आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'के', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "K", MUMBAI

सर्वश्री आर.एस. स्याल, लेखा सदस्य **एवं** विजय पाल राव, न्यायिक सदस्य, के समक्ष ।

Before Shri R.S.Syal, AM and Shri Vijay Pal Rao, JM

ITA No.7985/Mum/2010 : Asst.Year 2006-2007

M/s.Onward Technologies Limited 2nd Floor, Sterling Centre Dr.Annie Besant Road, Worli Mumbai – 400 018. **PAN :AAACO3742J.**	**बनाम**/ Vs.	The Dy.Commissioner of Income-tax (OSD) Range 8(1) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी **की ओर से** /**Appellant by : Shri Yogesh Thar**

प्रत्यर्थी **की ओर से** /**Respondent by : Shri Ajeet Kumar Jain**
Smt.Sasmita Misra

सुनवाई की तारीख / **Date of Hearing : 25.04.2013**		घोषणा की तारीख / **Date of Pronouncement : 30.04.2013**

आदेश / O R D E R

Per R.S.Syal (AM) :

This appeal by the assessee arises out of the order dated 20.10.2010 passed by the Assessing Officer u/s 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter called the `Act') in relation to the assessment year 2006-2007.

2. First ground of the appeal is against the disallowance of ₹48,87,004 made on account of late deposit of contribution to EPF / ESI. We find that the disallowance has been made simply for the reason that the assessee did not deposit its contribution before the due date under the respective Act. Admittedly, such amount was paid within the grace period or at best before the due date of filing the return of income u/s 139(1) of the Act. The Hon'ble Supreme Court in the case of *CIT vs. Alom Extrusions Limited [(2009) 319 ITR 306 (SC)]* has held that the amendment to first proviso and omission of the second proviso to section 43B by the Finance Act, 2003 is retrospective. The Hon'ble Delhi High Court in the case of *CIT vs. Aimil Limited [(2010) 321 ITR 508 (Delhi)]* has allowed deduction in respect of employees' share when the amount was paid before the due date under the Act. When we consider these two judgements, it becomes clear that both the employer's and employees' contribution are allowable as deduction if the amount of provident fund etc., though belatedly, but is paid before the due date of filing of return u/s 139(1) of the Act. As the amount in question was deposited by the assessee before the due date of filing the return of income, we hold that no disallowance is called for. This ground is allowed.

3. The second ground is against the treatment of interest income of ₹11,11,771 as `Income from other sources' against the Business income claimed by the assessee. At the very outset, the learned Counsel for the assessee was fair enough to concede that the Tribunal in the assessee's own case for the immediately preceding assessment

year has decided this issue in favour of the Revenue vide its order dated 11.04.2012 in ITA No.5235/Mum/2010. Respectfully following the precedent, we hold that the interest income of ₹11.11 lakh should be considered as falling under the head `Income from other sources'. This ground is not allowed.

4. Third ground of the appeal is against the claim of deduction u/s 10A. This ground has two parties. First part deals with the inclusion of Finder fees of ₹1.19 crore and Marketing fees of ₹29.12 lakh in the total turnover. The learned AR candidly admitted that the Tribunal in its afore-noted order for the preceding year has decided this issue against the assessee. Respectfully following the precedent, we uphold the action of the AO in this regard. Second component of this ground is against the inclusion of expenditure incurred in foreign currency from the total turnover. On this issue, the learned AR submitted that the Tribunal has decided this issue in assessee's favour in the afore-quoted order. The learned Departmental Representative admitted the position stated on behalf of the assessee in this regard. Respectfully following the precedent and in the absence of any distinguishing feature having been brought to our notice, we decide this issue in favour of the assessee. This ground is partly allowed.

5. Last ground of the appeal is against the Transfer Pricing (TP) adjustment of ₹1,46,75,307 to the value of international transactions. Briefly stated the facts of the case are that the assessee is a parent company of M/s. Onward Technologies Inc. USA (OTI-USA) and

M/s Onward Technologies GmbH, Germany (OTI-Germany). The Onward group is a global provider of Engineering Software Development services and solutions to end-users. During the previous year relevant to the assessment year under consideration, the assessee reported the following international transactions with its Associated Enterprises (AEs) :-

Sr. No.	Nature of service	Amount (₹ in crores) F.Y.2005-06	Method adopted	Amount (₹ in crores) F.Y. 2004-05
I.	**IT Enabled Services Segment :**			
1.	Marketing Fees (Paid)	1.88	TNMM	1.33
2.	Software Services – Offshore – USA (Received)	17.58	TNMM	13.73
3.	Technical Support Services (Received)	2.35	TNMM	1.97
4.	Software Services - Offshore - Germany (Received)	0.32	TNMM	0.51
	TOTAL	**22.13**		**17.54**
II.	**Distribution Segment :**			
5.	Recruitment Charges (Received)	1.19	CUP	1.03
6.	Sale of Customized Software Tools (Received)	2.07	CUP	0
	TOTAL	**3.26**		**1.03**
III	**Others (Reimbursements) :**			
7.	Management Fees (Received)	0.29	Actual	0.29
8.	Reimbursement of expenses (Received)	0.43	Actual	0.47
9.	Reimbursement of expenses (Paid)	0.26	Actual	0
	TOTAL	**0.93**		**0.76**
	GRAND TOTAL	**26.37**		**19.33**

6. Before proceeding further, we want to make it clear that there is no dispute on the international transactions under the II and III segments, viz., Distribution and Others (Reimbursements) inasmuch

as the Transfer Pricing Officer (TPO) accepted these transactions at Arm's Length Price (ALP). The entire controversy revolves around the determination of ALP in respect of international transactions under the first segment, being, IT Enabled Services. The TPO noted on page 2 of his order that the Operating income of the assessee was ₹66.25 crore with the operating profit of ₹0.24 crore. He further observed that the assessee earned revenue of ₹31.58 crore with operating income of ₹3.89 crore giving percentage of Operating income to Total cost at 14.05%. The total of the IT Enabled Services segment transactions amounted to ₹22.13 crore comprising of ₹1.88 crore towards payment of Marketing fees and the other three amounts totaling ₹20.25 crore towards receipts on account of software services and technical support services. On page 3 of his order, the TPO recorded that the IT Enabled Services were provided to its AEs at ₹22.13 crore. The assessee had chosen six comparables with its foreign AE as a tested party. The TPO recorded a categorical finding on page 5 of his order that the assessee had not determined the price charged by the assessee for providing the IT Enabled services in accordance with sub-sections (1) and (2) of section 92C of the Act, thereby ignoring the working of the assessee. He selected twenty comparable cases giving average of OP / TC at 20.68% as under:-

Sr. No.	Company Name	Sales (₹ in crore)	OP to Total Cost %
1.	Aztec Software Limited	128.61	18.09
2.	Geometric Software Limited (Seg.)	98.59	6.7
3.	IGate Global Solutions Ltd. (Seg.)	527.91	15.61
4.	Infosys Limited	9028	40.38
5.	KALS Info Systems Limited	1.97	39.75
6.	Mindtree Consulting Limited	448.79	14.67
7.	Persistent Systems Limited	209.18	24.67
8.	R Systems International Ltd.	79.42	22.2
9.	Aasken Communication Ltd. (Seg.)	240.03	13.9
10	Tata Elxsi Ltd. (Seg.)	188.81	27.65
11	Lucid Software Limited	1.02	8.92
12	Mediasoft Solutions P Ltd.	1.76	6.29
13	R S Software (India) Ltd.	91.57	15.69
14	SIP Technologies & Exports Ltd.	6.53	3.06
15	Bodhtree Consulting Ltd.	5.32	15.99
16	Accel Transmatics Ltd. (Seg.)	8.02	44.07
17	Synfosys Business Solutions Ltd.	4.49	10.61
18	Megasoft Limited	56.15	52.74
19	Lanco Global Solutions Ltd.	35.63	5.27
20	Flextronics Software Systems Ltd.	595.12	27.24
	Arithmetic Mean		**20.68%**

7. On being called upon to explain as to why the arithmetic mean of the above twenty comparable cases should not be adopted as arm's length profit as against the assessee's operating profit of 14.05%, the assessee made submissions against the TPO's action which have been incorporated on pages 4 and 5 of the his order. Here it is pertinent to mention that the assessee raised following objections against the twenty comparable cases chosen by the TPO : -

(i) None of the companies have back to back arrangement of Software Services Offshore (which in the assessee's case constitute more than 70% of the transaction with its AE), wherein the entire revenue from sales of the AE are received by the Indian Companies. The AE's for the marketing services rendered are given cost + 5% margin. In absence of the said data and facts the comparables cannot be applied to the assessee's case. Thus only companies with like nature of transactions can be compared.

(ii) Most of the companies referred by you like Aztec Software Ltd, Infosys Ltd. Tata Elxsi Ltd., Accel Transmatics Ltd., Mindtree Consulting Ltd., Flextronics Software Systems Ltd., Sasken Communications Ltd. etc. are large companies having high turnover and volume of business whereby having economics of scale cannot be compared. Thus the financials of the said companies cannot be bench marked or compared with that of the assessee.

(iii) Most of the companies referred by you have presence worldwide whereas the assessee has presence only in USA and very nominal transaction in Germany. Thus the transactions are not comparable.

(iv) Most of the companies referred by you have high intangibles whereas the assessee has no major intangibles. Thus the transactions are not comparable.

8. Rejecting the assessee's contentions, the TPO held that the twenty comparables cases chosen by him were functionally similar to the assessee. By considering the arithmetic mean of the OP/TC of these twenty comparables at 20.68% as ALP, the TPO proposed adjustment of ₹1.46 crore by applying the rate of 6.63% (20.68% - 14.05%) on ₹22.13 crore. The Dispute Resolution Panel (DRP) was

not convinced with the assessee's submissions and echoed the adjustment so proposed through the draft assessment order. This led to the addition of ₹1.46 crore, against which the assessee has come up in appeal before us.

9. We have heard the rival submissions and perused the relevant material on record. There are various facets of the determination of the ALP in respect of the ITES segment in the instant case. The sum and substance of the ld. AR's submissions is that the international transactions were entered into and recorded at ALP and that the calculation of the assessee's ALP is in order. Per contra, the ld. DR emphasized on the correctness of the determination of the ALP by the TPO as approved by the DRP. We will examine both the calculations one by one.

I. ASSESSEE'S ALP

10. In order to prove the correctness of the assessee's ALP, the ld. AR made several submissions, which can be broadly put into two categories, viz., (A) Overall perspective of the TP provisions and its bearing on the assessee's case; and (B) Case specific submissions

11. (A) Overall perspective of the TP provisions and its bearing on the assessee's case -

11.1. The arguments advanced on behalf of the assessee under this category are two-fold. First is that since the sale price received by the foreign AEs from the services ultimately sold to customers is equal to

that charged by the assessee from its AEs, which is further comparable to the six foreign cases doing the similar activity as the assessee's subsidiaries abroad, the international transaction between the assessee and the AEs should be considered at ALP. This refers to the foreign AE as a tested party. Second is that the authorities cannot go beyond the overall profit of the group of AEs. In our considered opinion, both these contentions are unsustainable as per law.

11.2.1. We take up the first contention by which the assessee has compared the profit earned by its foreign AE with outside comparables to prove that the price charged by it from the transactions with the AEs is at ALP. As can be noticed from internal page no. 34 of the TP Study that the assessee is harping on the selection of its AE as tested party on the basis of the US and UK Regulations. We have to decide as to whether the selection of the foreign AE as tested party is correct in the Indian context. For that purpose, we need to visit the provisions of the Chapter X of the Act with the caption "Special Provisions Relating to Avoidance of Tax" dealing with the computation of income from international transactions having regard to ALP. Section 92(1) of the Act provides that : `*Any income arising from an international transaction shall be computed having regard to the arm's length price.*' The term "*international transaction*" has been defined in section 92B to mean `*a transaction between two or more associated enterprises,* either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or

……..'. The methodology for the computation of arm's length price has been set out in section 92C(1) to be as per any of the prescribed methods, including `Transactional net margin method' (TNMM). This method has been admittedly employed by the assessee in the present case as the most appropriate method for determining the ALP in respect of the international transactions under consideration. Sub-section (3) of section 92C provides that : `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* has not been determined in accordance with sub-sections (1) and (2) ; or…….. the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him.' Rule 10B dealing with the determination of arm's length price under section 92C provides through sub-rule (1) that for the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method. The mechanism for determining ALP under TNMM has been enshrined under clause (e), which states that :

`(i) the net *profit margin realised 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 ;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base ;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market ;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii) ;

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.'

11.2.2. A conjoint reading of the above provisions indicates that firstly, *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 enterprise 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 92 otiose 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.

11.3. Now we espouse the second contention of the ld. AR that the authorities cannot go beyond the overall profit of the group of AEs in determining the ALP of the international transaction. It has been noticed *supra* that the object of Chapter-X of the Act is to prevent the avoidance of tax from transactions between two or more AEs. Because of such internal relation, the affairs between the AEs are capable of being arranged in such a way so as to reduce the incidence of tax in India. It is with this avowed object that the legislature has come out with the Chapter-X by declaring that any income arising from an international transaction shall be computed having regard to the arm's length price. The matter does not end here. The legislature in its wisdom has inserted section 92C which contains apparatus for the determination of the ALP in respect of international transactions. Sub-section (1) of section 92C provides that : `*The arm's length price in relation to an international 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.'. Sub-section (2) makes the same position beyond the shadow of any doubt by providing that : `*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'. On a careful analysis of the provisions of section 92 read with section 92C it is crystal clear that the ALP is to be determined by *any* one of the prescribed methods, which is most appropriate under the facts of the case. It is only the choice of one of the prescribed methods which has been left to the assessee or the authorities. It is neither open to the assessee nor the TPO to discard the prescribed methods and invent a new method or apply any other yardstick for determining the ALP. Coming back to the factual context prevailing before us, it is noticed that the ld. AR is accentuating on considering the overall profit of the group as a whole for the determination of the ALP in respect of the international transactions, which course of action has not been prescribed by the Act or rules under any of the methods governing the assessment year under consideration. As the argument advanced by the ld. AR that the profit of the group of AEs should be kept in view and in no case the TP adjustment should have the effect of breaching the overall profit earned by all the AEs taken as one unit, has no statutory mandate and is not stipulated under any of the prescribed methods. As such, the same is liable to be jettisoned as sans merit. We order accordingly.

12. (B) Case specific submissions

12.1. We will now evaluate and examine the case specific submission advanced on behalf of the assessee. It was put forth that the assessee chose six foreign comparable cases to demonstrate that the price charged by it from its AEs was at ALP under the TNMM.

Such point of view was sought to be canvassed before the TPO vide its letter dated November, 2009, a copy of which is available at page 367 (relevant page 374) of the paper book. In that letter it was stated by the assessee that its subsidiaries in USA and Germany were responsible for carrying out primarily sales and marketing activity along with sales and site support to clients in the respective countries. It remunerated the subsidiaries at cost plus 5% mark up. The assessee selected six comparables which were stated to be engaged in marketing functions in USA. The arithmetic mean of the cost plus mark up earned by those comparables was demonstrated at 4.07%. That is how the transactions between the assessee and its foreign AE were claimed at ALP.

12.2. There is no doubt on the fact that the assessee was following the TNMM for determining the ALP in respect of international transactions under the IT Enabled Services segment. It has been noticed above that as per rule 10B(1)(e), the ALP is determined under the TNMM with the starting point of the profit margin realized in relation to costs incurred or sales effected or assets employed etc. Once the profit rate of the assessee from the international transaction by the above exercise is determined (profit A), then it is compared with the profit rate earned by comparable cases (profit B), to see as to whether or not any TP adjustment is warranted. At this juncture, it is pertinent to note that rule 10B (1)(c) provides the procedure for determination of ALP under the `Cost plus method'. As per this method, the direct and indirect costs of production incurred by the

enterprise in respect of property transferred or services provided to an associated enterprise, are increased by the amount of a normal gross profit mark-up to such costs arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction to arrive at arm's length price in relation to the supply of the property or provision of services by the enterprise. Thus it is apparent that the mechanism of determining the ALP by adding mark up to the costs incurred is adopted under the `Cost plus method' and not the `TNMM'. The case of the assessee is that its 5% mark up to the costs incurred by the foreign AEs demonstrates the ALP of the international transactions of software and technical support services rendered to its AEs because such mark up is more than 4.07% of the comparable cases under the TNMM. The position that 4.07% is mark up on costs or is a profit rate as a percentage of some base under the TNMM in case of six comparables, is not properly emerging. Thus it can be seen that the assessee has mixed up the mandate of TNMM and Cost plus method in determining its ALP. Section 92C provides in no uncertain terms that the ALP can be determined by `*any*' of the prescribed methods. It is totally impermissible to adopt a combination of the prescribed methods or an altogether unprescribed method. Even within the prescribed method, one has to strictly go by the procedure enshrined in the method itself. Under no circumstance can the course of action prescribed under a method be dispensed with or substituted with a new one on the pretext of rationality or otherwise. This legal position has been

abundantly laid down by the special bench of the tribunal in a recent case of *L.G. Electronics India (P) Ltd. VS. ACIT 140 ITD 31 (Del-Trib)(SB).* As such, we are not inclined to approve the way in which the assessee has determined the ALP by mixing up the TNMM and the Cost plus method.

12.3. There is another vital reason for rejecting the assessee's method of determining the ALP. It has been greatly emphasized that the foreign AE incurred expenses on marketing and for carrying out the sales and marketing activity along with sales and site support to clients in the respective countries, for which it remunerated at cost plus 5% mark up. Since cost plus 5% mark up was higher than 4.07% of the comparables, the assessee claimed its international transactions of rendering offshore software and technical support services at arm's length. It is significant to note that the international transaction under consideration is that of receipt of amount from its AEs towards software and technical services rendered and not that of paying 5% mark up on the costs incurred by the AEs. By comparing the mark up on costs incurred by the AE, the assessee has altogether changed the complexion of the international transaction by substituting the actual transaction of `*rendering the software and technical support services'* with that of `*remuneration to AE*'. It is paramount to highlight that the TPO proceeded to benchmark the international transactions of ITES segment amounting to ₹ 22.13 crores alone. No adjustment was made in the Distribution segment or Reimbursement segment. We are at loss to comprehend as to how the international

transaction of rendering of software and technical and support services can be considered at arm's length on showing that another altogether distinct international transaction of remuneration to the AE for the services rendered was at arm's length. *Ex consequenti*, we are not inclined to accept the assessee's working from this angle as well.

13. To sum up, the methodology adopted by the assessee for computation of ALP in respect of its international transactions under the IT Enabled Services segment is completely unfounded and deserves to be and is hereby rejected in entirety.

II. REVENUE'S ALP

14.1. Having found that the assessee's ALP is *ab initio* incorrect, let us take up the determination of the ALP by the TPO as approved by the DRP to verify its correctness. It is noticed that there are certain infirmities in the TPO's order, some of which have bearing on the determination of ALP and others do not have. The recording of fact in para 5 of the TPO's order that the assessee is also providing software driven solutions and services to the banking industry, is incorrect inasmuch as this activity was done not by the assessee but its AEs as is manifest from page 24 of the paper book. The other infirmity in the TPO's order is on page 2 by which he recorded that the operating income of the assessee was at ₹66.25 crore and operating profit is ₹0.24 crore. These figures are adopted from page 44 of the paper book which represents the consolidated position of the assessee along with its two AEs. The exclusive figures of the

assessee are, in fact, contained on page 34 of the paper book which show the total revenue of ₹31.58 crore and the operating profit of ₹3.89 crore. These wrong recordings in the TPO's order have no bearing on the question of determination of ALP of the international transactions under dispute. As such, these are hereby ignored.

14.2. There are certain infirmities in the order of the TPO, which have bearing on the determination of the ALP. The TPO has proceeded on the premise that the assessee provided IT Enabled services to its two AEs worth ₹22.13 crore. This has been mentioned in para 8 and elsewhere also in his order. It is in contrast to the correct factual position recorded on page 2 of the TPO's order by which it is obvious that the amount of ₹1.88 crore represents the amount `Paid' by the assessee towards Marketing fees and the other three figures totaling ₹20.25 crore are the amounts `Received' by the assessee towards rendering of software services and technical support services.

14.3. Another glaring infirmity in the TPO's order which has bearing on the TP adjustment is that he determined 14.05% as Operating income / Total cost, which was later applied on the international transactions under the IT Enabled Services segment for working out the TP adjustment of ₹1.46 crore. In determining the Operating income / total cost of the assessee at 14.05%, the TPO took the figures on entity level inclusive of those from Distribution segment and Others (Reimbursements), which international

transactions were accepted by him at ALP. In such a situation, only the figures of IT Enabled Services segment were required to be considered as he was examining the ALP in respect of this segment alone. It is no doubt true that the assessee maintained its accounts on entity level. At the same time, the learned AR has emphasized that the segregation of figures in respect of IT Enabled Services segment is quite practical and can be easily done to the satisfaction of the TPO. In view of the fact that the adjustment was proposed in respect of IT Enabled Services segment, the TPO was supposed to restrict himself to the computation of such percentage of operating income to total cost of this segment alone.

14.4. Now we come to the twenty new comparable cases chosen by the TPO with an arithmetic mean of OP / TC at 20.65%. Before making a functional comparison between the assessee and these cases chosen by the TPO, it is relevant to take note the functional profile of the assessee. It is vivid from page 23 of the paper book, being a copy of the Directors' report, that the assessee company is engaged in the "Engineering Design Services". Similar position is emanating from page 26 of the paper book which is continuation of the Directors' report. It can be seen from pages 213 and 214 of the paper book, being the relevant part of the assessee's transfer pricing study, that the assessee is basically engaged in Engineering Design Services and IT consultancy services. It is basic and fundamental rule that the comparable cases can be those which are engaged in similar or as close as possible to the nature of business of the assessee. Now let us

examine the functional profile of some of the twenty comparable cases chosen by the TPO to verify if they are really comparable. Page 6 of the TPO's order contains the functional analysis of these twenty cases. First is the case of Aztec Software Limited, which is engaged in Educational Software focused on adult basic skill remediation and employability skills. Another case being KALS Info Systems Limited is Consultancy and IT service provider in life and general insurance sector. We have picked up these two cases randomly to note that they are *ex facie* functionally different from the assessee. In the like manner, there are certain other companies in this list of twenty comparable cases which are *prima facie* engaged in different functions when compared with that of the assessee. It can be noticed from page 5 of the TPO's order that the assessee raised objections as to the comparability of these twenty cases, albeit in a general manner, which came to be rejected without any cogent reasons. Rather there is no discussion worth the name in the TPO's order as to how the objections taken by the assessee as to the comparability of these companies, were not correct. Without going into the factual position *qua* each of these twenty cases as to whether they are comparable or not, in our considered opinion, the ends of justice would meet adequately if the impugned order on this issue is set aside and the matter is restored to the file of AO / TPO so that the comparability or otherwise of such cases may be discussed and decided in the light of the objections of the assessee on this issue. We sum up our conclusion that the AO / TPO would determine the ALP of ITES segment afresh by primarily considering the correct figures of

operating profit to total cost in respect of IT Enabled Service segment alone and thereafter considering the mean of the OP/TC of such cases out of twenty cases noted by the TPO, which are really comparable. It is also made clear that the other international transaction of payment of a sum of `1.88 crore included by the assessee under this segment should also be benchmarked as per law. Needless to say the assessee will be provided reasonable opportunity of hearing and will also have liberty to lead any fresh evidence in its defence in the fresh proceedings to follow.

15.1. Before parting with this issue, we would like to record that the ld. AR vehemently argued about the determination of the ALP for the current year by the assessee in the same way as was done in earlier years. It was stated that since such method was accepted by the TPO for the earlier years, the same ought not to have been rejected for this year. In the oppugnation, the ld. DR stated that *res judicata* does not apply to income tax proceedings and hence the factum of the TPO having accepted such wrong method of determining the ALP in the preceding years, was not relevant in so far as the current year was concerned.

16.2. The Hon'ble Supreme Court has held in several cases including *M.M. Ipoh & Ors. vs. CIT (1968) 67 ITR 106 (SC)* that : `The doctrine of *res judicata* does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year.' At the same time, it is equally true that

the *principle of consistency* has also been advocated by several Hon'ble courts including the Hon'ble Supreme Court in *Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC)* and the Hon'ble jurisdictional High Court in *CIT vs. Arthur Andersen & Co. (2009) 318 ITR 229 (Bom)* by holding that the decision made in earlier years is binding in subsequent years and should be followed. From the above decisions, it follows that a delicate balance needs to be maintained between the principle of *consistency* and the rule of *res judicata* depending upon the facts and the governing legal position prevailing in each case. At the same time, we want to highlight that the doctrine of *estoppel* together with its exceptions cannot be ignored. It is trite that there can be no estoppel against the provisions of the Act or the binding interpretation given to such provisions by the judicial forums. This rule has been cited with approval by several courts including the Hon'ble Supreme Court in *CIT vs. V.MR.P. Firm (1965) 56 ITR 67 (SC).* Where the facts of a case *prima facie* show that the authorities took a clearly incorrect view on the provisions of the Act in an earlier year, whether favoring the assessee or the Revenue, it cannot be argued in the subsequent year that the same incorrect approach should be repeated. The Hon'ble Delhi High Court in *CWT vs. Meattles (P) Ltd. (1984) 156 ITR 569 (Del)* has held that the Revenue authorities cannot be stopped from taking a correct view of statutory provisions in a later year.

16.3. We have elaborately discussed above that how the method employed by the assessee for determining the ALP in respect of

international transactions for the year under consideration is contrary to the statutory provisions having no approval from any judicial forum. If such a wrong method has been inadvertently accepted by the TPO in an earlier year, we cannot grant a license to the assessee to continue calculating the ALP in such a grossly erroneous manner in perpetuity. It needs to be discontinued forthwith. We, therefore, reject this contention advanced on behalf of the assessee that the application of such a wrong method be granted a seal of approval on the basis of its acceptance by the TPO in a preceding year.

17. In the result, the appeal is partly allowed.

Order pronounced on this 30th day of April, 2013.
आदेश की घोषणा दिनांकः को की गई ।

Sd/-	Sd/-
(Vijay Pal Rao)	**(R.S.Syal)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated : 30th April, 2013.
Devdas*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / DRP-I, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**