during AY 2011-12;*

(ii) Further, the Hon'ble DRP in its directions for AY 2011-12 has itself stated that deduction of provision for loss on suspended contracts of Rs. 9,00,00,000 utilised during AY 2011-12 should be allowed to the appellant in view of the pending appeal of the appellant.

2. On the facts and in the circumstances of the case and in law, the Ld AO has erred in making adjustment

of refund of Rs. 44,94,685 and consequent levy of interest u/s 234D of the Act of Rs. 10,78,724 in the computation form enclosed with the assessment order for AY 2011-12 by not appreciating that,

(i) The appellant did not receive such refund of Rs. 44,94,685 for AY 2011-12. Also, the appellant did not receive any intimation for adjustment of said refund of Rs. 44,94,685 due for the subject AY;

(ii)Since the appellant neither received refund of Rs. 44,94,685 nor received any intimation for adjustment of said refund, consequent levy of interest u/s 234D of the Act of Rs. 10,78,724 is incorrect.

The appellant prays for leave to add, alter, rescind from or withdraw any at or before the time of hearing of the appeal."

6.3.2 ITA No.1057/Del/2016 (Department's appeal):

"1. The Ld. DRP has erred in concluding that the services offered by the AE were not stewardship service, whereas the purpose of management services agreement, between the KHD Humboldt and the assessee company resulting in payment for legal and professional charges under consideration was to exercise control and supervisions of the assessee's activities to fit the sale, into the overall plan of the entries group with sole purpose for maximization of group profitability and parent company's return.

2. The Ld. DRP has erred in concluding that the computational of entity level profit margin of the assessee contravened the provisions of Rule 80B(l)(c)(i) of the rules when in fact the TPO allowed proportionate adjustment to the assessee.

3. The Ld. DRP has erred in law and in facts in disallowing the addition of provisions for liquidated damages, without examining the issue involved and the

finding of the AO.

4. The Ld. DRP has erred in law and in facts in disallowing the addition of provisions for warranty, as the assessee has failed to maintain a scientific and consistent method for estimation of / determination of its provision of warranty.

5. The Ld. DRP has erred in law and facts in disallowing the addition of advances & provisions written off, without allowing the AO to examine whether the entries were actually written off in the books and ledger of the assessee.

6. The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing."

7. Subsequently, after passing of the final assessment order for AY 2011-12, the TPO passed a rectification order u/s 154 with respect to assessment year 2011-12 vide order dated 09.02.2016. The TPO passed another rectification order u/s 154 with respect to assessment year 2011-12 vide order 25.02.2016 and made final adjustment with respect to provision for management support services amounting to Rs. 14,32,171/-, provision for technical support services amounting to Rs. 16,11,690/- and purchase of spare parts amounting to Rs. 1,12,27,864/-. Thus, the total adjustment proposed by the TPO as per the second rectification order amounted to Rs. 1,42,71,725/- as against the

adjustment of Rs. 8,28,95,238/- proposed in the first transfer pricing proceedings.

7.1 The assessee is in appeal before the ITAT challenging the second rectification order dated 25.02.2016 passed u/s 154 of the Act by the TPO as aforesaid and the following grounds have raised by the assessee in ITA No. 3207/Del/2016:-

> *"1. On facts and in law, the Assistant Commissioner of Income Tax, Circle 11(2), New Delhi ('Ld. AO') [along with the Deputy Commissioner of Income Tax (Transfer Pricing) - 2(1)(1), New Delhi ('Ld. TPO') - under reference from the Ld. AO] erred in making an adjustment of Rs. 14,271,725 to the total income of the Appellant on account of the difference in the arm's length price ('ALP') of its international related party transactions under the provisions of section 92CA(4) of the Income Tax Act, 1961 ('the Act').*
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> *2. On facts and in law, the Ld. AO/ Ld. TPO erred in passing the impugned rectification order which violates various statutory provisions and is liable to be quashed. In doing so, the Ld. AO/ Ld. TPO erred in:*
>
> *2.1 violating the provisions of section 154(3) of the Act;*
> *2.2 defying the principles of natural justice by not granting an opportunity of being heard to the Appellant;*
>
> *2.3 violating the provision of section 154(1) of the Act as the basis of issuing the impugned rectification order is not a mistake apparent from record and do not qualify the requirements section 154 of the Act.*

3. Without prejudice to Ground no. 2, on facts and in law, the Ld. AO/ Ld. TPO erred in disregarding the directions of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') while issuing the impugned rectification order and in doing so, violated the provisions of section 144C(10) of the Act.

4. Without prejudice to Ground no. 2, on facts and in law, the Ld. AO/ Ld. TPO erred in rejecting the economic analysis carried out by the Appellant, substituting the same with his own analysis and in doing so, not appreciating that conditions set out in section 92C(3) of the Act are not satisfied in the present case.

5. Without prejudice to Ground no. 2, on facts and in law, the Ld. AO/ Ld. TPO erred in rejecting the transfer pricing analysis undertaken by the Appellant in line with the Rule 10B(2) of the Rules to determine the arm's length price of international transactions pertaining to purchase of spare parts. In doing so, the Ld. AO/ Ld. TPO has grossly erred in

5.1 misinterpreting the directions given by the Hon'ble DRP that hold the transaction level analysis to be valid; and

5.2 misinterpreting the directions given by the Hon'ble DRP that hold the Appellant to be considered as the tested party.

6. Without prejudice to Ground no. 2 and Ground no. 5, on the facts and in law, the Ld. AO has grossly erred in computing the profit level indicator of the Appellant by disregarding the directions of the Hon'ble DRP that hold the treatment of income and expenses of similar nature to be consistent.

7. Without prejudice to Ground no. 2, on facts and in law, Ld. AO/ Ld. TPO has grossly erred in rejecting the transfer pricing analysis undertaken by the Appellant in line with the rule 10B(2) of the Rules to

determine the arm's length price of international transactions pertaining to provision of global marketing services. In doing so, the Ld. AO/ Ld. TPO erred in misinterpreting the directions given by the Hon'ble DRP that hold the Appellant to be considered as the tested party.

8. Without prejudice to Ground no. 2 and Ground no. 7, on facts and in law, Ld. AO/ Ld. TPO has grossly erred in computing the transfer pricing adjustment by considering wrong cost base of the segment pertaining to provision of global marketing services.

9. Without prejudice to Ground no. 2, on facts and in law, Ld. AO/ Ld. TPO erred in rejecting the transfer pricing analysis undertaken by the Appellant in line with the Rule 10B(2) of the Rules to determine the arm's length price of international transactions pertaining to provision of technical services. In doing so, the Ld. AO/ Ld. TPO grossly erred in misinterpreting the directions given by the Hon'ble DRP that hold the Appellant to be considered as the tested party.

10. Without prejudice to Ground no. 2, on facts and in law, Ld. AO/ Ld. TPO erred in disregarding the fact that these transactions and the relevant pricing has been accepted by the Ld. AO/ Ld. TPO in the subsequent year (i.e., AY 2012-13) in the Assessee's own case and there being no change in the facts and circumstances in AY 2011-12 vis-a-vis AY 2012-13."

8. The Ld. AR submitted that ground no. 1 of assessee's appeal (ITA No. 1154/Del/2016) and pertaining to provision for loss on suspended contracts amounting to Rs. 9 crore was similar to a ground in assessee's appeal for assessment year 2010-11 and the adjudication of the assessee's ground in assessment year 2010-

11 will decide the outcome of this ground in assessment year 2011-12 also.

8.1 With respect to ground no. 2 in the assessee's appeal, it was submitted that the ground pertaining to adjustment of refund and consequent levy of interest u/s 234D of the Act was not being pressed.

8.2 Coming to the department's appeal (ITA No. 1057/Del/2016), the Ld. AR submitted that ground nos. 1, 3, 4 and 5 were similar to the grounds taken by the department in assessment year 2010-11 on identical issues and since the issues were essentially the same, the outcome of the department's appeal in assessment year 2010-11 will have to be followed in assessment year 2011-12 also.

8.3 Coming to ground no. 2 of the department's appeal, the Ld. AR submitted that this ground challenges the direction of the Ld. DRP in concluding that the computation of entity level profit margin of the assessee did not contravene the provisions of Rule 10B(1)(c)(i) of the Rules. It was submitted that for the purpose of undertaking the benchmarking analysis, the assessee had followed transaction by transaction approach which was in accordance with Rule 10B and 10C of the Income Tax Rules,

1962. It was further submitted that the assessee had identified separate functions and line of operation while undertaking the benchmarking analysis. It was also submitted that the principle of undertaking transaction by transaction analysis for determination of ALP is embedded in the Indian Transfer Pricing Regulations, OECD Transfer Pricing Guidelines and UN Transfer Pricing Manual. It was further submitted that as per the UN Practice Manual, the Transfer Pricing analysis should ideally be made on a transaction by transaction basis. It was further submitted that each of the international transaction under dispute viz. purchase of spare parts, provision of technical services, provision of global marketing services were distinct and independent transactions and warranted separate analysis so as to determine the ALP. It was submitted that with respect to the provision of spare parts, the assessee had purchased certain spare parts such as machine parts, tools, jigs and spares etc. which were sold mostly to third party customers and, thus, the assessee was involved in trading of these parts. The Ld. AR submitted that the assessee had earned a gross profit margin of 43.64% from the sale of these parts whereas the average of the comparables resulted in a gross profit margin of 32.19% only. It

was further submitted that with respect to provision of technical services, the average cost plus charge by the comparable companies was 11.20% whereas the assessee had charged cost plus 10% from its AEs which was well within the ± 5% range. It was further submitted that the assessee had also provided similar technical services to independent third parties as well wherein the service charges ranged from Rs. 7,000/- per day to Rs. 20,000/- per day averaging Rs. 10,117/- per day which was lower than the per day rate of Rs. 30,000/- charged from its AE.

8.3.1 With respect to provision of global marketing services, it was submitted that the margin of the comparables with respect to the global marketing services was 8% whereas the assessee had charged cost plus 5% from its AE which was within the ±5% range.

8.3.2 The Ld. AR also emphasized that the value of intra company transaction was approximately 6% of the total turnover of the assessee, meaning thereby that approximately 94% of the business carried out by the assessee was third party business. The Ld. AR also placed reliance on a number of judicial precedents supporting the transaction level benchmarking analysis.

9. Coming to assessee's appeal bearing ITA No. 3207/Del/2016 challenging the rectification order dated 25.02.2016 passed u/s 154 of the Act, the Ld. AR submitted that the order passed u/s 154 violated the provisions of section 154(1) of the Act because what the TPO had sought to rectify was not a mistake apparent from the records. It was submitted that before the issue can be said to be eligible for rectification u/s 154, it is essential that the issue should be a mistake in the order passed by an income tax authority, the mistake should be apparent and the same should be apparent from the records of the assessee. It was submitted that by passing the rectification order, the TPO had carried out a fresh benchmarking analysis and this amounted to change in the view of the TPO and was not a mistake apparent from the record. It was further submitted that the TPO had selected fresh comparables and that too without granting a proper opportunity to the assessee to present its contentions and, thus, the same was not a mistake apparent from record. The Ld. AR also submitted that an earlier rectification order had been passed by the TPO on 9th February 2016. It was after due consideration of the material on record wherein the TPO had accepted the analysis carried out by the

assessee and, therefore, the impugned rectification order was bad in law.

9.1 It was further submitted that there was a failure to provide an opportunity to the assessee of being heard before enhancing the income and this violated the provisions of section 154(3) of the Act. It was submitted that the principle of natural justice has been upheld by the various Hon'ble Courts across the country in numerous cases and a list of case laws being relied upon by the assessee was also submitted before us.

9.2 It was further submitted that without prejudice to the earlier arguments, the TPO had erred in disregarding the directions of the Ld. DRP while issuing the impugned rectification order wherein the Ld. DRP had clearly directed that the margin of the assessee is to be assessed for determining the ALP whereas the TPO misconstrued the directions in respect of purchase of spare parts and continued with the entity level profit testing though the adjustment had been made on a proportionate basis. It was further submitted that the TPO had adopted contradictory position as on the one hand, the TPO mentioned that wherever the assessee has taken the AE as the tested party, the same should be rectified and on the other hand, the TPO had revisited

all the transactions wherever the assessee has taken itself as the tested party and, thus, the TPO had gone beyond the mandate of Section 154 in this regard by revisiting the already settled issues which were not a mistake apparent from record.

9.3 The Ld. AR also submitted that the TPO had erred in rejecting the economic analysis carried out by the assessee and has substituted the same by his own analysis. It was also submitted that with respect to purchase of spare parts, the assessee had applied TNMM and a comparable search had resulted in a mean NCPN of 11.85% as compared to 4% mark up charged by the supplier AE and the TPO in his original order had carried out the entity level profit testing by applying the TNMM. The Ld. DRP had upheld the assessee's contention that margin realized by the assessee only from the international transaction with the AE has to be considered but in the final assessment order, the Assessing Officer continued with the entity level profit testing approach which was rectified by the first rectification order darted 9th February, 2016 but vide the impugned order, the entity level benchmarking had been reinstated.

9.4 Similarly, with respect to provision of global marketing services, the assessee had applied TNMM but the TPO had

introduced fresh comparables without providing any reason for not accepting the assessee's approach. It was further submitted that similar was the case with respect to the provision for technical services.

9.5 The Ld. AR also submitted that the assessee was also challenging the action of the TPO in rejecting the transfer pricing analysis undertaken by the assessee and the action of the TPO in computing the profit level indicator of the assessee by disregarding the directions of the Ld. DRP. It was further submitted that the assessee was also challenging the action of the TPO in rejecting the transfer pricing analysis of the assessee so as to determine the ALP of the international transaction pertaining to global marketing services while misinterpreting the directions given by the Ld. DRP that the assessee was to be considered as the tested party. It was also submitted that the TPO had erred in computing the transfer pricing adjustment by considering wrong cost base of the segment pertaining to global marketing services.

9.6 The Ld. AR also submitted that the TPO, while passing the impugned rectification order, had disregarded the fact that the impugned transactions and the relevant pricing had been

accepted by the Assessing Officer/TPO in the subsequent assessment year i.e. assessment year 2012-13 in assessee's own case and there was no change in facts and circumstances in assessment year 2011-12 vis-à-vis assessment year 2012-13.

9.7 The Ld. AR also submitted that in case the assessee's legal grounds challenging the validity of the impugned rectification order were being allowed, the arguments advanced by him on merits need not be considered as they would then become academic in nature.

10. In response, the Ld. CIT DR, in respect of the assessee's appeal for AY 11-12, placed reliance on the order of the TPO and the directions of the Ld. DRP.

10.1 In respect of the Department's appeal for AY 11-12, the Ld. CIT DR placed reliance on the findings and observations of the TPO and vehemently argued that the Ld. DRP had erred in allowing relief to the assessee.

10.2 With respect to the assessee's appeal challenging the proceedings u/s 154 of the Act, the Ld. CIT DR submitted that the TPO had acted within the four corners of law in passing the rectification order.

11. We have heard the rival submissions and have also considered the evidences and documents on record. We now proceed to adjudicate on the issues involved.

ITA 494/Kol/2015:

11.1 As far as ground nos. 2 to 6 challenging the upholding of transfer pricing adjustment pertaining to legal and professional charges under intra-group services are concerned, it has been submitted by the Ld. AR that the TPO had passed a rectification order on 18/04/2017 which has resulted in reduction of total adjustment from Rs. 42,50,763/- to Rs. 9,91,844/- only which represents the disallowance of mark-up charged by the AE. It was also submitted that the Final Assessment Order subsequent to the rectification by the TPO was still awaited. The Ld. AR submitted that and if the assessee's ground was accepted in principle, the adjustment with respect to the mark up will not be contested by the assessee. In such a situation, we direct the AO to pass the final assessment order incorporating the adjustment only to the extent of Rs. 9,91,844/- and also protect the assessee's right to raise these grounds again in this assessment year in the event of the final assessment order not having been passed restricting the transfer pricing adjustment to Rs.

9,91,844/- only. The assessee shall also be at liberty to challenge the mark-up in subsequent assessment years should the need so arise. Thus, these grounds stand allowed in terms of our observations.

11.2 The corporate tax related grounds are ground nos. 8 and 9 and they challenge the directions of the Ld. DRP in confirming the provision for loss on suspended contracts amounting to Rs. 9 crores by treating the same as contingent liability. The facts remain undisputed. The amount represents bank guarantee furnished by the assessee to its customers which was given in the year under consideration but en-cashed by the customers in AY 2011-12. It is also undisputed that the assessee has already offered to tax the amount of advance which had been forfeited from the customers and to which the bank guarantee relates. The bank guarantee has been en-cashed in the subsequent assessment year, therefore, the liability has crystallized in the subsequent assessment year when it was en-cashed on 28/04/2010. The fact remains that at the time of furnishing the bank guarantee, it was not known as to when the liability will crystallize. Accordingly, we find no reason to interfere with the

directions of the Ld. DRP in this regard and dismiss ground nos. 8 and 9.

11.3 Accordingly, the assessee's appeal ITA 494/Kol/2015 stands partly allowed.

ITA 567/Kol/2015:

12. Department's ground no. 4 relates to the deletion of the transfer pricing adjustment amounting to Rs. 3,25,89,168/-and challenges the direction of the Ld. DRP in concluding that the services offered by the AE were not stewardship services. It is seen that the Ld. DRP in Para 3.3.2 of its directions has noted that in the assessee's case, the intra group services relate to general administration, finance and accounting, coordination, general management, corporate and project financing, recruitment and education. The Ld. DRP has further noted that the assessee is an entrepreneur in its own right and is engaged in engineering, procurement and commissioning projects for the third party clients and further that the assessee has hardly operated as an extension of the AE or has been catering exclusively to the AE. The Ld. DRP has given a finding that the assessee virtually undertakes all the risks associated with rendering services, marketing and also performs various complex

roles. The Ld. DRP has also taken note of the fact of the assessee providing substantial evidence in form of e-mails, correspondence with the AE etc. so as reach a conclusion that the AE was rendering services which were beneficial for the assessee in conducting its business and some benefits might have accrued to the overall group but the primary beneficiary was the assessee. The Ld. DRP concluded that the services rendered by the AE were not in the nature of stewardship activity Although the Department has assailed these directions of the Ld. DRP, in the proceedings before us, the Department could not point out any factual or legal error in the directions of the Ld. DRP by leading any evidence to the contrary. In such a situation, we are not in a position to differ from the findings of the Ld. DRP and we, accordingly, dismiss ground no. 4.

12.1 As far was ground no. 2 pertaining to deletion of disallowance pertaining to advances and deposits written off are concerned, it is seen that the assessee had written off Rs. 10,50,092/- pertaining to deposits and allowances and the disallowance was made on the ground that party wise details were not provided by the assessee. The Ld. DRP directed deletion of disallowance by observing that from the material available on

record, the same appeared to be revenue in nature. Thus, it is not the case of the department that the issue was not examined. The Ld. DRP has returned a categorical finding in this regard and, accordingly, we find no reason to interfere on this issue also. Ground No. 2 also stands dismissed.

12.2 Ground No. 3 challenges the direction of the Ld. DRP in allowing the provision for warranty amounting to Rs. 28,81,12,854/-. We find that the Ld. DRP had held the issue in assessee's favour by noting that this issue was a recurring issue in the assessee's case and a similar issue had arisen in AY 2008-09 wherein the Ld. CIT (A) had deleted the disallowance. The Ld. DRP has noted that the facts were identical in AY 2008-09 and the year under cons deration and, therefore, the disallowance was to be deleted. We also find that the department's challenge to the findings of the Ld. CIT (A) on this issue in AY 2008-09 was dismissed by the ITAT in ITA No. 2295/Del/2013. The Department has not been able to bring out any distinguishing factor with respect to the facts in the proceedings before us. In the circumstances, we find no reason to interfere and dismiss ground no. 3.

12.3 Ground no. 1 challenges the direction to delete the provision for liquidated damages amounting to Rs. 3,18,02,972/. This issue is covered in favour of the assessee by the order of the ITAT in assessee's own case for AY 2008-09 (supra) wherein the ITAT upheld the adjudication of the Ld. CIT (A) in deleting the disallowance. In view of the facts being identical in this year also we uphold the directions of the Ld. DRP subject to the rider that the assessee will substantiate before the AO that tax due on excess provision written back have been paid. Thus this ground stands allowed for statistical purposes

12.4 In the result ITA No. 567/Kol/2015 stands partly allowed for statistical purposes.

ITA 1057/Del/2016:

13. Ground No 1 of the department's appeal challenges the conclusion of the Ld. DRP that the services offered by the AE were not in the nature of stewardship services. This has resulted in a deletion of Rs. 5,70,59,551/- of transfer pricing adjustment. This issue was adjudicated in favour of the assessee by the Ld. DRP in AY 10-11 also and the Department had challenged the same before the ITAT. We have already dismissed this ground in department's appeal for AY 10-11 in earlier part of this order and

since the facts are identical, on similar reasoning, we refuse to interfere with the directions given by the Ld. DRP in this regard. Accordingly, Ground No. 1 stands dismissed.

13.1 Ground No. 2 challenges the action of the Ld. DRP in directing that the TPO/AO has to consider the margin realized by the assessee only from its international transactions with its AEs and there cannot be entity level margins. This has resulted in deletion of transfer pricing adjustment of Rs 2,79,79,689/-. Although, the Ld. CIT DR has vehemently argued against the directions of the Ld. DRP in this regard, the Ld. AR has been equally vehement in arguing that for the purpose of undertaking the benchmarking analysis, the assessee had followed transaction by transaction approach which was in accordance with Rule 10B and 10C of the Income Tax Rules, 1962. It has been further argued that the assessee had identified separate functions and line of operation while undertaking the benchmarking analysis. It was also argued that the principle of undertaking transaction by transaction analysis for determination of ALP is embedded in the Indian Transfer Pricing Regulations, OECD Transfer Pricing Guidelines and UN Transfer Pricing Manual. It was further submitted that as per the UN

Practice Manual, the Transfer Pricing analysis should ideally be made on a transaction by transaction basis. It has also been argued that each of the international transaction under dispute viz. purchase of spare parts, provision of technical services, provision of global marketing services were distinct and independent transactions and warranted separate analysis so as to determine the ALP. Also comparative analysis has been submitted by the Ld. AR in this regard. However, a perusal of the directions of the Ld. DRP shows that this aspect has not been considered in a proper perspective by the Ld. DRP and the directions in this regard have been given without recording a finding of fact in this regard and without giving any sound reason for such direction. In the circumstances, we have no option but to restore this ground to the file of the Ld. DRP with a direction to pass a speaking order on the issue after giving proper opportunity to the assessee. Accordingly, ground no. 2 stands allowed for statistical purposes.

13.2 Ground No. 3 challenges the deletion of disallowance of Rs. 10,97,86,518/- pertaining to liquidated damages. An identical ground has been held in favour of the assessee in earlier part of this order in department's appeal for AY 10-11 wherein we

upheld the directions of the Ld. DRP subject to the rider that the assessee will substantiate before the AO that tax due on excess provision of liquidated damages written back have been paid. On identical facts, we restore the issue to the file of the AO with similar directions. Thus, this ground stands allowed for statistical purposes.

13.3 Ground No. 4 challenges the direction of the Ld. DRP in deleting the disallowance pertaining to provision of warranty amounting to Rs. 18,76,87,197/-. We find that a similar issue had come up in Assessment Years 2008-09 and 2010-11 and the department's ground challenging the deletion had been dismissed by the ITAT in ITA Nos. 2295/Del/2013 and 567/Kol/2015 respectively. The Department has not been able to bring out any distinguishing factor with respect to the facts in the proceedings before us. In the circumstances, we find no reason to interfere and dismiss ground no. 4.

13.4 Ground No. 5 challenges deletion of disallowance in respect of write off of advances and deposits. However, it is seen that this ground does not arise out of the directions of the Ld. DRP. Thus, this ground is *in fructuous* and is dismissed as such.

13.5 In the result ITA 1057/Del/2016 is partly allowed.

ITA 1154/Del/2016:

14. Ground No .1 of the assessee's appeal challenges the action of the Ld. DRP in not allowing loss on suspended contracts. In earlier part of this order in assessee's appeal for AY 2009-10, we had dismissed the assessee's claim for deduction of provision for bank guarantee on the ground that the provision was an unascertained liability which had not crystallized during AY 10-

14.1 It is the claim of the assessee that this amount of bank guarantee was en-cashed in AY 10-11 i.e. the year under consideration and, therefore, it should be allowed as a deduction in the year of crystallization The Ld. DRP has discussed the issue at length on pages 11 and 12 of its directions and has held that the contention of the assessee is allowable in view of the facts. The AO is directed to give effect to the directions of the Ld. DRP in this regard. Accordingly, this ground is treated as allowed.

14.2 As the Ld. AR has submitted that Ground No. 2 challenging the adjustment of refund due and charging of interest u/s 234D of the Act was not being pressed, the same is dismissed as not pressed.

14.3 In the result, ITA No. 1154/Del/2016 stands partly allowed.

ITA 3207/Del/2016:

15. This appeal by the assessee challenges the rectification order passed by the TPO vide order dated 25.02.2016. It has been submitted that there was a failure to provide an opportunity to the assessee of being heard before enhancing the income and this violated the provisions of section 154(3) of the Act. It has also been argued that the principle of natural justice has been upheld by the various Hon'ble Courts across the country in numerous cases wherein it has been held that the failure to provide an opportunity before enhancement will render the entire proceedings null and void. Admittedly, the impugned rectification order was passed proposing to enhance the income of the assessee by enhancing the transfer pricing adjustments as made in the final assessment order dated 30/12/2015 passed subsequent to the directions of the Ld. DRP. In the proceedings before us, the department was not able to negate the contention of the assessee that the impugned rectification order was passed without giving any opportunity to the assessee. It remains uncontroverted that principle of natural justice was not followed

by the Transfer Pricing Officer while rectifying his earlier order. It is settled law that it not proper to remove a defect, if any, wherein no notice has been given to the assessee and wherein there will be an increased tax liability on the assessee. The Hon'ble Apex Court in the case of Chockalingam & Meyyappan Vs. CIT reported in (1963) 48 ITR 34 is precisely holding that principle of natural justice has to be followed by the authorities. As per Section 154(3) of the Act amendment/rectification which has the effect of enhancement of an assessment or reducing a refund or otherwise increasing the liability of the assessee shall not be made unless the authority concerned gives notice to the assessee of its intention to do so. Therefore, it is obligatory under the statute to issue notice by the tax authority to give a reasonable opportunity of being heard to the Assessee. This is clearly set out u/s 154 of the Income Tax Act and it has to be followed by the tax authorities at the initial stages. If this procedure of issuing the notice and giving reasonable opportunity of being heard is not followed, any further exercise will be *non est*. Therefore, the order itself becomes void *ab initio*. In the circumstances, we have no other option to set aside the impugned rectification order as being void *ab initio*.

15.1 As we have already set aside the impugned rectification order as being void *ab initio* and as has been fairly accepted by the Ld. AR that in case of the rectification proceedings being held as void, the grounds argued on merits will become academic, we are not adjudicating the other grounds as having become academic.

15.2 In the result ITA 3207/Del/2016 stands allowed.

16. In the final result:

(i) ITA 494/Kol/2015 stands partly allowed

(ii) ITA No. 567/Kol/2015 stands partly allowed for statistical purposes

(iii) ITA 1057/Del/2016 is partly allowed

(iv) ITA No. 1154/Del/2016 stands partly allowed

(v) ITA 3207/Del/2016 stands allowed.

The order is pronounced in the open court on 11.06.2018.

Sd/-	Sd/-
(R.K. PANDA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 11th June, 2018

'GS'

Copy forwarded to:

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

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By Order

ASSISTANT REGISTRAR