IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : FRIDAY I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA Nos.5535/Del/2016 & 7115/Del/2017
Assessment Years: 2012-13 & 2013-14

AT & T Global Network Services (India) Pvt. Ltd., Vatika Triangle, 3rd Floor, Sushant Lok-1, Block-A, Gurgaon.	Vs	JCIT, Special Range-1, New Delhi.
PAN: AAFCA8810L		
(Appellant)		(Respondent)

Assessee by	:	Shri Kanchan Kaushal, Advocate
Revenue by	:	Shri H.K. Choudhary, CIT, DR
Date of Hearing	:	28.02.2019
Date of Pronouncement	:	27.05.2019

ORDER

PER R.K. PANDA, AM:

The above two appeals filed by the assessee are directed against the separate orders passed u/s 144C r.w. section 143(3) of the IT Act, 1961 relating to assessment years 2012-13 & 2013-14 respectively.

2. Since common grounds are involved in these appeals, therefore, for the sake of convenience, these were heard together and are being disposed of by this common order.

ITA No.5535/Del/2016 (A.Y. 2012-13)

3. Facts of the case, in brief, are that the assessee AT&T Global Network Services (India) Pvt. Ltd. (AGNSI) is a company incorporated in India on 25th October, 2005 with an objective to provide telecommunication services in India and has obtained international long distance (ILD), national long distance (NLD) and internet service provider (IS) licence from the Department of Telecommunications. It commenced its commercial operations on 7th April, 2007. It has entered into service agreements with its customers in India for provision of end-to-end telecom activity services to such customers for transmission of data from source locations in India to destination locations within/outside India. It filed its return of income on 11th November, 2012 declaring an income of Rs.156.65 crore. The Assessing Officer referred the matter to the TPO u/s 92CA of the Act for determination of the Arm's Length Price (ALP) of the international transaction entered into by the assessee. The TPO, vide order dated 28th January, 2016, recommended an addition of Rs.19.30 crores being the ALP of the international transaction entered into by the assessee on account of intra group services. The Assessing Officer passed the draft assessment order on 17th February, 2016, determining the total income of the assessee at Rs.2,32,09,25,823/- wherein the Assessing Officer, apart from making the addition of Rs.19.30 crore, made various other additions. The DRP issued certain directions, vide its order dated 11th August,

2016. Subsequently, the Assessing Officer passed the final assessment order on 30th September, 2016 determining the total income of the assessee at Rs.2,27,14,13,720/-.

4. Aggrieved with such order of the Assessing Officer/TPO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds:-

1. Transfer Pricing Grounds

On the facts, in the circumstances of the case and in law:

1.1 The Ld. Transfer Pricing Officer ("TPO")/ Assessing Officer ("AO")/ Hon'ble Dispute Resolution Panel ("DRP") erred in making an upward adjustment of INR 19,30,10,578 under section 92CA of the Act to the total income of the Appellant in respect of intragroup services availed by the Appellant from its Associated Enterprises ('AEs').

1.2 The Ld. AO/ TPO/ DRP erred, on facts and circumstances of the case and in law, in rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to availing of intra-group services from its AEs on a standalone basis by rejecting Transactional Net Margin Method ('TNMM') as the most appropriate method.

1.3 The Ld. AO/ TPO/ DRP erred, on facts and circumstances of the case and in law, in arbitrarily rejecting TNMM and selecting Comparable Uncontrolled Price ('CUP') method as the most appropriate method to benchmark the international transaction pertaining to availing of intra-group services by the Appellant from its associated enterprises, without duly establishing suitability thereof.

1.4 The Ld. AO/ TPO/ DRP erred in disregarding the elaborate documentary evidence submitted as part of assessment proceedings to erroneously assume that 'no benefit' has been conferred upon the Appellant from the international transactions pertaining to availing of intra-group services and thereafter re-determining the ALP of the said transaction as 'NIL'.

1.5 The Ld. AO/TPO/DRP has erred in disregarding the receipt of services by the Appellant from its AEs which is contrary to the facts of the present year as well as to the stand taken by the Ld. TPO in prior year despite no change in the nature of services involved. Further, the Ld. TPO erred in contending that the services received are duplicative and stewardship in nature, ignoring the documentation and evidences submitted by the Appellant; which contradicts his own contention that the services have actually not been received.

1.6 The Ld. AO/TPO/DRP has erred in arbitrarily challenging the veracity of the contractual service agreement disregarding the actual conduct of the Appellant in the availing of intra-group services from AEs basis the elaborate documentary evidences submitted as part of assessment proceedings.

1.7. Without prejudice to the above, the Hon'ble DRP grossly erred in alleging that payment made by the Appellant for intra-group services is not wholly and exclusively incurred for the purposes of business and directing the Ld. AO to alternatively disallow such expenditure under section 37(1) of the Act, without providing any opportunity of being heard to the Appellant.

2. **Disallowance of circuit accruals**

2.1. On the facts, in circumstances of the case and in law, the Ld. AO/DRP erred in making a disallowance of Rs. 40,02,308 on account of circuit accruals created towards bandwidth and last mile services availed by the Appellant company, ignoring that the accruals were based on a reasonable and scientific basis.

2.2. On the facts, in circumstances of the case and in law, the Ld. AO failed to appreciate that the appellant follows mercantile system of accounting and accrues circuit charges on scientific basis.

2.3. On the facts, in circumstances of the case and in law, the Ld. AO/DRP failed to appreciate that as per the accounting standards notified under section 145(2) of the Act, the appellant was required to make provision for circuit accruals for the subject financial year.

2.4 On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not appreciating that the appellant produced evidences to the extent of 99% for utilisation/reversal of circuit accruals made in subsequent years and no adverse finding has been given by the Ld. AO/Hon'ble DRP on the same.

2.5 Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilised.

Therefore, any disallowance on account of circuit accrual is not tenable.

3. Disallowance of year-end accruals

3.1. On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in making a disallowance of Rs. 1,39,51,595 on account of year-end accruals representing accruals created towards normal business expenditure incurred by the Appellant ignoring that the accruals were based on a reasonable and scientific basis.

3.2 On the facts, in circumstances of the case and in law, the Ld. AO/ Hon'ble DRP failed to appreciate that as per the accounting standards notified under section 145(2) of the Act, the appellant was required to make provision for all liabilities/expenses for the subject financial year.

3.3 On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not appreciating that the appellant produced evidences to the extent of 95% for utilisation/reversal made in subsequent years and no adverse finding has been given by Ld.AO/Hon'ble DRP on the same.

3.4 Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilised.

Therefore, any disallowance on account of year-end accrual is unjustified.

4. **Dis**allowance on account of service tax payable

4.1 On the facts, in circumstances of the case and in law, the Hon'ble DRP/Ld. AO grossly erred in disallowing service tax payable of Rs 80, 72,791 as on March 31, 2012 without appreciating that the appellant has not debited the service tax to the Profit/Loss Account, accordingly no disallowance of the same can be made.

4.2 Without prejudice to the above, on the facts, in circumstances of the case and in law, the Ld.AO/Hon'ble DRP erred in disallowing service tax payable without appreciating that the evidences with respect to payment of deposit of service tax to the government account were furnished by the appellant company.

4.3 On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not allowing the claim of service tax payable disallowed in the preceding assessment year (i.e. AY 2011-12).

5. Disallowance of Support Service Expenditure

5.1. On the facts, in circumstances of the case and in law, the Ld. AO/ Hon'ble DRP erred in disallowing the legitimate business expenditure being in the nature of support service expenses of Rs. 11,87,48,765 paid to AT&T Communication Services India Private Limited ('ACSI').

5.2 On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not taking cognizance of the submissions made by appellant and the documentary and circumstantial evidence/ proof produced by the appellant, which duly substantiates that support services were rendered by ACSI to the appellant company.

5.3 On the facts, in circumstances of the case and in law, the Hon'ble DRP erred in ignoring that the aforesaid disallowance on account of support service expenditure has been directed to be deleted by the Hon'ble DRP for assessment years 2008-09, 2009-10, 2010-11.

6. Disallowance of annual revenue share based license fee

6.1 On the facts, in the circumstances of the case and in law, the Ld. AO/ Hon'ble DRP erred in disallowing an amount of Rs. 27,42,18,112 (being disallowance of Rs 30,53,49,361 for AY 2012-13 less credit of Rs. 1,66,89,296 for AY 2011-12 and of Rs. 1,44,41,953 for AY 2010-11) under the head licence fees debited to Profit & Loss Account by holding that annual license fee is not allowable as a revenue expenditure and it should be amortised under section 35ABB of the Act.

6.2 On the facts, in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not following the judgment of the Hon'ble jurisdictional Delhi High Court in the case of Bharti Hexacom Ltd. [2014] 265 CTR 130 (Delhi) wherein it was held that annual revenue share based license fee paid by the telecom operators is revenue expenditure, allowable under section 37(1) of the Act and not a capital expenditure amortizable under section 35ABB of the Act.

6.3 On the facts, in the circumstances of the case and in law, the Hon'ble DRP erred in ignoring that aforesaid disallowance has been directed to be deleted by the Hon'ble DRP for the preceding assessment year i.e. AY 2011-12.

7. **Disallowance of Lease line charges on account of non-deduction of tax at source**

7.1. On the facts, in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP in making disallowance under section 40(a)(ia) read with Section 194I of the Act account of non-deduction of tax at source on lease line expenses of Rs 6,50,79,639 incurred by appellant.

8. **Disallowance of amount of 20,74,814 on account of short deduction of tax at source**

8.1. On the facts, in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in disallowing an amount of Rs 20,74,814 under section 40(a) of the Act on account of non-deduction of fax at specified rate @ 10%.

8.2. On the facts, in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP grossly erred in not appreciating that the appellant deducted tax @ 2% instead of 10% which is short deduction of tax at source and that section 4o(a)(ia) of the Act is applicable only to cases involving non-deduction of tax at source and not on short- deduction.

9. **Disallowance of foreign exchange loss**

9.1. On the facts, in the circumstances of the case and in law, the Ld. AO grossly erred in making disallowance of Rs 4,80,06,052 on account of foreign exchange loss arising on revenue account.

9.2. On the facts, in the circumstances of the case and in law, the Ld.AO/Hon'ble DRP grossly erred in observing that the foreign exchange loss arises from External Commercial Borrowing (ECB) for procurement of capital goods without appreciating that during the year under consideration, no ECB facility was availed for capital goods.

10. **Non-grant of credit for taxes deducted at source**

10.1. On the facts, in the circumstances of the case and in law, the Ld. AO erred in not granting appropriate credit of taxes deducted at source as allowable to the Appellant for the year under consideration.

11. **Lew of interest under section 234B and 234C of the Act**

11.1. On the facts, in the circumstances of the case and in law, the Ld. AO erred in incorrectly charging interest under section 234B and 234C of the Act.

12. **Initiation of penalty proceedings**

12.1. On the facts, in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 271(i)(c) of the Act against the Appellant on account of the above adjustments made in the impugned final assessment order

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case.

