आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.45/PUN/2013

निर्धारण वर्ष / Assessment Year : 2008-09

M/s.Eaton Fluid Power Limited
145, Off. Mumbai – Pune Road.
Pimpri, Pune – 411 018. …. अपीलार्थी/Appellant

PAN: AAACV8426E

Vs.

The Asst. Commissioner of Income-Tax,
Circle-8,
Pune – 411 044. …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by	: Shri Percy.J.Pardiwala & Shri Vishal Kalra
प्रत्यर्थी की ओर से / Respondent by	: Shri Rajeev Kumar, CIT, Shri Sandeep Garg, CIT & Shri Suhas Kulkarni

सुनवाई की तारीख / **Date of Hearing : 13.12.2017**		घोषणा की तारीख / **Date of Pronouncement: 12.03.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against order of the Assistant Commissioner of Income Tax, Circle-8, Pune dated 30.11.2012 relating to assessment year 2008–09 passed under section143(3) r.w.s. 144C(13) of the Income Tax Act 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

1. *That on facts and circumstances of the case and in law the Ld. AO erred in assessing the income of the Appellant under the normal provisions of the Act at Rs.18,46,32,490 against returned income of Rs. 14,60,84,339 based on the directions received from Hon'ble Dispute Resolution Panel ("DRP") upholding the adjustment to the transfer price proposed by the learned Transfer Pricing Officer ("Ld TPO").*

2. *That on facts and circumstances of the case and in law the Ld AO/TPO erred in proposing and the Hon'ble DRP further erred in upholding an adjustment of Rs.3,85,48,147 in respect of the international transactions pertaining to (a)manufacturing activities of the Appellant and (b) IT services availed, alleging t the same to be not at arm's length in terms of the provisions of Sections 92C(1) and 92C(2) of the Act read with Rule 10D of the Income-tax Rules, 1962 ("the Rules").*

3. *That on facts and circumstances of the case and in law the Ld AO/DRP/TPO erred in splitting up the Appellant's operations into manufacturing and trading segments, and benchmarking the manufacturing activity separately, despite the fact that the manufacturing and trading activities are closely interlinked, thereby rejecting the methodology as per the transfer pricing study conducted by the Appellant.*

4. *That on the facts and circumstances of the case and in law, Ld. AO/TPO/DRP ought to have appreciated that even if the business of the Appellant was not to be viewed as a composite business and the profitability of the manufacturing activity were to be separately evaluated; the arm's length price should have been computed on basis of internal comparables and not external comparables.*

5. *That on the facts and circumstances of the case and in law, the Ld. AO/DRP/TPO erred in selecting certain external comparables which were not functionally comparable and in rejecting certain comparables that were functionally comparable, and thereby choosing an incorrect set of comparables disregarding the quantitative and qualitative and criteria applied by the assessee in this regard.*

6. *That on the facts and circumstances of the case and in law, the Ld. AO/DRP/TPO erred in applying the adjustment on the entire cost base of the relevant segment and not applying it proportionately in ratio of the imports consumed from associated enterprises to total consumption for the said segment.*

7. *That on the facts and circumstances of the case and in law, Ld. AO/DRP/TPO erred in rejecting the multiple year data as used by the appellant in its transfer pricing analysis, thereby ignoring the provisions of Rule 10B(4) of the Rules which allows use of multiple year data of comparable companies for the purposes of determination of the arm's length price as define under section 92F of the Act.*

8. *That on facts and circumstances of the case and in law the Ld AO/ TPO erred in proposing and the Hon'ble DRP further erred in upholding the transfer pricing adjustment of Rs.5,045,303, pertaining to payments made to associated enterprise for availing Information technology services, by determining the arm's length price of such international transaction as 'Nil' without furnishing the details of comparable uncontrolled transactions on the basis of which the arm's length price of 'Nil' was determined.*

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for leave to add, alter vary omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal.

3. Briefly, in the facts of the case, the assessee had filed the return of income declaring total income of Rs.14,60,84,339/-. The assessee was engaged in the manufacture and distribution of fluid power equipment such as pumps, gear pumps, valves, cylinders and related components for mobile and industrial markets. The unit of the assessee was at Pune. The assessee was wholly owned subsidiary of Eaton Corporation, which was globally diversified manufacturer of fluid power systems, electrical power products, electrical distribution and control products, automotive engine air management and fuel economy products and intelligent truck systems for fuel economy and safety. The assessee had entered into various international transactions with its associated enterprises and reference under section 92CA(1) of the Act was made to the Transfer Pricing Officer (TPO). The TPO noted that the assessee in the TP study report had applied TNNM method as the most appropriate method and had selected certain external companies. The assessee had also aggregated the purchase of raw material and export of finished goods and trading activities. The TPO computed the arm's length price in respect of international transactions entered into by the assessee with its associated enterprises. The TPO noted that the assessee had bifurcated its activities into trading and manufacturing. In the manufacturing sector, the assessee had bifurcated the sales into two parts; one part was the sale to third party where the entire purchases were from the third parties. This was claimed to be segment which was insulated from the transaction with associated enterprises. The other segment was where either purchases or sale transactions were from or to associated enterprises. The TPO did not accept the benchmarking

analysis proposed by the assessee company observing that it did not present actual picture of the transactions between the assessee and its associated enterprises. The TPO was of the view that internal comparability was possible since in the case of sale of gear pumps and cylinders, the entire material was sourced from the third parties and sale was made to associated enterprises as well as non-associated enterprises. However, this was also rejected as the sales to associated enterprises were only at Rs.1.34 crores as against the sales to non-associated enterprises at Rs.34.48 crores. The next issue which was raised by the assessee was comparison of the operating margins of the manufacturing segment with external comparables, when internal comparables were available, was found to be not appropriate. The next objection raised by the assessee was to the rejection of external comparables selected as per the TP study report and acceptance of certain new companies, which was not part of set of comparables. The TPO thereafter, considered the functional comparability or otherwise of the different companies under para 6.3.2 of his order. The assessee had proposed use of multiple year data instead of single year's data which was rejected by the TPO. The TPO thus, drew up the list of final comparables under para 9 at page 25 of his order and the arithmetic mean of PLI of said comparables worked out at 16.64% as against the PLI of the assessee by taking OP/OC at 6.31% and made an adjustment of Rs.4,88,23,152/- to the international transactions pertaining to the manufacturing activity.

4. The second segment was the IT services availed, wherein the TPO was of the view that the assessee had to prove that the services were rendered and the second aspect of intra-group services was the quantification of such services in terms of actual expenditure incurred and commensurate benefit

derived teherefrom. The TPO under para 13 at page 28 onwards has enlisted various aspects to be examined in respect of arm's length nature of intra-group services and it was held by the TPO that the payment for intra-group services including IT services would be treated at arm's length price only when it is proved substantially by the assessee that such services were actually received and further proving that such received services have benefited it. Vide para 14, the TPO at page 30 observed as under:-

> *"14. During the course of TP proceedings, the assessee was requested to furnish the information regarding the need of the said services, basis of charge, how the base cost is determined, evidences for receipt of services and the details of benefit derived from such services. However, in the present case except copy of shared service agreement effective from January 1, 2005 and a certificate obtained from the AE, the assessee could not produce any other information in support of its claim."*

5. The assessee in the TP study repot had mentioned the nature of services availed by it which are reproduced under para 15 at page 31 of the TPO's order and the TPO thus, concluded as under:-

> *"16. The shared service agreement, which is claimed to be the agreement for IT services availed, was between Eaton (China) investment company Ltd. and the assessee. The said agreement was made on November 16, 2009, and effective date is 1st January 2005. Which clearly indicate that the said agreement was made latter on with retrospective effect. As per the said agreement the services to be rendered by the Eaton (China) are accounting / finance, HR, Treasury, tax, internal audit.*
>
> *It is seem from the above that the services claimed to be received as mention in para 15 above and services to be rendered as per the said service agreement are totally different."*

6. The TPO thus, held that where the assessee had failed to prove the receipt of services and benefits derived from services with supporting evidence, the arm's length price of transactions was treated as Nil and hence, adjustment of Rs.50,45,303/- was proposed to be made to the arm's length price. In this regard, reliance was placed on the decision of Bangalore Bench of Tribunal in M/s. Gemplus India Pvt. Ltd. Vs. ACIT in ITA No.352/Bang/2009, relating to assessment year 2003-04. The Assessing Officer in the draft

assessment order passed added the said upward adjustment to the international transactions pertaining to both the manufacturing activities and the IT services availed totaling Rs.5,38,68,455/-. The assessee filed objections to the Dispute Resolution Panel (DRP), which in turn, directed the Assessing Officer / TPO to exclude the comparable Asco Numatics (India) Pvt. Ltd., whose margin was 40.82% and arithmetic mean of the PLI of comparables was worked out to 14.22%. The DRP also directed the adjustment to cost base as arm's length price of the services was determined at Nil. The TPO in response to the directions of the DRP, reduced the operating cost by Rs.18,64,402/- and intimated the revised operating cost at Rs.54,31,90,198/- by applying the arithmetic mean at 14.22% and after adjusting the operating cost, the adjustment to international transactions pertaining to manufacturing activity was worked out at Rs.3,35,02,844/-. The adjustment of Rs.50,45,303/- towards IT services availed was upheld by the DRP, consequently, the addition in the hands of assessee.

7. The assessee is in appeal against the order of Assessing Officer / TPO and the issue raised in the grounds of appeal No.1 to 7 is against the adjustment of Rs.3,85,48,147/- made in respect of international transactions pertaining to manufacturing activities of the assessee. The assessee is aggrieved by the order of Assessing Officer / TPO in splitting up the assessee’s operations into manufacturing and trading segment and benchmarking the same separately, despite the fact that both the activities were closely inter-linked. Further, the assessee is aggrieved that in case the profitability of manufacturing activity was to be separately evaluated, the arm's length price should have been computed on the basis of internal comparables and not external comparables. The next objection of the assessee is in

respect of rejection / selection of certain external comparables. The assessee is also aggrieved by the order of Assessing Officer / TPO in rejecting the multiple year data and also in applying the adjustment on the entire cost based of the relevant segment. By way of ground of appeal No.8, the assessee is aggrieved by the upholding of transfer pricing adjustment of Rs.50,45,303/- pertaining to the payment made to associated enterprises for availing IT services by determining the arm's length price of such transactions at Nil.

8. The learned Authorized Representative for the assessee pointed out that the assessee was engaged in the procurement of raw material and export of finished goods and also manufacturing activities which were aggregated and TNNM method was applied to benchmark the international transactions. However, the TPO segregated the manufacturing activity and the trading activity. Admittedly, in the trading activity, no addition was made but in the manufacturing activity, the assessee in the TP study report had selected certain external companies but before the TPO, it was pointed out that internal TNNM method may be applied since the margins of assessee were higher than the margins with others. The learned Authorized Representative for the assessee pointed out that the Tribunal while deciding the appeal of assessee in assessment year 2007-08 had directed the application of internal TNNM method as the most appropriate method. Our attention was drawn to the reasoning of TPO in this year and pointed out that the same was identical to the TPO's order in assessment year 2007-08. He further referred to the page 224 of the Paper Book, wherein bifurcation of receipts and outcomes i.e. actual and allowability is provided and the transactions with associated enterprises were to the extent of 6.40% and third party transactions were at 0.06%.

9. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the written note filed during the course of hearing, which talks of findings of TPO and DRP, which we have referred to in paras hereinabove.

10. We have heard the rival contentions and perused the record. The first issue raised by the assessee is against the transfer pricing adjustment made in the manufacturing segment. The TPO while benchmarking the international transactions undertaken by the assessee with its associated enterprises in the manufacturing segment had benchmarked the same by comparing the margins of the assessee company with the arithmetic mean of margins of comparables picked up by the TPO. The assessee had in the TP study report selected the external concerns as comparable and had benchmarked its international transactions by applying the TNNM method. During the course of TP proceedings, the assessee changed its stand and was of the view that internal TNNM method was to be applied. Before the TPO, the assessee proposed that internal TNNM method be applied and it was pointed out that the margins of assessee with its associated enterprises were higher than the margins of assessee with others, wherein the margin of associated enterprises was at 6.40% ad with the third parties, it was 0.06%. However, the TPO rejected the plea of assessee and benchmarked the international transactions by selecting the list of comparables and proposed upward adjustment to the arm's length price of international transactions at Rs.4.88 crores.

11. We find that similar issue of adoption of internal TNNM method arose before the Tribunal in ITA No.1623/PN/2011, relating to assessment year 2007-08. The Tribunal vide order dated 27.02.2015 has noted the factual

aspects and the arguments of both the learned Representatives and held as under:-

> *"12. We have carefully considered the rival submissions. The dispute on this aspect relates to a plea put-forth by the assessee during the course of the proceedings before the TPO whereby assessee canvassed that the international transactions in the Manufacturing segment be benchmarked by using internal TNM Method. No doubt, in the Transfer Pricing Study carried out by the assessee initially it had adopted the external comparability on an aggregated segment of Manufacturing plus Trading activities. The TPO had rejected the aggregation of the two activities and benchmarked the Manufacturing segment independent of the Trading segment. At that stage, assessee put-forth a plea that the benchmarking of the Manufacturing segment be carried out by using the internal TNM Method. Before the TPO, assessee pointed out that in the Manufacturing segment, the products manufactured by assessee consumed various raw materials and components, which were procured domestically from third parties as well as imported from associated enterprises and overseas third parties. Assessee segregated the products which did not consume raw material and components procured from associated enterprises from those products which consumed such raw material and components. Similarly, assessee separately identified the sales of these products. Primarily, assessee identified sales of products which neither had any consumption of raw material and components procured from associated enterprises and nor sold to the associated enterprises. This segment comprised of gear pumps and cylinders and it was accordingly considered as Third party segment. The operating margin in the said segment was determined at 2.80% in terms of the Tabulation which is placed in the Paper Book at page 114. The balance sales comprising of other products, namely, vane/piston, pumps, power units, cylinders control valves, etc. which entailed consumption of raw material and components purchased from associated enterprises were identified as the associated enterprises segment. This segment also included some gear pumps and cylinders which did not consume raw material and components procured from associated enterprises though the sales were to the associated enterprises. The operating margin in the associated enterprises segment in the Manufacturing segment was thus computed at 3.2% in terms of the Tabulation, a copy of which has been placed in the Paper Book at page 114. The aforesaid profitability statement showed that the profitability from transactions with associated enterprises was higher than the profitability of the transactions with the third parties. We find that assessee also asserted before the TPO that both the segments, namely, the associated enterprises segment and the third parties segment were functionally comparable in every aspect. Therefore, it was canvassed that based on the aforesaid internal TNM analysis, the international transactions of the assessee in the Manufacturing segment were at an arm's length price.*
>
> *13. In-fact, the internal comparables do have a more direct and closer relationship to the tested transactions rather than the external comparables. In other words, the profitability of an assessee from the controlled transactions can be benchmarked more meaningfully with reference to the assessee's profitability from similar transactions carried out in uncontrolled conditions, i.e. with third parties. In the present case, assessee pointed out that the associated enterprises segment and the third parties segment were functionally comparable and therefore the third parties segment was a good uncontrolled comparable available to benchmark the international transactions entered with the associated enterprises.*
>
> *14. Pertinently, assessee also undertook similar analysis with regard to its Trading segment before the TPO. In the Trading segment also, assessee*

tabulated the associated enterprises segment and the third parties segment and pointed out that the operating margin in the associated enterprises segment was higher than the operating margin in the third parties segment. The said calculation is a part of the Tabulation furnished to the TPO, a copy of which has been placed in the Paper Book at page 114. This approach of the assessee was similar to the approach in relation to the Manufacturing segment as discussed earlier. In so far as the international transactions entered with the associated enterprises in the Trading segment are concerned, the TPO was satisfied that they are at an arm's length price as no adjustment has been proposed by him. However, similar approach taken by the assessee with respect to the Manufacturing segment has not been accepted by the TPO. In our considered opinion, the grounds taken by the TPO to reject the assessee's plea for internal TNM comparable are neither germane and nor justified, apart from being inconsistent with his stand relating to similar situation in the Trading segment. We find from a copy of submissions dated 14.09.2010 addressed to the TPO, a copy of which has been placed in the Paper Book at pages 599 to 603 that assessee had explained the manner in which the bifurcation of Manufacturing segment was done into associated enterprises segment and the non-associated enterprises segment. The following averments made by the assessee are worthy of notice :-

> *"As explained during the hearing held on August 31, 2010, the Company manufactures certain products which do not entail consumption of any raw material imported from AEs. Thus, further split of manufacturing segment into AE and Non-AEY segment was done on a product basis i.e. products, manufacturing of which requires raw material imported from AE (categorized as 'AE segment[1]) and products, manufacturing of which does not require raw materials imported from AEs (categorized as 'Non-AE segment').*
>
> *The Non-AE segment represents the profitability made by the company from manufacture and sale of products which do not entail consumption of any raw material imported from AEs. The AE segment represents the profitability from manufacture and sale of products which entail consumption of raw materials from AEs.*
>
> *While preparing the AE and Non-AE segment, the revenue and costs to the extent identifiable are determined based on actual. The common costs I expenses, being insignificant portion of total operating expenses, as explained above were allocated considering net sales of each segment as the reasonable allocation key.*
>
> *Your good self would appreciate that Transactional Net Margin Method ('TNMM') requires a functional similarity rather than product similarity. Thus, under both the aforesaid segments, there is a functional similarity viz. manufacturing function though the product may not be identical. In view of the above, the internal comparability of profit from sale of manufactured products under AE and Non-AE segment would be the most appropriate method to benchmark the international transactions pertaining to manufacturing segment."*

15. The aforesaid shows that the segmentation of Manufacturing segment into associated enterprises segment and Third parties segment was done by the assessee on product basis, i.e. the associated enterprises segment reflect profitability on products which require consumption of raw material and components from associated enterprises whereas the Third parties segment reflects profitability from products which do not entail purchases of raw materials and components from associated enterprises. The TPO has pointed

out that the sale of finished goods in the associated enterprises segment includes a component of sale of Rs.8,37,000/- of products which do not consume any raw material or component purchased from associated enterprises. The assessee had explained that this was a minor transaction involving Gear pumps & Cylinders out of total sales of finished goods to associated enterprises of Rs.2.36 crores (approx). It was explained that profitability of this minor transaction was included in the associated enterprises segment to ensure comprehensive benchmarking of international transaction of sales to the associated enterprises. In our considered opinion, the said minor transaction does not vitiate the segmentation of Manufacturing segment into associated enterprises segment and Third parties segment done by the assessee for the purpose of internal TNM Method.

16. On the basis of the aforesaid, we find that the bifurcation of Manufacturing segment into associated enterprises and the third parities done by the assessee is fair and apt. The TNM Method does not envisage an absolute product similarity but rather emphasizes on functional similarity. Quite clearly, in the associated enterprises segment as well as the third party segment in the Manufacturing segment there is a functional similarity and therefore the internal TNM Method comparable professed by the assessee was wrongly rejected by the TPO. Before we parting on this issue, we would also refer to the following analysis of the segmentation in Manufacturing segment canvassed by the assessee before the TPO vide communication dated 28.10.2010 :-

- *"The profitability of the international transaction pertaining to purchase of raw material and components from AEs (approximate transaction value Rs.8.32 crores) is reflected in the operating margin of the AE segment, since the transaction forms a part of the same. (This includes the profitability of the minor sale transaction of Rs.8.37 lakhs to AEs of products that do not entail consumption of raw material and components purchased from AEs. The balance sales of Rs.2.28 crores entail consumption of raw material and components purchased from AEs and are automatically covered in this segment.)*
- *The profitability of comparable transaction pertaining to purchase of raw material and components purchased from third parties is reflected in the operating margin of the Third party segment.*
- *The operating margin derived from the international transaction pertaining to purchase of raw material and components purchased from AEs (forming a part of in the AE segment) would be benchmarked against the comparable operating margin derived from the third party transactions (covered in the AE segment).*
- *The operating margin derived from the international transaction pertaining to sale of finished products to AEs (forming a part of in the AE segment) would be benchmarked against the comparable operating margin derived from the third party transactions (covered in the AE segment)."*

17. On the basis of the aforesaid fact analysis, which has not been controverted by the TPO, we find that in the present case internal comparison of the operating margins using internal TNM Method is liable to be upheld in order to compute arm's length for the international transactions of purchase of raw material and components from associated enterprises as well as sales of finished goods effected to the associated enterprises. On the basis of the aforesaid benchmarking, the profitability of international transactions under the associated enterprises segment computed at 3.25% is higher than the profitability of transactions under the Third parties segment computed at 2.80%. Hence, the international transactions entered with the associated enterprises under the Manufacturing segment on account of purchase of raw

> *material and components and also sales are consistent with the arm's length price and no transfer pricing adjustment is thus required to be made. On this aspect, we uphold the plea of the assessee and accordingly, the Ground of Appeal No.2 raised by the assessee is allowed.*

12. The facts and issue arising in the present grounds of appeal Nos.2 to 6 are identical to the issue before the Tribunal in earlier years. The assessee in the present case has also applied internal TNMM method of comparison of operating margins for international transactions of purchase of raw material and components from associated enterprises as well as sale of finished goods effected to associated enterprises. On the basis of aforesaid benchmarking, the profitability under the AE segment was 6.31% which was higher than profitability of transactions under third party segment. Accordingly, we hold that no adjustment on account of arm's length price is required to be made in the hands of assessee. The grounds of appeal No.2 to 6 raised by the assessee are thus, allowed.

13. The ground of appeal No.1 raised by the assessee is general and hence, the same is dismissed.

14. The ground of appeal No.7 raised by the assessee is not pressed and hence, the same is dismissed as not pressed.

15. The issue in ground of appeal No.8 is against the order of TPO in valuing the arm's length price of international transaction of payment made to the associated enterprises for availing IT services at Nil and making an adjustment of Rs.50,45,303/-.

16. The learned Authorized Representative for the assessee pointed out that the assessee had made certain payments to Eaton (China) as per the agreement, copy of which is placed at pages 155 onwards. The learned Authorized Representative for the assessee took us through various covenants of the said agreement. The assessee thereafter, referred to the Certificate issued by WNS of the reimbursement of expenses. However, no break up of the services availed from the associated enterprises was filed by the assessee. The learned Authorized Representative for the assessee pointed out that the TPO vide para 13 onwards at page 28 onwards notes that no details of service provided by the associated enterprises were available and goes on to benchmark the international transactions of availment of services by the assessee from its associated enterprises at Nil. The learned Authorized Representative for the assessee in this regard, pointed out that the Assessing Officer first assessed the allowability of expenses and made the reference to the TPO. He placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. M/s. Lever India Exports Ltd. in Income Tax Appeal No.1306 of 2014, Income Tax Appeal No.1307 of 2014 & Income Tax Appeal No.1349 of 2014, judgment dated 23.01.2017. He further stated that the TPO had to apply most appropriate method to benchmark the international transactions and the provisions of section 37(1) of the Act could not be applied by the TPO. The learned Authorized Representative for the assessee placed reliance on following decisions:-

i) The Hon'ble Bombay High Court's decision in CIT Vs. M/s. Kodak India Pvt. Ltd. in Income Tax Appeal No.15 of 2014, judgment dated 11.07.2016;

ii) The Hon'ble High Court of Judicature at Hyderabad in the case of M/s. R.A.K. Ceramics India Pvt. Ltd., in ITTA No.595 of 2016, judgment dated 23.12.2016;

17. The second issue raised by the assessee was whether the TPO can verify whether services were provided or not by the associated enterprises to whom management fees were paid. In this regard, reliance was placed on following decisions:-

i) AWB India (P.) Ltd. Vs. DCIT (2014) 50 taxmann.com 323 (Delhi – Trib);

ii) TNS India (P.) Ltd. Vs. ACIT (2014) 48 taxmann.com 128 (Hyderabad – Trib);

iii) Merck Ltd. Vs. DCIT (2016) 69 taxmann.com 45 (Mumbai – Trib.); and

iv) Durr India (P.) Ltd. Vs. ACIT (2017) 78 taxmann.com 50 (Chennai – Trib.)

18. The learned Departmental Representative for the Revenue in reply, pointed out that the issue is in respect of management fees and in the submissions filed at page 31 of the Paper Book, the assessee had provided the nature of services availed by it. Our attention was drawn to the Annexure A to the agreement entered into between the assessee and Eaton (China) which is placed at page 167 of the Paper Book which enlists the services to be provided. The learned Departmental Representative for the Revenue stressed that the nature of services do not match i.e. what has been availed by the assessee and what is provided in the agreement. He further referred to the para 16 at page 31 of the order of TPO and pointed out that the agreement was dated 16.11.2009 with effective date of 01.01.2005. The learned Departmental Representative for the Revenue pointed out that the agreement is effected from back date. He further referred to the page 160 of the Paper Book and pointed out that the charges which were paid were not with respect to services provided but on the basis of value of net assets at current year end. He further pointed out that both the Assessing Officer and the TPO can have independent proceedings, wherein the Assessing Officer can make disallowance under section 37(1) of the Act and the TPO, where no services

are provided or where services are to be provided by holding company, then even if the cost is paid, can determine the cost to be taken at Nil. He stressed that under the TNNM method, the first point is to determine the cost and where the assessee is not able to provide the cost basis, then TNNM method fails. He further stated that where the TPO says that no services were provided, then who would pay for non-existing services. Referring to the case laws relied upon by the learned Authorized Representative for the assessee, he pointed out that all those case laws relate to services provided but in the present facts, benefit to assessee is not clear. In case of the assessee, no services were rendered and in such cases, no party shall pay, hence, provisions can be applied impliedly. In this regard, he placed reliance on the ratio laid down by the Bangalore Bench of Tribunal in Cranes Software International Ltd. Vs. DCIT (2014) 52 taxmann.com 19 (Bangalore – Trib.), wherein against no services provided, arm's length price was taken at Nil. He placed reliance on the ratio laid down in the following decisions:-

i) CIT Vs. Cushman and Wakefield (India) (P.) Ltd. (2014) 46 taxmann.com 317 (Delhi)

ii) M/s. Rockwell Automation India Pvt. Ltd. Vs. DCIT in ITA No.567/Del/2015, relating to assessment year 2010-11, order dated 31.03.2015

19. He then distinguished the facts of each of the case law relied upon by the learned Authorized Representative for the assessee. He further pointed out that the issue is decided against the assessee by the ratio laid down by the Bangalore Bench of Tribunal in M/s. Gemplus India Pvt. Ltd. Vs. ACIT (supra) and in Deloitte Consulting India Pvt. Ltd. Vs. DCIT (2012) 137 ITD 21 (Mum), which have been relied by the TPO.

20. The learned Authorized Representative for the assessee in rejoinder pointed out that the learned Departmental Representative for the Revenue has

stressed that CUP method has been impliedly applied by the TPO but on the other hand, the case of Revenue is that no services have been provided, hence, no transaction between the assessee and its associated enterprises, then no CUP method could be applied, as the said method postulates comparison of transactions. In the absence of any transaction, there is no merit in the plea of learned Departmental Representative for the Revenue. Referring to the ratio laid down by the Bangalore Bench of Tribunal in Cranes Software International Ltd. Vs. DCIT (supra) and the Hon'ble High Court of Delhi in Cushman and Wakefield (India) (P.) Ltd. (supra), he pointed out that the Bangalore Bench of Tribunal has not suggested any method to be applied. He further pointed out that the assessee had applied TNNM method.

21. The matter was re-fixed for clarification in view of submissions of learned Departmental Representative for the Revenue vis-à-vis Agreement which was entered into between the parties on 16.11.2009 but effective date from 01.01.2005 i.e. by an Agreement of later date, the assessee has entered into an Agreement with retrospective effect. On the next date of hearing, the plea of assessee was that it was engaged in manufacturing and trading of hydro gear boxes and pumps and both manufacturing and trading activities were aggregated. The assessee had both AE and non-AE segment and had furnished the comparison between the two and applied internal TNMM method. Further, reference was made to the order of TPO at page 2, wherein the items one to five were aggregated by the assessee in order to benchmark its international transactions. However, the TPO had segregated the item No.2 i.e. Informed Technical Services availed. The learned Authorized Representative for the assessee in this regard stressed that this service was for the purpose of business and the same was subsumed into other

transactions with associated enterprises. It was pointed out by the learned Authorized Representative for the assessee that the case of TPO was that actual rendition of services was not provided and also that the assessee has not shown the cost analysis benefit. The TPO thus, vide para 17 determined the arm's length price of transactions at Nil relying on the decision of Bangalore Bench of Tribunal in M/s. Gemplus India Pvt. Ltd. Vs. ACIT in ITA No.352/Bang/2009, relating to assessment year 2003-04. The learned Authorized Representative for the assessee before us has furnished additional evidence including copies of e-mail correspondence on sample basis evidencing the receipt of information technology services and related support services such as accounting / finance / human resources, etc. from Eaton, China for the year under consideration. The learned Authorized Representative for the assessee also referred to page 120 of Paper Book at para 4.3.22, where the details of services availed were filed before the authorities below. He further pointed out that services were routed through website, against which debit notes were raised by Eaton China and also JV vouchers by the assessee for credit to account of Eaton China and debiting expenses. The learned Authorized Representative for the assessee pointed out that even if the agreement is ignored, the TP study talked of services availed and also raising JVs and debit notes i.e. action of assessee proved the arrangement between the parties. He stressed that where the services were rendered by Eaton, China, then there is no merit in the stand of Revenue that no services were rendered. The learned Authorized Representative for the assessee also pointed out that the Revenue had stated that no documents were furnished to establish whether any services were rendered. He referred to page 63 of Paper Book to point out the related party transactions schedule and also at page 64 of Paper Book for information received from Eaton, China.

The learned Authorized Representative for the assessee referring to page 43 of Paper Book pointed out that total turnover was ₹ 173 crores and where all services were intermingled, then the same should not be segregated. Another point which was raised was since the working of group has closed group of companies, hence there is need to avail the services and because of their exposure and expertise, such services were provided for effective working of the group. Here, he also stressed that there was similar transaction in the last year but no TP adjustment was made. The learned Authorized Representative for the assessee then referred to the reliance of learned Departmental Representative for the Revenue on the ratio laid down by the Hon'ble High Court of Delhi in CIT Vs. Cushman and Wakefield (India) (P.) Ltd. (supra) to point out that both Assessing Officer and TPO could go into the nature of transactions. He placed reliance on the ratio laid down by following decisions:-

i) Hon'ble Bombay High Court in CIT Vs. M/s. Lever India Exports Ltd. in Income Tax Appeal No.1306 of 2014 & two ors., judgment dated 23.01.2017;

ii) Hon'ble Bombay High Court in CIT Vs. M/s. Kodak India Pvt. Ltd. in Income Tax Appeal No.15 of 2014, judgment dated 11.07.2016

iii) Hon'ble High Court of Judicature at Hyderabad in the case of R.A.K. Ceramics India Pvt. Ltd. in ITTA No.595 of 2016, judgment dated 23.12.2016

22. The learned Authorized Representative for the assessee stressed that where the main activity was at arm's length price and hence, there was no need to go into benefit test. As far as the case of TPO that of rendition of services, the learned Authorized Representative for the assessee admitted that e-mails were not submitted but this aspect stands established and can be analyzed and benchmarked. He further stressed that when the method adopted by the assessee is analyzed on entity level, then there is no question of segregation. He further referred to provisions of section 92B of the Act.

23. The learned Departmental Representative for the Revenue on the other hand, placed reliance on written submissions earlier filed.

24. We have heard the rival contentions and perused the record. The issue raised by way of ground of appeal No.8 is with regard to transaction of Informed Technologies availed. The assessee had entered into following international transactions with its associated enterprises:-

Sr. No.	*Description of International transaction*	*Amount (Rs.)*	*Method used*
1	*Import of raw materials, trading goods & components*	*44,76,55,384*	*TNMM*
2	*Export of finished goods*	*3,43,15,281*	
3	*Income from services*	*41,855*	
4	*Information Technology services availed*	*50,45,303*	
5	*Reimbursement of expenses to AE*	*1,02,81,768*	
6	*Allocation of expenses (received)*	*5,24,833*	*-*
7	*Recovery of expenses from AE*	*16,71,578*	*CUP*
	Total	***49,96,36,002***	

25. The first five transactions i.e. import of raw material, trading goods and components; export of finished goods; income from services; information technology services availed and reimbursement of expenses to associated enterprises were benchmarked together by using TNMM method. The case of assessee that all these transactions need to be aggregated as they are inter-dependent on each other while benchmarking international transactions to be at arm's length price or not. The assessee is engaged in two separate limbs of transactions i.e. import of raw material, trading goods and components at ₹ 44.76 crores, export of finished goods at ₹ 3.43 crores along with other transactions of income from services at ₹ 41,855/- and reimbursement of expenses to associated enterprises at ₹ 1.03 crores has been aggregated. However, the transaction of information technology services availed has been segregated by the TPO. The assessee claims that the said information technologies services have been availed by it from Eaton China Investments

Ltd. for Information Technology (IT) and related support services availed. The said information was provided in transfer pricing study report and it was reported under para 4.3.22 as under:-

> *"4.3.22 During the year, EFPL has paid Eaton China Investment Ltd. ('Eaton China') for Information Technology ('IT') and related support services availed. The functions performed by Eaton China include the provision of following services –*
>
> - *Infrastructure services including services pertaining to hardware issues, application issues, information security and compliance, voice and data telecommunications and security operations;*
> - *Business system activities including providing a platform for running a business system, hardware and software upgrades, system monitoring, business analysis, contracting for outside services on behalf of the service recipient and IT systems administration functions; and*
> - *Generic services including management of IT plant resources, helpdesk support, user training, change management, business continuity planning and disaster recovery, resource capacity planning, project management for infrastructure related activities, vendor management, information security and compliance and relationship management."*

26. In addition, the assessee was also availing quality control services. It was also reported vide para 4.3.23 that the consideration for service charged to Eaton China were as per the agreement / arrangement. The service charges were calculated at 5% of mark up on the cost incurred by Eaton China and any other Eaton entities. The services were routed through website.

27. The assessee also during the course of assessment proceedings filed certificate dated 22.04.2011 issued by Eaton China certifying the factum of provision of services by it to the assessee and the charge for services comprised of cost plus 5% markup. Eaton China also confirmed that other Eaton group companies availing same services were also charged on the same basis as the assessee. This information was filed before the TPO to establish first the case of availment of services from Eaton China and the basis for charging for such services by Eaton China on cost plus 5% markup.

28. The question which arises is whether in the given circumstances, the assessee can be held to have availed services from its associated enterprises, for which it had paid sum of ₹ 50,45,303/-. Before adjudicating the admissibility of claim of assessee, it may be pointed out that during the course of TP proceedings, the assessee also filed copy of shared service agreement dated 16.11.2009 which was between the assessee and Eaton China describing the nature of services rendered and basis of charge for services. The agreement which was entered into in 2009 was made effective from 01.01.2005. The terms of said agreement were at variance with the terms earlier agreed upon by the parties and the TPO on such analysis was of the view that no services were availed by the assessee. The stand of assessee in relying on the aforesaid agreement dated 16.11.2009 to establish its case of availing services in financial year 2007-08 is misplaced. The agreement was entered into much after the close of accounting period and even after the due date of filing the return of income for assessment year 2008-09 and hence, the terms of said agreement cannot be relied upon to establish the case of availment of services by the assessee from Eaton China. Accordingly, we find no merit in the stand of assessee and Revenue in relying on the said agreement and we ignore the same for adjudicating the issue raised in the present appeal.

29. Now, coming to the issue of transfer pricing adjustment made by TPO on account of services availed by the assessee from its associated enterprises and taking the value of said international transactions at Nil. In the first instance, we hold that TPO cannot sit in the judgment of business module of assessee and its intention to avail or not to avail any services from its associated enterprises. The role of TPO is to determine the arm's length price

of international transactions undertaken by the assessee and whether the same is at arm's length price when compared with similar transactions undertaken by external entities or internal comparables. We have already addressed similar issue in Emerson Climate Technologies (India) Limited Vs. DCIT in ITA No.2182/PUN/2013, relating to assessment year 2009-10 and in ITA No.211/PUN/2015, relating to assessment year 2010-11, order dated 29.12.2017 and observed as under:-

> *"17. We have heard the rival contentions and perused the record. The assessee was 100% subsidiary of Copeland Corporation, USA. The assessee was earlier a company incorporated under the Companies Act and was joint venture of 51:49 between Kirloskar Brother Ltd. (KBL) and Copeland Corporation. M/s. KBL exited the joint venture in June, 2006 and the assessee became wholly owned subsidiary of Copeland Corporation. Post-exit of KBL, there was need to provide operational, strategic and advisory support to the assessee company to ensure that assessee benefit from the manufacturing and operational processes followed by Emerson Group of Companies worldwide. The said support services were provided by Emerson HK and Emerson TH, for which the assessee entered into agreement/s with both the parties separately. The aim of providing support services to the assessee was to achieve the following objectives:-*
>
> - *Development of new products for the Indian market;*
> - *Implementation of cost effective and advanced manufacturing processes;*
> - *Improvement of the financial performance and accounting processes;*
> - *Establishing robust control and governance processes;*
> - *Establish best in class HR practices followed throughout the Globe;*
> - *Develop strong global customer business; and*
> - *Differentiate itself in the Indian market.*
>
> *18. In order to achieve the said objectives, the assessee availed services from its associated enterprises. In this regard, the assessee had furnished various documentary evidences before the TPO, which were in the form of e-mails/presentation, details of visit of personnel of associated enterprises to India, purposes of visit, etc. The assessee has placed on record the said evidences at pages 323 to 898 of the Paper Book i.e. copies of e-mails / presentations and summary containing detailed explanation of the same at pages 911 to 938 of the Paper Book. The assessee had summarized about 100 e-mails justifying the receipt and benefit of services from associated enterprises and filed the same separately with reference to the page nos. of paper book, where these were enclosed. In addition to the same, the assessee had enlisted certain key benefits, which were derived by it on account of payment of fees for advisory and other services in support of which documentary evidence was filed, which are as under:-*

Key benefits derived	***Page No.***
Development of New Products – Aluminium Motor, Product Sr. No.CR 72	*333 – 336*
Access to web portals enabling significant cost reduction such as e-sourcing etc.	*551 – 564*
Assistance in negotiating a beneficial purchasing rate with suppliers – viz. Bao Steel	*487 – 490*

Cost reduction targets achieved due to e-bidding platforms implemented	*533 – 534*
Identifying lead for new business opportunities for ECT India – Examples of support/inputs received for Whirlpool for Indian markets	*587 – 588*
Identifying lead for new business opportunities for ECT India – Examples of support/inputs received for Blue Star for its Middle East markets	*597 – 598*
Sharing of key data related to competitors such as Mitsubishi	*565 – 566*
Sharing of key data related to competitors such as Sanyo	*583 – 584*
Assistance in implementation of performance management system for employees of ECT India, identifying the training needs, etc	*621 – 622*
Access to regional / global information in respect of suppliers, commodities updates etc	*539 – 546*
Solutions obtained for critical issues such as unionizations issues with labour, legal cases pending in court, union wages proposals, high attrition rates, e-hiring deployment, etc.	*613 – 628*

19. The assessee thus, filed documentary evidence to demonstrate that it had availed services in the field of Human Resources, Marking and Product, Finance, Business Development and Management and other services i.e. support for new product, marketing material, training material and technical support. The assessee has also explained the need for services being in field of operational, strategic and advisory support services. The first aspect which arises in the present appeal is whether the TPO while ascertaining whether price paid for the services is at arm's length price or not, can enter the field of businessman, who is the best judge as to whether it needs to avail the said services. The answer to the same is 'No'. Each businessman is the best judge to come to decision as to whether it needs the said support services or not. Secondly, once such a decision has been taken by the businessman and it provides the evidence of services received by it from its associated enterprises, then the TPO cannot question the same by commenting upon the nature of services provided, where in any case, information is hyper technical. First of all, where the TPO has referred to the services provided and pointed out defects in the services provided, the first step that services have been provided stands established. Once the same is established by way of assessee producing several evidences before the TPO, which were in the form of contemporaneous data, then the TPO is precluded from commenting upon the same and holding that the assessee had not received any services and also there was no need for making any payments for such services, as the services provided were not upto the mark. In any case, the perusal of various evidences filed by the assessee i.e. contemporaneous data available on record shows that it is highly technical and the same has been used by the assessee for carrying on its business activities, such evidence cannot be brushed aside being not upto the mark. The TPO had referred to part of the data and drew conclusion, which is not warranted in any case.

20. Another aspect of the issue which needs to be kept in mind is the developing scenario of carrying on the business in the country. The said business is carried on by the entities which have presence outside India and have certain standards, which are attached to its brand name. In order to maintain its brand value, arrangements are made with different entities across the globe by holding companies, so that different entities operating in different parts of the world adhere to specific rules and regulations while carrying on business under the said brand. The assessee is 100% subsidiary of Copeland Corporation, which admittedly, has presence in various Countries.

The assessee has placed on record that besides the assessee entering into agreement with Emerson HK, Emerson TH, various entities of other countries had entered into such agreements. The terms of the agreement are similar for providing services, wherein a particular formula is designed by the person providing the services i.e. the basis for remuneration is the cost incurred by way of man hours charged to the entity with mark up of 5.8%. Such method of charging and remunerating was identical in the case of all the entities which were availing the services from Copeland Corporation through Emerson HK and Emerson TH. The assessee had also furnished on record the basis for charging cost by the two entities from the assessee. No doubt, the complete details of operations of the said concerns worldwide had not been filed, but that had no relevance to the activities or services availed by the assessee. There is no merit in the order of TPO in rejecting the segmental details of AEs filed by the assessee vis-à-vis services availed by it. What is to be considered in the hands of assessee is the services it had availed from Emerson HK and Emerson TH and not the whole activities undertaken by the said two concerns worldwide. The assessee had put on record that not only the assessee but many other concerns were availing same services from the two entities and even the basis for remuneration to the said concerns was the same in respect of all the countries. In such circumstances, there is no merit in the order of TPO in holding that as to whether the said concerns have given services or whether they are qualified to give the services and the cost incurred by AEs. First of all, this is outside the domain of TPO. Under the Transfer Pricing Regulations what the TPO has to determine is whether the services which have been provided by associated enterprises are at arm's length price. Accordingly, we find no merit in this part of the order of TPO.

21. In this regard, we find support from the ratio laid down by the Hon'ble High Court of Delhi in Hive Communication Pvt. Ltd. in Income Tax Appeal No.306/2011, wherein it has been held that the legitimate business needs of the company must be judged from the view point of the company itself and must be viewed from the point of view of a prudent businessman. It was further held by the Hon'ble High Court that it was not for the Assessing Officer to dictate what the business needs of the company should be; it is businessman who can only judge the legitimacy of the business needs of the company from the point of view of prudent businessman. Hence, the benefit derived and accruing to the company must also be considered from the angle of prudent businessman. The Hon'ble High Court clearly held that the term "benefit" to a company in relation to its business has a very wide connotation and it was difficult to accurately measure these benefits in terms of money separately. The said principle laid down by the Hon'ble High Court has been applied by the Delhi Bench of Tribunal in McCann Erickson India P. Ltd. Vs. Addl.CIT (supra) to hold whether the benefits derived by the assessee, in view of the evidences in respect of management service charges and client coordination fees, cannot be found fault with.

22. Similar proposition has been laid down by the Hyderabad Bench of Tribunal in TNS India Pvt. Ltd. Vs. ACIT (supra), wherein the Assessing Officer had not believed the write-up for the services provided and the benefit obtained. The Tribunal held that unless the Assessing Officer steps into assessee's business premises and observes the role of the said company or the assessee's business transactions, it would be difficult to place on record the sort of advice given in day-to-day operations. Therefore, the order of Assessing Officer/TPO that services were not rendered by the group companies to assessee was negated by the Tribunal.

23. The next stand of the TPO is two-fold; as to what benefits have been received by the assessee against the said support services and intricacy value of services given by the associated enterprises. The said aspect is linked to

the issue of whether there is any need for services and in the absence of its establishing the same, whether the TPO / Assessing Officer is correct in determining the arm's length price of transactions at Nil. The assessee had entered into an agreement with its associated enterprises for availing the services because of business benefits arising from such an understanding. Law does not require the assessee to demonstrate the need for availing the services. The assessee is best person to arrange its affairs to conduct the business in the manner it wants and Revenue cannot step into the shoes of businessman to decide what is necessary for the businessman and what is not. The TPO is not empowered to question the decision of assessee to avail support services from the associated enterprises. The decision taken by the assessee in the course of carrying on its business is commercial decision and the TPO cannot question such commercial wisdom of assessee's decision. The second linked issue which has been raised is that the assessee did not benefit from such support services where the assessee has shown losses during the year.

24. The Mumbai Bench of Tribunal in Dresser-Rand India (P) Ltd. Vs. Addl.CIT (supra) had held that We have further noticed that the TPO has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by so stretch of logic, it can have any role in determining ALP of that service. When evaluating the ALP of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same.

25. Accordingly, we hold that the TPO while benchmarking the transactions has to determine whether the price paid by the assessee for the services availed is what an independent enterprise would have paid for the same services. The analysis done by the TPO of the nature of services and benefits arising to the assessee on availing such services was beyond the scope of transfer pricing provisions and hence, we find no merit in the same."

30. The second aspect which needs to be considered in the present case is the services availed by assessee from its associated enterprises. The assessee is a group concern of worldwide Eaton group of companies and the intention to avail the said services is to carry out his business on worldwide platform. The total turnover of assessee for the year was ₹ 173 crores and the services availed from associated enterprises were intermingled to the extent that the Tribunal in earlier years has directed that for benchmarking international transactions undertaken by the assessee, import of raw materials for manufacturing purpose and export of finished goods should be aggregated.

The information technology services availed by the assessee also relate to aforesaid business carried on by the assessee and hence, we find merit in the plea of assessee in aggregating the same with other international transactions undertaken by the assessee with its associated enterprises. Accordingly, we hold so. In any case, the assessee in the reasons for filing additional evidence has pointed out that information was filed before the TPO along with agreement and certificate of Eaton China, but thereafter, no other query was raised by TPO or any clarification was sought in respect of information technology services availed. The assessee thus, was under the bonafide belief that the documents and explanation furnished by it has been accepted. Further, the assessee before us has pointed out that though it is filing additional evidence but because of confidentiality clause, such information cannot be shared as it would affect the business transactions of assessee. We have gone through the additional evidence filed by the assessee and we are of the view that the assessee has established its case of availment of said services in the field of information technology. In addition, the assessee has also filed certificate from its associated enterprise dated 22.04.2011 i.e. during the course of TP proceedings, under which there is certification of factum of provision of services by Eaton China to the assessee and also basis for charging of such charge i.e. cost plus 5% markup. It was also confirmed by Eaton China that similar services were availed by other Eaton group companies and they were charged on the same basis as in the case of assessee. The assessee had also filed on record copies of debit notes and other JV vouchers raised during the year under consideration justifying its case of availing the said services and payment in lieu thereof.

31. In the above said facts and circumstances in the issue involved, we hold that there is no merit in observations of TPO in holding that the assessee had not availed any services, hence the arm's length price of international transactions is to be adopted at Nil.

32. The learned Departmental Representative for the Revenue had placed heavy reliance on the ratio laid down by Hon'ble High Court of Delhi in Cushman and Wakefield (India) (P.) Ltd. (supra), which in turn, has also taken into consideration the decision of Mumbai Bench of Tribunal in Delloite Consulting India (P.) Ltd. Vs. DCIT (2012) 137 ITD 21 (Mum). In the facts of the case before the Tribunal, the TPO had determined arm's length price of international transactions at Nil keeping in view the factual position as to whether in a comparable case, similar payments would have been made or not in the terms of agreement. The Hon'ble High Court taking note of the issue before it observed that neither Revenue nor the Court must question the commercial wisdom of assessee or replace its own assessment or commercial viability of the transaction. However, the details of specific activities for such cost was incurred and the attended benefit to the assessee had to be considered since the same was not considered, the matter was remanded back to the file of concerned Assessing Officer for arm's length price adjustment by the TPO, in accordance with law. The said judgment is dated 23.05.2014.

33. The Hon'ble High Court of Judicature at Hyderabad in the case of R.A.K. Ceramics India Pvt. Ltd. (supra) while deciding the issue of fulfillment of conditions of benefit test as raised by the TPO vis-à-vis royalty payments made by assessee @ 3% which was restricted to 2% of net ex-factory sale

proceeds, held that it was incumbent upon the TPO after rejecting comparables selected by the assessee to come up with other comparables so as to justify the reduction of royalty payments. Further, no such exercise was undertaken by the TPO and by going into whys and wherefores of the improvement in the net sales and profits of assessee, the TPO held that there was no justification for payment of royalty @ 3% to associated enterprises by the assessee. The Hon'ble High Court held *This reasoning is without legal basis of law as it is not for the TPO to decide the best business strategy for the assessee.* The Hon'ble High Court also held that *This whimsical fixation by the TPO amounts to an arbitrary and unbridled exercise of power.* Thus, the order of Tribunal rejecting the case of TPO was upheld by the Hon'ble High Court.

34. The Hon'ble Bombay High Court in CIT Vs. M/s. Kodak India Pvt. Ltd. (supra) interpreted the provisions of section 92B(2) of the Act. The facts of the case as noted by the Hon'ble Bombay High Court were as under:-

> *"3. The respondent assessee is an Indian subsidiary of M/s. Eastman Kodak Co. USA (EKC). During the previous year relevant to the assessment year the respondent assessee sold its imaging business to one M/s. Carestream Health India Pvt. Ltd. The buyer company i.e. M/s. Carestream Health India Pvt. Ltd. was a Indian subsidiary of M/s. Carestream Inc. an USA company. The case of the respondent assessee was that the transaction of sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. was a transaction between the two domestic non Associated Enterprises. Hence, the provision of Chapter X of the Act would have no application. Thus, had not even declared this transaction in its 3 CEB report.*
>
> *4. However the Transfer Pricing Officer (TPO) while examining another Transfer Pricing issue came across the impugned transaction. It held on the basis of Section 92B(2) of the Act that even if the transaction between Kodak India Pvt. Ltd. and M/s. Carestream Health India Pvt. Ltd. was between two domestic non Associated Enterprises, yet it would still be considered to be an International transaction and Chapter X of the Act would be applicable. This on the basis that the holding companies of both the respondent assessee as well as M/s. Carestream Health India Pvt. Ltd. had entered into a global agreement for sale of its business. This global agreement was prior in point of time to the sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. The Assessing Officer passed a draft Assessment order under section 144C of the Act on the basis of the order of the TPO."*

35. Two aspects were decided by the Tribunal of section 92B(2) of the Act, which came into effect from 01.04.2015 and prior to that the transaction could not be deemed to be an international transaction. It also held that no addition on account of arm's length price was warranted since the TPO failed to apply any of the methods prescribed under section 92C of the Act. The Hon'ble High Court vide para 10 held as under:-

> *"10. We must also record the fact that the ALP was arrived at by the Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under section 92C of the Act. The method to determine the ALP adopted was not one of the prescribed methods for computing the ALP. It was not even any method prescribed by the Board. At the relevant time, i.e. for A.Y. 2008-09 Section 92C of the Act did not provide for other method as provided in Section 92C(1)(f) of the Act. The impugned order of the Tribunal holds that the method adopted by the Revenue to determine the ALP was alien to the methods prescribed under section 92C of the Act. In the above circumstances, the Tribunal declined to restore the issue to the Assessing Officer for re-determining the ALP by adopting one of the methods as listed out in Section 92C of the Act. This finding of the Tribunal has also not been challenged by the Revenue."*

36. In the facts of the case before the Hon'ble High Court of Bombay in CIT Vs. M/s. Lever India Exports Ltd. (supra), the TPO while evaluating the transactions between the parties held that the same were on principal to principal basis and no reimbursement of advertisement expenses by the respondent assessee to its associated enterprises could be allowed. Consequently, he determined the arm's length price at Nil by virtue of disallowing the expenditure. The Hon'ble High Court in such circumstances observed as under:-

> *"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 exercise has to be done, if at all, by the Assessing Officer in*

exercise of his jurisdiction 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."

(underline provided by us for emphasis)

37. In view of the ratio laid down by the jurisdictional High Court in CIT Vs. M/s. Kodak India Pvt. Ltd. (supra) and CIT Vs. M/s. Lever India Exports Ltd. (supra), the proposition laid down by the Hon'ble High Court of Delhi (supra) stands modified.

38. Applying the above said principle and in view of the facts and circumstances as referred to by us in the paras hereinabove, we hold the international transactions of information technology services availed has to be aggregated with other transactions being intrinsically linked to other international transactions undertaken by the assessee during the year and the same has to be benchmarked applying internal TNMM method as in the case of other international transactions. Further, we also reverse the order of TPO in holding that the assessee has not availed any services in view of various documents filed by the assessee and also certificate of Eaton China, which was filed during the course of TP proceedings evidencing not only the availment of services but also the basis of cost for such services. Similar services were availed by other Eaton group entities from Eaton China and its certificate that the same has also charged at the same rates as charged to the

assessee. In the entirety of the above said facts and circumstances, we reverse the order of TPO / Assessing Officer in taking the value of international transactions of Information Technology Services availed at Nil and delete the adjustment made. Allowing the claim of assessee, the ground of appeal No.8 raised by the assessee is thus, allowed.

39. In the result, appeal of assessee is partly allowed.

Order pronounced on this 12th day of March, 2018.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 12th March, 2018.

GCVSR

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

1. The Appellant;
2. The Respondent;
3. The DIT (Intl. Taxation), Pune;
4. The DRP, Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune