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

BEFORE SHRI A. T. VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.77/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2012-13)

AT & S India (P) Ltd. 12A Industrial Area, Nanjangud – 571301, Mysore District, Karnataka, India.	**Vs.**	**D.C.I.T, Circle-11(1), Kolkata** Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AAECA 2930 J		
(Appellant)	**..**	**(Respondent)**

Appellant by :Smt. Rituparna Sinha, AR
Respondent by :Shri G. Mallika juna CIT(DR)

सुनवाईकीतारीख/ **Date of Hearing : 05/04/2018**

घोषणाकीतारीख/**Date of Pronouncement : 11/05/2018**

आदश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the assessee, pertaining to Assessment Year 2012-13 is directed against a fair assessment order passed by the DCIT, Cirle-11(1), Kolkata (Assessing Officer) under section 143(3) read with section 144C (13) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), dated 28.11.2016, which incorporates the directions given by the Dispute Resolution Panel (DRP)-2, New Delhi, order dated 27.09.2016.

2. The grievances raised by the assessee in revised grounds of appeal are follows:

> *"1. That on the facts and in the circumstances of the case and in law, the Assessing Officer ('AO') has erred in making the arm's length price adjustment of INR 100,29,90,268/-,Export of Finished Goods to Associated Enterprise ('AE')*

2. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in making adjustment of INR 90,32,40,004/- to the total income of the appellant in respect of the international transaction involving of export of printed circuit boards ('PCBs') by the appellant to its AE for further sale to independent customers at same prices.

3. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in not appreciating that the aforesaid international transaction is at arm's length under the Comparable Uncontrolled Price Method, as confirmed by the Hon'ble Jurisdictional Tribunal in appellant's own case for AY 2011-12 on the same facts and circumstances of the case. Payments made to AE for purchase and order handling services and sales services.

4. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in disallowing the payments aggregating to INR 9,97,50,264/- made by the appellant to its AE for receiving purchase and order handling services and sales services from the AE.

5. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in not appreciating that the aforesaid disallowance leads to violation of the 'Rule of Consistency' enunciated by the Hon'ble Supreme Court in various decisions, as the payments made by the appellant for the aforesaid services have been allowed as deduction for AY 2009-10, AY 2010-11 and AY 2011-12 on the same facts and circumstances of the case.

6. That on the facts and in the circumstances of the case and in law, the Ld. Assessing Officer has erred in making the aforesaid disallowance without applying any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Income-tax Act, 1961 ('Act') which leads to violation of the relevant provisions of Income-tax Act 1961.

7.That on the facts and in the circumstances of the case and in law, the Ld.AO/ld.DRP has erred in alleging that the appellant fails to satisfy the benefit test, without duly considering the evidences of receipt of purchase services, order handling services and sales services filed by the appellant and detailed submission filed by the appellant on benefits received by it from the said services.

8.That on the facts and in the circumstances of the case and in law, the Ld. DRP has erred in confirming the aforesaid disallowance without appreciating that the ld AO in the draft assessment order under section 143(3) read with section 144C (1) of the Act has not made any adverse comment under section 37 of the Act in respect of the said transaction after examining the documentary evidences of receipt of services submitted by the appellant to the ld TPO and subsequently the told AO as per his direction.

9. That the appellant craves leave to add/ or amend, alter, modify or rescind the grounds hereinabove before or at the time of hearing of the appeal.

3. However in this appeal, the assessee has raised a multiple grounds of appeals, but at the time of hearing, the main grievance of the assessee has been confined as follows:

(i) Ld. Assessing Officer/TPO has erred in making adjustment of Rs. 90,32,40,004/- to the total income of the assessee in respect of the international transaction involving of export of printed circuit boards ('PCBs') by the appellant to its Associated Enterprise (‘AE’). This covers the revised ground Nos. 2 and 3 of the Assessee.

(ii) Ld. Assessing Officer/TPO has erred in disallowing the payments aggregating to INR 9,97,50,264/- made by the assessee to its AE for receiving purchase and order handling services and sales services from the Associated Enterprise(‘ AE’).This covers the revised ground Nos. 4 to 8 of the Assessee.

4. We shall take up additions challenged on account of transfer pricing adjustment as has been raised by the assessee in Ground Nos. 2 & 3, stating that the Ld. Assessing Officer/TPO has erred in making adjustment of Rs. 90 32,40,004/- to the total income of the assessee in respect of the international transaction involving of export of printed circuit boards ('PCBs') by the appellant to its Associated Enterprise (‘AE’), [AT & S AG(Europe)].

5. The brief facts qua the issue are that M/s AT & S India Private Limited, (hereinafter referred to as the ‘assessee’), is incorporated in India under the erstwhile Companies Act 1956. The assessee is a wholly owned subsidiary of AT & S Austria Technologie&SustemtechnikAktiongesellschaft(hereinafter referred to as AT &S AG). The assessee is engaged into the business of manufacturing and sale of printed circuit boards. The main issue of transfer pricing adjustment of Rs.90,32,40,004/-, which is made, in respect of sale of finished goods by the assessee to its AE [AT & S AG(Europe)] for further sale

of the same to individual customers in Europe at the same price and in the same quantity. The assessee entered into international transaction with its AE during the year and the Assessing Officer made a reference to the Transfer Pricing Officer ('TPO') u/s 92CA(1) for the purpose of determination of arm's length price ('ALP') in respect of the transactions entered into by the assessee company with its AE. In view of the provisions of sub-section 4 of section 92CA of the Act, the total income of the assessee was computed with the arm's length price determined by the TPO. In the transfer pricing study report, it was mentioned that the assessee imports raw material and spare parts and produces finished goods which are supplied to the AE in Europe for resale purpose in AE's territory. Thus, the assessee has entered into a distribution arrangement with the AE wherein assessee would supply goods to its AE for resale to third parties. The AE shall be entitled to commission @6% of gross distributor's price for carrying out distribution activities in the specified territory. On perusal of the transfer pricing report and financials of the assessee, it was observed by the TPO that 92.33% of the total productions of the assessee are sold to the AE and 62% of the aw material and 75% of the spare parts are imported which is controlled by AE. Therefore, the TPO has characterized assessee as a contract manufacturer, rather than a full-fledged manufacturer.

6. In response, during the proceedings before TPO, the assessee submitted that the assessee-company has entered into a distribution agreement with its AT & S AG (AE) and transferred a part of the printed circuit boards (i.e. 'PCB') manufactured by it to AT&S AG (AE) for distribution of the same in the specified territory of Europe. In this connection, the assessee submitted that his company is a full-fledged manufacturer and AT & SAG (AE) is a Distributor of the assessee and the same is substantiated by the provisions of the Distribution Agreement which reads as follows:

> *"2.1 The supplier grants to the Distributor, and the Distributor hereby accepts, the exclusive right to market, distribute and sell the products in the Territory."*

Therefore, the assessee submitted before the TPO that under the Distribution Agreement, the assessee has grant to AT & S AG (AE), the exclusive right to market, distribute and sell the products manufactured by the assessee in the specified territory (Europe). The assessee, as a principal, has the full authority to sell the products manufactured by it as per own business decision, therefore, the assessee has functioned as a full-fledged manufacturer of its product and AT & S AG (AE) functioned as a distributor of the assessee. The assessee submitted that AT & S AG (AE), with the prior written agreement of the assessee, can seek customers for the produc s manufactured by the assessee outside the specified territory or establish branch or maintain any distribution depot for the products of the assessee outside the specified territory or establish branch or maintain any distribution depot for the products of the assessee outside the specified territory in countries where the assessee has no exclusive distributors. The assessee also explained to the TPO that AT & S AG (AE) is entitled to get commission as per the Distribution agreement and from time to time and the commission may be reviewed by the assessee. The assessee paid commission to AT&S AG (AE) @ 6% of gross distributor`s price for carrying out distribution activities in the specified territory. As per the Distribution agreement, the AT & S AG (AE) further deducts preliminary warranty guarantee @ 2% of the gross distributor`s price out of the aforesaid sale proceeds for the purpose of incurring warranty expenses arising from further sale of PCB`s to independent customers. The assessee also explained to the ld TPO that AT & S AG (AE) remitted the sale proceeds collected by it from independent customers in the open market under uncontrolled conditions, to the assessee company, which was recorded in the books of accounts of the assessee company as “sales”.

Based on these facts and circumstances and copies of back-to-back invoices submitted to the ld TPO, the assessee demonstrated that the CUP Method would be the most appropriate method for determining the arm`s length price

of the aforesaid international transactions with reference to the aforesaid uncontrolled transactions entered into between AT & S AG (AE) and independent customers in Europe.

7. However, the TPO rejected the contention of the assessee and held that since the majority of the raw materials and spares are supplied by the suppliers controlled by the AE and almost the entire production is sold to the AE, the assessee undertakes simply manufacturing functions and bears only the risk relating to product quality, hence the assessee company needs to be characterized as a contract manufacturer, and not a full- fledged manufacturer. Since, the assessee has been characterized as contract manufacturer the payment for services received are in the shareholder activity and the all the services provided to the A.E are geared towards to the identified needs of the A.E i.e supply of Finished goods to its Customer after getting manufactured from the Assessee. Therefore, the payment in respect of the below mentioned service to the extent of 92.3% are held to be Nil.

Purchase and order handling charges-	3,74,87,673
Payment for sales service	7,05,49,004
Payment for shared information technology service	3,69,12,872
Total	14,49,49,549

Therefore, the 92.33 % of the above amount paid in respect of various services purported to be received was taken as NIL i.e 13,38,31,918(92.33% x Rs.14,49,49,549).

8. The ld TPO calculated the profitability of the assessee company as per its annual report as follows:

Description	Amount (Rs.) Million
Net operating revenue	2966.43

Operating Revenue	**2966.43**
Expenses debited to profit and loss account	3728.16
Less: Loss on sale of fixed assets	7.09
Operating Expenses	3721.07
Operating Profit	(-) 754.64
OP/TC (PLI)	(-) 20.28%
OP/OR	(-) 25.44%

10. The ld TPO observed that an amount of Rs.13,38,31,918/- was in the nature of stewardship services, as computed in para 7 of this order, hence its arm`s length price was held to be Nil The TPO calculated the profitability of the company after reducing the amount of Rs.133.83 Million, as follows:

Description	Amount (Rs.) Million
Net operating revenue	2966.43
Operating Revenue	**2966.43**
Expenses debited to profit and loss account	3728.16
Less: Loss on sale of fixed assets	7.09
Less: Amount determined to be Nil	133.83
Operating Expenses	3587.24
Operating Profit	(-) 620.81
OP/TC (PLI)	(-) 17.30%
OP/OR	(-) 20.92%

Therefore, the ld TPO noted that in the assessee`s case under consideration, admittedly neither CUP method nor Profit Split Method is applicable. In CPM and RPM, ALP is determined by adding an appropriate gross profit margin to an AE's cost of producing products or services and in TNMM, ALP is determined by comparing the Net Profit Margin of controlled and uncontrolled transaction. The TPO noted that in the facts and circumstances of the assessee`s case, the TNMM is the most appropriate method. The CPM and RPM are not applicable in the assessee`s case, as calculation of GP is very subjective and the Indian Accounting Standards does not provide for the presentation of gross profit. It has to be calculated based on the guidance of ICAI which may result in substantial subjectivity in allocating fixed and variable costs. Therefore, the ld TPO held that the TNMM method should be applied to determine the ALP of the assessee`s transactions.

11.The ld TPO worked out the arm s Length margin (in %) by selecting the following comparable companies:

Sl. No.	Companies	OP/TC
1	Hind rectifiers ltd.	12.84%
2	Ruttonshainternational Ltd	14.73%
3	Epitome components Pvt ltd	4.50%
4	Centum electronics ltd	7.01%
5	Fineline Circuits (I) Ltd	4.47%
6	Essae Circuits (P) ltd	18.71%
7	Deki Electronics Ltd.	9.53%
8	Tibrewal Electronics Ltd.	13.01%
9	Akasaka Electronics Ltd.	0.54%
10	BLG Electronics Ltd.	3.83%
11	Watts Electronics Ltd.	6,96%
12	Micropack Ltd.	12.45%
	Average	9.05%

12. Thereafter, the arm's length price of the international transaction related to provision of service provided to A.E was calculated by the ld TPO as follows:

Particulars	Amount in million
Operating Cost (As per para 10 of this order)	3587.24
Arm’s Length margin (%) [as per para 11 of this order)	9.05%

Arm's Length margin (Rs.) [Rs. 3587.24 + 9.05% of Rs.3587.24]	3911.88
Arm's Length price received for selling of goods to AE(para 10)	2966.43
Short fall [Rs.3911.88 – Rs. 2966.43]	945.45
Percentage of material sold to AE to total revenue 92.33%	
Proportionate difference for which adjustment is required to be made is : (92.33% of Rs.945.45)	872.9

This way, the ld TPO determined the arm's length price of the said transaction by applying the TNMM at the entity level considering the appellant as a tested party. Therefore, The ld TPO worked out total adjustment for sale of finished goods at Rs.872.90 Millions and treated as Transfer Pricing Adjustment.

13. Aggrieved by the order of the TPO/Assessing Officer, the assessee filed petition before the Dispute Resolution Panel (DRP'). The Hon'ble DRP gave the direction confirming the stand taken by the TPO as follows:

> *"The assessee has applied CUP method in respect of the sale of finished goods. The assessee undertakes sale of the PCB hips to its AE. The AE gets the clients and the orders and also determines the price of such supplies. The AE then sources such products from any subsidiary including the assessee to supply the product, The TPO is to examine the Inte national transaction entered by the assessee with its AE and the TPO is not authorized to examine or adjust the transaction of the AE with its clients. The latter leg is not in the purview of the TPO. The TPO can however consider and peruse the complete chain of transaction if it helps in realistic determination of ALP between the assessee and the AE. The assessee has submitted making out a case for applicability of CUP method: "Your kindself may please note that in the instant case the transactions involving sale of PCBs by the assessee to AT& S AG in Austria (Europe) during the financial year 201l-12 stood as controlled transactions, whereas the transactions involving sale of exactly the same PCBs in the same quantity as those transacted between the assessee and AT&S AG, by AT&S AG to independent customers in Europe during the relevant Financial year stood as comparable uncontrolled transactions. The prices at which PCBs were sold by the assessee to AT&S AG having been equal to the prices at which PCBs were sold by AT&S AG to independent customers, your kindself may please appreciate that the international transaction involving sale of finished goods by the assessee to AT&S AG adheres to the arm's length principle embodied in the Indian Transfer Pricing Regulation. In view of the above, we humbly pray to your kindself to accept that the international transaction involving sale of finished goods by the assessee to AT&S AG is at arm's lengthunder the CUP Method."*
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> *The plea taken by the assessee is that the AE does not charge any markup on the sale made from supplies received from the assessee. This is a fallacious submission. The assessee has omitted to state that though the AE supplies at the same price as received from the assessee but retains its commission while making the remittance to the assessee. There is hence no back to back supplynor is there a case for a mere pass through entity. The AE performs significant functions in terms of development of*

market/clients & procuring orders apart from technological development and designing of the PCBs. CUP would not be applicable here as the AE not only supplies product but also undertakes to care for fault rectification and other related services. CUP can be invoked by comparing the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. The facts here are that the AE is supplying a mix of the product and services and renders complete service matrix (including pricing, supply, QC and replacement apart from owning the intangibles). The applicability of CUP would yield spurious results in this scenario. The panel is hence not in agreement with the Ld AR submissions in this regard. The objection is accordingly dismissed."

14. Aggrieved by the order of the ld. DRP/Assessing Officer, the assessee is in appeal before us. The ld. counsel for the assessee at the outset submitted before us that suitable method for the assessee company is only Comparable Uncontrolled Price (CUP) method. The CUP method for computing arm's length price of the assessee's sale of finished goods to its AE is suitable, as the specific characteristics of PCBs (indicated by product identification number) sold by the assessee to AT&S AG were exactly the same as the specific characteristics of PCBs sold by AT&S AG to independent customers in back to back transactions. The prices at which PCBs were sold by the assessee to AT&S AG were exactly equal to the prices at which PCBs were sold by AT&S AG to independent customers in back to back transactions.The quant ties in which PCBs were sold by the assessee to AT&S AG were exactly equal to the quantities in which PCBs were sold by AT&S AG to independent customers in back to back transactions. The controlled transactions as well as uncontrolled transactions took place in Europe i.e. in the same geographical location as disclosed in the copies of back to-back invoices submitted to the TPO/DRP on sample basis. For administrative convenience, AT&S AG retained distribution commission and warranty expense out of the sale proceeds collected from the independent customers and remitted the balance to the assessee. Therefore, the CUP method is suitable for the assessee.

Apart from this, the ld. counsel for the assessee submitted before us that this identical issue is fully covered by the Hon'ble Jurisdictional Tribunal in

assessee's own case in ITA No.179/Kol/2016, for Assessment Year 2011-12, order dated 03.08.2016, wherein the Hon'ble Tribunal held as follows:

> *"11. We have heard the rival contentions of both the parties and perused the materials available on record. From the foregoing discussion we find that the TPO has made an upward adjustment for Rs. 69,30,53,397/- of the goods exported to the AE. The TPO treated the assessee as tested party and selected various companies for comparables. The TPO has taken the PLI as operating profit to sales for the working of ALP. The DRP confirmed the same after making some changes in the companies selected for comparables by the TPO. In the light of arguments advanced by the ld. AR and DR we find that the action of lower authorities with regard to the selection of tested party is correct in the light of following judgments. Onward technologies Limited Vs DCIT 35 taxmann.com 584 wherein it was held as under:*
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> *"A conjoint reading of the above provisions indicates that irstly, a transaction between two or more associated enterprises is called an international transaction; secondly, any income from such international transaction is required to be determined at ALP; thirdly, the ALP in respect of such international transaction should be determined by one of the prescribed methods, which also include the TNMM. Under this method, the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base, which is then compared with the net profit margin realized by the enterprise or by an unrelated e terprise from a comparable uncontrolled transaction. The modus operandi of determining ALP of an international transaction under this method is that firstly, the profit rate earned by the assessee from a transaction with its AE is determined (say, profit A), which is then compared with the rate of profit of comparable cases (say, profit B) for ascertaining as to whether profit A is at arm's length vis-à-vis the profit B. If it is not, then the transfer pricing adjustment is made having regard to the difference between the rates of profit A and profit B. The rate of profit of comparable cases (profit B) may be computed from internally or externally comparable cases, depending upon the FAR analysis and the facts and circumstances of each case. Thus the calculation of profit B may undergo change with the varying set of comparable cases. However, in so far as calculation of profit A is concerned, there cannot be any dispute as the same has to necessarily result only from the transaction between two or more associated enterprises, as is the mandate of sections 92 read with 92B in juxtaposition to rule 10B. The natural corollary which, thus, follows is that under no situation can the calculation of 'profit A' be substituted with anything other than from the international transaction, that is, a transaction between the associated enterprises. So, it is the profit actually realized by the Indian assessee from the transaction with its foreign AE which is compared with that of the comparables. There can be no question of substituting the profit realized by the Indian enterprise from its foreign AE with the profit realized by the foreign AE from the ultimate customers for the purposes of determining the ALP of the international transaction of the Indian enterprise with its foreign AE. The scope of TP adjustment under the Indian taxation law is limited to transaction between the assessee and its foreign AE. It can neither call for also roping in and taxing in India the margin from the activities undertaken by the foreign AE nor can it curtail the profit arising out of transaction between the Indian and foreign AE at arm's length. The contention of the ld. AR in considering the profit of the foreign AE as 'profit A' for the purposes of comparison with profit of comparables, being 'profit B', to determine the ALP of transaction between the assessee and its foreign AE, misses the wood from the tree by making the substantive section 92otiose and the definition of 'internal transaction'*

u/s 92B and rule 10B redundant. This is patently an unacceptable position having no sanction of the Indian transfer pricing law. Borrowing a contrary mandate of the TP provisions of other countries and reading it into our provisions is not permissible. The requirement under our law is to compute the income from an international transaction between two AEs having regard to its ALP and the same is required to be strictly adhered to as prescribed. This contention, is therefore, repelled."

Reliance is also placed in another decision of Hon'ble Mumbai Bench in the case of Cybertech Systems & software limited Vs. ACIT (33 taxmann.com 371) wherein the assessee had tried to justify the arm's length value of the transaction on the ground that the overseas AE had been incurring losses on the margin retained from the assessee. On appeal, the Tribunal rejected the assessee's argument that such transactions have to be considered at arm's length on ground that there is no shifting of profits. The Tribunal categorically held that the assessee i.e., the Indian party has to be taken as the tested party and the TNMM method is to be followed. Recently the Delhi Bench of ITAT in the case of Ranbaxy Lab Ltd. vs. Addl CIT (AY 2004-05) rejected the assessee's case since it had taken the foreign AEs as 'tested parties' and calculated its ALP. The ITAT agreed with the AO's contention that such benchmarking is not in consonance with the Income Tax rules.

Besides the above the AE cannot be treated as tested party because its accounts are based on Austria GAAP which is different from Indian GAAP. Accordingly the method of accounting, allocation of costs, recognition of revenue etc. differ for making the comparison. In the instant case we need to determine the ALP of the transaction between the assessee and AE for the export of the PCB. Therefore the tested party will be the Indian Party. In view of above we find no reason to interfere in the order of DRP. Hence the assessee has rightly been treated as tested party. With regard to the TNMM method adopted by the lower authorities for the computation of ALP we find that the various courts have he d to adopt the CUP method in the aforesaid facts and circumstances. At this juncture it is important to understand the CUP method as per the provisions of clause (a) of sub-rule (1) of rule 10B of the Income-tax Rules (hereinafter referred to as the 'Rules'), which inter alia reads as follows:

"10B. (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :-

(a) comparable uncontrolled price method, by which,-
(i) The price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;
(ii) Such price is adjusted to account for differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;
(iii) The adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction [or the specified domestic transaction] ;"

The term 'comparable uncontrolled transaction' has not been defined in the Act and the Rule. As per clause of rule 10A of the Rules, an uncontrolled transaction means a transaction between enterprises other than associated enterprises, whether resident or non-resident. The term 'comparable uncontrolled transaction' has been defined in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax

Administration, July 2010 (hereinafter referred to as the 'OECD Guidelines), which inter-alia reads as under:

"Comparable uncontrolled transaction
A comparable uncontrolled transaction is a transaction between two independent parties that is comparable to the controlled transaction under examination. It can be either a comparable transaction between one party to the controlled transaction and an independent party ("internal comparable") or between two independent parties, neither of which is a party to the controlled transaction ("external comparable').

The OECD Guidelines inter alia defines the CUP Method as follows:

"Comparable uncontrolled price (CUP) method
A transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. "

11.1 We also find support from the decision of the Hon'ble Mumbai Tribunal in the matter of DCIT vs. Isagro (Asia) Agrochemicals (P.) Ltd reported in [2013] 31 taxmann.com 388 (Mumbai - Trib.), wherein the Hon ble Tribunal interalia held that : "various benches of the Tribunal including Asstt CIT v. MSS India (P.) Ltd.[2009] 32 SOT 132 (Pune) and Philips Software Centre (P.) Ltd. v. Asstt. CIT ITA No.179/Kol/2016 A.Y 2011-12 [2008] 26 SOT 226 (Bang.) have preferred the following of CUP method. It is obvious that when the price of similar goods or services as sold or provided to the non-AEs is available, such a price constitutes the best guide to find out whether the price charged or paid to the AEs is at ALP or not. It is more so when such comparable uncontrolled transactions is internal. When similar goods as traded with AEs constituting international transactions are traded with Non-AEs, it always proper to consider the price of goods traded with non- AEs, for benchmarking price of good traded with AEs. In our considered opinion the Id. CIT(A) was justified in upholding the preference of CUP method over TNMM. "

In the instant case, the transactions involving sale of PCBs by the appellant to AE during the financia year 2010-11 stood as controlled transactions, whereas the transactions involving sale of exactly the same PCBs in the same quantity as those transacted between the appellant and AE and by AE (i.e. one of the parties to the controlled transaction) to independent customers in Europe during the relevant financial year stood as comparable uncontrolled transactions. The prices at which PCBs were sold by the Assessee to AE are equal to the prices at which PCBs were sold by AE to independent customers. Thus the international transaction involving sale of finished goods by the assessee to AE adheres to the arm's length principle embodied in the Indian Transfer Pricing Regulation under the CUP Method. Besides the above the assessee has submitted back to back invoices and on which no adverse comment has been passed by the lower authorities on its genuineness. It was also observed that the financial distribution segment report of AE submitted by the assessee was rejected by the TPO without assigning any specific reasons and defects in the report. We therefore inclined to treat the price charged by the assessee of the goods exported to AE as ALP as the same price was charged by the AE from the other customers.

11.2 We also find that in Form No. 3CEB for the previous year under consideration the assessee mentioned the method of determining arm's length price as 'TNMM' in respect of export of PCBs valued INR 197,55,10,000/- with regard to the commission and preliminary warranty guarantee. Transfer Pricing Study was silent about the

method for benchmarking the gross prices receivable by the appellant from AE for export of PCBs. But the DRP identified the aforesaid export as a separate transaction ('Sale') and confirmed the application of the TNMM at the entity level. However, we find that the DRP should have applied the method which is the most appropriate and in the instant we have already held that the CUP method as the most appropriate method.

11.3 In this connection, we rely in the decision of the Hon'ble Mumbai Tribunal in the matter of Mattel Toys (I) (P.) Ltd vs. Deputy Commissioner of Income-tax, Circle - 6(3) reported in [2013] 34 taxmann.com 203 (Mumbai - Trib.), wherein the Hon'ble Tribunal inter alia held that:

"41. Now coming to the argument of the learned Departmental Representative that once the assessee itself has chosen TNMM as most appropriate method in TPR, then it cannot resort to change its method at an assessment or appellate stage. In our opinion, such a contention cannot be upheld because if it is found on the facts of the case that a particular method will not result into proper determ nation of the ALP, the TPO or the appellate authorities can very well hold that why a particular method can be applied for getting proper determination of ALP or the assessee can demonstrate a particular method to justify its ALP. Thus, even i the assessee had adopted TNMM as the most appropriate method in the transfer pricing report, then also it is not precluded from raising the contentions/objections be ore the TPO or the appellate Courts that such a method was not an appropriate method and is not resulting into proper determination of ALP and some other method should be resorted. The ultimate aim of the transfer pricing is to examine whether the price or the margin arising from an international transactions with the related party is at ALP or not. The determination of approximate ALP is the key factor for which most appropriate method is to be followed. Therefore, if at any stage of the proceedings, it is found that by adopting one of the prescribed methods other than chosen earlier, the most appropriate ALP can be determined, the assessment authorities as well as the appellate Courts should take into consideration such a plea before them provided, it is demonstrated as to how a change in the method will produce better or more appropriate ALP on the facts of the case. Accordingly, we reject the contentions of the learned Departmental Representative and also the observations of the Assessing Officer and the learned Commissioner (Appeals) that the assessee cannot resort to adoption of RPM method instead of TNMM."

From the above we find that the Hon'ble Mumbai Tribunal has inter alia held that the ultimate aim of transfer pricing is to examine whether the price or the margin arising from an international transactions with the related party is at arm's length price (in short, 'ALP) or not. Accordingly, even if an assessee has adopted TNMM as the most appropriate method in the transfer pricing report, then also it is not precluded from raising the contentions/objections before the assessment authorities and the appellant Courts that such a method was not an appropriate method and is not resulting into proper determination of ALP and some other method should be resorted. In view of the principle enunciated by the Hon'ble Mumbai Tribunal in the aforesaid case, we apply the CUP Method in respect of the international transaction involving export of printed circuit boards and accordingly delete the adjustment of INR 69,30,53,397/- made in the assessment order.

11.4 We also find that various Hon'ble Court have held that the CUP Method being preferred over the profit based methods. In this connection we rely in the decision of the Hon'ble Delhi Tribunal in the matter of Hughes Systique India (P.) Ltd vs.

ACIT reported in [2013] 36 taxmann.com 41 (Delhi - Trib.), wherein the Hon'ble Tribunal inter alia held that:

"6.5 The CUP method provides the most direct comparison for the purpose of determining the arm's length price of international transactions and is to be preferred over the other profit based methods. Reliance is placed in this regard on the following decisions:

- Aztec Software & Technologies Services Ltd. v. Asstt. CIT [2007] 107 ITD 141/162 Taxman 119 (Bang.) (SB)

- UCB India (P.) Ltd. v. Asstt. CIT [2009] 30 SOT 95 (Mum.)

- Gharda Chemicals Ltd. v. Oy. CIT [2010] 35 SOT 406 (Mum.)

- Intervet India (P.) Ltd. v. Asstt. CIT [2010] 39 SOT 93 (Mum.)

- Asstt. CIT v. Dufon Laboratories [2010] 39 SOT 59 (Mum) 11.

Reliance in this regard is also placed on the decision of Hon'ble Mumbai Tribunal in the case of Serdia Pharmaceuticals (India) (P.) Ltd. v. Asstt. CIT reported in [2011] 44 SOT 391/9 taxmann.com 13 wherein the Hon'ble Tribunal while dealing with the priority of applications of methods for the determination of ALP, has held as under:

"64... as long as CUP method can be easonably applied in determining the arm's length price of an international transaction in a particular fact situation, and unless another method is proven to be more reliable a method vis-a-vis the fact situation of that particular case, the CUP method is to be preferred. The reason is simple. When associated enterprises enter into a transaction at such conditions in commercial and financial terms, which are different from commercial and financial terms imposed in comparable transaction between independent enterprises, the difference in these two sets of conditions in financial and commercial terms re attributed to inter relationship between the associated enterprises that is sought to be neutralized by the transfer pricing regulations. As long as CUP method can be reliably applied on the facts of a case, it does offer most direct method of neutralizing the impact of inter- relationship between AEs on the price at which the transactions have been entered into by such AEs. "

Relying on the decision of Serdia Pharmaceuticals India (P.) Ltd. (supra), the Hon'ble Delhi Tribunal in the case of Clear Plus India (P.) Ltd. v. Dy. CIT reported in [2011] 10 taxmann.com 249, interalia held that:

"7 .... In the case of Serdia Pharmaceuticals India (P) Limited, it has been held that CUP method is a preferred method and it leads to more reliable results vis-a-vis the results obtained by applying transaction profit method. In the case of SNF (Australia) Pty. Limited, it has been held that the focus is on the market in which products are acquired. The ratio of this case is applicable mutatis- mutandis to the facts of the case as the focus is on the market in which products are sold."

In the case of Gharda Chemicals Ltd. (supra), the Hon'ble Income Tax Appellate Tribunal held that internal comparable should be preferred over external comparables. The relevant extract of the judgment is furnished here in below:

"Internal CUP method envisages comparing the uncontrolled transactions of the appellant itself with other unrelated parties so as to determine the ALP with the AE. However the External CUP method disregards the price charged or paid by the appellant to or from its unrelated parties and contemplates the comparison of the price so charged from or paid to its AE with some external independent reliable price data under similar circumstances of transactions with AE. Ordinarily the Internal CUP method should be preferred over the External CUP method as it neutralizes several distinguishing factors, such as the local factors and the economies available or unavailable to the appellant in particular, having bearing over the comparison of price charged from unrelated parties and AE."

11.5 In view of the above judicial precedents, we find that the CUP method provides the most direct comparison for the purpose of determining the arm's length price of international transactions and is to be preferred over the other profit based methods. Accordingly in the instant case internal CUP method should be preferred over the external CUP method. Hence, we hold that in the instant case, the CUP Method (internal) is the most appropriate method in determining the arm's length price of the international transaction involving export of PCBs by the assessee to AE and accordingly, delete the adjustment of INR 69,30 53,397/- made in the assessment order."

15. On the other hand, the ld DR for the Revenue submitted before us thatthe OECD Guidelines defines 'tested party' as "the one to which a transfer pricing method con be applied in the most reliable manner and for which the most reliable comparable can be found, i.e. it will most often be the one that has the less complex functional analysis." UN Manual defines tested party in the similar manner. A Tested party should have the following attributes on bases of theses definitions

- Available of reliable and accurate data for comparison
- Least Complex (amongst the parties to the transaction)
- Data available can be used with minimal adjustments

Thus, it is clear from the above that, tested party is the one to which TP method can be easily applied. This means, in this case INDIAN COMPANY being the TESTED PARTY, the TP provisions or method shall be purely with reference to Indian Company only.

Further to make things more clear the TP analysis has to be under taken for the transaction undertaken by Indian Company with foreign AE. In order to apply CUP method to the assessee's case, it is relevant to examine as to

whether conditions required exist or not. The ld DR explains the provisions of Rule 10B (1) (a), in the context of the assessee under consideration as follows:

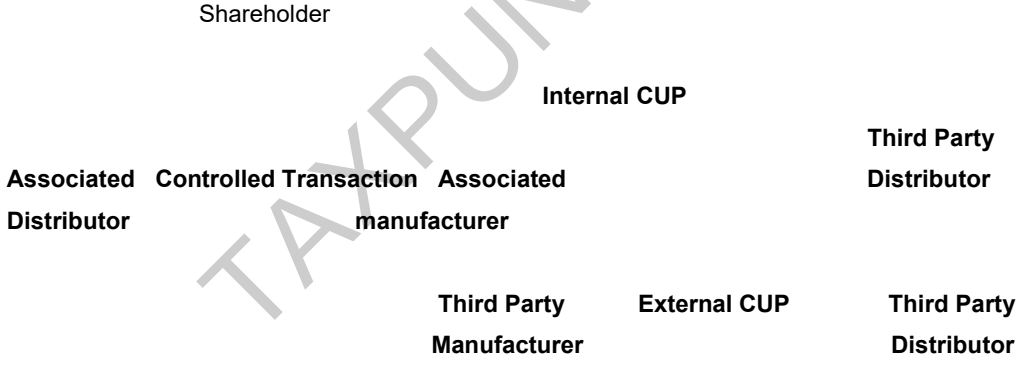
Comparable uncontrolled price method – Rule 10B(1)(a)

- Compares the price charged in a controlled transaction with the price in an uncontrolled transaction
- Requires strict comparability in products, contractual terms, economic terms, etc.

There are two kinds of third party transactions.

- Firstly, a transaction between the taxpayer and an independent enterprise (internal CUP)
- Secondly, a transaction between two independent enterprises (External CUP)

The below example shows the difference between the two types of CUP Methods:



With the help of the above diagram, the ld DR Explained the Bench that in order to apply CUP method either internal or external, the CUP is necessary and for that the relevant Rules are 10B (2), 10B (3), 10B (4) of the Income Tax Rules. Therefore, to apply the CUP method, the transaction entered into by the tested party should be compared with uncontrolled transaction and such uncontrolled transactions do not include transactions between the associated enterprises. Indian TP regulations prescribe that most appropriate method has to be identified for benchmarking on international transaction and comparison has to be done with uncontrolled transactions and not controlled transactions to arrive at the arm's length price. Accordingly, the approach of bench marking the transaction pertaining to sale

by AE by comparing the same with controlled transaction of assessee itself does not fall under any of the methods prescribed under the provisions of section 92C of the Act. It is contrary to Indian TP regulations and not acceptable under the Indian TP regulations. Similar view has been taken by ITAT in case of Skodo Auto India Pvt. Ltd. Vs. ACIT (122TTJ 699), M.S.S. India Pvt. Ltd. (123 ITJ 657) and BechtelIndia Pvt. Ltd. Vs. DCIT (136TTJ 212).

The ld DR pointed out that as per Para 2.6 of OECD TP guidelines, it is obvious that for application of anyTP method for benchmarking international transactions comparison has tobe with uncontrolled transactions.Further, the assessee's reliance on the decision of DCIT vs. Calance Software (P). Ltd. reported in 82 Taxman. Com 390 (Delhi ITAT) is misplaced, as facts are different but for back to back transactions of software development services at the same price. Therefore, the ld DR pointed out the followings:

1.The assessee is a manufacturer whereas the AE is a distributor. Hence, functions are different.

2. In the referred case, there is no issue of tested party.

3. Once the tested party issue comes into existence, the scenario changes and the mechanism of TP has to be applied to the tested party.

4. As explained above, as per Indian TP regulations as well as OECD guidelines uncontrolled transactions should be taken into account for comparability.

5. The referred cases has assumed that the transactions entered by AE with third parties can be considered as comparables, which is not defined either in Indian TP regulations or in OECD guidelines.

6. Even in the case of Ghardia Chemicals on which Hon'ble Kolkata has relied upon, the assessee namely ghardia chemicals has sold dicamba to third parties.

In addition to the above, it should be noted that for the application of the CUP method in general, a high degree of comparability is needed between the transaction under review and the comparable uncontrolled transaction. In this respect, the OECD guidelines have listed five comparability factors that should be taken into consideration when determining if uncontrolled transaction is comparable to a controlled transaction Viz: characteristics of the product or service, functional analysis, contractual terms, economic circumstances and business strategies. The ld DR also pointed out that in order to apply the CUP Method, the following factors should be taken into consideration:

- As explained above, the functions will be different for a manufacturer and for a distributor, itself explanatory.
- Contractual terms, (e.g., scope and terms of warranties provided, sales or purchase volume, credit terms, transport terms).
- The assessee as per the distribution agreement, is paying commission and warranty, whereas the AE is not charging such commission and warranty to third parties.
- Level of the market (i.e., wholesale, retail, etc.): The assessee is a manufacturer and as such selling products on wholesale basis to AE, whereas AE is distributing by catering to different parties on retail basis.
- Geographic market in which the transaction takes place. The transaction between assessee and AE is between India and Austria while AE is selling internally only.
- Foreign currency risks.
- Inventory risks
- Delivery terms means sales AT FOB basis or CIF basis
- Insurance and transportation costs

- Market conditions and competition in the market
- Alternatives realistically available to the buyer and seller

In view of the above factual matrix, the ld DR for the Revenue requested the Bench to relook into the issue of applicability of CUP method. The ld DR stated that there are Supreme Court decisions where it was held that coordinate benches of tribunal can take different view if the application of law and facts have not been properly appreciated in the previous judgments. Therefore, ld DR submitted that the order of DRP and TPO may be upheld or sent back to TPO with a direction to assessee to provide necessary internal or external comparables for examination by TPO.

16. We have given a careful consideration to the rival submissions and perused the material available on record we note that ld DR for the Revenue submitted before us about the applicability of Comparable Uncontrolled Price Method (CUP- Method) and explained the circumstances where the CUP method may not be applicable. He explained the internal CUP and external CUP and relied on certain judgments of the Tribunal, which are given in para 15 of this order. We note that all these are theoretical and academic exercise. The ld DR failed to bring on record any cogent evidence or material which can prove that CUP method is not suitable for the assessee. Why and how the uncontrolled price does not exist in the assessee`s case under consideration? The main focus of the ld DR for the Revenue is that since the assessee is a manufacturer whereas the associated enterprise (AE) is a distributor, hence, functions are different, therefore CUP method is not applicable to the assessee.

We note that under the Distribution Agreement, the assessee has grant to AT & S AG (AE), the exclusive right to market, distribute and sell the products manufactured by the assessee in the specified territory (Europe). The assessee, as a principal, has the full authority to sell the products

manufactured by it as per own business decision, therefore, the assessee has functioned as a full-fledged manufacturer of its product and AT & S AG (AE) functioned as a distributor of the assessee. The AT& S AG (AE), with the prior written agreement of the assessee, can seek customers for the products manufactured by the assessee outside the specified territory or establish branch or maintain any distribution depot for the products of the assessee outside the specified territory in countries where the assessee has no exclusive distributors. The AT & S AG (AE) is entitled to get commission as per the Distribution agreement and from time to time the commission may be reviewed by the assessee. The assessee paid commission to AT&S AG (AE) @ 6% of gross distributor`s price for carrying out distribution activities in the specified territory. As per the Distribution agreement, the AT & S AG (AE) further deducts preliminary warranty guarantee @ 2% of the gross distributor`s price out of the aforesaid sale proceeds for the purpose of incurring warranty expenses arising from further sale of PCB`s to independent customers. The AT & S AG (AE) remitted the sale proceeds collected by it from independent customers in the open market under uncontrolled conditions, to the assessee company, which was recorded in the books of accounts of the assessee company as “sales”. Therefore, in the assessee`s case under consideration there are independent customers, and the price is fixed by the Principal (Assessee), the product design and specification is decided by the assessee. The Associated Enterprise, the AT & S AG (AE) plays a limited role, that is, it collect the money on behalf of the assessee and remits the same to assessee, for that AE is paid commission. Even commission and warranty expenses are determined and decided by the assessee (Principal).The AT & S AG (AE) does not do any value addition in the goods manufactured by the assessee. Therefore, in this scenario, the stand of the ld DR that CUP Method is not applicable to the assessee, is not acceptable.

17. Now we deal with the issue of 'tested party'. The Tested party is one to which a transfer pricing method con be applied in the most reliable manner and for which the most reliable comparable can be found. The selection of tested party depends on the following factors:

(i) Least Complex (amongst the parties to the transaction)
(ii) Data available can be used with minimal adjustments

Therefore, it is abundantly clear from the above that, a tested party is the one to which TP method can be easily applied. This means, in this case Indian Company being the tested party and the TP provisions or method shall be purely with reference to Indian Company only. The Transfer Pricing analysis has to be under taken for the transaction undertaken by Indian Company with foreign independent customers.

Besides, the Coordinate Bench of ITAT Mumbai has held in case of Aurionpro Solution Limited (ITA No 7872 of 2011) that for the purpose of determining the ALP, tested party can be the assessee. The Indian TP regulation per chapter X of the Income Tax Act 1961 is an anti-evasion tool to prevent adverse profit shifts. The materiality of examination of the International Transactions has to be in this light Therefore, the testing has to be done in order to examine if the Indian entity is offering its profits to lawful taxation in India. In order to determine the correct profits by ascertaining correct ALP, the transactions have to be examined by keeping the Indian entity in primary focus. Therefore, keeping the AE as a tested party would fundamentally defeat the basic purpose of the TP regulations. In the facts and circumstances of the case, the assessee Indian Company is justified to be taken as the tested party.

18. We note that as the issue (including tested party) is squarely covered in favour of the assessee by the Jurisdictional Tribunal in assessee's own case in ITA No.179/Kol/2016, for Assessment Year 2011-12,(supra) and there is no

change in facts and in law and the Revenue is unable to produce any material to controvert the aforesaid findings. Therefore, we are of the view that the arm's length price computed by the DRP/TPO needs to be deleted. Accordingly, we delete the arm's length adjustment to the tune of Rs.90,32,40,004/-.

19. Issue No.2 raised by the assessee relates to arm's length price adjustment to the tune of Rs.9,97,50,264/- made by the TPO/Assessing Officer in respect of payments made by the assessee to its AE for receiving purchase and order handling services and sales services from the AE. This covers the revised ground Nos 4 to 8 of the Assessee.

20.Grounds of appeal Nos. 4 to 8 are closely linked. These grounds are directed against the ALP adjustments made by the AO / DRP in respect of payments made by the appellant for receiving purchase and order handling services and sales services based on the allegation made by the ORP in their order that the appellant failed to satisfy benefit test in respect of the said expenses incurred as per the Cost Contribution Agreement (CCA).

Briefly stated, the relevant material facts are as follows. The AT&S group of companies were engaged in manufacture of PCBs and hence, those companies had similar and comparable needs for services in terms of arrangements required to be made in connection with purchase of raw materials, efficient handling of orders placed by customers and sale of products in the global market. In order to secure economies of scale and optimization of global business opportunities, the AT&S group of companies combined together under the CCA and contributed to a common fund for financing global purchase services, global order handling services, global sales services and other services. The costs incurred under the CCA was

allocated to the parties to the aforesaid agreement using appropriate allocation keys mentioned in the CCA without adding any profit element thereto. The team formed under the CCA taking staff from all the group companies, was responsible for development of market / customer base for the group globally, procurement of order for PCBs from the customers globally, handling of customer orders globally in efficient manner, selection of suitable suppliers of raw materials globally and so forth.

The assessee made separate payments to AT&S Asia Pacific Ltd Hong Kong (administrator of CCA) for receiving (i) sales services, (ii) purchase and order handling services and (iii) shared information technology services under the CCA during the relevant financial year. As the aforesaid transactions constituted reimbursement of actual cost without any profit element having been included therein, the assessee applied the CUP Method for determining the arm's length, nature of the aforesaid transactions. The assessee filed submissions before the ld TPO containing detailed submission on the nature of purchase & order handling services and sales services along with copies of documentary evidences on sample basis in support of its contention. The assessee filed the aforesaid explanations and documentary evidences on sample basis to the DRP for their verification. The ld TPO determined the arm's length price of the aforesaid international transactions at NIL value based on the allegation that the said services were shareholder activity in nature. The ld DRP also held that the services were not stewardship in nature but the assessee primarily failed to satisfy benefit test and hence, the arm's length price of the aforesaid international transactions would be NIL.

21. When the matter was referred to ld TPO by the Assessing Officer, the Ld. TPO alleged that the intra-group services rendered under the CCA were shareholder activity. Therefore, the TPO determined the arm’s length price of the aforesaid international transactions at NIL value without applying any of

the methods prescribed under sub section (1) and (2) of section 92CA of the Act, read with rule 10B of the I.T. Rules, 1962. The observations of the TPO are given below:

> *"5.12 Based on the above discussions, the undersigned is of the view that due cognizance needs to be given to the substance of the transaction, and not just the form. Since the majority of the raw materials and spares are supplied by suppliers controlled by the AE and almost the entire production is sold to the AE, the assessee undertakes simply manufacturing functions and bears only the risk relating to product quality. Hence, the assessee needs to be characterized as a contract manufacturer, and not a full-fledged manufacturer.*
>
> *6. Since, the assessee has been characterized as contract manufacturer the payment for services received are in the shareholder activity and the all the services provided to the A.E are geared towards to the identified needs of the A.E i.e supply of Finished goods to its Customer after getting manufactured from the Assessee.*
>
> *7. Hence, the payment in respect of the below mentioned service to the extent of 92.3% are held to be Nil.*
>
> *Purchase and order handling charges- 3,74,87,673*
> *Payment for sales service 7,05,49,004*
> *Payment for shared information technology service 3,69,12,872*
> *14,49,49,549/-*
>
> *8. Hence the 92.33 % of the above amount paid in respect of various services purported to be received is taken as NIL i.eRs.13,38,31,918/- is taken at Nil.*

22.Based on the order of the ld TPO, the Assessing Officer made the addition in the fair assessment order. The total upward adjustment of Rs.100,67,30,000/- was made in the draft assessment order passed on 17.03.2016, consisting ALP in respect of export of printed Circuit Board(PCBs) and on account of receiving of purchase and handling services and sales services. Later, as per the direction of ld DRP, New Delhi dated 27.09.2016, the assessee company has submitted the calculation of revised total TP adjustment. As per the direction of ld DRP, the assessee company got relief of Rs.37,39,732/- and the TP adjustment to the extent of Rs.100,29,90,268/- (that is, Rs.100,67,30,000 – Rs.37,39,732) was sustained in the hand of the assessee. Out of total TP adjustment, the amount of Rs. 90,32,40,004/- relates to export of printed circuit board (PCBs) and amount of Rs.

9,97,50,264/- relates to purchase & order handling services and sales services.

The further break -up of Rs.9,97,50,264/-, which relates to purchase & order handling services and sales services are as follows:

(i)	Amount attributed to Sales Services	Rs. 6,51,37,895
(ii)	Amount attributed to purchase & order handling	Rs. 3,46,12,369
Total		Rs.9,97,50,264

23. Aggrieved by the order of Ld TPO/AO, the assessee filed the objections before the Hon'ble Dispute Resolution Panel The Dispute Resolution Panel alleged that the services did not meet benefit test, that is, the assessee failed to satisfy benefit test. Therefore, ld. Dispute Resolution Panel confirmed the arm's length price of the aforesaid international transaction as determined by the Ld TPO/AO as Nil value without applying any of the methods prescribed under sub-section (1) and (2) of section 92C of the Act r.w.r. 10B of the Rules. The relevant observations of the DRP are given below:

> *"These objections are same in terms of issues concerned, hence taken up together. The assessee has participated in CCA (Cost Contribution Agreement) for receiving purchase and order handling services, sales services and shared information technology services. The TPO has treated the value at NIL. The panel had in prior period considered the submission and accepted the services on account of IT activities. The same is upheld in view of similar nature of services and the facts of the case, the directions in respect of the other services are as below:*
>
> *The assessee has allocated costs in terms of the alleged services received. It has to be seen in the context of these services as to whether these result in some tangible benefit to the assessee or not. The services as they appear are routine services and it may be just to standardize the output of the assessee. Further, the production by the Indian entity may be as per specification from the parent, but this cannot extend to the office and market operations of the sourcing etc of the assessee. It has been contended by the Ld Counsel that the assessee is a risk bearing manufacturer in this context, it is quite illogical that the entity is magnifying its costs by availing of services which at best can be duplicate in nature and content. The examination of financials of the assessee leads to this conclusion. The service content does not appear to be of the nature of stewardship nature. The TPO is well within his statutory domain to determine ALP for the intra group services rendered apparently per force to the assessee. Hon'ble Delhi High court has held in EKL Appliances ([2012] 24 Taxmann.com 199 Delhi/ 345 ITR 241 Delhi):*

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 consideration for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure con no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously.

Further, the assessee has to meet the rigors of the benefit test as laid down in the recent judgment of Delhi ITAT in case of BOMBARDIER TRANSPORTATION INDIA PVT LTD reported in 2015-TII-473-ITAT-DEL-TP. It has been observed here as under:

"Intra Group services vis-a-vis Benefit test"

It is seen that in the present A.Y, there is clear finding by the TPO and the DRP that the assessee has not given the details of the total costs incurred by the AE on a particular services. In fact, the assessee could not establish how the said cost was incurred and on what basis the said cost was placed upon the assessee, Thus, the assessee's contentions of the benefit given in A.Y. 2008-2009 and 2010-2011 be taken into consideration, does not survive. The payment for Intra Group Services to AEs is separate international transaction independent of financial results and capable of verifiable separately. Therefore, the TPO was right in his action to determine the ALP separately, rather than aggregating it with other transactions under TNMM. The documents field before the Panel shows that the assessee company has received hardware/software from third parties directly and the billing was also raised by those third parties on the assessee.

Only the said transaction was routed through the AE, those invoices were to the tune of Rs. 13,87,84,117/- and invoices amounting to Rs.97,99,091/- which was raised by the third parties on the AE for the services rendered by them to the assessee. Thus, the DRP rightly directed the TPO to examine these invoices and allowability of the same as expense to be decided. From the review of the services and benefit report and the supporting documents submitted by the assessee, it can be seen that the assessee company is benefited from the supervision and guidance of the group's functional experts. Though, the annexure show that the assessee was benefitted significantly from the intra-group services received from its AEs, it failed to give the supporting evidence such as invoice, confirmation from parties to prove the same. The assessee has also undertaken a detailed cost benefit analysis in order to demonstrate the cost savings achieved by it by availing the said services from the AEs. Therefore, when AEs transact with each other, for the purpose of transfer pricing, they must replicate the dynamics of market forces, as there is no concept of free lunch in business dealings. Thus, the DRP rightly held that the benefit test which is well recognized by OECD and other developed countries, Tax regime have to be seen for allowing the payment in case of Intra-Group Services. The expected benefit must be sufficiently direct and substantial so that anindependent entity in similar circumstances, would be prepared to pay for it. If nobenefits have been provided, then the services cannot be charged for. Since the assessee,just explained in generic

nature about the benefits vis-a-vis the intra-group services payment to its AEs, therefore, we uphold the orders of the DRP as well as the TPO."

A reference may also be made to the judgment of Hon'ble Delhi ITAT in Knorr Bremse India P Limited (ITA no. 5097/Del/2011) Asstt. Yr: 2007-08-

"9.2. After hearing the parties with reference to material on record, we find that the authorities below have not conclusively held that the assessee could not enter into such a transaction nor had they disallowed the same by holding that such an expenditure is not assessee's business expenditure. The DRP as well as the authorities below have merely elucidated that the payments are reimbursement in respect of Ms. Rita Ricken and other personnel's case to serve the interest of share holders. By saying so they have only described the circumstance under which the international transaction has been entered by the appellant, so as to test the benefit that can be said to have reached the assessee. It, therefore, cannot be said to have questioned the commercial expediency of such transactions entered by the appellant. The I.T. rules contain exhaustive detail regarding nature of information and documents which are required to be maintained by the, assessee. Rule 10D(I) of the I.T. Rules, 1962 also mandates the maintainability of record of uncontrolled transactions to be taken into account in analyzing the comparability of the international functions entered into by the assessee. It, therefore, is obligatory on part of the appellant to maintain such record and produce the same before the TPO to show that it has benchmarked the international transaction at ALP. This obligation, however, has not been discharged by the assessee. 9.3. The appellant in the present case is also not shown to be willing to pay any amount for such services, if it were, so provided by an independent enterprise or if the same would have been performed in house. The DRP is found to have considered these services as non-beneficial for the recipient and did not take it as chargeable services. The perusal of e-mails and other contemporaneous record only goes to reveal that incidental and passive association benefit has been provided by the associate enterprise. In this view of the matter there could neither be any cost contribution or cost reimbursement nor payment for such services to the AE. The TPO, therefore, has rightly adopted Nil value for benchmarking the arm s length price in respect of both these services.Wetherefore, do not find any reason to interfere with the well-reasoned conclusion reached by the AO on this count. The grounds raised in appeal in this respect, therefore, stand rejected."

Basis above, the panel holds that the services are not of the nature of stewardship in nature, but also not meeting the benefit test so as to merit allowance of the same. The ALP determined by the TPO is accordingly upheld, though not as stewardship service. The assessee fails on the benefit test primarily. This objection is disposed of as above.

24. Aggrieved by the order of theld DRP/TPO, the assessee is in appeal before us. The assessee has raised Ground Nos.4 to 8 in respect of arm's length price adjustment to the tune of Rs.9,97,50,264/- against payment made by the assessee to its AE for receiving purchase and order handling services and sales services from the AE. These grounds are common and identical; therefore, these have been taken altogether.

Before us, Ld. Counsel, Rituparna Sinha, as regards thepurchase and order handling services and sales services from the AE, submitted thatas no adjustment was directed by the TPO in respect of the aforesaid transactions for A.Y. 2009-10, AY 2010-11 and AY 2011-12 on the same facts and circumstances of the case, therefore, the TPO violated the rule of consistency enunciated by the Hon'ble Supreme Court 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 counsel submitted before us the copies of Form No. 3CEB for AY 2009-10 (pb no. 1354), AY 2010-11 (pb no 1363) and AY 2011-12 (pb no 1372) to substantiate that no adjustments were made by the TPO in respect of the aforesaid transactions for A.Y. 2009-10, AY 2010-11 and AY 2011-12 on the same facts and circumstances of the case.

25.Regarding the fact that the DRP/TPO did not dispute the CUP method applied by the appellant in determining the arm's length price of sales services and purchase and handling services, the counsel submitted that the DRP/TPO determined the ALP of the said transactions at NIL value without applying any of the methods prescribed under sub-section (1) and sub-section (2) of section 92C of the Act which leads to violation of the provision of sub-section (3) of section 92CA of the Act read with sub-section (3) of section 92C of the Act. In this connection, reliance is primarily placed on the decision of the Hon'ble Jurisdictional Tribunal in the matter of NLC Nalco (India) Ltd. vs DCIT (ITA No. 529/Kol/2008 for A.Y. 2003-04) and ITA No. 1256/Kol/2009 for A.Y. 2004-05) reported in (2016) 71 taxmann.com 57 (Kolkata – Trib). In rendering the aforesaid decision, the Hon'ble Jurisdictional Tribunal placed reliance on the following decisions:

- Decision of the Hon'ble Delhi High Court in the matter of CIT v EKL. Appliances reported in (2012) 24 taxmann.com 199 (Delhi).In this connection, the Hon'ble High Court referred to the decision of the

Hon'ble Supreme Court in the matter of CIT v Walchand& Co. etc. reported in (1967) 65 ITR 381.

- Decision of the Hon'ble Delhi Tribunal in the matter of McCann Erickson India (P) Ltd. v Addl. CIT reported in (2012) 24 taxmann.com 21.
- Decision of the Hon'ble Mumbai Tribunal in the matter of DIT vs Diebold Software Services (P) :Ltd. reported in (2014) 48 taxmann.com 26/151 ITD 463.

26. The ld Counsel, Rituparna Sinha, submitted before us that the assessee furnished before the A.O. the evidences of receipt of purchase services, order handling services and sales services (please refer to page No. 190 (3rd and 4th paragraphs) of the paper book). After examining the details, the A.O. did not make any adverse comment in his order under section 37(1) of the Act. In this connection, the appellant places reliance on the decision of the Hon'ble High Court of Bombay in the matter of CIT vs Lever India Exports Ltd reported in (2017) 78 taxmann.com 88 (Bombay) and the order of the Hon'ble High Court of Delhi in the matter of Commissioner of Income tax – IV. Cushman and Wakefield (India) (P) Ltd reported in (2014) 46 taxmann. Com 317 (Delhi). The Hon'ble High Courts held that the authority of the TPO would be to conduct a transfer pricing analysis to determine the arm's length price and not to determine whether there is a service or not from which the assessee got benefits. That exercise of factual verification would be left to the A.O. under section 37 of the Act. It is pertinent to note that in the instant case, the A.O. on verification of the aforesaid details, became satisfied and did not make any adverse comment under section 37(1) of the Act in the assessment order:

27. Coming to the Ld Counsel`s other limb of contention on 'Benefit Test', she submitted before us that the Ld.AO/ld.DRP was wrong in alleging that the appellant fails to satisfy the 'benefit test', without duly considering the evidences of receipt of purchase services, order handling services and sales

services filed by the assessee and detailed submission filed by the assessee on benefits received by it from the said services from the AE. The amount of Rs. 9,97,50,264/- relates to purchase & order handling services and sales services.The break -up of Rs.9,97,50,264/-, which relates to purchase & order handling services and sales services are as follows:

(i) Amount attributed to Sales Services Rs. 6,51,37,895

(ii) Amount attributed to purchase & order handling Rs. 3,46,12,369

Total Rs.9,97,50,264

The ld Counsel for the assessee submitted before us a brief submissions by way of the following chart to prove the benefit test This chart explains the nature of services, main functions, and documentary evidences for receipt of services along with paper book reference. This chart also explains the relevant para of the Cost Contribution Agreement (CCA). The assessee received the purchase & order handling services and sales services and documented them properly. The assessee also submitted the Costs allocated to AT&S India Pvt. Ltd. as per certificate issued by PWC Austria (pb.no. 997 to 999). The assessee submitted before the ld TPO, the copies of 78 chains of e-mail, job description sheets of 10 individual employees of the CCA team, evaluation reports of 6 global customers and flow chart of quotation processing services. In order to support the plea (that assessee derived benefits from these services as per CCA agreement), the ld Counsel placed reliance on the judgment of the Hon`ble Kolkata Tribunal in the matter of DCIT Vs. Landis +Gyr ltd reported in [2017] 86 taxmann.com109 (Kol-trib).

Chart showing nature of services and documentary evidences of receipt of services

Services under the CCA	TP Ajustment as disclosed in page no 398 (INR)	Segments	Nature of Services	Documentary evidences of receipt of services along with paper book reference	Costs allocated to AT&S India Pvt. Ltd. as per certificate issued by PWC Austria (no 997 to 999) (EUR)
Sales Services	92.33% of INR	Sales	Please refer to Page No. 535 to 537 of the paper	1.We are enclosing job description sheets of the employees of AT&S group of companies on	8,47,288

	7,05,49,004 (i.e. INR 6,51,37,895)		book for description of services. Main Functions: 1.Securing global customers for printed circuit boards manufactured by group companies (participants of CCA). 2.Price negotiation with the global customers. 3.Customer Care 4.To contribute in the creation of customer statistics. 5.Quotation processing services.	sample basis who are engaged in provision of sales services under the CCA: Susanne Bucht (page no 596 – 597), Katharina Bost (page 598), Nicole Follmer (page no 599 – 600). Heike Zimmermann (page no. 602 – 603) 2.We are considering a flow chart of the quotation processing exercise undertaken by CCA team – (page no 581 and page no 983 to 994) 3.We are enclosing copies of ten chains of e-mails (page no 606 to 633) along with clarification thereon (page no 582 to 588). In the aforesaid e-mails, it is mentioned that the global sales service team under the CCA receives enquiry or annual contracts from global customers and starts the quotation processing exercise. In this connection, they requested the employees of the appellant to calculate price quotes for their products and send the same to them for finalisation with the global customers. 4.We are enclosing copies of ten chains of e-mails (page no 1179 to 1273) along with clarification thereon (page 1023 to 1027). In the aforesaid e-mail , the employees of the appellant communicate to the CCA team that they have completed the alculation of prices of products offered against va ious purchase orders received from lobal cu tomers and requested the CCA team t complete the quotation processing exercise for global customers.	
		Sales Engineering	Sales engineers are sales persons with technical knowledge of the products and their markets worldwide. They contribute significantly in marketing / selling the products manufactured by the appellant		1,90,807
		PF / CAM	Product engineering (PE) and computer aided Engineering (CAM) teams consist of persons who have comprehensive knowledge regarding t e technical know how employed to manufactur the products offered by the AT&S group f companies They contribu significantly in calculating he prices of the said products		2,304
Order Handling Services	92.33% of INR 3,74,87,673/- (purchases and order handling services) INR 3,46,12,368	Supply Chain Management	Ple se r fe to page no 530 to 533 of the paper book f r description of services Main Functions: 1.Responsible for administration of business processes relating to orders for goods from global customers 2.To design and release new processes of order handling 3.To secure implementation and roll-out of new processes of order handling 4.To monitor the quality, cost and efficiency of processes of order handling 5.To introduce necessary escalation steps in case of deviations from the given plans / processes: 6.To monitor overall stock situations according to defined targets. 7.To maintain global customer contact and correspondence 8.Reclamation handling 9.To create sales order 10.To monitor order statistics and 11.To maintain global	1.We are enclosing job description of the employees of AT&S group of companies on sample basis who are engaged in provision of order handling services under the CCA: Susanne Bucht (page no 596), Nicole Follmer (page no 600), Heike Zimmermann (page no 603). 2.We are further enclosing job description sheets of the employees of AT&S group of companies on sample basis who are engaged in provision of order handling services under the CCA; Alexander Macht (page no 881 to 882). Scholar Reinhard (page no 883 to 884). Ritz Romana (page no 885 to 886), Paukawits Michael (page no 887 to 888), Melbinder Petra (page no 889 to 890). Gether Silvia (page no 891 to 892). 3.We are enclosing copies of ten chains of e-mails (page no 826 to 879) along with clarification thereon (page no 805 to 811). It is found that the order handling team under the CCA allocates orders received from global customers to the appellant and deal with the matters of shipment / delivery of the ordered items. The CCA team functions as a coordinator between the appellant and global customers in the matter of technical specifications of the products ordered, delivery schedule, sample quantity and so forth. 4.We are enclosing copies of twenty three chains of e-mails (page no 1103 to 1077) along with clarification thereon (page no 1019 to 1022). It is found that the CCA team deals with such matters as delay in delivery date, allocating new order to the appellant, entries made in material master created in SAP software, shipment of products, taking up quality confirmatory tests, approval	3,99,976(302316+97660)

			customer forecast in SAP software	from customer for additional speed up cost and other matters of order handling	
Purchase Services		Purchasing	Please refer to Page No. 528 to 530 of the paper book for description of services. Main Functions: 1. Procurement of raw materials at reasonable price for all the ground companies on global basis; 2. Selection of suitable suppliers of raw materials; 3. Supplier rating and supplier development in order to improve supplier's performance for attaining defined levels of cost, quality and delivery lead times; 4. Audit of global suppliers i.e. evaluation of suppliers to ensure that the materials purchased by the AT&S group of companies conforms to the industry set standards; 5. Price negotiation with global suppliers for bulk purchase of raw materials for all the group companies in order to secure economies of scale and to ensure substantial cost saving for the group companies; 6. To deal ith escalation scenario (i.e. in the event the indi idual group companies face problem in the mat r of quality of raw m terials, delivery chedule and so forth, the matter is to be escalated to the appropriate bodies and solutions are to be worked out.)	1.We are enclosing a Procurement Communication Guidelines which distinguishes between the role played by the purchasing team under the CCA and local purchasing team of the appellant (page no 812 to 814 and page no 894 to 896) 2.We are enclosing extracts from the evaluation reports prepared by the CCA team on six global suppliers (page no 815 and page 898 to 824) 3.We are enclosing copies of eighteen chains of e-mails (page no 927 to 949) along with clarification thereon (page no 815 to 820). It is found that the CCA team, with its strong bargaining power has made remarkable achievement in securing price reduction in the matter of bulk purchase of raw materials for all the group companies including the appellant. This leads to substantial cost saving for the appellant. 4.We are enclosing c pies of seven chains of e-mails (page no 1079 to 1101) along with clarification thereon (page n 1018 to 1019). The contents of the aid e-mails indicate price reduction and esultant cost saving for the appellant, intr duction of technical procurement roadm p and other related issues.	1,93,553

28.On the other hand, the Ld. DR for the Revenue, strongly relied upon the directions of the DRP as well as order of the TPO and submitted before us that the assessee failed to satisfy the benefit test in respect of sales services, purchase and handling services. He pointed out that Indian Transfer Pricing regulations explicitly cover the transactions in the nature of provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service, within the ambit of Transfer Pricing provisions. However, assessee failed to provide

any further guidance on the approach to be followed while benchmarking intra-group services. The Ld. DR placed reliance on the international tax practices followed in the UN TP Manual, OECD Guidelines, the United States Transfer Pricing regulations etc, both by the taxpayer and the Revenue while undertaking the compliance and the audit exercise respectively. The test for an intra-group service generally involves examination of the following factors:

- The nature of activities;
- The associated need and benefits;
- Documentary evidence in support of the transact on;
- The charge-out mechanism; and
- The ALP of the transaction.

The Ld DR explained that it is essential to draw a line of distinction between a business activity and a service. Essentially, the guiding principle that goes in determining the existence of an intra-group service iswhether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in house for itself. An in-depth analysis, following the aforementioned conceptual difference between business activities and services, clears the air on many common business activities erroneously perceived to be in the nature of intra-group services and this includes, the Activities without any benefit. Any activity which does not lead to an incremental commercial or economic value addition for the recipient cannot be regarded as a service. In the case of Gemplus India (P) Ltd. vs. ACIT, [2010] 8 taxmann.Com 170 the Bangalore Tribunal upheld the adjustment made by the TPO where the payments to be made to AE were not dependent on the nature and volume of services and even the appellant failed to prove any commensurate benefit against such payments.

Activities providing incidental or remote benefits, in a situation where an entity receives incidental benefits attributed solely to it being part of the MNE group, and not because of any specific activity being performed, the same requires no remuneration. The Activities leading to duplication of benefits, a third party would never make payment for receiving the same service twice since the incremental benefit is lost. Keeping this in mind, an activity leading to duplication of benefits cannot be construed as a service and therefore does not require any remuneration.

The ld DR pointed out that it is necessary to identifythe incremental economic or commercial value that has arisen to the services recipient. A direct nexus between the services received and corresponding value created should be established. An intra-group service should be analyzed to see how it helps the service recipient make gains through increased profitability be it by increasing sales or by reducing costs. In order to understand the value creation aspect of intra-group services, it is necessary to break the same into bits and pieces and analyze it further. The value of an intra-group services can segregate into its reference value and its differential value. The reference value of an intra-group service would necessarily constitute the price of the next best alternative. Whereas, the differential value of the service is essentially the net benefit it delivers to the recipient over and above those rendered by competitive reference service providers i.e. the value over and above the reference value. It is that part of the economic value which is attributed to its difference over alternatives. It is very common to find an Indian subsidiary of an MNE group receiving some centrally provided services, for instance, to gain economies of scale through the concentration of activities. These services may vary from being very simple administrative functions to more complex industry specific functions. The decision to provide certain services centrally may also be determined by the need to have the best practices implemented across geographies. Therefore, the needs and benefits of Intra-group service arrangements is driven by the necessity to achieve operational efficiency,

improve business operations, standardize policies, procedures and controls that are conducive to the MNE group's business operations.

29. In addition to this, the ld. DR for the Revenue has relied on the judgement of Hon`ble Mumbai Tribunal, in the case of Tata Motors European Technical Centre Plc. Vs. Assistant Director of Income Tax(IT)(2)(2) in [2014] 52 taxmann.com 411 (Mumbai-Trib.)wherein it was held as follows:

> *"The Indian Transfer Pricing Regulations while selecting comparable companies lays emphasis on FAR analysis, and conditions prevailing in the markets in which the parties operate for carrying out the comparability analysis. If such comparability analysis could not be done properly with the Indian comparables looking to the characteristics and nature of the functions performed and services rendered then, it has to be seen from the angle who is selected as tested party' and based on that, comparables are to be chosen from the economic factors and the functions performed in the conditions prevalent of the tested party. If the tested party itself is foreign based and the services rendered by it is very specific, for which the Indian comparables are not available or functionally not comparable then, it cannot be held that foreign comparables cannot be selected for benchmarking the Arm's Length Price or margin. Indian Transfer Pricing Regulation does not puts any fetters on selection of foreign comparables, if conditions are as such, that the Indian comparables do not stand the test of comparability with the tested party. Answer to this has been given in the OECD Transfer Pricing Guidelines wh ch pr vides that non-domestic comparables should not be automatically rejected and it has to be seen on case by case basis by the reference to the extent to which they satisfy the comparability factors. [Para 9]*
>
> *If the tested party has been selected consistent with the functional analysis of the controlled transaction and is a least complex party to the controlled transaction, then even if it is a foreign party, the same should be taken as the basis for carrying out comparability analysis with the uncontrolled transaction by taking into account the business environment in the country where the tested party is being benchmarked. Internationally, it has been recognized that choice of the tested party should be such having least complexity and should be the party in respect of which most reliable data for comparability is available.*
>
> *In Chapter 10, of the UN Manual, Indian Transfer Pricing Regulation have accepted the foreign comparables in cases where the foreign AE is the least complex entity and requisite information about the tested party and comparables are available. Thus, the Indian Transfer Pricing does not reject the concept of foreign comparables, if the tested party is foreign AE. The blanket assumption by the TPO and DRP that foreign comparables cannot be accepted at all, is not correct.[Para 10]*
>
> *In the instant case, there can be no dispute with regard to the fact that the tested party is TMETC, whose operating profit is to be benchmarked by carrying out functional analysis of its controlled transactions for which reliable data for its comparability is available in the country where it is located, then such comparables has to be taken into account for carrying out the comparability analysis for the purpose of Transfer Pricing and benchmarking the Arm's Length Price. The TMETC for the purpose of rendering services in India is incurring all its cost in UK like direct costs, employee costs, legal and professional fees, rent and other operating*

expenses, then for the purpose of computation of PLI, these costs have to be taken into consideration for determining the profit margin. Since all the main costs attributable to the PE are based on cost incurred in UK, then it can be very well-said that PE is influenced by the economic and financial conditions of UK, as against the Indian economic factors. The Indian economic factors are not at all influencing the cost or margin of the assessee, hence it cannot be held that Indian comparables can be used to benchmark the TMETC transaction and the price with Tata Motors. For this reason, the finding of the TPO as well as DRP that PE is an Indian enterprise, working in India and therefore, its margin is to be benchmarked with Indian comparables is not accepted.

The PE in India is a service PE, having no establishment in India, nor incurring any costs, deployed any assets, therefore, cannot be held that it is an independent Indian enterprise. Nothing has been brought on record that assessee's PLI is influenced by the economic factors in India, viz, attribution of costs, assets or other factors relevant for determination of profits are based in India. Thus, in our opinion, the Transfer Pricing Officer and DRP were not correct in holding that UK comparables cannot be taken into consideration for the purposes of comparative analysis and benchmarking the assessee's margin. Accordingly, under the facts and circumstances of the case, the foreign comparables i.e. UK comparables can be taken into account for carrying out FAR analysis and benchmarking the Arm's Length margin of the assessee's transactions with its AE and the selection of the Indian comparables by the TPO is not accepted. Since the TPO has not carried out any comparability analysis or FAR analysis in respect of UK comparables chosen by the assessee, therefore, he is directed to carry out such analysis and benchmark the assessee's margin. If such comparables do not stand the test of comparability then, TPO may search other comparable after confronting to the assessee. In that case, for the search of comparability assessee will provide necessary assistance to the TPO. With this direction, the matter of transfer pricing adjustment is restored back to the file of the TPO/Assessing Office . [Para 11]"

30. We have given a careful consideration to the rival submissions and perused the material available on record, we note that the cornerstone of Transfer Pricing principle is the comparability analysis of a controlled transaction with an uncontrolled transaction which is substratum of arriving at Arm's length price. The controlled and uncontrolled transactions are comparable if none of the differences between the transactions materially affect the factor being examined in a given methodology, whether determination of prices or for profit margin and for such determination a reasonable accurate adjustment can be made to eliminate the material effects of any such differences. Rule 10B(2) of Income Tax Rules, provides the comparability of the transaction with uncontrolled transaction which has to be judged with reference to specific characteristics of the property transferred or

services provided; FAR analysis; contractual terms; conditions prevailing in the markets, that is, economic conditions in which respective parties transact or operate including geographical locations, size etc. Thus, comparison of attributes of the transaction is carried which would affect conditions in Arm's length dealing. Rule 10B (3) specifically provides as under:-

> "An uncontrolled transaction shall be comparable to an international transaction or a specified domestic transaction if-
> (i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or
> (ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences".

This, Rule specifically recognizes that reasonably accurate adjustment should be made to eliminate the material effects of differences, if any. Sub-rule (2) lays down the factors for determining comparability whereas; sub-rule (3) lays down the standard of comparability. The standard comparability not necessarily entails complete identity between the two transactions but sufficient similarity. It can be held to be sufficient similar if the differences between them is not material so as to effect price or profit in the open market and if there is one such thing, then such a material difference needs to be eliminated through adjustments. The factors governing the price or profit in a transaction may depend upon business strategies, market conditions, competitions, market penetration schemes, geographical locations, climatic conditions, etc. Guidelines issued by OECD also recognized the business strategies adopted by the companies which have a bearing on profitability levels. Para 1.60 and 1.62 of OECD guidelines for the sake of ready reference are reproduced hereunder:

> "Para 1.60 of the Guidelines states as under:
> "Business strategies also could include market penetrate schemes. A taxpayer seeking to penetrate a market or to increase

its market share might temporarily charge a price for its product that is lower than the price charged for otherwise comparable products in the same market. Furthermore, a taxpayer seeking to enter a new market or expand (or defend) its market share might temporarily incur higher costs (e.g. due to start-up costs or increased marketing efforts) and hence achieve lower profit levels than other taxpayers operating in the same market".

Further, para 1.62 of the OECD Guidelines states as under:

"When evaluating a taxpayer's claim that it was following a business strategy that temporarily decreased profits in return for higher long-run profits, several factors should be considered. Tax administrations should examine the conduct of the parties to determine if it is consistent with the professed business strategy. Another factor to consider is whether the nature of the relationship between the parties to the controlled transaction would be consistent with the taxpayer bearing the costs of the business strategy. For example, in arm's length dealings a company acting solely as a sales agent with little or no responsibility for long-term market development would generally not bear the costs of a market penetration strategy."

Thus, business strategies market penetration, increase or save its market share are relevant and material factors determining prices and profit. All these factors have to be taken into consideration while eliminating the material effects which warrants some kind of reasonable accurate adjustments.

31. Before us the material factors relating to principle of consistency, which have been pointed out by the assessee is that on the same facts and circumstances of the case, no ALP adjustments were directed by the Ld TPO in respect of international transactions involving payments made by the assessee under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years i.e. AY 2009-10, AY 2010-11 and AY 2011-12. Though there was no change in the facts and circumstances of the case for the

previous year relevant to the assessment year 2012-13, the TPO/DRP determined the arm's length price of the said transactions at NIL value thereby violating the rule of consistency enunciated by the Hon'ble Supreme Court in the matter of Commissioner of Income Tax, Delhi-lV versus M/s. Dalmia Promoters & Devels. (P) Ltd, reported in [2015] 5ITR-OL277 (SC). In the aforesaid decision, the Hon'ble Supreme Court has held that:

"We are not going into this issue in as much as this appeal can be disposed of on the ground that consistency does demand that there being no change in circumstances, the income for the year 1993-94 would also have to be treated business income as for the previous three years. Accordingly, the appeal is dismissed."

We note that the Department has been consistently accepting the assessee`s transfer pricing documentation on the same facts and circumstances of the case, and no ALP adjustments were d rected by the Ld TPO in respect of international transactions involving payments made by the assessee under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years i.e. AY 2009-10, AY 2010-11 and AY 2011-12, therefore we do not agree with the stand taken by the TPO in the current assessment year under consideration, by following the Rule of consistency. For that we rely on the order of the Hon'ble Supreme Court in RadhasoamiSatsang vs. CIT 193 ITR 321 (SC), wherein it was held as follows:

"We are aware of the fact that, strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties 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. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter - and, if there was no change, it was in support of the assessee – we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of

Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

We are of the view that the above cited precedents on principle of consistency are squarely applicable to the assessee under consideration, as the facts under the Cost Contribution Agreement (CCA) for receiving purchase services, order handling services and sales services for last three assessment years i.e. AY 2009-10, AY 2010-11 and AY 2011-12, remain same and the Ld. DR for the Revenue is unable to produce any material to controvert the aforesaid facts in CCA agreement. Therefore, the Revenue has to have some consistency in its views and it cannot blow hot and cold at its sweet-will and hence the assessee succeeds on this score.

32. On the next objection of the ld Counsel of the assessee, we note that the action of the TPO/AO in determining the arm's length price of the international transactions under consideration without applying any of the methods prescribed under sub-section (1) and sub-section (2)of section 92C of the Act, which leads to violation of the provision of sub-section(3) of section 92CA of the Act read with sub-section (3) of section 92C of the Act.

The relevant provisions of section 92C are given below for ready reference:

"Section 92C: Computation of arm's length price.

(1) The arm's length price in relation to an international transaction [or specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely:—

(a) comparable uncontrolled price method;

(b) resale price method;

(c) cost plus method;

(d) profit split method;

(e) transactional net margin method;

(f) such other method as may be prescribed by the Board.

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed:

***Provided** that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:*

***Provided** further that if the variation between the arm's length price so determined and price at which the international transaction [or specified domestic transaction] has actually been undertaken [does not exceed such percentage not exceeding three percentage of the latter, as may be notified] by the Central Government in the Official Gazette in this behalf] the price at which the international transaction [or specified domestic transaction] has actually been undertaken shall be deemed to be the arm's length price.*

Provided also that where more than one price is determined by the most appropriate method, the arm's length price in relation to an international transaction or specified domestic transaction undertaken on or after the 1st day of April, 2014, shall be computed in such manner as may be prescribed and accordingly the first and second proviso shall not apply.]

Explanation.—For the removal of d ubts, it is hereby clarified that the provisions of the second proviso shall also be applicable to all assessment or reassessment proceedings pending before an Assessing Officer as on the 1st day of October, 2009.

(2A) Where the first proviso to sub-section (2) as it stood before its amendment by the Finance (No. 2) Act, 2009, is applicable in respect of an international transaction for an assessment year and the variation between the arithmetical mean referred to in the said proviso and the price at which such transaction has actually been undertaken exceeds five per cent. f the arithmetical mean, then, the assessee shall not be entitled to exercise the option as referred to in the said proviso.

(2B) Nothing contained in sub-section (2A) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154 for any assessment year the proceedings of which have been completed before the 1st day of October, 2009.

(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 [or 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,the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction [or specified domestic transaction] in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

***Provided** that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer"*

We note that it is abundantly clear from the provisions of sub-sections (1), (2) and (3) of section 92C, as explained above, that AO/TPO should determine the arm`s length price (ALP) by applying the six methods prescribed in sub-section (1) of section 92C of the Act. Normally, the arm`s length price is to be determined by applying the five methods Viz: (a) comparable uncontrolled price method; (b) resale price method;(c) cost plus method;(d) profit split method;(e) transactional net margin method. However, the sixth method may be prescribed by the CBDT. Therefore, the arm`s length price (ALP) has to be computed by applying only these six methods and the AO/TPO cannot ignore these methods Therefore, the AO/TPO cannot say at any point of time that none of the methods prescribed in section 92C(1) are applicable to the assessee. The AO/TPO has to apply the appropriate method to find the arm`s length price (ALP) of the assessee. Hence considering the provisions of section 92C of the Act, it is safely concluded that the AO/TPO cannot ignore these six methods which is prescribed in the statute to determine the arm`s length price (ALP).

Besides, section 92CA (3) also advocates that AO/TPO should not deviate from the six methods prescribed in section 92C(1), the relevant provisions of sub- section (3) of section 92CA are given below:

"Section 92CA: Reference to Transfer Pricing Officer.

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction [or specified domestic transaction] in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

Therefore, it is abundantly clear that the TPO has to compute the arm`s length price (ALP), by applying the provisions of sub-section (3) of section 92C of the Act. It means the TPO can not apply his own method to compute the arm`s length price (ALP) of the assessee. That is, the statute does not give right to the TPO/AO to adopt their own developed methods. The most appropriate method (MAM) has to be selected by the TPO/AO out of the six methods prescribed by the statute. He has to select any one method as MAM, out of the six methods prescribed in section 92C (1) of the Act to compute the arm`s length price (ALP).

We note that in the assessee`s case under consideration, the TPO/AO determined the arm's length price of the international transaction under consideration at NIL value, without applying any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Act, as explained above. The DRP alleged that the assessee failed to satisfy benefit test in respect of purchase & order handling services and sales services under the CCA and hence, the DRP confirmed the action of the TPO in determining the arm's length price of the said services at NIL value. It is pertinent to note that the aforesaid actions of the DRP and the TPO go against the basic tenet of the Indian Transfer Pricing Laws and violate the provision of sub-section (3) of section 92CA of the Act read with sub-section (3)of section 92C of the Act.For that we rely of the decision of the Coordinate Bench Kolkata Tribunal in the matter of NLC Nalco (India) Ltd vs. DCIT [2016] 71 taxmann.com 57 (Kol. - Trib.). In the aforesaid case, the assessee received technical and management assistance from its AE. The TPO determined the arm's length

price of the international transaction at 'NIL' value based on benefit test and without applying any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Act. On first appeal, the CIT (A) upheld the order passed by the AO/TPO, On second appeal, the Hon'ble Tribunal noted 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 would necessitate intervention of the Assessing Officer/TPO for determination of arm's length price of the international transactions under review at 'NIL' value solely based on the allegation that the benefits claimed to have been received by the assessee from the AE under the controlled service agreement would not be ones for which an independent enterprise would be wil ing to pay. The Tribunal noted that the TPO did not apply any of the methods prescribed under sub-section (1) read with sub-section (2) of section 92C of the Act, andprimarily based on the above observations, the Tribunal allowed the assessee's appeal anddirected to delete the ALP adjustment made by the AO/TPO.

We note that in the assessee s case under consideration, the TPO/AO has not selected any method (out of six methods), therefore, the arm`s length price (ALP) computed by the AO/TPO is not in accordance with the provisions of section 92C (1) of the Act, hence we direct the TPO/AO to delete the addition.

33. Now, we address the issue relating to 'Benefit Test'. The ldDR for the Revenue alleged that the assessee had failed to satisfy the 'benefit test' in respect of payments made by the assessee under the CCA(Agreement) for receiving purchase services, order handling services and sales services. We note that the assessee has submitted before the ld. TPO, the detailed nature of the aforesaid services and copies of documentary evidences of receipt of services on sample basis. We note that the ld Counsel for the assessee submitted before us a brief chart which is mentioned in para 27 of this order to prove the benefit test. This chart explains the nature of services, main functions, and documentary evidences for receipt of services along with paper

book reference. This chart also explains the relevant para of the Cost Contribution Agreement (CCA). The assessee received the purchase & order handling services and sales services and documented them properly. The assessee also submitted the certificate issued by PWC Austria (pb.no. 997 to 999), about the Costs allocated to AT&S India Pvt. Ltd. The copies of 78 chains of e-mail, job description sheets of 10 individual employees of the CCA team, evaluation reports of 6 global customers and flow chart of quotation processing services prove that assessee has received benefit from these services. The ld DR for the Revenue has not disputed that these services have not been received by the assessee, he disputed only the Benefit Test', that assessee did not get the benefit out of these services. We are of the view that assessee has proved that he had received the benefit from these services, by way of submitting a brief chart containing the services obtained, which is mentioned in para 27 of this order. Therefore, we note that the assessee has satisfied the 'benefit test', and for that we rely of the judgment of the coordinate bench Kolkata in the case of DCIT Vs. Landis + Gyr Ltd. [2017] 86 Taxmann.com, 109 (Kol trib.), wherein it was held that the assessee had derived commercial benefits out of rendering of intra group services by AE and payment made thereon were in the nature of third party, which would willing to pay.

34. We note that Ld. AO in the draft assessment order under section 143(3) read with 144C (1)of the Act, has not made any adverse comment under section 37 of the Act in respect of the services received under the CCA, for purchase services, order handling services and sales services. During the course of scrutiny assessment proceedings, the assessee submitted before the AO the same evidences of receipt of purchase services, order handling services and sales services as those submitted to the TPO, as per the direction of the AO. It is pertinent to note that the AO, after examining the aforesaid details, did not make any adverse comment under section 37 of the

Act. As per the provision of sub-section (1) of section 37 of the Act, the AO is authorized to examine whether an expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee) is incurred by an assessee wholly and exclusively for the purposes of the business in the matter of computation of the income chargeable under the head "Profits and gains of business or profession. We note that the Hon'ble High Court of Bombay in the matter of CIT vs. Lever India Exports Ltd.[2017] 78 taxmann.com 88 (Bom) wherein the Hon'ble High Court has held as follows:

> *"**7.** We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exe cise has to be done, if at all, by the Assessing Officer in exercise of his urisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained."*

We note that in the assessee`s case under consideration, the AO has not disallowed the benefit of services received by the assessee under the Cost Contribution Agreement. The authority of the TPO would be to conduct a

transfer pricing analysis to determine the arm's length price ('ALP') and not to determine whether there is a service or not from which the assessee benefits. That exercise off actual verification would be left to the AO under section 37 of the Act. The AO could, therefore, determine under Section 37 of the Act that the expenditure claimed was not for the benefit of the business, and thus, disallow that amount. This does not restrict or in any way bypass the functions of the TPO. The jurisdiction of the TPO is specific and limited i.e. to determine the arm's length price of an international transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. Therefore, we are of the view that the assessee has derived benefits from these services as per CCA agreement and hence the arguments advanced by the ld DR for the Revenue is not acceptable. Hence, based on the facts and circumstances and the case law cited above, we direct the AO/TPO to delete the arm`s length price adjustment to the tune of Rs.9,97,50,264/- in respect of the international transactions involving payments made by the assessee in respect of purchase, order handling services and sales services.

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

Order s pronounced in the open court on 11.05.2018.

Sd/-	***Sd/-***
(A. T. VARKEY)	**(A. L. SAINI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक Date: 11/05/2018
(RS, SPS)

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant- AT & S India (P) Ltd.
2. प्रत्यर्थी/ The Respondent-D.C.I.T, Circle-11(1), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.