5. Ground of appeal No.1 to 1.7 relates to the transfer pricing adjustment. The ld. counsel for the assessee submitted that the assessee has entered into a service agreement dated 19th March, 2008 with AT&T Communication Services International Inc. (ACSI) for provision of intra group services for the period April 1 2011 to 30th June, 2011. As per the said agreement ACSI shall render services to the assessee on cost plus mark up. Further, the assessee has entered into a service agreement dated 1st July, 2011 with Interwise Asia Pacific Pte Ltd. (IAPPL) for provision of intra-group services wherein services were provided by IAPPL effective July 01, 2011. As per the said agreement, IAPPL shall render the aforesaid services to the assessee on cost plus mark up. These agreements are placed at pages 193 to 208 of the Volume I of the

paper book. He submitted that during the relevant year, out of the many services for which it had entered into agreements, only one service, namely, global customers service centre (GCSC) was availed. He submitted that AGNS provided network activity service to customers of its AEs. For rendering the aforementioned services, the AGNS availed support service in the nature of global customers support centre from its AEs. The key functions performed by GCSC is primarily divided into two parts i.e.,

a) Ticket handling which includes the following services:-

- Review ticket status
- Customer handling verification
- Check action real time
- Manual CON notification
- Detection and management of major incidents
- Creating a case ticket
- Creating and linking GenChild tickets with Master ticket
- Stopping the clock on a ticket
- Updating next check time
- Document all ticket related communication
- Document diagnostics, troubleshooting efforts in the ticket
- Manage ticket queue

b) Problem determination (PD)/Triage

- CPE verification

- Diagnostics and troubleshooting
- Problem determination
- Assemble appropriate team to address ticket
- Review asset history.

6. He submitted that during the impugned assessment year out of the many services for which the assessee has entered into agreement, only one service, namely global customer service centre was availed. Further, the nature of service availed in the present years are exactly similar to the services availed of in the earlier years including the immediately preceding year. He submitted that along with the similarities in the nature of services availed of by the assessee from its AEs, the manner and the process of computation of charges also remained the same as in earlier years. He submitted that GCSC cost has been allocated to India on the basis of India related fault tickets as percentage of total fault tickets for Asia Pacific region. During the relevant period 26.34% of cost of the team based in Singapore and 48.79% of the cost team based in Hong Kong was allocated to AGNS India on the basis of tickets raised from India. He submitted that the cost paid by the assessee for GCSC services was benchmarked by the assessee using combined transaction approach using Transactional Net Margin Method (TNMM) as the most appropriate method with Operating Profit/Operating Cost (OT/TC) as the profit level indicator. The assessee earned OP/TC of 23.15% which was significantly higher than the arithmetic mean of OP/TC of 6.34% earned by comparable companies. Accordingly, the assessee considered the transaction to be at arm's length. However, the TPO challenged the

availing of intra group services from AEs amounting to Rs.19,30,10,576/-. He rejected the aggregation approach adopted by the assessee under TNMM and adopted CUP as the most appropriate method in the absence of comparable data. The TPO held that the assessee has not been able to prove the receipt of benefits and demonstrate the arm's length nature. Accordingly, the TPO determined the ALP of the aforesaid services at nil on ad hoc basis. The DRP upheld the action of the TPO.

7. The ld. counsel for the assessee submitted that the Tribunal in assessee's own case in the assessment year 2009-10 held the TNMM to be the most appropriate method. While holding so, they held that the assessee has satisfied the need test of the said services, the services availed are not duplicate in nature, services availed are not in the nature of shareholders services, benefit test has been satisfied and substantial material evidences have been placed on record. He submitted that following the orders of the Tribunal, the Tribunal in assessee's own case for assessment year 2010-11 and 2011-12 has also deleted similar addition. The ld. counsel for the assessee filed the following chart to substantiate the similarity of information/documents between assessment year 2009-10 and 2012-13:-

Assessment year	Name of Intra-group Services	Nature of service	Evidence(s) submitted	Basis of Allocation
2009-10	GCSC	The GCSC team is based in Hong Kong and Singapore and is engaged in maintenance and fixing repairs or outages for	The list of the tickets processed along with nature of problem resolved bas been submitted	India related fault tickets as percentage of total fault tickets for Asia Pacific

		customers of AGNSI as well as other AT&T group companies in Asia Pacific region. During FY 2009-10, the GCSC team processed over 26,600 tickets for AGNSI	as evidence	
2012-13	GCSC	The GCSC team is based in Hong Kong and Singapore and is engaged in maintenance and fixing repairs or outages for customers of AGNSI as well as other AT&T group companies in Asia Pacific region. During FY 2011-12, the GCSC team processed over 39,000 tickets for AGNSI	The list of the tickets processed along with nature of problem resolved bas been submitted as evidence	India related fault tickets as percentage of total fault tickets for Asia Pacific

8. He accordingly submitted that the issue stands squarely covered by the decision of the Tribunal in assessee's own case for the assessment year 2009-10 and, therefore, it should be concluded that the international transaction pertaining to intra group services adheres to the arm's length standard as prescribed in the Indian TP regulations and the addition so made by the Assessing Officer/TPO/DRP should be deleted.

9. The ld. DR, on the other hand, strongly relied on the order of the Assessing Officer/TPO/DRP

10. We have considered the rival arguments and perused the orders of the Assessing Officer/TPO/DRP. We find the assessee, in the instant case, has benchmarked the cost paid by the assessee for GCSC services using combined transaction approach and using TNMM method as the most appropriate method with Operating Profit/Operating Cost as profit level indicator. Since the OP/TC was 23.15% which was significantly higher than the arithmetic mean of OP/TC of 6.35% earned by comparable companies, the assessee considered the transaction to be at arm's length. We find the TPO rejected the aggregation approach adopted by the assessee under TNMM and adopted CUP as the most appropriate method in the absence of comparable data. The TPO further held that the assessee was not able to prove the receipt of the benefits and demonstrate the arm's length nature. The TPO accordingly determined the ALP of the aforesaid services at nil on ad hoc basis which has been upheld by the DRP.

11. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2009-10 wherein the Tribunal, after considering the facts, material evidences, etc., held that the assessee satisfies the need benefit and rendition test. The Tribunal also upheld the TNMM to be the most appropriate method. The relevant observations of the Tribunal from para 49 onwards read as under:-

> "49. On appreciation of the above facts it is apparent that looking at the nature of the business of the assessee and the kind of industry the assessee operates in, the assessee has justified that such services are required. It is not the case of the ld TPO that assessee is having this services therefore they are duplicative in nature

or are in nature of shareholders' services. It is pertinent to note that requirement of the services should be judged from the viewpoint of the appellant as a businessperson. We agree with the argument of the assessee that if the network related problems prevent the customers from using its services, the assessee is bound to suffer reputational damage and potential loss to business. Addressing the customer's problems promptly and by a specialized team (which may be an AE) should satisfy the benefit test, as the assessee received an economic benefit to maintain its business operation. Therefore in this regard we are of the view that assessee has substantiated that these services are required by it for its business sustainability. The only allegation which TPO / DRP made was that the assessee has not been able to substantiate need test by way of appropriate documentation and held that the assessee should have availed these services from an independent third party in India rather than from its AE. After going through the fact and submissions placed on record we are of the view that the assessee has satisfied the need/benefit test for availing these services from its AE. Regarding the rendition of the services by the AE, the appellant submitted before the TPO, the copy of inter-company agreements, tickets processed by GCSC, sample list of project assignment on which GCSC team assisted the assessee, list of deals on which GSE presales team assisted the assessee. The assessee also explained the allocation key with details of teams spread across different countries, copies of invoices etc. For the purposes of substantiating the services rendered by the assessee it has submitted the details of all the service rendered by the AE to the assessee as in the paper book same are placed on sample basis. Therefore, assessee has placed substantial material evidencing the receipt of the services. Regarding the receipt of the services from AE, the assessee can be asked to maintain and produce the evidence of receipt of services, which a businessperson keeps and maintains regarding services related from the third party. The burden cannot be higher on the assessee for evidencing the receipt of services of higher level merely because the services have been rendered by its AE. Against these evidence placed by the assessee before the lower authorities ld. DRP has merely stated that assessee has not been able to provide sufficient evidence and that the AE has provided such services to the assessee. We failed to understand what _sufficient evidence' was and what was lacking in the case of the assessee. We could not find any instances placed where the TPO / DRP held that the evidence placed by the assessee are not substantiated by rendition of service by the AE. The assessee has also relied on the Hon'ble Delhi Tribunal in the case of GE Money Financial Services Pvt Ltd. Vs ACIT in ITA No. 5882/Del-2010 and TNS India Pvt. Ltd. V. ACIT: (2014) 32 ITR (Trib.) 44 (Hyd.)whereby on similar facts the Hon'ble Delhi Tribunal has rejected the plea of the Revenue and has held that for receipt of services, rendering of services must be seen from the view point of the assessee and further assessee cannot be asked to keep and maintain evidences of services rendered by AE higher than which is expected from a businessman receiving services from an unrelated provider. Respectfully the following the decision of the coordinate the bench we are of the view that the assessee has justified the receipt of the services and satisfied the rendition test. Regarding the benefit test, the assessee submitted that

owing to the nature of industry it operates in it requires specialized knowledge and experience in order to provide seamless services to customers. It has inherent risks and advantages that can be effectively harnessed only through sharing of resources and efficiencies that are inbuilt in-scale. Accordingly, availability of support in terms of strategy, data usage and administration is essential and indispensable for the assessee in order to achieve cost efficiency and normal functioning of its business operations. For this reason, the assessee is availing such essential services from its AEs. For this purpose, the assessee had entered into an agreement with its AE. These functions or services, if not availed from the AEs, would have to be undertaken by the assessee itself. However, due to very nature of network connectivity services and in order to achieve better economies of scale and synergies, these functions are centralized within the AE of the assessee which renders such services. It is, therefore, clear that such services confer a benefit on the assessee. While examining the arm's length nature of the impugned international transaction, the learned TPO has applied cost-benefits test and attempted to map the benefits received against payment made for such services. While he has concurred with the assessee's contentions regarding receipt of benefits in respect of several services, for certain other services, he has erroneously believed that no benefits have been received and re-determined the ALP on that basis, without appreciating that the same have benefitted the assessee and accordingly, warrant a payment.

50. The assessee has also argued that the TPO is only empowered to determine the ALP of international transaction. It was argued that there is no legal requirement or mandate for any taxpayer to necessarily undertake a cost-benefits analysis and a mere absence of such analysis should not necessarily lead to a pre-conceived notion that no benefits have been received by the assessee and should not form a basis to disallow the said payment. We also hasten to add that that for determination of ALP , the benefit to the user must arise otherwise, it fails the basic test of determining ALP. If there is no benefit to the user naturally nobody would pay for the services and hence ALP of such transaction is always Nil because they are worthless. Such is not the case here. To support its contention, the assessee has relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs Cushman and Wakefield (India) Pvt Ltd. (ITA 475/ 2012), wherein, it was held that the authority of the TPO is to conduct a TP analysis to determine the ALP and not to determine whether the tax payer derives a benefit from the service. The Hon'ble Delhi High Court has opined that the determination of benefit to the tax payer is not in the domain of the TPO. In this regard, the Appellant also placed reliance on the following judicial precedents to bring home the point that the benefit test needs to be satisfied from the view point of assessee and business prudence :

a. Ericsson India Private Limited vs Dy CIT [ITA No. 5141/Del/2011 (Delhi ITAT)]
b. CIT v. EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi)
c. Hive Communication Pvt. Ltd. (ITA No.306/2011)

d. Commissioner of Income Tax vs. Cushman and Wakefield (India) P. Ltd. (269 CTR 16) (Del.)

51. The above decisions unanimously holds that in reaching the conclusion that whether an independent entity would have paid for such services neither the revenue nor the court must question the commercial wisdom of the assessee or replace its own assessment of the commercial viability of the transaction. The judicial precedents also stipulate that the duty of the Ld. TPO is restricted to determine the ALP of the international transaction and that he cannot replace his views with the views of the assessee. Respectfully following the binding precedent cited above we are of the view that benefit test for determination of Arms length Price is to be viewed from the perspective of the assessee and businessman and not from the perspective of revenue. In this case appellant has demonstrated the benefit which it is expected to derive from the various services rendered by its AE and ld. TPO has erred in replacing with its own judgment of the benefit derived by the assessee, we reject this approach.

52. However for determination of arms Length pricing, the assessee has adopted TNMM as the most appropriate method. The TPO has rejected TNMM as the most appropriate method and applied the CUP method. For this TPO has not given any reasoning. In fact, TPO and DRP has not brought out any data on record for bench marking of intra group transaction and treating the value of services as NIL by applying the CUP method which is against the basic principles of TP regulations. Data availability s the life line of any method adopted in comparability analysis. If there is no data available in that particulars method then comparability analysis under that method fails. In a scenario where no data is available to apply the direct methods, one has to resort to residuary methods for benchmarking a transaction / group of transaction such as 'TNMM'. Considering all these factors the Appellant adopted TNMM to benchmark the transaction. In the absence of any justification by DRP/TPO for application of CUP, we justify the use of TNMM as the most appropriate method.

53. In view of the above findings, we hold that for intra group services (where the evidences have been furnished), the assessee has satisfied the need, benefit and rendition test. However we would also like to mention that out of seven services the assessee has not furnished evidences for following three services namely- country services, information technology, project management. In the absence of any evidences, the test of necessity, need and rendition cannot be commented upon and the assessee is given an opportunity to furnish the evidences for these three services before the AO/TPO for necessary verification. The ld TPO may examine them and decide the issue with respect to those services in accordance with law. With respect to the method as the ld TPO has not examined the comparability analysis under the TNMM method of Intra Group services, he must examine the comparability analysis of IGS (intra Group Services) and determine ALP.

12. Since the assessee in the impugned assessment year has only entered into agreement for one service only, namely global customer service centre, therefore, following the decision of the Tribunal in assessee's own case for the assessment year 2009-10 which has been followed by the Tribunal in assessee's own case for assessment years 2010-11 and 2011-12 and in absence of any distinguishable features brought before us by the Revenue, we hold that the addition made by the Assessing Officer/TPO and upheld by the DRP is not sustainable. We accordingly set aside the order of the Assessing Officer/TPO and direct them to delete the addition. The transfer pricing grounds raised by the assessee are accordingly allowed.

13. Ground of appeal No.2 relates to disallowance of circuit accruals.

14. Facts of the case, in brief are that the assessee, during the impugned assessment year incurred circuit charges aggregating to Rs.192.52 crores i.e., Rs.82.62 crores towards infrastructure cost and Rs.107.89 crores towards last mile charges towards services provided by other telecom operators. Out of the above amount of Rs.37.55 crore towards the year end accrual the Assessing Officer disallowed an amount of Rs.40,02,308/- on account of non-submission of supporting documents which has been upheld by the DRP.

15. It is the submission of the ld. counsel for the assessee that as part of the month end accounting process, the assessee accrues expenses incurred up till the end of a particular month based on the liability incurred/crystalised and estimated expense

based on the orders placed for various circuits. Such accruals include expenses incurred in relation to the services rendered during the relevant financial year, estimated on a reasonable and scientific basis for which bills/invoices are not received during the year. It is also his submission that as a practice, accruals for a particular month are reversed in the succeeding month when fresh accruals for the period beginning from the start of the year till such month are made and the payments made against the aforesaid accruals are accounted for in an account, namely, prepaid circuit ledgers and later on reduced from the circuits accrual account at the end of the month. The circuit charges are recorded through a system called GAIM (Global Access Inventory Management System) on a worldwide basis which is highly automated system. It is his submission that since the year end circuit accruals credited by the assessee represent accruals towards normal business expenditure incurred by the assessee for the relevant financial year and recorded in accordance with the matching principle, deduction in respect thereof should be allowed to the assessee. Further, the assessee was able to produce documentary evidence, subsequent utilization/reversal of more than 98% of the expenses represented by year end circuit accruals which itself evidences that even the balance accruals have also been credited on a reasonable basis and, therefore, no disallowance in this regard is called for. Therefore, the allegation of the Assessing Officer that no documentary evidence has been produced by the assessee in respect of the circuit accruals is erroneous and the addition should be deleted. Referring to the decision of the Tribunal in assessee's own case in assessment year 2009-10 which has been followed by the Tribunal in assessee's own case for

assessment year 2010-11 and 2011-12, he submitted that under identical circumstances addition made by the Assessing Officer and upheld by the DRP has been deleted. He accordingly submitted that this being a covered matter, the addition made by the Assessing Officer on account of circuit accruals should be deleted.

16. The ld. DR, on the other hand, while supporting the order of the Assessing Officer/TPO/DRP, submitted that since the assessee did not submit the requisite details to substantiate its case, the addition made by the Assessing Officer and upheld by the DRP should be sustained.

17. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the Assessing Officer made a disallowance of Rs.40,02,308/- on account of circuit accruals credited towards band width and last mile services availed by the assessee on the ground that the assessee did not file the requisite supporting documents. It is the submission of the ld. counsel for the assessee that the assessee follows mercantile system of accounting and accrues circuit charges on scientific basis. It is also his submission that as per the accounting standards notified u/s 145(2) of the Act, the assessee is required to make provision for circuit accruals for the subject financial year. It is also his submission that the assessee has provided evidence to the extent of almost 98% of the expenses represented by year end circuit accruals for utilization/reversal of circuit accruals made in subsequent year and no adverse finding has been given by the Assessing Officer/DRP. We find merit in the arguments advanced by the ld. counsel for the assessee. We find identical issue had come up before the Tribunal in assessee's own

case for assessment year 2009-10. We find the Tribunal has discussed the issue at para 34 and 35 of the order and held that the circuit accruals are credited on scientific basis and thus needs to be allowed in the year of creation on accrual basis. The relevant observation in the order of the Tribunal reads as under:-

> "34. We have carefully considered the rival contentions and perused the order of the ld TPO/ AO/ DRP . The assessee has explained the basis of creating the provisions for circuit accruals, which is calculated automatically and scientifically by the software. As submitted assessee has been followed this basis on a global basis. As explained by the appellant, the process is scientific in a way that as and when a request for new circuits is placed by the customer to appellant, the request is created in favour of third party vendor who in turn is required to provide service. Such requests are converted into orders by the Customer Access Provisioning Team who act as primary interface with the vendors with regard to ordering and delivery of the circuits. Order is placed with the vendor to deliver circuit at a particular address and at a particular time. Accordingly, vendor delivers the circuit (along with necessary hardware and software). Post such delivery, the order gets close and the inventory of circuit usage is recorded in GAIM(Global Access Inventory management system) . GAIM contains various details relating to the circuit, such as Circuit ID number, activation date, tariff codes (rental, usage, one time charge), expected monthly cost, location of circuit, etc. Once the order is closed, the liability to pay the vendor arises. Invoice received by the vendor are entered into GAIM manually or uploaded from electronic files. Thereafter, invoices are validated in GAIM before payment. During invoice validation, GAIM automatically compares the invoice/bill data to the circuit inventory and expected costs. As GAIM works on calendar year basis i.e. from January to December, the accruals for the period starting from January to March are excluded / added on proportionate basis. Assessee further explained that the validation process also identifies any discrepancies which have to be resolved via the dispute management process before the invoice can be approved for payment. The validation checks include:
>
> • Circuit ID exists in inventory for vendor;
>
> • Invoice date is after circuit activation date;
>
> • Service period is before circuit cease date;
>
> • Invoice tariff code matches order tariff code
>
> • Invoice cost is not varying more than USD 100 vis-à-vis the expected cost

- Invoice number is unique for vendor

The invoices for which validation is completed with no discrepancies or for which the discrepancies identified, the same are logged / resolved via dispute management process, are approved for payment. The assessee also explained the logic used by GAIM to calculate the Circuit Accrual for both active and ceased circuits taking into account the activation date and the cease date i.e. no accruals will be posted prior to the activation date or after the cease date. For the current and prior period GAIM will look at each tariff code for each circuit to determine if there is any invoice cost and circuit accruals are booked accordingly. Prior year expenses are tracked each month and matched against the prior year accrual balance brought forward manually. Accordingly, only the current year accrual balances are booked in the profit and loss account.

35. We find that the process explained is entirely automated process which captures the details vis-à-vis each circuit, amount to be booked against each circuit and the accrual to be created. Further, assessee has been creating the provision on an year on year basis in accordance with the mercantile system of accounting in accordance with accounting standard issued by the ICAI otherwise correct expenditure would not be captured as per the matching principle. The assessee has also demonstrated through evidences that the provision so created is either reversed or expensed off in the subsequent year. The assessee has also been able to submit evidences for most of the reversals before the lower authorities. It is also not the claim of the revenue that the amount of provisioning made by the assessee is incorrect or not based on proper documentation and estimations. We also find that the lower authorities allow the entire claim of expenditure in the next year when such reversals are made. Thus, we are of the view that this practice of disallowing the claim of circuit accrual in the year of creation and allowing it in the next year is nothing but a timing difference. The fact that the expenses are allowed in the subsequent year also proves that the lower authorities have not disputed the incurrence of such expenses. Hence, in accordance with the mercantile provisions it should be allowed in the year of creation itself. The assessee has also drawn reference to the principles laid down by the Hon'ble Apex Court in the case of M/s Rotork Controls India (P) Ltd (314 ITR 62) and M/s Bharat Earth Movers (245 ITR 428). According to us the provision for circuit accruals is made in compliance of accounting standards issued by the Institute of Chartered Accountants of India and also on a proper scientific basis backed by documentation. Therefore , we hold that the circuit accruals are created on scientific basis and thus needs to be allowed in the year of creation on accrual basis. In the result the ground No. 6 of the appeal is allowed."

18. Since the facts of the instant case are identical to the facts of the case decided by the tribunal in assessee's own case for assessment year 2009-10 which has been followed in subsequent assessment years i.e., assessment year 2010-11 and 2011-12, therefore, in absence of any contrary material brought to our notice, we hold that the Assessing Officer is not justified in making addition on account of circuit accruals. We, therefore, direct the Assessing Officer to delete the addition. The ground raised by the assessee on this issue is accordingly allowed.

19. Ground No.3 relates to disallowance of year end accruals.

20. The facts of the case, in brief are that the assessee has made year end provisions on outstanding as on 31.03.2012, the details of which are as under:-

Particulars	Accrual as on 31.03.2012
Accrual control account	27.81 crores
IPA accruals	0.32 crores
Total	28.13 crores

21. Out of the accrual control account, the assessee submitted evidences amounting to Rs.26.74 crore on various dates regarding reversal entries and utilization entries which were allowed by the Assessing Officer in the final assessment order. However, the Assessing Officer disallowed year end accruals of Rs.1.39 crore (accrual control account and IPA accrual).

22. Aggrieved with such order of the Assessing Officer/TPO/DRP, the assessee is in appeal.

23. The ld. counsel for the assessee submitted that the assessee follows mercantile system of accounting and accordingly, in order to arrive at the correct profit for any given year, it required to account for all the expenses pertaining to the year in accordance with the matching principle. The assessee had accounted for all the expenses relatable to the impugned financial year for which bills/invoices would have been received/paid after the close of the financial year by way of year end accruals. As and when the invoices relatable to the aforesaid year end accruals were received/paid by the assessee in the subsequent years, the actual expenses were charged in the books of account after appropriate deduction of tax on such expenses. Since the year end accruals credited by the assessee represented accruals towards normal business expenditure incurred by the assessee for the financial year relevant to the subject assessment year, deduction in respect thereof should be allowed to the assessee. It is also his submission that the assessee has produced documentary evidence/supporting bills/reversal of more than 95% of the expenses represented by year end accruals. This substantiates that even the balance accruals have also been credited on reasonable basis and, therefore, no disallowance in this regard is called for. Referring to the decision of the Tribunal in the case of the sister concern, namely, ACSI for assessment year 2010-11 vide ITA No.1016/Del/2015, order dated 15.02.2018, he submitted that under identical circumstances the disallowance made by the Assessing Officer which was upheld by the DRP was deleted. Similarly, the Tribunal in the case of sister concern, namely, ACSI, again, for assessment year 2012-13 and 2011-12 deleted the disallowance. Similarly, the Tribunal in assessee's own

case for assessment year 2010-11, vide ITA No.1059/Del/2015 order dated 18th September, 2017 has deleted the addition and further the Tribunal, following the said decision, has also deleted similar addition in assessment year 2011-12. Therefore, this being a covered matter in favour of the assessee, the addition made by the Assessing Officer should be deleted.

23.1 The ld. DR, on the other hand, submitted that when the assessee is unable to substantiate with documentary evidence to the satisfaction of the Assessing Officer regarding the justification for the accruals, the addition made by the Assessing Officer and sustained by the DRP should be upheld and the ground raised by the Revenue should be dismissed.

24. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the Assessing Officer in the instant case, disallowed an amount of Rs.1.39 crores on account of non-submission of supporting documents relating to the year ending provisions of outstandings. It is the submission of the ld. counsel for the assessee that when the assessee follows mercantile system of accounting and accounts all its expenses pertaining to the year in accordance with the matching principle and was able to substantiate with evidence to the satisfaction of the Assessing Officer in case of more than 95% of the expenses represented by year end accruals, therefore, no disallowance is called for. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2010-11. We

find the Tribunal vide ITA No.1059/Del/2015, order dated 18th September, 2017, has discussed the issue and deleted the addition by observing as under:-

> "16. We have carefully considered the rival contentions and also perused the facts of the case. The assessee has explained the basis of creating the provisions for year-end accruals. As explained by the appellant, we note that the assessee has been creating the provision on any year on year basis in accordance with the mercantile system of accounting otherwise correct expenditure would not be captured as per the matching principle. The assessee has demonstrated through evidences that the provision so created is either reversed or expensed off in the subsequent year. The assessee has also been able to submit evidences for most of the reversals before the lower authorities. We also find that the lower authorities allowed the entire claim of expenditure in the next year when such reversals are made. Thus, this practice of disallowing the claim of year end accrual in the year of creation and allowing it in the next year is nothing but a timing difference. It also proves that the AO is not disputing the claim of expenses rather just deferring the claim to next year. Hence, in accordance with the mercantile provisions it should be allowed in the year of creation itself."

25. We find the above decision has again been followed by the Tribunal in assessee's own case for assessment year 2011-12. Since the facts of the impugned assessment year are identical to the facts of the case decided by the Tribunal in assessee's own case for assessment year 2010-11 and 2011-12, therefore, respectfully following the decision of the Tribunal in assessee's own case for preceding three assessment years, we hold that the disallowance made by the Assessing Officer is not justified. Accordingly, the same is directed to be deleted. The ground raised by the assessee is accordingly allowed.

26. Ground of appeal No.4 relates to the disallowance on account of service tax payable.

27. After hearing both the sides, we find that during the relevant assessment year, an amount of Rs.1,73,86,770/- was booked as output service tax in "Other current liabilities" in the balance sheet. Out of the above amount, the assessee submitted details of payment/reversal of service tax payable in subsequent years amounting to Rs.1,16,42,030/-. After verification of the details, the Assessing Officer allowed an amount of Rs.93,13,979/- out of Rs.1,73,86,770/- and made addition of Rs.80,72,791/- on account of non-submission of supporting documents to substantiate the payment of the same u/s 43B of the IT Act. We find identical issued had come up before the Tribunal in the case of the sister concern of the assessee, namely ACSI. We find the Tribunal vide ITA No.354/Del/2017, order dated 31st October, 2018, has restored the issue to the file of the Assessing Officer with certain directions. The relevant observations of the Tribunal at para 16 of the order read as under:-

> "16. We have carefully considered the orders of the authorities below qua the issue. It appears that the Assessing Officer has not properly appreciated the accounting entries in their due perspective. The marginal heading of section 43B clearly states that certain deductions to be allowed on actual payment. This means that if the assessee has claimed deductions, the same can be disallowed u/s 43B of the Act. However, in the case in hand, the assessee has not claimed any deduction as the input service tax and the output service tax have never been routed through the P&L Account. However, in the interest of justice and fair play, we restore this issue to the files of the Assessing Officer. The assessee is directed to explain the entries and the Assessing Officer is directed to verify the same and decide the issue as per the provisions of the law. Ground No.2 is treated as allowed for statistical purposes."

28. Respectfully following the same, we restore the issue to the file of the Assessing Officer with a direction to grant an opportunity to the assessee to explain the entries and the Assessing Officer shall decide the issue as per fact and law, after

giving due opportunity of being heard to the assessee. We hold and direct accordingly. The ground raised by the assessee is accordingly allowed for statistical purposes.

29. Ground No.5 relates to the disallowance of support service expenditure.

30. After hearing both the sides, we find the assessee has incurred support service expenditure of Rs.11,87,48,765/- paid to its group company i.e., AT&T Communication Services India Pvt. Ltd. (ACSI) for support services rendered by it. The Assessing Officer disallowed the support services charges of Rs.11.87 crores on account of non-submission of supporting documents. We find identical issue was decided by the Tribunal in assessee's own case for assessment year 2009-10 in ITA No.2538/Del/2014, order dated 18.09.2017. We find the Tribunal has discussed the issue at para 75 and 76 of the order and the appeal of the Revenue has been dismissed by observing as under:

> "75. We have carefully considered the rival contentions and perused the facts of the case. The facts of the case as explained by the appellant are that, ACSI, a group company of appellant and an entity in operations for more than 10 years by then, was having developed support services functions. Accordingly, since such functions were already housed in ACSI, appellant entered into a support services agreement with ACSI for provision of the aforesaid support services to appellant. We have gone through the submission of the assessee and find that necessary evidences in the form of the support service agreement, invoices, the details of payments made and the bank statements evidencing the payment thereof have been furnished by the assessee to prove the genuineness of the expenses. We find that no evidence has been brought on record by the Department to dispute the said claim. Rather, the Department's claim is merely based on suspicion as also noted by the DRP while deleting the above disallowance. We also find that even otherwise, both ACSI and appellant are profit making entities and hence, there was no tax incentive for the parties to deflate the revenues earned by appellant. The decision was totally based on commercial considerations. By transferring the cost from ACSI to appellant no added tax advantage is being availed by

> appellant. We are also of the view that commercial expediency of a particular expenditure incurred by a businessman should be examined from the perspective of the business person and no third party, including the tax authorities, is entitled to question the commercial reasoning/justification of the expenditure so incurred. Reliance in this regard is placed on the following judicial precedents furnished by the assessee:
>
> i. CIT v. Panipat Woollen & General Mills Co Ltd (103 ITR 66) (SC)
> ii. CIT v. Sales Magnesite (P) Ltd [1995) 214 ITR 1
> iii. Binodiram Balchand vs. Commissioner of Income Tax (48 1TR 548)
> iv. Calcutta Landing and Shipping Co Ltd vs. CIT (65 ITR 1) (Cal High Court)
> v. CIT Vs B Dalmia Cement Ltd (254 ITR 377)
>
> 76. Respectfully following the principles laid down in the aforesaid judicial precedents, we find that where the appellant has actually incurred the aforesaid support services cost and no evidence has been brought by the Department to controvert the same, such expenditure cannot be disallowed merely on suspicion. We affirm the finding of the ld DRP on this issue. In view of the above, the appeal of the revenue on this ground is dismissed.

31. Since the assessee had not submitted the requisite details before the Assessing Officer, therefore, we restore this issue to the file of the Assessing Officer with a direction to give an opportunity to the assessee to submit the details and decide the issue in the light of the decision of the Tribunal for A.Y. 2009-10 as reproduced above. This ground by the assessee is accordingly allowed for statistical purposes.

32. Ground No.6 relates to the disallowance of annual revenue share based licence fee.

33. Facts of the case, in brief are that the assessee during the impugned assessment year incurred expenses of Rs.32.71 crores towards revenue share based licence fee for maintenance and usage of the telecom licence payable to the Department of Telecom. The Assessing Officer disallowed the assessee's claim of revenue share based licence fee as allowable expense u/s 37(1) of the Act on the premise that the same is liable to

be amortized as per the provisions of section 35ABB of the Act over the remaining life of the licence (15 years). Thus, an amount of Rs.30.53 crores was disallowed on proportionate basis. The Assessing Officer capitalized the annual revenue share based licence fee on the ground that the Revenue has filed a Special Leave Petition against the order of the Hon'ble Delhi High Court in the case of *CIT vs. Bharti Hexacom Limited (2014) 265 CTR 130 (Del)* which is squarely applicable to the assessee's case and to keep the matter alive.

33.1 The ld. counsel for the assessee submitted that the annual revenue share based licence fee incurred by the assessee is a business expenditure allowable u/s 37(1) of the IT Act. Such expenditure has been incurred by the assessee towards maintenance and usage of the telecom licence and not for acquiring a right to operate telecommunication services and thus would not attract the provisions of section 35ABB of the Act. He submitted that the application of provisions of section 35ABB is grossly erroneous and liable to reversed since section 35ABB applies only when an assessee incurs a capital expenditure for obtaining/acquiring any right to operate telecommunication services. Thus, if the expenditure is not for obtaining or acquiring any right and also it is not in the nature of a capital expenditure, section 35ABB of the Act is not applicable. Referring to the decision of the Delhi High Court in the case of *CIT vs. Bharti Hexacom Limited (supra)* he submitted that the Hon'ble High Court in the said decision has unequivocally and categorically held that the licence fee paid under the revenue share regime is clearly a tax deductible expenditure and has to be allowed u/s 37(1) of the Act. Referring to the decision of the Delhi Bench of the

Tribunal in the case of *Hutchison Essar Telecom vs. JCIT vide ITA Nos.1751 & 1752/MDS/2004*, he submitted that the Tribunal has approved the treatment of subscriber based licence fee as an allowable expenditure under section 37 of the Act. Referring to the decision of the Mumbai Bench of the Tribunal in the case of *Bharti Airtel Ltd. vs. ACIT vide ITA No.398/Mum/2006, order dated 25th June, 2010*, he submitted that the Tribunal in the said decision has held that the deduction for annual licence fee paid to the Department of Telecommunications should be allowed u/s 37(1) of the Act. Merely because the Revenue has not accepted the decision of the Hon'ble Delhi High Court and an SLP has been filed against the said order, the same cannot be a ground to disallow the expenditure. Referring to the decision of the Tribunal in assessee's own case for assessment year 2010-11 vide ITA no.1059/Del/2015, order dated 18th September, 2017, he submitted that under identical circumstances, the Tribunal has deleted the disallowance made by the Assessing Officer. He accordingly submitted that this being a covered matter in favour of the assessee, the disallowance made by the Assessing Officer which has been upheld by the DRP should be deleted.

34. The ld. DR, on the other hand, strongly supported the order of the Assessing Officer and DRP.

35. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find identical issued had come up before the Tribunal in assessee's own case for assessment year 2010-11. We find the Tribunal in

ITA No.1059/Del/2015, order dated 18th September, 2017, has discussed the issue and allowed the claim of the assessee by observing as under:-

> "21. We have carefully considered the rival contentions and also perused the facts of the case as well as the decisions relied upon by the appellant. We agree with the contention of the assessee that the expense of Rs. 24,55,13,201/- incurred towards revenue share based license fee for maintenance and usage of telecom license payable to Department of Telecom is a recurring fee paid by the license holder on periodic basis towards maintenance and use of the license and the benefit of the same does not extend beyond the close of the year. Further, it is also relevant to note here benefit of the revenue share based license fees paid during one financial year cannot be extended to the subsequent financial year, for which license fee is to be paid separately upon the adjusted gross revenues of such subsequent year. Therefore, payment of the aforesaid annual fee cannot be said to confer any right of an enduring nature upon appellant. We are convinced that the appellant's case is squarely covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Bharti Hexacom Limited [2014] 265 CTR 130 (Delhi) other case laws relied upon by the appellant as cited above. The Ld. DR could not controvert that how this issue is not squarely covered by the decision of the jurisdictional High Court.It is also important to note that in the immediately succeeding year on same facts, the DRP has allowed the claim of the licence fees on revenue basis u/s 37(1) of the Act. In view of the above facts and respectfully following the decision of the Hon'ble jurisdictional High Court we allow the claim of the assessee. In the result the ground No. 4 of the appeal is allowed."

36. Merely because the Revenue has filed SLP against the order of the Delhi High Court, the same cannot, in our opinion, be a ground to take a contrary view than the view taken by the Hon'ble High Court unless and until the same is reversed or stayed by the Hon'ble Apex Court. Therefore, respectfully following the decision of the Tribunal in assessee's own case for assessment year 2010-11, the disallowance made by the Assessing Officer on account of annual revenue share based licence fee is deleted. The ground raised by the assessee is accordingly allowed.

37. Ground No.7 relates to the lease line charges on account of non-deduction of tax at source.

38. Facts of the case, in brief are that the assessee, during the impugned assessment year, incurred lease line expenses which represent telecom charge paid/payable to other telecom operators for provision of telecom connectivity services required for transmission of data. The assessee, on a conservative basis, withheld taxes on leaseline expenses/connectivity charges paid to other telecom operators under section 194J of the Act except on amount of Rs.6,50,79,639/-. The Assessing Officer asked the assessee to provide justification for not withholding taxes on leaseline expenses as appearing under the Note No.1 of Appendix IX of Tax Audit Report vide order sheet entry dated 21st December, 2015. It was submitted that the leaseline services are standard automated services which are availed by any telecom service provider for the transmission of data. Therefore, the arrangement between AGNS and other telecom operators is not an exclusive arrangement. It was submitted that the services are standard automated services and required no human intervention and are thus, not in the nature of fees for technical services and therefore, provisions of section 194J of the Act are not applicable. On being asked by the Assessing Officer to provide justification for not withholding taxes u/s 194J of the Act, it was submitted that leaseline expenses are paid only for the carriage of data through the telecom infrastructure of the other operators and not for the performance of any work as envisaged u/s 194C of the Act.

38.1 However, the Assessing Officer rejected the contention of the assessee on the ground that the taxes on such expenses were required to be withheld u/s 194I of the Act which states that 'any person responsible for paying any income by way of rent is required to deduct tax for use of any machinery or plant or equipment.' The ld.DRP upheld the action of the Assessing Officer and the Assessing Officer, in the final order, made the disallowance of Rs.6,50,79,639/-.

39. The ld. counsel for the assessee submitted that the leaseline services are standard automated services which are availed by any telecom service provider for connectivity service. It is facility of network which commonly availed in telecom business and is as such not an exclusive rent arrangement whereby any asset is taken on lease for its specific use. There is no exclusive right of possession or custody of the equipment and enjoyment thereof over a stipulated period of time in order that a payment can be said to be rent. Referring to the provisions of section 194I, he submitted that the above section clearly states that section 194I is applicable only when rent is paid on account of use of plant and machinery or use of land or building or furniture and fittings. The word 'use' employed in section 194I of the Act suggests that there should be a right to possession or custody of the equipment and enjoyment thereof over a stipulated period of time in order that a payment can be said to be rent. However, in the instant case, the payment is on account of leaseline expenses paid to other telecom operator which are purely automated. Therefore, the provisions of section 194I will not be applicable. He submitted that the leaseline charges were paid

to the telecom service provider for faster connectivity service through dedicated leaseline. As such, the payment has been made for availing the facility of connectivity services from vendors required for transmission of data and is not for use of any asset involved in provision of such facility covered u/s 194I of the Act. He submitted that the assessee was neither in possession nor control of equipments which were used for providing internet and communication facilities. Therefore, there was a clear absence of the element of leasing of equipment as a fall out of which the applicability of the provisions of section 194I stood clearly excluded. Since the payment is not at all related to any use of equipment, the assessee was under no obligation to deduct tax at source u/s 194I. Referring to the decision of the Hon'ble Madras High Court in the case of *Skycell Communications vs. DCIT reported in 251 ITR 53 (Mad)*, he submitted that such connectivity services are in the nature of standard facility/service and, therefore, the assessee is not obliged to deduct tax at source on the payment made to such service provider. Referring to the decision of the Mumbai Bench of the Tribunal in the case of *Destimony Securities Pvt. Ltd. vide ITA No.4106/Mum/2014, order dated 21st June, 2017 for assessment year 2007-08*, he submitted that the Tribunal, in the said decision, has held that internet and communication charges are not liable for deduction of any tax at source u/s 194I as the same are merely in the nature of payment which cannot be characterized as having been made for availing of any special/exclusive or customized service rendered to the user or consumer who may approach the service provider for such service. Referring to the decision of the Delhi Bench of the Tribunal in the case of *Global One India (P) Ltd. reported in 150 ITD*

203, he submitted that the Tribunal in the said decision has held that when the lessee is not having any domain or control or possessory rights over such facility, payment made towards use of standard facility cannot be categorized as use of assets. Accordingly, the tribunal held that the payments made towards use of standard facility, when the lessee is not having any domain or control or possessory rights over such facility cannot be categorized as use of assets for the purpose of the Act and, therefore, no tax is liable to be deducted at source. Referring to the decision of the Mumbai Bench of the Tribunal in the case of *Hero Motocorp vs. Addl. CIT reported in 156 TTJ 139*, he submitted that the Tribunal in the said decision has held that no tax is to be deducted at source for payment towards standard facility provided by MTNL/BSNL by way of leaseline. Referring to the Mumbai Bench of the Tribunal in the case of Alok Industries Ltd. in ITA no.1423/Mum/2015, order dated 3rd July, 2017, he submitted that the internet charges for broadband connection are not liable for deduction of any tax at source u/s 194J, 194C as well as 194I of the Act. Referring to the decision of the Karnataka High Court in the case of CIT (TDS) vs. Vodafone South Ltd. reported in 290 CTR 436, he submitted that the Hon'ble High Court in the said decision has held that the payment made by the assessee, a mobile service provider company, to another mobile service provider company for utilization of roaming mobile data and connectivity could not be termed as technical service and, therefore, no TDS was deductible. Referring to the decision of the Hon'ble Supreme Court in the case of CIT vs. Bharti Cellular Ltd. reported in 234 CTR 146, he drew the attention of the bench to the following head notes:-

> "Section 194J of the Income-tax Act, 1961 - Deduction of tax at source - Fees for technical/professional services - Assessee was a cellular service provider - It had an interconnect agreement with BSNL/MTNL under which it paid interconnect/access/port charges to BSNL/MTNL - Question that arose for consideration was whether TDS was deductible by assessee on interconnect/access/port charges paid to BSNL/MTNL - Whether in absence of any expert evidence from department to show how mutual intervention was involved in technical operations by which assessee was given facility by BSNL/MTNL for interconnection, matter could not be decided - Held, yes - Whether, therefore, Assessing Officer was to be directed to decide matter after examining a technical expert from side of department - Held, yes [Matter remanded]"

40. He accordingly submitted that in view of the above judicial precedents, the disallowance of expenses made by the Assessing Officer in the hands of the assessee on account of non-deduction of tax which has been upheld by the DRP should be deleted.

41. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer/TPO/DRP.

42. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find the Assessing Officer disallowed an amount of Rs.6,50,79,639/- paid by the assessee on account of leaseline expenses which were paid to other telecom operators for provision of telecom connectivity service required for transmission of data on the ground that the assessee failed to deduct tax at source as per the provisions of section 194I of the Act. It is the submission of the ld. counsel for the assessee that the leaseline charges are paid to the telecom service provider for faster connectivity service through dedicated leaseline and, therefore, such payment

has been made for availing the facility of connectivity services from vendors required for transmission of data and is not for use of any asset involved in provision of such facility covered u/s 194I of the IT Act. It is also the submission of the ld. counsel for the assessee that the assessee was neither in possession nor control of the equipments which were used for providing internet and communication facilities and, therefore, there was a clear absence of the element of leasing of equipments and, therefore, the provisions of section 194I cannot be applied. We find merit in the above argument of the ld. counsel. We find identical issue had come up before the coordinate Bench of the Tribunal in the case of Global One India (P) Ltd.(supra). We find the Tribunal at para 9 to 11 of the order has decided the issue in favour of the assessee by observing as under:-

> "9. The Ld. Counsel for the assessee submitted that the A.O. disallowed payments made for lease lines, as the assessee has not deducted tax at source u/s 40(A)(i)(a). The A.O. disallowed the same by holding that lease lines were, technically speaking, equipment and payment for taking these lines on lease, is covered u/s 194-I and that the assessee himself has described the payment has been made towards lease lines. The Ld. Counsel relied on the decision of the Delhi high court in the case of Asia Satellite Tele Communication Co. 332 ITR 340(Del)C and submitted that the issue is covered in his favour. He relied on the decision of the Mumbai Tribunal in the case of "Vodafone S.R.Ltd." 135 TTJ 182 and submitted that such payments are not for the use of equipment and, therefore, not liable to TDS u/s 194-I.
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> 9.1. On the additional ground of deduction u/s 80 IA(iv), he submitted that any disallowances made by the A.O. would go to increase the income and consequently the assessee would be eligible for deduction u/s 80 IA on such increased profits. He relied on the order in the case of "Gem Plus Jewellery India Pvt. Ltd." (2011) reported in 330 ITR 175 (Bom) in support of his contentions. For levy of interest u/s 234C, he recorded that such interest is levied only on returned income and not on assessed income.

9.2. In reply, the Ld.D.R., though not leaving his ground, submitted that he relies on the order of the A.O. and the reasoning thereof for disallowance made u/s 40A(i)(a) of the Act.

9.3. On the additional grounds the Ld.D.R. submitted that the A.O. may be directed to examine the same, if the Tribunal chose to admit these grounds.

10. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers on record and orders of the authorities below, case laws cited, we hold as follows.

11. We first take up corporate tax issues which is ground no.5 for the A.Y. 2007-08. The assessee is a licensed internet provider. During the year it procured, domestic half circuit facility to its customers from Telecom Service Providers like BSNL, MTNL, and international half circuit facility from Flag, Atlantic, at France. These are standard facilities provided for transmission of data by those organisations. The issue is whether tax should be deducted at source u/s 194 I from payments made for use of such standard facilities. The Hon'ble Delhi High Court, in the case of Asia Satellite vs. CIT, reported in 332 ITR 340 and the Hon'ble Madras High Court, in the case of Skycell Communications Ltd. vs. DCIT, reported in 351 ITR 53 (Madras) have adjudicated the issue in favour of the assessee. Respectfully following the same, we hold that payments made towards use of standard facility, when the lessee is not having any domain or control or possessory rights over such facility, cannot be categorized as use of assets for the purpose of the Act.

11.1. Respectfully following the order of the Jurisdictional High Court on this issue, we allow this ground of appeal of the assessee. In the result ground no.5 for the A.Y. 2007-08 is allowed."

42.1 We find Mumbai Bench of the Tribunal in the case of *Alok Industries Ltd. (supra)* has also decided an identical issue in favour of the assessee by observing as under:-

"16. We have considered the submissions of the parties and perused the materials on record. Undisputedly, the assessee has paid the amount in question to Sify Ltd. towards use of internet/lease license charges. As could be seen, in a number of judicial precedents, some of which have been cited before us, it has been held that payment made towards broadband/lease line charges is not in the nature of royalty so as to attract the provisions of section 194J. Since, the services rendered are not in the nature of technical service as envisaged u/s. 194J, the ld. CIT(A) has attempted to rope in the payment u/s. 194I by referring to the definition of 'process' as provided under Explanation (6) to section 9(1)(vi). However, the said

amendment was made by Finance Act, 2012 w.r.e.f. 01.6.1976. Thus, as per existing provision, when the assessee made the payment there was no liability to deduct tax at source by treating it as royalty. The amendment made with retrospective effect cannot fasten liability on the assessee. That being the case assessee cannot be treated as assessee in default. The decisions relied upon by the ld. AR support this view. As far as the observation of the ld. CIT(A) that the payment made otherwise is covered u/s. 194I, we must observe in case of Hero Moto Corp. Ltd. (supra)and Global India (supra), the tribunal has held that the broadband/lease line facilities provided by the service provider for transmission of data does not come in the category of payment made towards rent for equipment, plant and machinery. Therefore, respectfully following the decisions of the ITAT, we set aside the order of the ld. CIT(A) on this issue. Grounds raised are allowed."

43. We find the Hon'ble Karnataka High Court in the case of Vodafone South Ltd. (supra), while deciding an identical issue, has observed as under:-

"8. We have heard Mr.K.V.Aravind, learned counsel appearing for the appellants - Revenue in all the appeals. The learned Counsel relied upon two decisions of the Apex Court for canvassing the contention that the roaming charges paid by the assessee to the other service provider can be said as 'technical services'; one was the decision of the Apex Court in the case of Commissioner of Income-tax, Delhi vs. Bharti Cellular Limited, reported at [2010] 193 Taxman 97 (SC); and the another was the decision of the Apex Court in the case of Commissioner of Income-tax-4, Mumbai vs. Kotak Securities Limited, reported at [2016] 67 taxmann.com 356 (SC) and it was submitted that if the observations made by the Apex Court in the above referred decisions are considered, the decision of the Tribunal would be unsustainable and consequently, the questions may arise for consideration before this Court in the present appeals.

9. We may record that in the decision of the Apex Court in the case of Bharti Cellular Limited (supra) the Apex Court after having found that whether human intervention is required in utilizing roaming services by one telecom mobile service provider Company from another mobile service provider Company, is an aspect which may require further examination of the evidence and therefore, the matter was remanded back to the Assessing Officer. Further, in the impugned order of the Tribunal, after considering the above referred decision of Bharti Cellular Limited, the Tribunal has further not only considered the opinion, but found that as per the said opinion the roaming process between participating entities is fully automatic and does not require any human intervention. Therefore, we do not find that the aforesaid decision in the case of Bharti Cellular Limited, would be of any help to the appellants - Revenue.

10. In the another decision of the Apex Court, in the case of Kotak Securities Limited, the matter was pertaining to the charges of the Stock Exchange and the Apex Court, ultimately, found that no TDS on such payment was deductible under Section 194J of the Act. But the learned Counsel for the appellants – Revenue attempted to contend that in paragraphs 7 and 8 of the above referred decision of the Apex Court, it has been observed that if a distinguishable and identifiable service is provided, then it can be said as a "technical services". Therefore, he submitted that in the present case, roaming services to be provided to a particular mobile subscriber by a mobile Company is a customize based service and therefore, distinguishable and separately identifiable and hence, it can be termed as "technical services".

11. In our view, the contention is not only misconceived, but is on non existent premise, because the subject matter of the present appeals is not roaming services provided by mobile service provider to its subscriber or customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service provider Company to another mobile service provider Company. Hence, we do not find that the observations made are of any help to the Revenue.

12. As such, even if we consider the observations made by the Apex Court in the case of Bharti Cellular Limited, supra, whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as "technical services" or not, is essentially a question of fact. The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and does not require any human intervention. Coupled with the aspect that the Tribunal has relied upon the decision of the Delhi High Court for taking support of its view.

13. In our view, the Tribunal is ultimately fact finding authority and has held that the roaming process between participating company cannot be termed as technical services and, therefore, no TDS was deductible. We do not find that any error has been committed by the Tribunal in reaching to the aforesaid conclusion. Apart from the above, the questions are already covered by the above referred decision of the Delhi High Court, which has been considered by the Tribunal in the impugned decision.

14. In view of the above, we do not find that any substantial question of law would arise for consideration. Hence, the appeals are dismissed."

44. The various other decisions relied on by the ld. counsel for the assessee also support its case. In view of the above discussion, we hold that the assessee is not liable for withholding tax u/s 194I of the Act on account of payment of leaseline

charges to other telecom operators for provision of telecom connectivity services required for transmission of data. Accordingly the Assessing Officer is directed to delete the disallowance. The ground raised by the assessee on this issue is accordingly allowed.

45. Ground No.8 relates to short deduction of tax of Rs.20,74,814/-.

46. Facts of the case, in brief, are that in the Tax Audit Report in Form No.3CD of clause 27 of Appendix IX, it has been pointed out that the tax payer had deducted tax @ 2% instead of 10% u/s 194J. The Assessing Officer, therefore, asked the assessee to explain as to why the provisions of section 40(a)(ia) should not be applied and disallowance be made. Rejecting various explanations given by the assessee, the Assessing Officer made addition of Rs.20,74,814/- and the DRP upheld the action of the Assessing Officer. Accordingly, the Assessing Officer, in the final order, made the addition of the same.

47. The ld. counsel for the assessee submitted that the provisions of section 40(a)(ia) of the Act can be applied only to a case involving non-deduction of tax at source and cannot be applied to cases involving mere short-deduction of tax at source. Referring to the decision of the Mumbai Bench of the Tribunal in the case of *ACIT vs. Dish TV India Ltd. reported in 167 ITD 412,* he submitted that the Tribunal in the said decision has held that where tax was deductible u/s 194J, but was actually deducted u/s 194C, such a short-deduction would not meet the requirements of section 40(a)(ia) as the assessee could not be held as defaulter when there was only shortfall in

deduction of TDS. Referring to the following decisions, he submitted that no disallowance can be made in the hands of the assessee towards the expenses where taxes have been deducted at a lower rate than the rate applicable under the normal provisions:-

i) DCIT vs. Chandabhoy Jassobhoy in ITA No.20/Mum/2010 (Mumbai Tribunal)

ii) DCIT vs. M/s S.K. Tekriwal, ITA No.1135/Kol/2010 (Kolkata Tribunal)

iii) Roca Bathroom Products (P) Ltd. vs. JCIT,,175 TTJ 450

iv) Hero MotoCorp. Ltd. vs. Addl.CIT, 156 TTJ 139 (Del-Trib)

v) UE Trade Corpn (India) Ltd. vs. DCIT 54 SOT 596

vi) ACIT vs. Pankaj Bhargava.

48. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer/TPO/DRP.

49. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. The only issue to be decided in the impugned ground is as to whether any addition can be made on account of short-deduction of tax by invoking the provisions of section 40(a)(ia) of the IT Act. Admittedly, the assessee in the instant case has deducted the tax @ 2% instead of 10% u/s 194J of the Act. We find an identical issue had come up before the Mumbai Bench of the Tribunal in the case of Dish TV India Ltd. (supra). We find the Tribunal, after considering various decisions, held that the

provisions of section 40(a)(ia) will not be applicable in the case of an assessee where there is shortfall in deduction of TDS. The relevant observation of the Tribunal from para 15 onwards reads as under:-

> "15. We heard the rival submissions and gone through the orders of the tax authorities below. We noted that in both the cases the assessee was of the opinion that tax had to be deducted under section 194C @2% but the Revenue was of the view that tax has to be deducted under section 194J @10%. Therefore, the AO applied provisions of Section 40(a)(ia) and made the disallowance in respect of both the expenditures. Before us the learned D.R. relied on the decision of the Hon'ble Kerala High Court in the case of CIT vs. PVS Memorial Hospital Ltd. 60 taxmann.com 69 copy of which was placed before us in which it was held that deduction under a wrong provisions of the law will not save an assessee from section 40(a)(ia), i.e. where the tax was deductible under section 194J but was actually deducted under section 194C, such a deduction would not meet the requirements of section 40(a)(ia). We noted that prior to this decision the Hon'ble Calcutta High Court in the case of CIT vs. S.K. Tekriwal 361 ITR 432 vide order dated 3rd December, 2014 taken a view by which the Hon'ble High Court dismissed the appeal of the Revenue against the order of the Tribunal by holding that where tax was deducted by the assessee, though under a bona fide wrong impression under wrong provisions, the provisions of Section 40(a)(ia) could not be invoked and if there was any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various tax deduction at source provisions, the assessee could be declared to be an assessee in default under section 201 but no disallowance could be made invoking the provisions of Section 40(a)(ia). The said decision of the Hon'ble Calcutta High Court has not been referred to before the Hon'ble Kerala High Court and the Kerala High Court, therefore, did not consider the decision of the Calcutta High Court. This Tribunal in the case of CIT vs. Shri Zubin J. Gandevia in ITA No. 3357/Mum/2014 vide order dated 1st February, 2016 had the occasion to consider the binding nature of both the decisions and ultimately under para 8 of its order held as under: -
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> "8. Before us the Ld. Counsel has pointed out that there is a divergent view also taken by the Hon'ble Kerala High Court in the case of P V M Memorial Hospital (supra). But such a decision may not have a persuasive value as it is quite a trite law that if there are two conflicting decisions of non- Hon'ble Jurisdictional High Courts, then the decision in favour of the assessee should be taken. We agree with such a contention raised by the assessee that, if there are two conflicting decisions and in absence of any Hon'ble Jurisdictional High Court, decision one favourable to the assessee should be preferred and this proposition has been long back settled by the Hon'ble Supreme Court in the case of Vegetable Products Ltd. (supra).

Thus, we hold that, no disallowance under section 40(a)(ia) should be made on short deduction of tax under different or wrong provision of the section."

Similarly, Visakhapatnam Bench of this Tribunal in the case of P.S.R. Associates vs. ACIT in ITA No. 345/Viz/2013 vide order dated 6th January, 2016 had also an occasion to consider both the decisions of Hon'ble Calcutta High Court as well as that of Hon'ble Kerala High Court on the same issue and ultimately under paras 10 & 11 of its order held as under: -

"10. The Departmental Representative relied upon the Hon'ble Kerala High Court judgment in the case of M/s. P.V.S. Memorial Hospital Ltd. (supra) and argued that the provisions of section 40(a)(ia) is applicable even for short deduction of TDS. The Hon'ble Kerala High Court has upheld the disallowance of expenditure under sec. 40(a)(ia) of the Act, for short deduction of TDS. With due respect to the Hon'ble Kerala High Court, we prefer to follow the judgment referred by the Authorized Representative of the assessee in the case of S.K. Tekriwal (supra), for the reason that when there are two reasonable constructions are possible on similar issue i.e. one in favour of the assessee and another in favour of the Revenue, the decision in favour of the assessee should be followed as held by the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192.

11. Considering the facts and circumstances of the case and also applying the ratio of the Hon'ble Calcutta High Court judgment in the case of S.K. Tekriwal (supra), we are of the opinion that the CIT(A) rightly deleted the addition made under sec. 40(a)(ia) of the Act. In the present case on hand, the assessee has deducted TDS and deposited the same with the Central Govt. account as prescribed under the Act. The allegation of the A.O. is that the assessee failed to deduct TDS under appropriate provisions of the Act. Therefore, we are of the view that the provisions of sec. 40(a)(ia) of the Act is applicable, in case there is a failure on the part of the assessee to deduct TDS and remit the same to the government account. There is nothing in the said section to treat inter alia that the assessee is defaulter where there is shortfall in deduction of TDS. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under the various TDS provisions, the assessee can be declared to be an assessee in default under sec. 201 of the Act and no disallowance can be made by invoking the provisions of sec. 40(a)(ia) of the Act. Therefore, we do not find any error or infirmity in the CIT(A)'s order, hence, we inclined to uphold the order of the CIT(A) and reject the ground raised by the Revenue."

16. No contrary decision of this Tribunal or of the Hon'ble Jurisdictional High Court or Hon'ble Supreme Court was placed before us. We, therefore, are bound to follow the decision of the Coordinate Bench. Therefore, we do not find any infirmity or illegality in the order of the CIT(A) in holding that provisions of Section 40(a)(ia) will not be applicable in the case of the assessee as there is

nothing in the section to treat the assessee as defaulter where there is shortfall in deduction of TDS. We, therefore, affirm the CIT(A) and dismiss the grounds taken by the Revenue in both the appeals.

17. In the result, both the appeals filed by the assessee are allowed for statistical purposes while both the appeals of the Revenue are dismissed."

50. The various other decisions relied on by the ld. counsel for the assessee also support his case that provisions of section 40(a)(ia) cannot be applied for making disallowance where there is shortfall in deduction of tax. In view of the above discussion, we direct the Assessing Officer to delete the disallowance. Ground of appeal No.8 of the assessee is accordingly allowed.

51. Ground No.9 relates to the disallowance on account of foreign exchange loss of Rs.4,80,06,052/-.

51.1 Facts of the case, in brief, are that the assessee debited an amount of Rs.16,45,02,426/- in the Profit & Loss Account on account of foreign exchange fluctuation loss under the head 'Other expenses' under Note 26 and an amount of Rs.6,70,59,477/- under the head 'Finance costs' under Note 27 aggregating to Rs.23,15,61,903/-. While computing the income, the assessee had *suo motu* disallowed an amount of Rs.18,35,55,851/- out of the total foreign exchange loss treating the same as capital in nature and claimed the remaining loss amounting to Rs.4,80,06,052/- as revenue in nature as a tax deductible expenses in the computation of income. The Assessing Officer asked the assessee to justify the claim of the same. Since the assessee failed to demonstrate the genuineness of the loss, the Assessing

Officer disallowed the foreign exchange loss of Rs.4,80,06,052/-. The DRP upheld the action of the Assessing Officer. The Assessing Officer, in the final order, accordingly made the disallowance of the same.

52. The ld. counsel for the assessee submitted that the above method of accounting adopted by the assessee is in accordance with the method of accounting laid down by the mandatory Accounting Standard-11 (AS-11). As per the said provision, transactions denominated in foreign currency are recorded by AGNS at the exchange rate prevailing on the date of the transaction and are subsequently settled or translated at the exchange rates prevailing on the date of balance sheet. Any loss/gain arising on account of such settlement/translations are recognized in the profit and loss account for the relevant period. He submitted that any loss arising on revenue account transaction being revenue expenditure is claimed as a tax deductible expenses and conversely any loss on capital account transaction is disallowed while computing taxable income of the assessee. Referring to the following decisions, the ld. counsel submitted that foreign exchange fluctuation loss is an allowable business expenditure:-

i) Woodward Governor India Private Limited, 312 ITR 254 (SC);

ii) Tony Electronics Ltd., 375 ITR 431 (Del); and

iii) Welspun Zucchi Textiles Ltd., 61 SOT 280 (Mumbai Tribunal).

53. He, however, filed certain additional evidences under Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963 and requested the Bench to consider the additional evidence which substantiates the veracity of the nature of transaction.

54. The ld. DR, on the other hand, while supporting the order of the Assessing Officer and DRP, submitted that due to non-substantiation of the genuineness of the foreign exchange loss, the Assessing Officer disallowed the same which has been upheld by the DRP. He accordingly submitted that the order of the Assessing Officer be upheld and the ground raised by the assessee on this issue should be dismissed.

55. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find the Assessing Officer disallowed the foreign exchange fluctuation loss of Rs.4,80,06,052/- on the ground that the assessee failed to demonstrate the genuineness of the loss. We find the DRP also upheld the action of the Assessing Officer and the Assessing Officer, in the final order, has disallowed the same. It is the submission of the ld. counsel for the assessee that the additional evidences filed now will substantiate the genuineness of the loss. Considering the totality of the facts of the case and in the interest of justice, we admit the additional evidences filed before the Bench at the time of hearing and restore the issue to the file of the Assessing Officer with a direction to go through the same and decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. Ground of appeal No.9 of the assessee is accordingly allowed for statistical purposes.

56. Ground No.10 relates to non-grant of credit for TDS. After hearing both the sides, we remit this issue to the file of the Assessing Officer with a direction to grant

proper credit of TDS after giving an opportunity of being heard to the assessee. This ground of the assessee is allowed for statistical purposes.

57. Ground No.11 of the assessee relates to levy of interest u/s 234B and 234C which, according to us, are mandatory and consequential in nature. Accordingly the ground is dismissed.

58. Ground No.12 relating to initiation of penalty proceedings is premature at this juncture. Accordingly, this ground is dismissed.

ITA No.7115/Del/2017 (A.Y. 2013-14)

59. Grounds raised by the assessee are as under:-

1. Transfer Pricing Grounds

TP adjustment with respect to receipt of Intra-Group Services

That on the facts and circumstances of the case, and in law, the Ld. AO (following the directions of the Ld. DRP), erred on facts and in law in enhancing the income of the Appellant by INR 22,43,41,663/- holding that the international transaction pertaining to receipt of intra-group services do not satisfy the arm's length principle envisaged under the Income-tax Act, 1961 ('the Act'), and in doing so have grossly erred in:

1.1. rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to availing of intra-group services from its AEs on a standalone basis;

1.2. Arbitrarily rejecting TNMM and selecting Comparable Uncontrolled Price ('CUP') method as the most appropriate method to benchmark the international transaction pertaining to availing of intra-group services by the Appellant from its associated enterprises, without duly establishing suitability thereof;

1.3. disregarding the elaborate documentary evidence submitted as part of assessment proceedings to erroneously assume that 'no benefit' has been conferred upon the Appellant from the international transactions pertaining to availing of intra-group services and thereafter re-determining the ALP of the

said transaction as 'NIL';

1.4. disregarding the receipt of services by the Appellant from its AEs which is contrary to the facts of the present year as well as to the stand taken by the Ld. TPO in prior year despite no change in the nature of services involved. Further, the Ld. TPO erred in contending that the services received are duplicative and stewardship in nature, ignoring the documentation and evidences submitted by the Appellant; which contradicts his own contention that the services have actually not been received;

1.5. arbitrarily challenging the veracity of the contractual service agreement disregarding the actual conduct of the Appellant in the availing of intra-group services from AEs basis the elaborate documentary evidences submitted as part of assessment proceedings; and

1.6. disregarding the judicial pronouncement/ finding of the Hon'ble ITAT in Appellant's own case for assessment years 2009-10, 2010-11 and 2011-12

TP adjustment with respect to payment of royalty

That on the facts and circumstances of the case, and in law, the Ld. AO (following the directions of the Ld. DRP), erred on facts and in law in enhancing the income of the Appellant by INR 23,60,77,026/- and holding that the international transaction pertaining to payment of royalty does not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred in:

1.7. rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating payment of royalty, availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to payment of royalty from its AEs on a standalone basis by rejecting Transactional Net Margin Method ('TNMM') as the most appropriate method;

1.8. holding that the Appellant did not receive any tangible benefit in lieu of the payment of royalty; thereby challenging the commercial wisdom of the Appellant in making payment for royalty and passing the order in contrast with the recent judicial pronouncements in this regard;

1.9. arbitrarily rejecting the supplementary analysis using Comparable Uncontrolled Price ('CUP') method to benchmark the payment of royalty transaction submitted by the Appellant without giving any cogent reasons;

1.10. holding that as per the facts of the case of the Appellant, no independent party would have made a payment for royalty and thereby challenging the commercial expediency of the Appellant; and

1.11. Disregarding the judicial pronouncement/ finding of the Hon'ble ITAT in Appellant's own case for the assessment year 2009-10.

2. Disallowance of circuit accruals

2.1. On the facts, in circumstances of the case and in law, the Ld. AO/DRP erred in making a disallowance of Rs. 31,614 on account of circuit accruals created towards bandwidth and last mile services availed by the Appellant company, ignoring that the accruals were based on a reasonable and scientific basis.

2.2. On the facts, in circumstances of the case and in law, the Ld. AO failed to appreciate that the appellant follows mercantile system of accounting and accrues circuit charges on scientific basis.

2.3. On the facts, in circumstances of the case and in law, the Ld. AO/DRP failed to appreciate that as per the accounting standards notified under section 145(2) of the Act, the appellant was required to make provision for circuit accruals for the subject financial year.

2.4. On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not appreciating that the appellant produced evidences to the extent of 99% for utilisation/reversal of circuit accruals made in subsequent years and no adverse finding has been given by the Ld. AO/Hon'ble DRP on the same.

2.5. Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilised.

2.6. On the facts, in circumstances of the case and in law, the Hon'ble DRP erred in ignoring that the aforesaid disallowance of circuit accruals has been deleted by the Hon'ble ITAT in Appellant's own case for assessment years 2009-10, 2010-11, 2011-12.

Therefore, any disallowance on account of circuit accrual is not tenable.

3. Disallowance of vear-end accruals

3.1. On the facts, in circumstances of the case and in law, the Ld. Assessing Officer /Hon'ble DRP erred in making a disallowance of Rs. 93,76,358 on account of year-end accruals representing accruals created towards normal business expenditure incurred by the Appellant ignoring that the accruals were based on a reasonable and scientific basis.

3.2. On the facts, in circumstances of the case and in law, the Ld. AO/ Hon'ble DRP failed to appreciate that as per the accounting standards notified under section 145(2) of the Act, the appellant was required to make provision for all liabilities/expenses for the subject financial year.

3.3. On the facts, in circumstances of the case and in law, the Ld. Assessing Officer /Hon'ble DRP erred in not appreciating that the appellant produced evidences to the extent of 94% for utilisation/reversal made in subsequent years and no adverse finding has been given by Ld.AO/Hon'ble DRP on the same.

3.4. Without prejudice to the above, on the facts, in circumstances of the

case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilised.

Therefore, any disallowance on account of year-end accrual is unjustified.

4. Disallowance of Support Service Expenditure

4.1. On the facts, in circumstances of the case and in law, the Ld. AO/ Hon'ble DRP erred in disallowing the legitimate business expenditure being in the nature of support service expenses of Rs. 9,38,09,542 paid to AT&T Communication Services India Private Limited ('ACSI').

4.2. On the facts, in circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not taking cognizance of the submissions made by appellant and the documentary and circumstantial evidence/ proof produced by the appellant, which duly substantiates that support services were rendered by ACSI to the appellant company.

4.3. On the facts, in circumstances of the case and in law, the Hon'ble DRP erred in ignoring that the aforesaid disallowance on account of support service xpenditure has been deleted by the Hon'ble ITAT for assessment years 2009-10, 2010-11, 2011-12.

Disallowance of annual revenue share based license fee

5.1. On the facts, in the circumstances of the case and in law, the Ld. AO/ Hon'ble DRP erred in disallowing an amount of Rs. 34,23,30,432 (being disallowance of Rs. 39,52,72,350 in AY 2013-14 less credit of Rs. 2,18,10,669 for AY 2012-13, Rs. 1,66,89,296 for AY 2011- 12 and of Rs. 1,44,41,953 for AY 2010-11) under the head licence fees debited to Profit & Loss Account by holding that annual license fee is not allowable as a revenue expenditure and it should be amortised under section 35ABB of the Act.

5.2. On the facts, in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in not following the judgment of the Hon'ble jurisdictional Delhi High Court in the case of Bharti Hexacom Ltd. [2014] 265 CTR 130 (Delhi) wherein it was held that annual revenue share based license fee paid by the telecom operators is revenue expenditure, allowable under section 37(1) of the Act and not a capital expenditure amortizable under section 35ABB of the Act.

5.3. On the facts, in the circumstances of the case and in law, the Hon'ble DRP has erred in not following its own direction in the assessment year 2011-12 wherein the adjustment was directed to be deleted. Further, the Hon'ble DRP erred in ignoring that the aforesaid disallowance has been deleted by the Hon'ble ITAT in Appellant's own case for assessment year 2010-11.

6. Disallowance of Lease line charges on account of non-deduction of tax at source

6.1. On the facts, in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP erred in making disallowance under section 4o(a)(ia) read with Section 194I of the Act on account of non-deduction of tax at source on lease line expenses of Rs 11,55,75,950 incurred by appellant.

7. Disallowance of foreign exchange loss

7.1. On the facts, in the circumstances of the case and in law, the Ld. AO grossly erred in making disallowance of Rs. 28,04,499 on account of foreign exchange loss arising on revenue account.

8. Non-grant of credit for taxes deducted at source

8.1. On the facts, in the circumstances of the case and in law, the Ld. AO erred in not granting appropriate credit of taxes deducted at source as allowable to the Appellant for the year under consideration.

9. Lew of interest under section 234B of the Act

9.1. On the facts, in the circumstances of the case and in law, the Ld. AO erred in incorrectly charging interest under section 234B of the Act.

10. Initiation of penalty proceedings

10.1. On the facts, in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 27i(i)(c) of the Act against the Appellant on account of the above adjustments made in the impugned final assessment order.

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

60. Ground of appeal No.1 to 1.06 relates to transfer pricing adjustment relating to intra group services. After hearing both the sides we find that the above grounds relating to intra group services are identical to Ground of appeal No.1 to 1.7 in ITA No.5535/Del/2016. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds by the assessee are allowed. So far as the TP adjustment on account of payment of Royalty is concerned, as per ground of appeal No.1.7 to 1.10 we find, the Tribunal in assessee's own case for A.Y. 2009-10 has observed as under:-

"65. We therefore accept the plea of assessee and hold that the ld TPO is only duty bound to determine the ALP of the royalty payments.

66. With respect to analysis under CUP method by the ld TPO, we fully agree with him in rejecting internal CUP as it pertains to related party transactions which are between its fellow AEs. We also agree with him in rejecting external CUP data as the assessee has not submitted any data regarding similarity in terms and conditions of the royalty agreements. He also rightly held that even from the limited data submitted are for different industries/ geographical location /duration and amounts. No analysis of the royalty agreements between the various parties and the accompanying circumstances and conditions therein has been done by assessee. We also agree that even a minor difference in royalty agreement may have a significant effect on the royalty rates.

67. According to us the royalty payments needs to be tested on the basis of factum and quantum both aspects. It also needs to be looked at the functions to be performed by the parties for royalty payments. It also nees to be looked in to nature of the use of the intangibles which are covered in License Agreement with AT&T Corp, pursuant to which it was granted the right to use licensed marks in marketing material for publicity, advertising, signs, product brochures, instruction manuals and in other form of advertising. These intangibles, which are licensed to AGNS India, are key value drivers for the business and benefit it by enabling it to expand its presence in the marketplace. What would be the duration of payments of such license royalty is also determinative of the factor of the payments as it cannot also continue for an indefinite period . It may also happen that India brand because o consumer may become bigger than AE's brand.

68. As the assessee has adopted the TNMM which is crude method of benchmarking royalty payments and Ld TPO has disregarded the transaction only on the benefit analysis and has also rejected the CUP benchmarking of the assessee , we are of the view that this issue needs to be set aside to the file of the ld TPO to determine the ALP of the royalty payments afresh after examining the method, comparability and then ALP afresh. Assessee is also directed to support its ALP determination afresh after submitting the detailed answer to all the questions raised by the ld TPO in para no 9 of his order except the benefit test. Hence this ground no 8 of the appeal is allowed with above directions."

60.1 Respectfully following the decision of the Tribunal, we hold that the TPO cannot apply benefit test and is only required to determine the ALP of the royalty payment. Accordingly, we restore the issue to the file of the TPO to determine the ALP of the Royalty payment in accordance with the law and after giving due

opportunity of being heard to the assessee. We hold and direct accordingly. These grounds of appeal No.1.7 to 1.10 are allowed for statistical purposes.

61. Ground of appeal No.2 to 2.6 relates to disallowance of circuit accruals. After hearing both the sides we find that the above grounds are identical to Ground of appeal No. 2 to 2.5 in ITA No.5535/Del/2016. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds by the assessee are allowed.

62. Ground of appeal No.3 to 3.4 relates to disallowance of year end accruals.. After hearing both the sides we find that the above grounds are identical to Ground of appeal No. 3 to 3.4 in ITA No.5535/Del/2016. We have already decided the issue and the grounds raised by the assessee have been allowed. Following the similar reasonings, the above grounds by the assessee are allowed.

63. Ground of appeal No.4 to 4.3 relates to disallowance of support service expenditure. After hearing both the sides we find that the above grounds are identical to Ground of appeal No. 5 to 5.3 in ITA No.5535/Del/2016. We have already decided the issue and the matter has been restored to the file of the Assessing Officer/TPO with certain directions. Following similar reasonings, the above grounds are restored to the file of the Assessing Officer and accordingly allowed for statistical purposes.

64. Ground of appeal No.5 to 5.3 relates to disallowance of annual revenue share based licence fee. After hearing both the sides we find that the above grounds are identical to Ground of appeal No. 6 to 6.3 in ITA No.5535/Del/2016. We have

already decided the issue and the grounds raised by the assessee have been allowed. Following the similar reasonings, the above grounds by the assessee are allowed.

65. Ground of appeal No.6 to 6.1 relates to leaseline charges on account of non-deduction of tax at source. After hearing both the sides we find that the above grounds are identical to Ground of appeal No. 7 to 7.1 in ITA No.5535/Del/2016. We have already decided the issue in ITA No.5535/Del/2016 and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds by the assessee are allowed.

66. Ground of appeal No.7 to 7.1 relates to disallowance of foreign exchange loss. After hearing both the sides we find that the above grounds are identical to Ground of appeal No. 9 to 9.2 in ITA No.5535/Del/2016. We have already decided the issue and the matter has been restored to the file of the Assessing Officer with certain directions. Following similar reasonings, the above grounds are restored to the file of the Assessing Officer with similar directions and the grounds are accordingly allowed for statistical purposes.

67. Ground of appeal No.8 to 8.1 relates to non-grant of credit of TDS. After hearing both the sides we restore the issue to the file of the Assessing Officer with a direction to verify the records and give necessary credit for the TDS after giving reasonable opportunity of being heard to the assessee. We hold and direct accordingly. These grounds are accordingly allowed for statistical purposes.

68. Ground Nos.9 to 9.1 relate to levy of interest u/s 234B which, in our opinion, is mandatory and consequential in nature. Accordingly the above grounds are dismissed.

69. Ground Nos. 10 to 10.1 relating to initiation of penalty proceedings according to us are premature at this juncture. Accordingly, the above grounds are dismissed.

70. In the result, both the appeals filed by the assessee are partly allowed for statistical purposes.

The decision was pronounced in the open court on 27.05.2019.

Sd/-	Sd/-
(BEENA A. PILLAI) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 27th May, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi