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IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. No. 780/Ahd/2016
(Assessment Years: 2011-12)

Shell Global Solutions International BV, C/o. BSR Associates & LLP, 903 Commerce House V, Nr. Vodafone House, Prahaladnagar, Corporate Road, Ahmedabad-380051	Vs.	Deputy Commissioner of Income Tax, International Taxation-I, Ahmedabad-380014
[PAN No.AAICS3589H]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 747/Ahd/2017
(Assessment Year: 2012-13)

Shell Global Solutions International BV, C/o. BSR Associates & LLP, 903 Commerce House V, Nr. Vodafone House, Prahaladnagar, Corporate Road, Ahmedabad-380051	Vs.	Deputy Commissioner of Income Tax, International Taxation-I, Ahmedabad-380014
[PAN No.AAICS3589H]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 2935/Ahd/2017
(Assessment Year: 2013-14)

Shell Global Solutions International BV, C/o. BSR Associates & LLP, 903 Commerce House V, Nr. Vodafone House, Prahaladnagar, Corporate Road, Ahmedabad-380051	Vs.	Deputy Commissioner of Income Tax, International Taxation-I, Ahmedabad-380014
[PAN No.AAICS3589H]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri S. N. Soparkar, Sr. Advocate & Shri Parin Shah & Ms. Dhruvi Salot, A.Rs.
Respondent by:	Shri Sudhendu Das, CIT D.R.

Date of Hearing	01.08.2023
Date of Pronouncement	11.10.2023

O R D E R

PER SIDDHARTHA NAUTIYAL, JM:

These appeals have been filed by the Assessee against the orders passed by the Ld. Disputes Resolution Panel -2, (in short "Ld. DRP"), Mumbai vide orders dated 29.12.2015, 29.11.2016 & 20.09.2017 passed for the Assessment Years 2011-12 to 2013-14. Since common facts and issues for consideration are involved for all the assessment years before us, all years are being heard together and issues are being disposed of by way of a common order.

We shall first take up the appeal of the assessee for A.Y. 2011-12

2. The assessee, M/s. Shell Global Solutions International B.V. is a company incorporated in Netherlands and is engaged in the business of providing research and technical services to array of petroleum related segments. It's services include chemical analysis, crude oil evolution, engineering, energy optimisation, gas to liquids conversion, re-gasification, hybrid cracking, inspection, thermo-analysis and water treatment.

3. During the year under consideration, the Assessing Officer observed that as per Form No. 3 CEB, the assessee had received certain amounts from it's Associated Enterprises (in short "AE") in India for services related to operations of LNG storage and re-gasification. During the course of assessment, the Ld. Transfer Pricing Officer (in short "TPO") observed that the assessee had provided services related to operation of LNG storage and re-gasification terminal to its Associated Enterprises, HPPL and Hazira LNG Pvt. Ltd. The assessee has adopted CUP method for determination of Arms Length

Price (in short "ALP"). However, the TPO observed that no comparison appears to have been made with the available internal CUP nor any alteration has been made to the above amount while conducting the transfer pricing study in respect of the fact that the prices charged to non-AE parties are substantially higher than prices charged to the AE by the assessee. During the course of transfer pricing proceedings, the TPO observed that the assessee charged an average rate of Euro 564.45 per hour to its AE Hazira LNG Pvt. Ltd. and at an average rate of Euro 347.96 per hour to its AE Hazira Port Pvt. Ltd. as against Euro 2075.45 per hour charged to third parties. Further, the assessee provided manpower services to another Indian Associated Enterprise SIMPL which were benchmarked using CUP as the most appropriate method. The TPO observed that the personnel provided by the assessee to its AE were subsequently provided to a third party by the AE. The TPO observed that the average hour rate charged by the assessee to its AE was Euro 187.5 while average hour rate charged by the AE to the third party was Euro 338.25. During the course of proceedings before the TPO, the assessee took the argument that the assessee had charged a higher price for the aforesaid services from it's AE, it would have let to tax base erosion in India, however, the TPO rejected the arguments put forth by the assessee. Accordingly, the Ld. TPO made an upward adjustment of Rs. 13,49,53,506/- on account of the above transactions during the course of the proceedings. Similar adjustments were made for A.Ys. 2012-13 and 2013-14 by the Ld. TPO as well, against which the assessee is in appeal before us. With respect to the aforesaid issue of Transfer Pricing Adjustment the assessee has taken the following Grounds of Appeal:-

ITA No. 780/Ahd/2016 (A.Y. 2011-12)

"1. The Learned AO/Transfer Pricing Order('TPO') has erred in and learned DRP has further erred in confirming action of the AO / TPO on the facts and in law in applying the transfer pricing provisions to the international transactions entered into by the Appellant with the Indian Associated Enterprises in respect of services rendered to them and making a transfer pricing adjustment of Rs. 13,49,53,506/-."

ITA No. 747/Ahd/2017 (A.Y. 2012-13)

*"**Transfer Pricing Adjustment of Rs. 57,57,77,763***

1.1. The learned AO / TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO / TPO on the fact and in law in applying the transfer pricing ('TP') provisions and making a TP adjustment to the value of international transactions entered into by the Appellant with Hazira LNG Private Limited ('HLPL'), Hazira Port Private Limited ('HPPL') in respect of rendering services in relation to operation of LNG storage and regasification.

1.2. The learned AO / TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO / TPO on the facts and in law in applying the TP provisions and making a TP adjustment to the value of international transactions entered into by the Appellant with Shell India Markets Private Limited ('SIMPL') in respect of rendering of manpower services.

The Appellant prays that the TP provisions are not intended to apply where the adoption of the arms-length price would result in a decrease in overall tax incidence in India.

1.3. The learned AO / TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO / TPO on the facts and in law in misinterpreting directions of the learned DRP in earlier years, wherein learned DRP has accepted the legal position that the TP .provisions cannot be applied where the adoption of the arm's length price would result in a decrease in overall tax incidence in India, however, TP adjustment was upheld on account of the losses incurred by HLPL, HPPL and SIMPL in the respective years, without appreciating the facts that:

- *HLPL has started making profits from the captioned year (i.e. AY 2012-13 and onwards);*
- *HPPL has started making profits from AY 2013-14 and onwards; and*

- *SIMPL may be liable to pay the tax on the assessed income for the AY 2012-13.*

1.4. Without prejudice to the above, on the facts and in the circumstances of the case and in law, learned AO / TPO has erred and learned DRP has further erred in confirming the TP adjustment with respect to the income from services mentioned above, from HLPL, HPPL and SIMPL by not allowing the benefit of provisions of Article 9(1) of India -Netherlands Tax Treaty ('DTAA') being more beneficial to the Appellant than the provisions of the Income-tax Act, 1961 ('the Act') and by virtue of section 90(2) of the Act."

ITA No.2935/Ahd/2017 (A.Y. 2013-14)

*"**Transfer Pricing Adjustment of Rs. 50,68,79,713***

1.1. The learned AO / TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO / TPO on the fact and in law in applying the transfer pricing ('TP') provisions and making a TP adjustment to the value of international transactions entered into by the Appellant with Hazira LNG Private Limited ('HLPL'), Hazira Port Private Limited ('HPPL') in respect of rendering services in relation to operation of LNG storage and regasification.

1.2. The learned AO / TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO / TPO on the facts and in law in applying the TP provisions and making a TP adjustment to the value of international transactions entered into by the Appellant with Shell India Markets Private Limited ('SIMPL') in respect of rendering of manpower services.

The Appellant prays that the TP provisions are not intended to apply where the adoption of the arms-length price would result in a decrease in overall tax incidence in India.

1.3. The learned AO / TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO / TPO on the facts and in law in misinterpreting directions of the learned DRP in earlier years, wherein learned DRP has accepted the legal position that the TP .provisions cannot be applied where the adoption of the arm's length price would result in a decrease in overall tax incidence in India, however, TP adjustment was upheld on account of the losses incurred by HLPL, HPPL and SIMPL in the respective years, without appreciating the facts that:

- *HLPL has started making profits from the captioned year (i.e. AY 2012-13 and onwards);*
- *HPPL has started making profits from AY 2013-14 and onwards; and*
- *SIMPL may be liable to pay the tax on the assessed income for the AY 2012-13.*

1.4. Without prejudice to the above, on the facts and in the circumstances of the case and in law, learned AO / TPO has erred and learned DRP has further erred in confirming the TP adjustment with respect to the income from services mentioned above, from HLPL, HPPL and SIMPL by not allowing the benefit of provisions of Article 9(1) of India -Netherlands Tax Treaty ('DTAA') being more beneficial to the Appellant than the provisions of the Income-tax Act, 1961 ('the Act') and by virtue of section 90(2) of the Act.

1.5 Without prejudice to the above, on the facts and in the circumstances of the case and in law, learned AO / TPO has erred and learned DRP ahs further erred in rejecting the approach of the Appellant of comparing the fixed and optional services provided to HLPL and HPPL with the respective fixed and optional services provided to comparable company.

1.6 Without prejudice to the above, the Appellant humbly submits that in case, if the contention of the Appellant on the non-taxability of Rs. 2,84,20,716 (received from HLPL) as fees for technical services under Article 12 of DTAA (as per Ground No. 4 below) is accepted, then the corresponding transfer pricing adjustment in relation to the services rendered to HLPL should also be reduced to the extent."

4. Before us, the Ld. Counsel for the assessee at the outset submitted before us that he shall not be pressing the argument with respect to base erosion since the issue is now covered against the assessee by order of Hon'ble Special Bench of Kolkata Tribunal in the case of Instrumentarium Corporation Ltd. and also by the order of Divisional Bench of Hon'ble Ahmedabad ITAT in appellant's own case for A.Y. 2007-08 to A.Y. 2010-11. However, the Counsel for the assessee submitted that since the transaction has been considered to be at Arm's Length Price in the hands of the Indian Associated Enterprise i.e. SHELL Indian Markets Pvt. Ltd. (SIMPL), Hazira Port Pvt. Ltd. (HPPL) and Hazira LNG Pvt. Ltd. (HLPL), no transfer pricing adjustments

should be made in the hands of the assessee for the same transaction. In the case of HPPL, the Counsel for the assessee submitted that for A.Y. 2011-12 to A.Y. 2012-13 the transaction can be said to have been accepted at an Arm's Length Price in the hands of the Indian Associated Enterprises as no adjustment was recommended by the TPO as no transfer pricing reference was made. In the case of SIMPL the Counsel for the assessee submitted that the matter was referred to Ld. TPO and Ld. TPO of SIMPL has not recommended any adjustment in respect of transaction pertaining to manpower services. In the case of HLPL, for A.Ys. 2011-12 and 2013-14 the matter was referred to the TPO of HLPL and the Ld. TPO of HLPL has not recommended any adjustment. However, in case of HLPL for A.Y. 2012-13 the TPO has not accepted the transaction at Arm's Length Price and has made adjustments to the same. It was submitted that the assessee is in appeal before ITAT against the aforesaid adjustments and it was submitted that the assessee has a good case on merits and is accordingly willing to be bound by the order passed by ITAT on this issue. The Counsel for the assessee submitted that the aforesaid legal proposition has been accepted in favour of the assessee by the decision rendered by Karnataka High Court in the case of CIT vs. UE Development Indian Pvt. Ltd. in ITA No. 52, 53, 54 & 55/2014 which was also subsequently followed by other Courts as well, in which it was held that if the transaction is considered to be at Arm's Length Price in the hands of the Indian Associated Enterprises, then no transfer pricing adjustment should be made in the hands of the assessee company with respect to the same transaction. In addition to the above legal argument, the Counsel for the assessee took an additional argument in respect of issues between the assessee and HLPL for A.Y. 2012-13, in which it was submitted that Brunei LNG (BLNG) has been accepted to be the comparable for HLPL by the Ld. TPO of the assessee. The Counsel for

the assessee submitted that the agreement with HLPL and BLNG is structured in a manner i.e. there is similar as that with HLPL a fixed opening of services along with variance optional component of services which would be invoices basis the applicable charge out rates. For A.Y. 2012-13, the TPO of HLPL has only accepted fixed component of services to be at ALP and hence, optional component of services is disallowed and added to the income of HLPL. Accordingly, it was submitted that on one hand HLPL has already offered taxes on optional component of services and if on the other hand upward TP adjustment is made in the assessee's case, then the same will lead to double taxation which is against the principle of taxation. Further, it was submitted before us that the assessee has rendered services with respect to LNG storage and re-gasification terminal to its AEs i.e. HLPL and HPPL. Similar services were also provided to third parties i.e. BLNG. The Counsel for the assessee submitted that the structure of these two contracts i.e. the Operating Services Agreement (OSA) with HLPL and HPPL as well as with BLNG are structured in a similar manner i.e. there is a fixed component of services along with annual quota of entitlements are for which there is a lumpsum annual fee and there is a provision to provide various optional services which would be invoiced basis the charged out rates for the employees under various job groups. However, it was submitted that the TPO has erred in quantification of TP adjustment i.e. fixed services have not been compared with fixed services and optional services have not been compared with optional services. Hence, it was submitted that "likes have not been compared with likes" and the assessee placed reliance on the decision rendered by ITAT Hyderabad in the case of M/s. Takshill Solutions Ltd. in ITA No. 1768/Hyd/2012 where in the same principle of "likes have not been compared with likes" has been adjudicated.

5. In response, the Ld. D.R. placed reliance on the order passed by DRP in which the aforesaid additions were confirmed.

6. We have heard the rival contentions and perused the material on record. On going through the facts of the case, there are certain facts which need to be mentioned while adjudicating on the issue. Firstly, we observe that during the course of proceedings before the Department, the assessee has apparently given no justification as to why there was of variance between the price charged by the assessee to its Associated Enterprises and the rates which were charged by the assessee for the same services to third parties. At all stages before the Department, (both the Transfer Pricing Officer as well as before DRP), the assessee has stressed upon the arguments on based erosion only. However, before us, the assessee has submitted that in view of the decision of Hon'ble ITAT Kolkata Special Bench in the case of Instrumentarium Corporation Ltd. (supra) the assessee shall not be pressing for this argument of base erosion. In the alternative, the assessee has relied upon the case of CIT vs. UE Development India Ltd. (supra) and has taken a legal argument that since in the case of Associated Enterprise, no transfer pricing adjustment made by the concerned TPO, the transaction in question should be considered at ALP. However, we observe that in the case of HPPL for A.Ys. 2011-12 and 2012-13, no transfer pricing reference was made in the first instance and hence no adjustment was recommended by the TPO. Accordingly, for A.Y. 2011-12 and 2012-13, in the case of HPPL, no adjustment was made with respect to the aforesaid transaction for the reason that no transfer pricing reference was made in the first instance. Further, in the case of HLPL, for A.Y. 2012-13, for the same services, upward adjustment has been made and the matter is pending adjudication before the ITAT Ahmedabad. It would be noteworthy to refer to

the case of ITAT Bangalore in the case of **Filtrex Technologies Pvt. Ltd. vs. ACIT 93 taxmann.com 301 (Bangalore-Tribunal)**, wherein it was held that where assessee made payments of royalty and administrative charges to AE, mere fact that ALP of said payments had been accepted in case of AE, it could not be concluded that price paid by assessee in international transactions had to be accepted as at arm's length. In this case, while passing the order, the TPO made the following observations:-

> *"**19.** We have given very careful consideration to the rival submissions. As far as Gr.No.8 raised by the Assessee in its appeal is concerned, the plea of the Assessee is that in the Assessment proceedings of FHPL and FIPL for the very same AY viz., AY 2012-13, the TPO has accepted that the income shown by FHPL and FIPL was (a) for services it rendered to the Assessee and (b) that the remuneration received was at Arm's Length. The AO of FHPL and FIPL while completing the assessment of FHPL and FIPL was fully aware of the fact that the transaction by which FHPL and FIPL received fees from the Assessee was a transaction between two Associated Enterprises (AE) and the same was an international transaction. **The AO of FHPL and FIPL was therefore bound to determine income arising from the international transaction having regard to Arm's Length Price as per the mandate of Sec.92 of the Act. The AO was at liberty to make a reference to the TPO to find out the ALP of the international transaction. He did not do so. In exercise of his powers not to make a reference for determination of ALP to the TPO, the AO accepted the consideration received by FHPL and FIPL as at Arm's Length**.*
>
> ***20. The question therefore is as to whether the fact that income declared by FHPL and FIPL has been accepted as at Arm's Length, means that the corresponding payment by the Assessee to FHPL and FIPL should also be regarded as at Arm's Length**. The acceptance of return of income of FHPL and FIPL and the observations made in the orders of assessment passed for AY 2012-13 in their case shows that the AO of FHPL and FIPL accepted that services were in fact rendered by FHPL and FIPL and that the nature of services rendered was technical services and fees for right to use IPR i.e., royalty. Therefore the TPO in his order cannot say that no benefit or services were received by the Assessee from FHPL and FIPL. To this extent the orders of assessment in the case of FHPL and FIPL would be relevant and will go to show that the Assessee received benefit or service from FHPL and FIPL for which it made payments to FHPL and FIPL.*

21. *Apart from the conclusion that the Assessee received services from FHPL and FIPL for which it made payments from the orders of assessment in the case of FHPL and FIPL, we also find that the Hon'ble Delhi High Court in the case of CIT v. EKL Appliances Ltd., IT Appeal No.1068 of 2011, dated 29.03.2012 had taken the view that the TPO has to evaluate the ALP of an international transaction and without doing so, he cannot give a finding that the Assessee received no services and therefore the ALP has to be determined at NIL. The Hon'ble Delhi High Court had to deal with a case where an assessee entered into an agreement pursuant to which it paid brand fee/royalty to an associated enterprise. The TPO disallowed the payment on the ground that as the assessee was regularly incurring huge losses, the know-how/brand had not benefited the assessee and so the payment was not justified. This was reversed by the CIT (A) & Tribunal on the ground that as the payment was genuine, the TPO could not question commercial expediency. On appeal by the department, the Hon'ble Delhi High Court held that the "transfer pricing guidelines" laid down by the OECD make it clear that barring exceptional cases, the tax administration cannot disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. The guidelines discourage re-structuring of legitimate business transactions except where (i) the economic substance of a transaction differs from its form and (ii) the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. The OECD guidelines should be taken as a valid input in judging the action of the TPO because, in a different form, they have been recognized in India's tax jurisprudence. It is well settled that the revenue cannot dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur (Eastern Investment Ltd. v. CIT [1951] 20 ITR 1 (SC), CIT v. Walchand & Co. [1967] 65 ITR 381 (SC) followed). Even Rule 10B(1)(a) does not authorise disallowance of expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same.*

22. *The Hon'ble Delhi High Court in the case of CIT v. Cushman & Wakefield India (P.) Ltd. [2014] 46 taxmann.com 317/367 ITR 730, observed that whether a third party - in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for*

reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion. In the present case however, the arrangement between the AE and the Assessee is not a cost sharing arrangement but a payment for specific services rendered. To this extent the above observations of the Hon'ble High Court may not be relevant to the present case. The Hon'ble Delhi High Court held that the following aspects would require consideration in order to identify intra group services requiring arm's length remuneration:

** Whether services were received from related party.*

** Nature of services including quantum of services received by the related party.*

** Services were provided in order to meet specific need of recipient of the services.*

** The economic and commercial benefits derived by the recipient of intra group services.*

** In comparable circumstances an independent enterprise would be willing to pay the price for such services?*

** An independent third party would be willing and able to provide such services?*

Whether payment made to AE meets ALP criterion will be determined, keeping in mind all the above factors, as well.

23. *The learned counsel placed reliance on the decision of the ITAT Bangalore in the case of UE Development India Pvt. Ltd. (supra). This decision was rendered prior to the decision of the Hon'ble Delhi High Court in the case of Cushman & Wakefield India (P.) Ltd. (supra). The special Bench ITAT, Kolkata in the case of Instrumentarium Corpn. Ltd. v. Asstt. DIT [2016] 71 taxmann.com 193/160 ITD 1 had to deal with somewhat similar issue. The background in which this question has come up for the consideration before the special bench was that the Assessee Instrumentarium Corporation Limited (ICL-Finland, in short), was a company incorporated in, and tax resident of, Finland. The assessee was engaged in the business of manufacturing and selling medical equipment, and it has a wholly owned subsidiary in India by the name of Datex Ohmeda India Pvt Ltd (Datex India, in short) which acted as ICL-Finland's marketing arm for its products in*

India. On 26th August 2002, the assessee entered into an agreement, which was duly approved by the Reserve Bank of India, to advance an interest free loan of Rs 36 crores to Datex-India. The interest free advance by the assessee to its Indian subsidiary which is the subject matter of dispute before the Special bench. The precise point of dispute was if the Assessing Officer adopts arm's length interest on the loan, an arm's length price (ALP) adjustment is required to be made to the income to be brought to tax in the hands of the assessee, i.e. ICL-Finland. Corresponding the Indian entity should be allowed the deduction of interest expense. The tax inflow in India on interest income in the hands of ICL-Finland would be just 10% of the ALP interest while the corresponding expense if allowed in the hands of the Indian entity, there would be a benefit of 30% if the ALP interest to the Indian entity. In this scenario whether the exercise of determination of ALP would serve any purpose, was the question before the Special Bench. The plea of the assessee was that there was no erosion of Indian tax base and therefore no such adjustment can be made. The special Bench ruled against the Assessee and held that in order to further the objective of preventing base erosion, the substantive section of the Indian TP code, i.e., section 92(1) of the Act, requires that any income arising from an international transaction shall be computed having regard to the ALP. Further, as per Rule 10D of the Income-tax Rules, 1962, ALP is required to be contemporaneously determined by an assessee. From a conjoint reading of CBDT circular No. 14 of 2001, section 92(1) and Rule 10D, contemporaneous determination of ALP would need to be undertaken by an assessee, and such determination cannot be bereft of the underlying intent of prevention of base erosion in India.

24. *Section 92(1) of the Act lays down that any income arising from an international transaction shall be computed having regard to the arm's length price. Section 92B(1) of the Act defines "international transaction" and it lays down that for the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. Section-92C(1) of the Act lays down that the arm's length price in relation to an international transaction shall be determined by any one of the most appropriate methods set out in that section, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other*

relevant factors as the Board may prescribe. When the AO makes a reference to the TPO for determination of ALP, the provisions of Sec. 92CA(2) & (3) of the Act makes it mandatory for the TPO to determine ALP of international transaction, whether it is referred to by the AO or any other transaction which comes to his notice. These provisions read thus:

> *"(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction referred to in sub-section (1).*
>
> *(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall,by order in writing, determine the arm's length price in relation to the international transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee."*

25. *Once, the TPO determines ALP, the AO has no other option but to make addition to the total income of an Assessee as TP adjustment by the TPO. This would be clear from the provisions of Section 92CA(4) of the Act. Sec.92CA(4) of the Act, as it stood prior to amendment by the Finance Act, 2007 read as follows:-*

> *"92CA (4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C having regard to the arm's length price determined under sub-section (3) by the Transfer Pricing Officer."*

The AO on receipt of a report from the TPO had power to disregard to the ALP determined by the TPO. However with effect from 1st June, 2007, Section 92CA(4) has undergone a change vide Section 33 of the Finance Act, 2007 whereby it has been laid down that the Assessing officer is bound to pass an order in conformity with the ALP determined by the TPO. Amended Section 92CA(4) reads as under:—

> *"92CA(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer." (Emphasis Supplied)*

26. *The provisos to Sec. 92CA(4) of the Act read thus:*

> *"**Provided** that no deduction under section 10A or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :*
>
> ***Provided further** that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from which tax has been deducted or was deductible under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise."*

27. *The CBDT in it's Circular No. No.14/2001 dated 9.11.2001 has explained the purport of the 2nd proviso to Sec. 92C(4) of the Act as follows:*

> *"55.13 The second proviso to section 92C(4) refers to a case where the amount involved in the international transaction has already been remitted abroad after deducting tax at source and subsequently, in the assessment of the resident payer, an adjustment is made to the transfer price involved and, thereby, the expenditure represented by the amount so remitted is partly disallowed. Under the Income-tax Act, a non-resident in receipt of income from which tax has been deducted at source has the option of filing a return of income in respect of the relevant income. In such cases, a non-resident could claim a refund of a part of the tax deducted at source, on the ground that an arm's length price has been adopted by the Assessing Officer in the case of the resident and the same price should be considered in determining the taxable income of the non-resident. However, the adoption of the arm's length price in such cases does not alter the commercial reality that the entire amount claimed earlier would have actually been received by the entity located abroad. It has therefore been made clear in the second proviso that income of one associated enterprise shall not be recomputed merely by reason of an adjustment made in the case of the other associated enterprise on determination of arm's length price by the Assessing Officer.".*

28. *It is clear from the above circular that second proviso to Sec. 94CA(4) is meant to apply only when ALP is determined in the case of FIPL and FHPL. Another aspect which the Circular makes it clear is that the commercial reality of a transaction will be looked into viz., wherever the determination of income or expense in the hands of one enterprise results in tax base erosion of the country, the AO is free to apply the provisions of Sec.92(1) read with Sec.92CA(4). Corresponding adjustment in the assessment of the other*

enterprise to the transaction need not be made where there is no tax base erosion of the country. This is also the purport of Sec.92(3) of the Act which lays down that wherever computation of income under sub-section (1) of Sec.92 or the determination of the allowance for any expense or interest under that sub-section, or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2) of Sec.92, has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into. There would appear to be a conflict between the provisions of Sec. 92CA(4) and Sec.92(3) but a harmonious construction of these provisions would be hold that in respect of a same transaction the revenue can opt to determine total income on the basis of ALP determined in accordance with Sec.92(1) of the Act, in the hands of one party to the said transaction, wherever tax base of the country would erode. The revenue can desist from doing so in the assessment of the other party to the said transaction wherever there would not be tax base erosion. It cannot therefore be said that consequent to acceptance of return of income filed by FHPL and FIPL, the price paid by the Assessee in the international transaction has to be accepted as at Arm's Length.

29. In the light of the above discussion and the decisions on the issue rendered after the decision in the case of UE Development India Pvt. Ltd. (supra), we are of the view that ALP has to determined in the hands of the Assessee irrespective of the acceptance of ALP in the hands of FHPL and FIPL. The question as to whether the payment for such services are at Arm's Length or commensurate with the benefit received by the Assessee are all matters which needs examination by the TPO. No such exercise has been carried out by the TPO. But that does not mean that the ALP has been established by the Assessee. We are therefore of the view that it would be just and proper to set aside the order of the Assessing Officer on this issue and remand the question of determination of ALP to the TPO for fresh consideration*. It is made clear that the TPO shall not dispute that services were rendered by the AE. If the approach of the Assessee in adopting TNMM at entity level is disputed by the TPO, the Assessee should be permitted to file TP study for each of the international transaction separately. The assessee is also directed to file the TP study, if not already filed which is in accordance with the provisions of the Act and substantiate that the price paid by it to its AE is at arm's length within the methods laid down in the Act and the judicial decisions rendered on this issue. The TPO will consider the same in accordance with the law, after affording an opportunity of being heard."*

7. In the aforesaid case, the Hon'ble ITAT took into consideration the case of UE Development India Pvt. Ltd. and held that it cannot be said that consequent to acceptance of return of income filed by the Associated Enterprises, the price paid by the assessee in the international transaction has to be accepted as an arm's length price. The ITAT further held that ALP has to be determined in the hands of the assessee irrespective of the acceptance of the ALP in the hands of the AEs of the assessee. In the instant facts we observe that at any stage of the proceedings, the assessee has given no justification for charging the rates at which the services were rendered to the AEs as compared to similar services provided to third parties. Further, the assessee has only emphasized on the argument of based erosion before the Transfer Pricing Officer and DRP, which argument was not pressed before us in view of the decision of Instrumentarium Corporation Ltd. (supra) rendered by ITAT Kolkata Special Bench. Further, we observe that for two years, no transfer pricing adjustment was made in the case of AEs for the simple reason that no transfer pricing reference was made by the Assessing Officer in the first instance. Further, we observe that the argument of "likes have not been compared with like" and the argument of similarity of agreement with BLNG were never taken before the Tax Authorities at any stage of the hearing. Accordingly, looking into the facts of the instant case, and respectfully following the decision rendered by ITAT Bangalore in the case of Filtrex Technologies Pvt. Ltd. (supra), the matter is being restored to the file of Ld. AO for determination of ALP in respect of the aforesaid transactions. The assessee is also directed to file the relevant supporting documents to substantiate that the price paid by the AEs to the assessee is at arm's length within the methods laid down in the Act and the judicial precedents rendered

on this issue. The Ld. TPO is directed to consider the same in accordance with the law, after affording an opportunity of being heard to the assessee.

8. In the result, Ground No. 1 (A.Y. 2011-12) Ground No. 1 (A.Y. 2012-13) and Ground No. 1(2013-14) are allowed for statistical purposes.

Ground No.2 (A.Y. 2011-12) (2012-13) and (2013-14) Software Royalty:-

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

"2. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the revenues of Rs 94,57,189 received by the Appellant from Bharat Petroleum Corporation Limited (BPCL), Blural Oman Refineries Limited (BORL) and HPCL Mittal Energy Limited (HPCI. Mittal') for grant of software license as royalty under section 9(1)(vi) of the Act and under Article 12 of India Netherlands tas treaty (Tas Treaty')."

"2. ***Income from software treated as royalty in nature- Rs. 35,85,667***

The learned AO/ TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/TPO on the facts and in law in treating the revenues of Rs. 35,85,667 received by the Appellant from Bharat Petroleum Corporation Limited (BPCL) and Bharat Oman Refineries Limited ('BORL') for grant of software license as royalty under section 9(1)(vi) of the Act and under Article 12 of DTAA."

"2. ***Income from software treated as royalty in nature- Rs. 26,80,583***

The learned AO/ TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/TPO on the facts and in law in treating the revenues of Rs. 26,80,353 received by the Appellant from Bharat Petroleum Corporation Limited (BPCL) and Bharat Oman Refineries Limited ('BORL') for grant of software license as royalty under section 9(1)(vi) of the Act and under Article 12 of DTAA."

10. We shall first discuss the facts for A.Y. 2011-12 and since the facts in the issues for consideration for A.Y. 2012-13 and 2013-14 are similar our

observations for A.Y. 2011-12 would apply to A.Y. 2012-13 and 2013-14 as well.

11. The brief facts in relation to this ground of appeal are that the assessee earned revenues from provision of off the shelf standard software to certain Indian entities. The Assessing Officer taxed the aforesaid amounts as software royalty in the hands of the assessee under Section 9(1)(vi) of the Act read with the applicable Treaty law. While holding receipts as royalty payment, the DRP primarily relied upon the decision of Karnataka High Court in the case of CIT vs. Samsung Electronics Co. Ltd. 16 taxmann.com 141 to hold that the payments received by the assessee company from Indian customers give rise to royalty income in terms of Article 12 of India-Netherlands DTAA r.w.s. 9(1)(vi) of the Act.

12. Before us at the outset, the Ld. Counsel for the assessee submitted that now the taxability of software royalty has been decided in favour of the assessee by the decision rendered by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. 125 taxmann.com 42 (SC) and also in the Supreme Court decision in the case of Infosys Technologies Ltd. 142 taxmann.com 224 (SC). We observe that the Hon'ble Supreme Court in the aforesaid decisions have held that amount payments by resident Indian and user / distributors to non-resident computer software manufacturers / suppliers as consideration for resale / use of computer software through distribution agreement is not payment for use of copy right in computer software and thus, same does not amount to income taxable in India. Accordingly, in view of the aforesaid decision, wherein the Hon'ble Supreme Court has held that payments made the assessee to non-resident related to use

of computer software was not royalty, this issue is decided in favour of the assessee.

13. In the result, Ground No. 2 of the assessee's appeal is allowed.

Ground No. 3 (A.Y. 2011-12) and Ground No. 4 (A.Y. 2013-14):- DRP erred in treating revenues of Rs. 51,68,025/- received by the assessee from Hazira LNG Port Ltd., Hazira Port Pvt. Ltd. and Hindustan Petroleum Corporation Ltd. as fees for technical services under Section 9(1)(vii) of the Act and under Article 12 of the Tax Treaty.

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

"3. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the revenues of Rs. 51,68,025 received by the Appellant from Hazim LNG Port Limited, Hazira Port Private Limited and Hindustan Petroleum Corporation Limited as Fee for technical services under section 9(1)(vii) of the Act and under Article 12 of Tax Treaty."

"4. ***Income from HLPL treated as fees for technical services – Rs. 2,84,20,716***

The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the revenue of Rs. 2,84,20,716 received by the Appellant from HLPL as Fees for technical services under section 9(1)(vii) of the Act and under Article 12 of DTAA."

16. The brief facts in relation to these grounds of appeal are that the assessee provided Computational Fluid Dynamics (in short "CFD") modelling of the temperature effects on the Hazira Sea Water outflow into the port and also provided marine biological advice on its implications to HLPL. Further, the assessee provided desktop quality review of Shell Reliability Centre Maintenance done by HLPL's site team. Further, the assessee performed a

Integrity Review of Ageing Switchgear (in short "IRAS") for HPCL for providing the above services, and the assessee received a total consideration of Rs. 51,68,025/-. The Assessing Officer held that the aforesaid receipts qualify as fee for technical services under Section 9(1)(vii) of the Act read with Article 12 of the Treaty.

17. Before us, the primary argument taken by the Ld. Counsel for the assessee that under the applicable India-Netherlands treaty, the taxability of aforesaid services are governed by the "make available" clause in respect of payment for "Fees for Technical Services (FTS)", in terms of which payments for services qualify as FTS under the Income Tax Act read with the India-Netherlands Treaty only if the assessee "makes available" technology to the recipient of services. It was submitted that in the instant facts while holding that aforesaid payments as FTS, nothing has been brought on record by the Department to demonstrate that the condition of "make available" as provided under the Treaty has been satisfied in the instant set of facts, so as to make the payment taxable in India as FTS.

18. In response, Ld. D.R. placed reliance on the observations made by DRP in its order.

19. We have heard the rival contention and perused the material on record. On going through the description of services, perusal of the relevant agreements and the order passed by the DRP, we are of the considered view that looking into the nature of services there is nothing to suggest that the condition of "make available" as provided in the India-Netherlands Tax Treaty have been satisfied. Further, looking into the nature of services, there is nothing to suggest that there was any agreement for transfer of any technical

plan or design to the recipient of services under the aforesaid agreement as well. Further, looking into the nature of services, wherein the analysis done by the assessee is submitted in a form of report to the recipient of services, there seems to be nothing to suggest that the technology for providing the aforesaid services have been imparted to the recipient of services in a way that the recipient of services would not be required the services of the assessee further in the future and has been enabled by the assessee to perform such services on its own without any recourse or assistance of the assessee in the future. More specifically, with respect to Work Order No. 131965, we observe that the work performance on the analysis was done only with a view to advice HPCL to decide whether switchgear was obsolete and hence, required to be refurbished or replaced. Therefore, looking into the instant facts we are of the considered view that the condition of "make available" has not been satisfied in the instant set of facts and hence, the services do not qualify as FTS. In this connection it would be useful to reproduce the relevant extracts of the decision of Karnataka High Court in the case of CIT vs. De Beers Indian Minerals Pvt. Ltd. 21 taxmann.com 214 (Kar.):-

> *"Therefore, the assessee not being possessed with the technical know how to conduct this prospecting operations and reconnaissance operations, engaged the services of Fugro which is expert in the field. By way of technical services Fugro delivered to the assessee the data and information after such operations. The said data is certainly made use of by the assessee. Not only the said data and information was furnished in the digital form, it is also provided to the assessee in the form of maps and photographs. These maps and photographs which were made available to the assessee cannot be construed as technology made available. Fugro has not devised any technical plan or technical design. Therefore, the question of Fugro transferring any technical plan or technical design did not arise in the facts of these cases. The maps which are delivered are not of kind of any developmental activity. As such, earlier the information which is furnished to the assessee by way of technical services in the digital form is also given in the form of maps. Therefore, the case on hand do not fall in the second part of the aforesaid clause dealing with development and transfer of plans and designs."*

20. Further, we are observe that the Department has not been able to demonstrate that in the instant facts, any technology was "made available" to the recipient of services in a manner that the recipients had been imparted with the requisite knowledge in such a manner that they were enabled to perform the aforesaid services in the future, without any recourse to the services of the assessee. Further, we are also unable to agree with the observations made by DRP that the intention of imparting advice per se involves the sharing of experience, knowledge or skills of the trainer so that the person receiving the services can use the experience, knowledge or skills shared by the services provider for his own purposes in the future. In our considered view, there is nothing in the hand of the Tax Treaty or the judicial precedents on the subject to come to any such conclusion. In the result, we are of the considered view that the aforesaid services do not qualify as "fee for technical services" under Section 9(1)(vii) of the Act read with Article 12 of the India-Netherlands Tax Treaty.

21. In the result, Ground No. 3 of the A.Y. 2011-12 and Ground No. 4 of A.Y. 2013-14 of the assessee's appeal are allowed.

Ground No. 4 (2011-12) (2012-13) and Ground No. 5 (2013-14):-
Taxability of revenues received from Larsen & Toubro (L&T):-

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

"4. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the revenues of Rs. 8,18,82,400 received from Larsen & Toubro Limited ('L&T') as taxable under section 9(1)(vii) of the Act."

"4. ***Income from Larsen & Toubro Limited ('L&T') treated as fees for technical services***

The learned AO/TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/TPO on the facts and in law in treating the revenue of Rs. 7,41,84,000 received from L&T as taxable under section 9(1)(vii) of the Act."

"5. ***Income from Larsen & Toubro Limited ('L&T') treated as fees for technical services – Rs. 2,44,01,667***

The learned AO/TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the revenue of Rs. 2,44,01,667 received from L&T as taxable under section 9(1)(vii) of the Act."

23. The brief facts in relation to these grounds of appeal are that the assessee had entered into the several contracts with Larsen & Toubro (in short "L&T") in connection with L&T's various projects outside India. The services broadly included engineering services related to manufacturing of coal gasification equipment by L&T. The aforesaid services were provided in countries outside of India viz. Vietnam and China etc. and were in relation to overseas EPC projects undertaken by L&T. Before the Assessing Officer the assessee contended that the aforesaid receipts are not taxable in India because of exclusion clause under Section 9(1)(vii)(b) of the Act. The assessee's contention was that the services were provided by the assessee outside of India and hence the aforesaid receipts are not taxable in India. However, the Assessing Officer did not agree with the contention of the assessee for the reason that manufacturing of gas fire equipment has been done in India by L&T and the manufactured equipment has been supplied to the non-resident third party. The Assessing Officer further held that mere location of the person placing an order being outside India does not shift the source of income and economic activity outside India. The Assessing Officer held that the economic activity of manufacturing to which the technical services pertained were carried out entirely in India. In appeal, DRP did not agree with the contention

of the assessee and held that the assessee is not carrying out any business outside India and the business is being carried out from India, for which the FTS has been paid.

24. In appeal before us, the Counsel for the assessee submitted that the payment for services was received in bank accounts outside India. The services were rendered outside to L&T for its overseas customers. The services are connected with the EPC Contract of L&T for erection and commissioning of coal gasification plant outside India namely in China and Vietnam. The Counsel for the assessee relied on the decision rendered by the Jurisdictional High Court in the case of Motif India Infotech Pvt. Ltd. in ITA No. 1177 of 2018 wherein the Gujarat High Court held that the source of income is outside India since assessee's customer work based outside India. Further, the Counsel for the assessee also placed reliance on the decision of Bangalore ITAT in the case of Titan Industries Ltd. 11 SOT 206 wherein it was held that when the customers of the company are located outside India, then the source is outside India.

25. In response, Ld. D.R. placed reliance on the observations made by the DRP and AO.

26. We have heard the rival contentions and perused the material on record. On going through the facts of the instant case, we observe that the assessee entered into contract for provision of engineering services related to coal gasification equipment to be installed at the plant site in Vietnam and China. We observe that the services were to be rendered primarily from the office of the assessee located at Germany. Further, from the terms of the services it is seen that the services on relation to installation of equipment at Vietnam and

China. Further, it has been also submitted before us that payment for the aforesaid services were received outside of India. It would be useful to reproduce the relevant extracts of the ruling rendered by the Gujarat High Court in the case of Motif India Infotech Pvt. Ltd. (supra) which held that as per clause (b) of Section 9(1)(vii) the income by way of fees for technical services payable by a person who is a resident of India would be deemed to accrue or arise in India. However, this clause contains two exceptions namely where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India, or it is for the purpose of making or earning any income from any source outside India. In other words, therefore, if the assessment of an assessee falls in either of these two clauses, the income by way of fees or technical services paid by the assessee would still not be covered within the deeming clause of Section 9(1)(vii) of the Act.

27. In the present case, the Commissioner (Appeals) and the Tribunal have accepted assessee's factual assertion that the payments were for technical services provided by a non-resident, for providing services to be utilized for serving the assessee's foreign clients. Thus, the fees for technical services was paid by the assessee for the purpose of making or earning any income from any source outside India. Clearly, the source of income namely the assessee's customers were the foreign based clients of L&T and the services were also to be performed in locations outside of India. In this case, from the facts placed on record in our view, L&T has made payment for utilization of the services provided by the assessee in business carried out by L&T outside of India. The services which were provided by the assessee were utilized by L&T in respect of its plant set up in Vietnam and China for its foreign clients. Accordingly,

respectfully following the decision of Motif India Infotech Pvt. Ltd. (supra), this ground of the assessee's appeal is allowed.

28. In the result, assessee's appeal with respect to the aforesaid ground is allowed.

Ground No. 5 (A.Y. 2011-12):- Levy of interest under Section 234A, 234B, 234C and 234D of the Act.

29. Before us, the Counsel for the assessee submitted that for years prior to F.Y. 2012-13 as per the provisions of Section 209(1)(d) of the Act, the amount of income tax which is "deductable or collectable at source" can be reduced by the assessee while calculating advance taxes. Assessee's submissions before us is that for A.Y. 2011-12 and 2012-13, the wordings used in Section 209(1)(d) of the Act are "deductable at source" and not "deducted at source" and hence the assessee is not liable to pay interest under Section 234B of the Act for A.Y. 2011-12 and 2012-13.

30. We observe that the Hon'ble Supreme Court in the case of **Mitsubishi Corporation 130 taxmann.com 276 (SC)** has held that Proviso to Section 209(1) issued by Finance Act, 2012 providing that if a non-resident assessee received any amount including tax deductible at source, assessee could not reduce such tax while computing its advance tax liability was applicable prospectively after Assessment Year 2012-13. The Hon'ble SC while passing the order made the following observations:

> *"The dispute relating to the interpretation of the words 'would be deductible or collectible' in section 209(1)(d) can be resolved by referring to the proviso to section 209(1)(d), which was inserted by the Finance Act, 2012. The proviso makes it clear that the assessee cannot reduce the amounts of income-tax paid to it by the payer without deduction, while computing*

liability for advance tax. The memorandum explaining the provisions of the Finance Bill, 2012 provides necessary context that the amendment was warranted due to the judgments of courts, interpreting section 209(1)(d) to permit computation of advance tax by the assessee by reducing the amount of income-tax which is deductible or collectible during the financial year. If the construction of the words 'would be deductible or collectible' as placed by the revenue is accepted, the amendment made to section 209(1)(d) by insertion of the proviso would be meaningless and an exercise in futility. To give the intended effect to the proviso, section 209(1)(d) has to be understood to entitle the assessee, for all assessments prior to the financial year 2012-13, to reduce the amount of income-tax which would be deductible or collectible, in computation of its advance tax liability, notwithstanding the fact that the assessee has received the full amount without deduction."

31. Respectfully following the decision of Hon'ble Supreme Court in the case of Mitsubishi Corporation (supra), we are of the considered view that the assessee is not liable to pay interest under Section 234B of the Act for A.Y. 2011-12 and A.Y. 2012-13.

32. In the result, Ground No. 5 of the assessee's appeal is allowed.

ITA No. 747/Ahd/2017 Assessment Year (2012-13):-

Ground No. 1:- (Transfer Pricing Adjustment of Rs. 57,57,77,763/-)

33. In light of observations made for A.Y. 2011-12, the matter is being restored to the file of the Ld. TPO for carrying out the necessary verification / analysis and pass order in accordance with law.

34. In the result, Ground No. 1 of the assessee's appeal is allowed for statistical purposes.

Ground No. 2:- (Income from software treated as royalty in nature Rs.35,85,667/-)

35. In view of our observations with respect to Ground No. 2 for A.Y. 2011-12, Ground No. 2 of the assessee's appeal for A.Y. 2012-13 is allowed.

Ground No. 3:- (Rendering for Global P&T Functional Services treated as fees for technical Services Rs. 15,58,83,228/-)

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

> *"3. **Income from rendering of Global P&T Functional Services treated as fees for technical services - Rs. 15,58,83,228***
>
> *3.1. The learned AO/TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/IPO on the facts and in law in treating the revenues of Rs 15,58,83,228 received by the Appellant from Shell India Markets Private Limited (SIMPL) for Global P&T Functional Services as Fees for technical services under section 9(1)(vii) of the Act and under Article 12 of DTAA.*
>
> *3.2. Without prejudice to above mentioned Ground No. 3.1 above, The learned AO/TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/FPO on the facts and in law in disregarding the fact that amount received for the above mentioned services is mere reimbursement of expenses incurred by the Appellant without any mark up and hence is in the nature of reimbursement of expenditure."*

37. During the year under consideration, the assessee entered into an agreement with it's subsidiary Shell India Pvt. Ltd. to provide Global P&T Functional Services. Broadly, the services included proceeding strategy support services, human resources services, legal services, providing advice relating to environmental healthy and safety matters and provision of IT services etc. The Assessing Officer treated the above services as "Fee for Technical Services" under Section 9(1)(vii) of the Act read with the Tax Treaty. The aforesaid additions were also confirmed by DRP.

38. The assessee is in appeal before us against the aforesaid order passed by DRP holding that the aforesaid services qualify as "Fee for Technical Services" and are hence taxable in India. Before us, the Counsel for the assessee submitted that in view of the "make available clause" under the India-Netherlands Tax Treaty, payments for such services do not quality as FTS since the assessee has not made available any technical knowledge, experience, skill, know-how or process to Shell India and hence the same are not taxable as FTS under Article 12 of the Tax Treaty. Further, it was submitted that the above services are provided by the assessee on recurring basis from year to year and if the technology had been "made available" to its subsidiary Shell India, there would have been no need for availing the aforesaid services on a recurring basis, from year to year. Accordingly, it was submitted that the aforesaid services do not qualify as FTS under the India-Netherlands Tax Treaty.

39. In response, the Ld. D.R. placed reliance on the observation made by the Assessing Officer in his order.

40. We have heard the rival contention and perused the material on record. On going through the nature of services, we are of the considered view that the aforesaid services do not qualify as fee for technical services in view of the specific exclusion provided under the India-Netherlands Tax Treaty excluding those services from the ambit of technical services, which do not "make available" technology to the recipient of such services. On perusal of the nature of services, in our considered view, no such technology has been made available to Shell India during the course of rendering of such services. From the facts placed before us it is evident that the Department has not been able to substantiate that the services were rendered in a manner so as to make the

technology available to the recipient of services in a manner that in the future the recipient is able to perform the aforesaid services, without further recourse to the services of the assessee. In the recent case of **Star Rays 153 taxmann.com 226 (Gujarat)** the Gujarat High Court held that where assessee company availed diamond testing services for certification of diamond from U.S. company and claimed that payment was not tax deductible at source, assessee's case was protected under India-USA DTAA as mere rendering of services could not be roped into FTS since assessee company utilising services was unable to make use of technical knowledge etc. of AE. While passing the order, the Gujarat High Court made the following observations:-

> *"6. Apparently reading the orders under challenge would indicate that based on factual appreciation especially the condition in the customer service agreement, the bank invoice and the Bank remittance advice a finding of fact has been arrived at that the assessee's case was protected under the India-USA DTAA and that mere rendering of services cannot be roped into FTS unless the person utilising the services is able to make use of the technical knowledge etc. Simple rendering of services as in the present case is not sufficient to qualify as FTS."*

41. Accordingly, in view of the facts of the assessee's case and the judicial precedents on the subject which have consistently taken a view that unless the services are rendered in the manner such that the technology is "made available" transferred to the assessee in such a manner that he is enabled to perform such services by itself in the future and does not require further services from the service provided, it is only then that such services would qualify as fee for technical services under the applicable Tax Treaty which specifically contains the "make available" clause. In the instant facts, we observe that nature of services are not which make available the technology to the recipient of services i.e. Shell India and further, the Department has also

not placed on record any evidence to support that such services have made available the technology to the recipient of such services.

42. Accordingly, in view of the facts noted above and the judicial precedent of the subject, Ground No. 3 of the assessee's appeal is allowed.

Ground No.4:- Income from L&T treated as FTS (Rs.7,41,84,000/-)

43. In view of our observation in Ground No. 4 for A.Y. 2011-12, Ground No. 4 of the assessee's appeal is allowed.

Ground No. 5 (A.Y. 2011-12):- Levy of interest under Section 234A, 234B, 234C and 234D of the Act.

44. In view of our observation in Ground No. 5 for A.Y. 2011-12, Ground No. 5 of the assessee's appeal is allowed.

ITA No. 2935/Ahd/2017(A.Y. 2013-14)

Ground No. 1:- (Transfer Pricing Adjustment of Rs. 50,68,79,713/-)

45. In light of observations made for A.Y. 2011-12, the matter is being restored to the file of the Ld. TPO for carrying out the necessary verification / analysis and pass order in accordance with law.

46. In the result, Ground No. 1 of the assessee's appeal is allowed for statistical purposes.

Ground No. 2:-Income from software treated as royalty (Rs.26,80,583/-)

47. In view of our observation in Ground No. 2 for A.Y. 2011-12, Ground No. 2 of the assessee's appeal is allowed.

Ground No. 3:-Income from rendering Global P&T Functional Services treated as fees for technical services (Rs.21,62,65,463/-)

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

> *"3. **Income from rendering of Global P&T Functional Services treated as fees for technical services - Rs. 21,62,65,463***
>
> *3.1. The learned AO/TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/IPO on the facts and in law in treating the revenues of Rs 21,62,65,463 received by the Appellant from Shell India Markets Private Limited (SIMPL) for Global P&T Functional Services as Fees for technical services under section 9(1)(vii) of the Act and under Article 12 of DTAA.*
>
> *3.2. Without prejudice to above mentioned Ground No. 3.1 above, The learned AO/TPO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO/FPO on the facts and in law in disregarding the fact that amount received for the above mentioned services is mere reimbursement of expenses incurred by the Appellant without any mark up and hence is in the nature of reimbursement of expenditure."*

49. In view of our observation in Ground No. 3 for A.Y. 2012-13, Ground No. 3 of the assessee's appeal is allowed.

Ground No. 4:- Income from HLPL treated as fees for technical services (Rs.2,84,20,716/-)

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

> *"4. **Income from HLPL treated as fees for technical services – Rs. 2,84,20,716***

The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the revenue of Rs. 2,84,20,716 received by the Appellant from HLPL as Fees for technical services under section 9(1)(vii) of the Act and under Article 12 of DTAA."

51. In view of our observation made relating to Ground No. 3 for A.Y. 2011-12 and on review of terms of contract is before us, we observe that under the said contract the assessee is required to review the selected and identify technical documents prepared by third party contractors and HLPL. On going through the terms of the contract we observe that the contract primarily involves review in terms of contract and no technology has been made available to the recipient of services under the scope of the agreement. As observed earlier, under Article 12 of the India-Netherlands Treaty, in order for any services to qualify as "fee for technical services", it is a pre-requisite that technology must be "made available" to the recipient of services in a manner that in the future he is in a position to its perform such services by itself and does not require the services of the assessee. However, from the terms of the contract, in our considered view, the agreement does not envisage "making available" the knowledge to the service recipient in such a manner that he is able to perform such services in the future ,without recourse to the assessee.

52. Accordingly, in light of the analysis made with respect to Ground No. 3 for A.Y. 2011-12, the meaning and scope of the term "make available" as pronounced by various judicial precedents on subject and on the facts of the instant case, we are of the considered view that such services do not "make available" technology to HLPL and hence the aforesaid payment does not qualify as FTS under Article 12 of the India-Netherlands Tax Treaty.

53. In the result, Ground No. 4 of the assessee's appeal is allowed for A.Y. 2013-14.

Ground No. 5:- Income from L&T treated as FTS (Rs.2,44,01,667/-)

54. In view of our observation in Ground No. 4 for A.Y. 2011-12, Ground No. 5 of the assessee's appeal is allowed.

Ground No. 6:- Levy of interest under Section 234A, 234B, 234C and 234D of the Act.

55. In view of our observation in Ground No. 5 for A.Y. 2011-12, Ground No. 6 of the assessee's appeal is allowed.

56. In the combined result, appeals of the assessee are allowed for statistical purposes.

This Order pronounced in Open Court on	**11/10/2023**

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 11/10/2023
TANMAY, Sr. PS ***TRUE COPY***

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad