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In the Income-Tax Appellate Tribunal,
Delhi Bench 'I-1', New Delhi

Before : Shri Bhavnesh Saini, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 6055/Del/2010
Assessment Year: 2006-07

MakeMy Trip (India) Pvt. Ltd., Plot No. 103, Udyog Vihar, Phase-I, Gurgaon. PAN- AADCM5146R **(Appellant)**	**vs.**	DCIT, Circle 6(1) New Delhi. **(Respondent)**

Appellant by	Sh. Tarandeep Singh, Advocate & Sh. Shubham Gupta, Advocate
Respondent by	Sh. Sanjay I. Bara, CIT/DR

Date of Hearing	26.07.2018
Date of Pronouncement	30.07.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the assessment order dated 26.10.2010 passed consequent to directions of the Dispute Resolution Panel, New Delhi U/s 144C(5) of the Income-tax Act, 1961, relating to A.Y. 206-07. The grounds raised read as under :

> The addition amounting to INR 11,758,120 undertaken by the Learned Deputy Commissioner of Income-tax, Circle 6(1), New Delhi ("the Ld. AO") vide assessment order dated October 26, 2010 (received by the Appellant on November 01, 2011) passed under section 143{3) read with section 144C(13) of the Income-tax Act, 1961 ("the Act") is not in accordance with the law and therefore not sustainable.
>
> **Transfer Pricing ("TP") Adjustment - INR 8,043,918**
> 1. That the Hon'ble Dispute Resolution Panel - II, New Delhi ("the DRP") has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order dated December 24, 2009 passed by the Ld. AO under section 143(3) read with section 144C(1) of the Act. The Hon'ble DRP while issuing directions under section

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144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the Additional Commissioner of Income-tax, Transfer Pricing Officer - 1 (3) vide order under section 92CA(3) of the Act dated July 09, 2009 ("TP Order"). On the facts and in the circumstances of the case, the Ld. TPO and the Ld. AO have erred in proposing and the Hon'ble DRP has further erred in confirming the transfer pricing adjustment of INR 8,043,918 without due application of mind and without affording a reasonable opportunity of being heard in the matter to the Appellant on the following grounds:

1.1. By summarily rejecting Appellant's business characterization as presented in its transfer pricing documentation and modifying the functional and risk profile of the Appellant as regard its two business segments [i.e. provision of tour and travel related services to the third-party customers/ Agent business segment ("Direct customer business segment") and to the AE ("Related-party/ Sub-agent business segment")] based purely on own conjectures and surmises. The consequential application of Cost Plus Method ("CPM") by the Ld. TPO by undertaking comparability analysis of the aforesaid segments at the 'gross level' is devoid of merits and inconsistent with the functional and risk profile of the Appellant.

1.2. By not giving due consideration to Assessee's counter-submissions as regards allocating a proportion of operating expenditure incurred by the AE which follows as a corollary to the 'gross level' approach adopted by the Ld. TPO while undertaking the impugned TP adjustment.

1.3. By concluding the assessment without serving a show-cause notice upon the Appellant as mandated by proviso to Section 92C(3) of the Act. Thus, the action taken by the Ld. TPO is against the principles of natural justice.

1.4. By resorting to an erroneous application of CPM to arrive at the impugned TP adjustment.

1.5. By not allowing the benefit of (+/-) 5 percent as provided in the proviso to Section 92C(2) of the Act, while determining the arm's length price of the international transaction of the Appellant.

1.6. By not appreciating that there was no intention whatsoever on the part of the Appellant to shift profits outside India. The Ld. TPO's observation at para 3.6 of the order under section 92CA (3) of the Act dated July 09, 2009 as regard round tripping of the investment pattern and possibility of shifting profits outside India is devoid of merits, without any justification and based purely on conjectures and surmises of the Ld. TPO.

Other Disallowances/ Adjustments of INR 3,714,202

2. The other disallowances/additions to the income amounting to INR 3,714,202 undertaken by the Ld. AO are bad in law on the following grounds:

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2.1. On the facts and in the circumstances of the case, the Ld AO has erred in disallowing the entire amount of Rs 3,714,202, being the additions made to the website development cost, assuming it as depreciation on website development cost instead of depreciation amount of Rs 1,917,661.

2.2. Without prejudice to ground no 2.1, on the facts and in the circumstances of the case, the Ld AO has erred in proposing and the Hon'ble DRP has further erred in disallowing depreciation on Website Development Cost incurred during the year amounting to Rs 3,714,202 ignoring the fact that it qualifies as 'Software' within the meaning of Section 32 of the Act read with Appendix I of the Rules and eligible for depreciation at the rate of 60 percent.

2.3 On the facts and in the circumstances of the case, the Ld AO has erred in proposing and the Hon'ble DRP, has further erred in not allowing the alternate claim of allowing depreciation at the rate of 25% applicable to 'Intangible assets' even after confirming that CIT (A) - IX in its order for Assessment Year 2004-05, has allowed depreciation on website development cost at the rate of 25%, holding it as 'Intangible assets'.

2.4. On the facts and in the circumstances of the case, the Ld AO has erred in proposing and the Hon'ble DRP has further erred in disallowing the depreciation on Website Development Cost ignoring the fact that the Revenue had, in Assessment Year 2001-02, examined at length the issue and allowed depreciation on website development and the same has not been challenged in the Assessment Years 2002-03 and 2003-04. The Hon'ble DRP has grossly erred in holding that the Revenue's stand has been substantially upheld by CIT(A) while passing the order for Assessment Year 2004-05 whereas the CIT(A) has allowed depreciation at the rate of 25% as 'Intangible Assets' on website development cost, which has not been followed in the order of the Ld AO/ Hon'ble DRP.

2.5. Without prejudice to the above grounds, on the facts and in the circumstances of the case, the Ld AO has erred in proposing and the Hon'ble DRP has further erred in not considering the jurisdictional High Court decision in the case of Commissioner of Income-tax IV vs. India Visit.com private Limited (219 CTR 603) wherein the expenditure on website have been allowed as revenue expenses under Section 37(1) of the Act. The Ld AO has erred in placing reliance on the case of Goetze India Ltd Vs CIT (284 ITR 323) and holding that no claim can be made at the time of assessment which have not been made at the time of return ignoring the fact that:

2.5.1 Website development cost as revenue expenditure was submitted as an alternate plea, without prejudice to the original contention of the assessee, in case the depreciation is not allowed on website development cost as 'Software'.

2.5.2. The captioned decision in the case of Commissioner of Income-tax IV Vs India-visit.com Private Limited (Supra) was pronounced by jurisdictional High Court after the return for the year had already been filed."

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2. The brief facts of the case are that the assessee company is engaged in the business of rendering travel services comprising ticketing, tours and packages, car rentals, hotel bookings etc., customer handling and data management services. Having noticed the international transactions made by the assessee company, the Assessing Officer made a reference to TPO u/s. 92CA(1) for determination of arm's length price for the international transactions entered by the assessee, MakeMy Trip (MMT India) with MakeMy Trip.com Inc (MMT Inc.). On the basis of adjustments determined by the TPO, the Assessing Officer framed draft assessment order u/s. 144C on 22.12.2009, proposing following additions :

(i).	80,43,918	Adjustment on account of Arm's length price of international transactions .
(ii).	37,14,202	Disallowance on account of Web site development expenses.

2.1 The assessee company filed objections before the ld. Dispute Resolution Penal, who vide their order dated 27.09.2010 affirmed the draft assessment order and directed the Assessing Officer to proceed further and complete the assessment as proposed in the draft assessment. Pursuant to the directions of DRP, the Assessing Officer made addition of Rs.80,43,918/- as TP adjustment and Rs.37,14,202/- as disallowance of website expenses and accordingly adjusted the above income from the declared loss shown by the assessee. Aggrieved by the assessment order, the assessee is in appeal, inter alia, on the grounds mentioned hereinabove.

3. During the course of hearing, the ld. AR of the assessee company submitted that the ld. DRP was not justified in affirming the adjustments made

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by the TPO without considering the true character of appellant's business presented in the TP documents and have wrongly modified the functional and risk profile of assessee company with respect to various segments of its business and, therefore, the application of Cost Plus Method by the TPO while analyzing the comparability tests of business segments of assessee at the gross level is based on conjectures and surmises, if the same are analysed with the functional and risk profile of the assessee. It is also submitted that the adjustment on account disallowance of website development expenses is also not justified. It is further submitted that both these issues have been decided by Co-ordinate Bench of Tribunal in assessee's own case for the assessment year 2005-06 vide order dated 29.03.2017 in ITA No. 1875/Del./2011 and 2337/Del./2011, which is confirmed by Hon'ble Delhi High Court in ITA No.881/2017. Therefore, the TPO shall have to pass fresh order as per order of the Tribunal on Ground No. 1.

4. On the other hand, the ld. DR relied on the orders of the authorities below.

5. Having considered the rival submissions and gone through the entire material available on record, we observe that only two issues are involved in this appeal for adjudication. The first is with respect to adjustment of Rs.80,43,918 on account of arm's length price of international transactions and second disallowance of Rs.37,14,202/- of expenses incurred on website development. We further find that both these issues are squarely covered by the decision of Co-ordinate Bench in the case of assessee itself (supra) for the preceding assessment year 2005-06. With respect to Website expenses, the Tribunal has observed as under :

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"4. In so far as the claim of depreciation on website development cost is concerned, the assessee had claimed depreciation on the written down value of Rs.48,25,879/- as well as on the additions made during the year of Rs.94,000/- @60% treating the same to be software, whereas the AO in the order of the assessment has held that on the cost incurred no depreciation is allowable as the expenditure incurred on the website development cost is capital expenditure. In the first appeal, ld. CIT(A) however held that expenditure incurred on the website development is the cost incurred on acquisition of an intangible asset and would thus qualify depreciation @25%. It has been pointed out by the assessee' learned Counsel that the aforesaid issue came up for consideration in the assessee's own case for the immediately preceding assessment year i.e. AY 2004-05 in ITA No. 3916 & 4087/Del/2009 and the Tribunal by its order dated 09.03.2012 has held that the assessee is entitled to claim of depreciation @ 25% being the depreciation allowable on intangible asset. In view of the aforesaid, the ground of appeal filed by the revenue that the assessee is not eligible to the claim of depreciation does not survive and hence is rejected.

5. However, in so far as the claim of the assessee that it is eligible for the claim of depreciation @ 60% instead of 25% as allowed in the preceding year, learned Senior Counsel of the assessee has submitted that assessee has incurred expenditure on the website development cost and website is nothing "but software and since the software has been included in Appendix-I {item (5) under Item-111 under the Machinery & Plant}, and rate of depreciation on the software has been provided 60%, as such, assessee has claimed depreciation @60% in the return of : income. It has further been submitted that the issue stands fully covered by the order of Special Bench in the case of Amway India Enterprises vs. DCIT reported in [2008] 114 TTJ 476 (Delhi) (SB), wherein it has been held that expenditure incurred on the software is eligible for depreciation @60% and aforesaid order of the Tribunal has also been affirmed by the Hon'ble High Court of Delhi and is reported in [2012] 346 ITR 341 (Delhi). In view thereof, we hold accordingly.

6. It may further be stated here that AO had disallowed the claim of depreciation of Rs. 56,000/- on the cost of acquisition of the software of Rs.94,000/-. However, from the perusal of the depreciation chart, it is apparent that opening WDV of block of asset of website development cost was Rs. 48,25,879/- and during the assessment year, an addition of Rs.

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94,000/- was made and on the total block of asset, depreciation cost was Rs.48,25,879/- and during the assessment year, an addition of Rs.94,000/- was made and on the total block of asset, depreciation @ 60% was claimed of Rs.29,51,927/- (including depreciation on the addition made during the year of Rs. 94,000/- @60%). The AO has disallowed a sum-of Rs. 56,000/-- being the depreciation on the additions made during the year, however he has not disputed the depreciation claimed on the block of asset of website development cost of Rs. 48,25,879/-. In view thereof, once the AO himself has accepted the allowance of depreciation on the block of assets of website development cost @ 60% as such, disallowance made on the additions made during the year is unjustified in law and accordingly, it is held that on the website development cost, assessee is entitled to claim of depreciation @ 60%, we order accordingly. The ground Nos. 1 to 3 of the appeal of the assessee are allowed and connected ground Nos. 3 and 3.1 of the appeal of the Revenue are rejected."

6. In view of the aforesaid decision, we decide this issue in favour of the assessee and against the Revenue. Accordingly, ground No. 2 raised by the assessee deserves to be allowed.

7. As far as the other issue pertaining to adjustment of arm's length price of international transactions is concerned, this issue has also been decided by the Tribunal, observing as under :

"15 In the instant case, the assessee is an online travel company and providing online ticketing and tour and travel services through its websites i.e. www.makemytrip.co.in to the customers located in India. That the AE of the assessee is also providing online ticketing and tour and travel services through their website www.us.makemytrip.com and such services are primarily provided to US Non-Resident Indians. As such, whereas the assessee is providing online ticketing and tour and travel services to the customers located in India, on the other hand AE of the assessee provide online ticketing and tour and travel services to the US Non-Resident Indians. That in respect of the customers located in India i.e. direct customers, in respect of whom assessee provide its services, assessee earn direct revenue from such customers. Whereas, AE of the assessee makes substantial efforts for acquisition of the customers and also incurs substantial expenditure on marketing activities. Further, the AE of the assessee has also entered into two agreements with the assessee, one dated 6th December, 2001 [which has been replaced with, agreement

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dated 1st October, 2003) for providing Customer Handling and Data Management Services and Business Promotion Services and another dated 3rd October, 2001 (which has been replaced with agreement dated 1st April, 2004) for providing ticketing and tour and travel services. Assessee has been remunerated under both the agreements. That sum-received under the agreement for Customer Handling and Data Management Services has been accepted to be arm's length. In respect of ticketing and tour and travel services provided to the AE, assessee earns a margin of 2% and 5% respectively for Ticketing and Tour & Packages. It is seen that under the agreement dated 1st April, 2004, the AE of the assessee has outsourced the services of the assessee for providing ticketing and tour and travel services and under the aforesaid agreement services provided by the assessee to AE has been stated in clause 2 which is reproduced hereinbelow:

"2. Services
The Service Provider shall provide the following services:
a) Ticketing Services: -
i) The supplier will issue the tickets as per Client's request/order.
ii) The Supplier shall deliver the tickets to the Client or Client's customer(s) directly as per client's instructions.
iii) The Supplier shall provide the Client with the Tracking numbers on a weekly basis for the tickets dispatched by the supplier to or on behalf of the client .
iv) In case there is a delay or a delay is expected in dispatch of the tickets, due to any reason whatsoever, the supplier shall keep the client informed.
b) Tour Arrangement services:
i) The supplier will contact/interact directly with the client's customer once a booking is passed on by the client to the supplier.
ii) The supplier will provide the customer with necessary information and/or details as per customer's requirement/request.
iii) The supplier will co-ordinate, arrange and organize the entire trip of the customer including interacting with hotels, guides, transporters etc.
iv) The supplier will keep both the client and it's customer(s) informed on any development or delay or any other specific information which the supplier becomes aware of and anticipates the same to materially effect the customer's trip or tour or the interests of the client.
The client shall provide the service provider with all the details, including but not limited to:
a. Name(s) of the passenger (s)/beneficiary (ies) of the services,
b. Address, phone number, email and other contact details of the passenger(s)/beneficiary(ies) of the services,
c. Detailed itinerary of the passengers,
d. Shipping address for travel documents, and
e. *Selling price to the customer/passenger in case of tour arrangement services,*
f. Any other detail that may be relevant to each case."

15.1 As such role of assessee in respect of the customers of the AE is only that of agent and no more. In sub-agent segment, assessee merely acts on behalf of the AE and all the risk is that of the AE. That AE of the assessee is directly responsible

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towards their customers. Even the customer acquisition efforts are only of the AE and for customer acquisition, assessee has no role to play. Since in online travel business, the major and primary activity is to attract the customers to visit the website, and this is responsibility of the AE and once the customer visits the website, only then the activity of the assessee will begin. Even though the assessee under the agreement, undertakes the activity of - booking of tickets and arrangement of tour and travel, however, in case of any breach, only AE is responsible. Whereas, in respect of direct customers of the assessee, assessee acts as principal and all the risk lies with the assessee. In such, circumstances, we agree with the contention of the assessee that both the segments are not comparable on account of the risk and additional functions undertaken by the AE in respect of the international transactions.

15.2 That in so far as the benchmarking analysis is concerned, in the instant case/to benchmarked its international transaction, assessee has chosen Transactional Net Margin Method [TNMM) being the most appropriate method with profit level indicator of Net Cost Plus (NCP) i,e: Net Profit/Total Expenses i.e. comparison has been done at net level. The activities of the assessee under the AE segment is that of IT enabled services, as such, assessee in its .TP Report selected 10 comparables undertaking IT enabled services, and weighted average margin of such comparables was calculated at 9.60%. Since the NCP of the assessee was computed" at 36.71%, as such, international transactions was claimed to be at arm's length. That the TPO did not agree with the transfer pricing analysis of the assessee, and firstly he did not agree-with the selection of the most appropriate method as TNMM and he applied Resale price method as most appropriate method, wherein comparison is done at gross profit margin level. He further, compared the gross profit/total cost of sub-agent segment with the gross profit/total cost of direct customer segment and after granting an adjustment of 16.21%, made the impugned upward adjustment to the international transaction of the assessee in respect of ticketing and tour and travel transactions.

15.3 We find that firstly comparison at gross margin level in the business model of the assessee is incorrect, since to compare at gross margin level, international transaction as well as the comparable transaction must be of high degree of similarity and in the instant case, we have held herein above that there is significant difference *in* direct customer segment and sub-agent business segment Accordingly, both the transactions are not comparable at gross margin level. Further, in so far as the applicability of resale price method is concerned, same is also inapplicable as in the instant case, assessee is not receiving any goods or services from its AE which is being resold to independent third parties. In relation to the above, reliance is placed on the OEGD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, wherein it is stated that the RPM Method is applied when a product or service is purchased from the associated enterprise and the same is sold to an independent party with an appropriate markup. Also, in order to. apply RPM Method, there should not be material 'differences between the controlled and uncontrolled transaction that will adversely affect the gross margin" of the RPM Method The relevant extracts are produced below:

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[Quote]
"2.21 The resale price method begins with the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. This price (the resale price) is then reduced by an appropriate gross margin on this price (the "resale price margin") representing the amount out of which the reseller would seek to cover its selling and other operating expenses and, in the light of the functions performed (taking into account assets used and risks assumed), make an appropriate profit What is left after subtracting the gross margin can be regarded, after adjustment for other costs associated with the purchase of the product (e.g. customs duties), as an arm's length price for the original transfer of property between the associates enterprises. This method is probably most useful where it is applied to marketing operations.

2.22 The resale price margin of the reseller in the controlled transaction may be determined by reference to the resale price margin that the same reseller earns on items purchased and sold in comparable uncontrolled transactions ("internal comparable"). Also, the resale price margin earned by an independent enterprise in comparable uncontrolled transactions may serve as a guide ("external comparable"), Where the reseller is carrying on a general brokerage business, the resale price margin may be related to a brokerage fee, which is usually calculated as a percentage of the soles price of the product sold. The determination of the resale price

2.23 Following the principles in Chapter I an uncontrolled transaction is comparable to a controlled transaction (i.e. it is a comparable uncontrolled transaction) for purposes of the resale price method if one of two conditions is met: a) none of the differences (if any) between the transactions being compared or between the enterprises undertaking those transactions could materially affect the resale price margin in the open market; or, b) reasonably accurate adjustments can be made to 'eliminate the material effects of such differences. In making comparisons .for purposes of the resale price method, fewer adjustments are normally needed to account for product differences than under the CUP method, because minor product differences are less likely to have as material an effect on profit margins as they do on price.
[Unquote] -

Further, in order to substantiate the reliance placed on the guidelines issued by the OCED in relation to the" application of transfer pricing methodologies/reliance is placed on the ruling of Hon'ble High Court in case of Sumitomo Corporation India (P.) Ltd. vs. CIT reported in 387 ITR 611 (Delhi), wherein the Delhi bench has placed reliance on the aforesaid guidelines issued by OECD in relation to the application of the berry ratio to benchmark the margins earned by the- taxpayer. The relevant extracts are produced below:

[Quote]
"44. Subsequently, in 1990, Berry ratio was included as an acceptable PLl in certain circumstances under the Treasury Regulations in USA. OECD Guidelines issued in July 2010 also accepted that Berry ratio to be apposite in certain circumstances. More

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recently, Japan has also accepted use of Berry ratio for purposes of transfer pricing in certain circumstances in its tax legislation reforms introduced in March 2013.

45, Traditionally, the denominator of the ratio only comprised of selling, general and administration expenses. However, the Treasury Legislation of USA also included depreciation as a part of the Operating Expenses used as a denominator in the berry ratio. As is apparent, Berry ratio has limited applicability; it can be used effectively only in case where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. In other words, the operating 'expenditure incurred by the Assessee effectively captures all functions performed and risks undertaken by the Assessee. Thus, in cases where an Assessee uses intangibles as a part of its business, Berry ratio, would not be an appropriate PLl as the value of such tangibles would not be captured in the operating cost and, therefore, it would not be appropriate to compute the ALP based on net profit margin having regard to the operating cost as a relevant base. Similarly, Berry ratio would not be an appropriate PLI for determining ALP in cases of Assessees who have substantial fixed assets since -the. value added by such assets would not be captured in Berry ratio; -

47. In our prima facie view, the third reason stated by the TPO, that is, the rate of commission paid to the Assessee is based on the value of the goods, would be a valid reason to reject the use of Berry ratio because Berry ratio can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. The fundamental premise being that the operating expenses adequately represent all functions performed and risks undertaken. For this reason Berry ratio is effectively applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them."
[Unquote]

15.4 That the learned DR has also challenged the aggregation of the ticketing and tour and travel services and submitted that TPO has separately benchmarked both the transactions and approach of the assessee in not separately benchmarking is incorrect. We find in the instant case, AE of the assessee is providing online ticketing and travel-services, and to provide such services, AE has entered into two agreements: one for Customer Handling and Data Management Services and other for providing ticketing and tour and travel services. That since Customer Handling and Data Management Services are provided in respect of both ticketing and tour and travel services, and further assessee provides its services in respect of ticketing and tour and travel services to the customers of the AE, either online or through phone, and provision of such services are provided through common personnel, and functions undertaken by the assessee in respect of both the services are identical and carried out through the same resources and in similar manner, as such, we are of the view that such services are interconnected and hence such transactions must be aggregated for the purpose of the benchmarking. Accordingly, in this regard, the submissions of the revenue does not deserve acceptance.

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15.5 Furthermore, the TPO did not draw any adverse inference from the economic analysis transaction of Customer Handling and data Management Services undertaken by the assessee. The same was not contested by the TPO while the same formed part of the economic analysis conducted by the assessee in the TP Study. Since all such transactions were part of the overall TNMM applied by the assessee and the very fact that the TPO himself has accepted the transaction relating to customer handling and data management services at arm's length, the approach followed by the TPO to modify the transfer pricing methodology used to benchmark the other two transactions is without any merit.

15.6 We also find that the TPO failed to appreciate the nature of functions performed and the risk assumed by the assessee in relation to the international transactions carried out by the assessee with its AEs. Since the assessee performed routine back office services (viz. customer handling and data management services) for its AEs,, without being assigned or carrying out any key entrepreneurial function in relation to the offshore business of the AEs, the assessee can be characterized as a routine back office service provider. Hence, the approach adopted by the assessee to benchmark such transactions using TNMM as the most appropriate method by finding comparables engaged in providing similar services holds merit.

15.7 In this regard, we uphold view taken by the Ld. CIT(A) wherein it was held that the TPO failed to appreciate the nature of functions performed and the associated risks assumed by the assessee in relation to the international transactions with the AEs. The relevant excerpts of the CIT (A)'s order is reproduced below:

[Quote] '
"15.1 Based on detailed arguments presented by the appellant, I am convinced with the view that the AO/ TPO failed to appreciate the nature of functions performed and associated risks assumed by the appellant in relation to international transactions with its foreign affiliate. Accordingly, in view of the statutory principles enshrined under Section 92C(3) of the Act, I reject the transfer pricing approach adopted by the TPO since it was based on misplaced assumptions regarding the function-asset-risk profile of the appellant,, which cannot be sustained owing to lack of corroborative evidence or supporting material on record.

15.2 Since the appellant performed routine services (viz. customer handling and data management services) for its foreign affiliate without being assigned or carrying out any key entrepreneurial function in relation to the offshore business, it had adopted the correct economic benchmarking approach in its transfer pricing documentation by analyzing the arm's length margin being reported by independent third-parties engaged in providing similar business process outsourcing services under uncontrolled conditions. These benchmarking results or choice of most appropriate method ('TNMM') has not been independently challenged or contested by the TPO. Accordingly, I confirm that the book values of international transactions reported by the appellant for the relevant previous year qualify the arm's length test under Section 92 of the Act, in accordance with the detailed analysis incorporated In the transfer pricing study. In this context, the appellant further argued during the course of the hearings that it was

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entitled to claim economic adjustments as per Rule 10B(2) and 10B(3) of the Income tax Rules, 1962, to account for differences in the risk profile of third-party service providers, who are typically exposed to open market risks, on one hand and captive service providers, like the appellant, on the other hand, who operate in a largely insulated business paradigm. However, appellant's claim for such adjustment is considered to be dismissed for statistical purposes since the appellant qualifies the arm's length test de hors any such adjustment.

15.3 Owing to fundamental differences in the functional/ risk profile of the domestic business carried on the appellant (referred to by the TPO as 'Segment 1') vis-a-vis routine customer handling and data processing services rendered by it to its foreign affiliate (referred to by the TPO as 'Segment 2'),'the TPO was grossly incorrect in adopting the 'cost-plus' approach by seeking to true-up the economic results of routine international transactions using 'gross- margins' earned in the functionally dissimilar (entrepreneurial) domestic business segment Accordingly, I reject the economic benchmarking methodology and profit-level indicator adopted by the TPO at the time of assessment,"

[Unquote]

15.8 The assessee further contends that the adjustment carried out by the TPO to iron the differences between the direct customer business and the sub agent business is grossly erroneous and without any scientific reasoning. In this regard, the assessee submitted that the adjustment undertaken by the TPO for marketing functions undertaken by the AE in the U.S. has inherent anomalies to the extent the above average margin represents the return for a different set of activities (i.e. IT enabled services) undertaken by the comparable companies in India. Further, the TPO erred in not accounting for geographical differences while arriving at the adjustment for marketing functions undertaken by the AE in the U.S. Further the computation mechanism adopted by the TPO to affect the above .adjustment is faulty and erroneous. The TPO reduced the gross-profit margin of the appellant earned from its Direct customer business segment to affect above adjustment, instead of making appropriate adjustment to the cost-base/ value-added expenses of the AE for marketing activities/ functions undertaken by the AE. However, since we have already rejected the approach adopted by the TPO above, we refrain ourselves from commenting on the validity of any such adjustment computed by the TPO.

15.9 The assessee has further contended that the approach taken by the assessee in comparing the direct customer segment and the sub agent segment is incorrect and even if the TPO's approach were to be followed, and the assessee be characterized as risk-bearing entrepreneur akin to its direct customer segment for the sub-agent business, then the proportion of the operating expenses incurred by the AE in the US should also be allocated to the assessee. The assessee has filed its workings with the approach followed by the TPO and has contested that there will be a loss of 2.45 mn and which will result in a downward adjustment to the income of the assessee, which itself contravenes the section 92(3) of Income Tax Act The assessee has given its detailed working before the TPO as well as CIT (A), and CIT(A) has also elaborately discussed the same in her order. The working as provided by the; assessee before the

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TPO and CIT(A), which has also been elaborately discussed by the CIT(A) is to attribute 15.90% of the gross profit earned by the assessee is produced below:

MMT U.S. – Gross Margin Composition	Amt. (INR mn) (Refer Note1)	Break up (in percentage terms) of the total GP	Percentage GP attributable to tickets procured from India (Refer Note 1)	Effective GP Percentage Attributable to tickets procured from India	Forward linking approach of the TPO (Attribution of MMT U.S. GP to MMT adjustment proposed by the TPO) (Refer Note 2)	Final adjustment
	A	B	C	D = B *C	È	F=D*E
Gross margin on tickets	51.94	51.57%	47.36%	24.42%	60.69%	14.82%
Gross margin on T & P	2.90	2.88%	66.82%	1,92%	55.75%	1.07%
Gross margin on cancellation	6.62	6.57%	Nil	-	-	-
Commission Income	39.25	38.97%	Nil	-	-	-
	100.71	100.00%		26.35%		15.90%

Note I: MMT U.S. - GP composition and break-up of tickets and T&P sourced from MMT India

S. No.		Amt (INR mn)	%	Amt (INR mn)
I	Tickets			502.74
	Net cost			
	India sourced @ cost plus 2%	213.48	47.36%	
	US sourced	237.32	52.64%	450.80
	Gross Profit - I(Tickets)		10.33%	51.94
II	T &P			
	Net cost			
	India sourced @cost plus 5%	6.00	66.82%	
	U.S. sourced	2.98	33.18%	8.98
	Gross Profit –II (T & P)		24.41%	2.90
III	Cancellation			9.80
	Net cost			
	U.S. sourced	3.18	100.00%	3.18
	Gross Profit – III(Cancellation)		67.55%	6.62

Note 2: Forward linking approach of the TPO (Attribution of MMT U.S. GP to MMT India)

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			Selling price to MMT U. S.					
S. No.	Transactions	Cost	Appellant's approach	TPO's approach	Final selling price	MMT U.S. GP	GP attributed to MMT India by the TPO	Percentage attribution
			@ Cost plus 2% /5%)	@ Cost plus 8.4 %/19.30%)				
		A	B=A*	C=A* mark up (8.4% / 19.30%)	D=B *US GP	E	F=C-B	G=F/E%
I	Tickets	98.03	100	106.26	110.33	10.33	6.26	60.46%
II	Tours and Packages	95.24	100	113.62	124.41	24.41	13.62	55.79%

15.10 We have gone through the working of adjustment provided by the assessee, wherein approximately 15.90 percent of AE's operating expenses will be allocated to the assessee, since the assessee will receive 15.90 percent of the total gross profit if the TPO's approach is applied. Accordingly, Rs. 16.67 mn (being 15.90 percent of the AE's operating expenses amounting to Rs. 104.87 mn) is required to be allocated to the assessee. For better appreciation of the working, same is extracted herein below:

Incremental Costs attributable to MMT India	
	Amt (INR mn)
Total operating expenses of MMT U. S. (not included in Direct costs)	
- Site hosting	2.63
- Customer handling and processing charges	48.60
- Depreciation	0.50
- Presonnel expenses	2.25
- Operating and admin expenses	50.90
-	104.87
-	
- Percentage of US Gross Profit attributed by the TPO to MMT India	15.90%
-	
- Amount of US operating expenses attributable to MMT India	16.67
-	

As a result, of the above computation of the operating expenses, a downward revision amounting to Rs. 2.45 mn is required to be a undertaken to the intercompany transfer prices as shown below:

Particulars	TPO's Approach	Assessee's Approach	Additional GP attributed to MMT India
Gross Profit - Ticketing (sub-agent)	Rs.17.58	Rs.4.18	Rs.13.40
	Rs.1.11	Rs.0.29	Rs.0.82
MMT India' total gross profit on sub-agents business	Rs.18.69	Rs.4.47	Rs.14.22

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Less :			
U. S. Costs attributed to India Net operating losses attributable to the appellant			Rs.16.67 Rs.(2.45)

On perusal of the above computation, the adjustment computed by by the TPO has the effect of downward adjustment to the book value of international transactions of the assessee. In this regard, we find that we have already .rejected the approach adopted by the TPO, the claim of the assessee on account of downward transfer pricing adjustment does not survive. Hence, in our view the adjustment undertaken by the Ld. TPO to iron out the differences between the two segments is not warranted.

15.11 In view of the foregoing discussion, we are of the .opinion that the selection of most appropriate method by the TPO of resale price method is incorrect as resale price method is inapplicable to the facts of the assessee. Apart therefrom, while determining the arm's length price, the TPO has benchmarked the margin of profit earned in subagent segment with the margin of profit earned by the assessee from its direct customers. In doing so, TPO has failed to appreciate that AE of the assessee is not the customer of the assessee, and it is assessee who is the acting as subagent of the AE and in respect of such transactions, assessee has also been remunerated. Since the direct customer segment and subagent segment are materially different as such, the margin of profit earned by the assessee in respect of transactions entered with its AE is not comparable with the margin of profit earned by the assessee with its direct customers. Further, if the approach of the TPO is to be applied then the effect of the comparison would be that assessee will receive 15,90 percent of the total gross profit earned by the AE, and in such circumstances proper adjustment would be to allocate the proportionate operating expenses incurred by the AE, and in such circumstances, the effect would be that there would be downward adjustment to the book value of international transactions of the assessee, which itself contravenes the section 92(3) of Income Tax Act. In summary, appeal of the revenue in relation to the benchmarking adopted by the assessee and the approach followed by the CIT (A) for the international transactions of the assessee is arm's length and the grounds raised by the Revenue are dismissed accordingly.

8. Having gone through the aforesaid discussion made by Co-ordinate Bench in the case of assessee itself for A.Y. 2006-06, we find that there is no change in the facts and circumstances in the instant case. Moreover, the above decision reached by the Tribunal has been upheld by the Hon'ble jurisdictional High Court in ITA No. 881/2017 in appeal filed by the Revenue. Therefore, respectfully following the decision of the Co-ordinate Bench and of Hon'ble

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High Court, we decide this issue also in favour of the assessee, as done by ITAT in the aforesaid order. The Assessing Officer/TPO is directed to follow the order of the Tribunal for A.Y. 2005-06 and to pass consequential order accordingly by giving reasonable opportunity of being heard. Ground No. 1 raised by assessee is, thus, allowed for statistical purposes.

9. In the result, the appeal is partly allowed, as indicated above.

Order pronounced in the open court on 30th July, 2018.

Sd/-	**Sd/-**
(Bhavnesh Saini)	**(L.P. Sahu)**
Judicial member	**Accountant Member**

Dated: 30th July, 2018
aks

Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi