**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCHES: 'I-2', NEW DELHI**

**BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER**
**AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 1483/Del/2016**
**AY: 2011-12**

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| Viavi Solutions India P. Ltd.<br>(Formerly known as JDSU India P.Ltd.)<br>Infotech Centre, 3rd Floor<br>14/2 Milestone, Delhi Gurgaon Road<br>Gurgaon 122 016<br><br>PAN: AACW0654M | **vs**. | DCIT, Circle 13(1)<br>New Delhi |

**ITA No. 1478/Del/2016**
**AY: 2011-12**

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|---|---|---|
| DCIT, Circle 13(2)<br>New Delhi | **vs**. | JDSU India P.Ltd.<br>(Presently known as Viavi Solutions India P. Ltd.)<br>New Delhi |

**ITA No. 231/Del/2017**
**AY: 2012-13**

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|---|---|---|
| Viavi Solutions India P. Ltd.<br>(Formerly known as JDSU India P.Ltd.)<br>Infotech Centre, 3rd Floor<br>14/2 Milestone, Delhi Gurgaon Road<br>Gurgaon 122 016<br><br>PAN: AAACW0654M | **vs**. | ACIT, Circle 26(1)<br>New Delhi |

**(Appellant)** **(Respondent)**

**Assessee by** : Sh. Nageswar Rao, Adv.
Sh. Sandeep Karhail, Adv. &
Sh. Shatani K Chakraborty
**Department by** : Sh. H.K.Chaudhary, CIT-DR

**Date of Hearing** : 26.04.2018

**Date of Pronouncement**: 11.07.2018

**ORDER**

**PER BEENA A PILLAI, JUDICIAL MEMBER**

The present appeals have been filed by assessee as well as revenue against order dated 30/01/16 passed by DCIT, Circle 13 (1), New Delhi under section 143 (3) read with 144C (1) of the Income Tax Act, 1961 ('the Act' for short) for Assessment Year 2011-12 and assessee's appeal against order dated 29/11/16 passed by ACIT, Circle 26 (1), New Delhi, under section 143 (3) read with 144C (1) of the Act for Assessment Year 2012-13 on the following grounds of appeal:

***Assessment year 2011-12***

***ITA No. 1483/Del/2016***

*On the facts and circumstances of the case and in law, the learned Deputy Commissioner of Income-tax, Circle-13(1), New Delhi ("AO") has erred in passing the assessment order under Section 143(3) of the Income-tax Act, 1961 ("the Act") after considering the adjustments proposed by the Deputy Commissioner of Income-tax, Transfer Pricing Officer 2(3)(2) ("TPO") in his order passed under Section 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ("DRP").*

*That on the facts and circumstances of the case and in law,*

*General Grounds:*

*1. The learned AO has erred in assessing the income of the Appellant at INR 17,740,270/- as against the returned loss of INR 17,161,261/-.*

*2. The learned TPO / DRP erred in making an adjustment of INR 29,255,299 in respect of distribution segment under section 92CA(3) of the Act.*

*Transfer Pricing Grounds:*

*Rejection of economic analysis of the Appellant*

*3. The learned AO / TPO / DRP have erred in making an adjustment under Section 92CA(3) of the Act without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of Section 92C(3) of the Act.*

*4. The learned AO / TPO / DRP have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("the Rules").*

*Segregation of closely linked transactions*

*5. The learned AO / TPO / DRP have erred in rejecting the combined transaction approach, wherein closely linked transactions were benchmarked together by the Appellant and instead adopting an approach of segregating closely linked transactions for the purpose of determination of the arm's length price ("ALP") of the impugned transaction.*

*6. The learned AO / TPO / DRP have erred in taking inconsistent benchmarking approach for different years despite similar facts prevailing in those years.*

*7. The learned AO / TPO / DRP have erred by arbitrarily segregating the audited financial statements of the Appellant into distribution segment and commission segment in the proportion of their sales without considering the functions, assets and risk profile ("FAR") of the Appellant for each of the segments.*

*8. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO / DRP have erred in segregating the audited financial statements of the Appellant into distribution segment and commission segment by using incorrect allocation ratio.*

*9. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO / DRP have erred in not giving set off of excess profits earned in commission segment.*

*10. The learned AO / TPO / DRP have erred in not restricting the adjustment proportionate to the value of international transactions.*

*Computation of operating margin*

*11. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO / TPO / DRP have erred in computing operating margin of the Appellant by excluding certain other operating income and including certain extra-ordinary expenses while computing the operating margin of the Appellant.*

*12. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO / TPO have erred in computing operating margin of the appellant by excluding certain other operating income and including certain extra-ordinary expenses while computing the operating margin of the appellant.*

*13. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO / TPO have erred in excluding the recharge income from operating margin computation without excluding the corresponding cost which is directly identifiable.*

*14. The learned AO / TPO / DRP have erred in:*

*a. Using single year data instead of multiple year data*

*b. Determining the arm's length margins I prices using data pertaining only to FY 2010-11 which was not available to the Appellant at the time of complying with the Transfer Pricing ("TP") documentation requirements.*

*15. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO / TPO / DRP have erred in not using Resale Price Method as the most appropriate method for computation of arm's length price for the impugned transaction.*

*Rejection/Selection of comparable companies*

*16. The learned AO / TPO/ DRP have erred by rejecting a comparable company (i.e. Ashco Niulab Industries Limited) identified by the appellant for having different accounting year.*

*17. The learned AO / TPO/ DRP have erred in taking an inconsistent approach by rejecting comparable company (i.e. Ashco Niulab Industries Limited) despite of the same being accepted in previous assessment years.*

*Corporate Tax Grounds: Disallowance of provision made for service tax on rent expenses*

*18. The learned AO /DRP have erred in disallowing the provision made by the Appellant on account of service tax amounting to INR 436,938 holding it as unascertained liability.*

*19. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /DRP have erred in taking cognizance of the fact that out of provision of service tax on rent amounting to INR 436,938, Appellant has already made payment of INR 321,630 in the subsequent year and hence cannot be considered as unascertained liability.*

*20. Without prejudice to above, in the facts and circumstances of the case and in law, the learned AO / DRP have erred in adopting an inconsistent approach by disallowing the entire provision made for service tax despite that partial amount has been allowed by learned AO / DRP in previous year for the actual payment.*

*Disallowance of payment of advance of service tax considering it as prior period expense:*

*21. The learned AO /DRP have erred in disallowing the service tax amounting to INR 5,172,191 by considering it as a prior period expense.*

*Denial of credit of TDS*

*22. The learned AO /DRP have erred in denying the TDS credit of INR 712,544 to the Appellant.*

*Difference in TDS as per Profit & Loss Account and Form 26AS*

*23. The learned AO /DRP have erred in adding INR 37,101 to the income of the Appellant on account of Difference in TDS as per Profit & Loss Account and Form 26AS.*

*Levy of Interest*

*24. The learned AO has erred in charging interest under Sections 234A and 234B of the Act.*

*Initiation of Penalty proceedings*

*25. The learned AO has erred in initiating penalty proceedings under Section 271(1 )(c) of the Act against the Appellant for concealing the income through submission of inaccurate particulars in the tax return.*

*26. The learned AO has erred in initiating penalty proceedings under Section 271B of the Act against the Appellant for failure to get the accounts audited within stipulated time period.*

*Each of the ground is referred to separately, which may kindly be considered independent of each other and 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 for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.*

## ***ITA No. 1478/Del/2016***

*"1.That the directions of the Hon'ble DRP are erroneous and contrary to facts and law.*

*2. That whether the Hon'ble DRP has erred in law and in facts and circumstances of the case in directing the TPO to give working capital adjustment in the case of assessee.*

*The Appellant craves leave to add, alter or amend any grounds of appeal raised above r at the time of hearing."*

## ***Assessment year 2012-13***

## ***ITA No. 231/Del/2017***

*On the facts and circumstances of the case and in law, the learned Assistant Commissioner of Income-tax, Circle-26(1), New Delhi ("AO") has erred in passing the assessment order under Section 143(3) of the Income-tax Act, 1961 ("the Act") after considering the adjustments proposed by the Deputy Commissioner of Income-tax, Transfer Pricing Officer 2(3)(2) ("TPO") in his order passed under Section 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ("DRP").*

*That on the facts and circumstances of the case and in law,*

*General Grounds:*

*1. The learned AO has erred in assessing the income of the Appellant at INR 4,40,51,560/- as against the returned income of INR 64,69,150/-.*

*2. The learned TPO / DRP erred in making an adjustment of INR 3,63,76,118 in respect of distribution segment under section 92CA(3) of the Act.*

*Transfer Pricing Grounds:*

*Rejection of economic analysis of the Appellant*

*3. The learned AO / TPO / DRP have erred in making an adjustment under Section 92CA(3) of the Act without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of Section 92C(3) of the Act.*

*4. The learned AO / TPO / DRP have erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("the Rules") and modifying the same for determination of arm's length price ("ALP") of the impugned transaction and holding that the same is not at arm's length..*

*Segregation of closely linked transactions*

*5. The learned AO / TPO / DRP have erred in rejecting the combined transaction approach, wherein closely linked transactions were benchmarked together by the Appellant and instead adopting an approach of segregating closely linked transactions for the purpose of determination of the arm's length price ("ALP") of the impugned transaction.*

*6. The learned AO / TPO / DRP have erred in taking inconsistent benchmarking approach for different years despite similar facts prevailing in those years.*

*7. The learned AO / TPO / DRP have erred by arbitrarily segregating the audited financial statements of the Appellant into distribution segment and commission segment in the*

*proportion of their sales without considering the functions, assets and risk profile ("FAR") of the Appellant for each of the segments.*

*8. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO / DRP have erred in segregating the audited financial statements of the Appellant into distribution segment and commission segment by using incorrect allocation ratio.*

*9. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO / DRP have erred in not giving set off of excess profits earned in commission segment.*

*10. The learned AO /TPO / DRP have erred in not restricting the adjustment proportionate to the value of international transactions.*

*Computation of operating margin*

*11. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO / DRP have erred in computing operating margin of the Appellant by excluding certain other operating income and including certain extra-ordinary expenses while computing the operating margin of the Appellant.*

*12. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO have erred in computing working capital adjusted operating margin of the comparable companies.*

*13. The learned AO / TPO / DRP have erred in:*

*a. Using single year data instead of multiple year data*

*b. Determining the arm's length margins I prices using data pertaining only to FY 2011-12 which was not available to the Appellant at the time of complying with the Transfer Pricing ("TP") documentation requirements.*

*14. Without prejudice to above, in the facts and circumstances of case and in law, the learned AO /TPO / DRP have erred in not using Resale Price Method as the most appropriate method for computation of arm's length price for the impugned transaction.*

*Rejection/Selection of comparable companies*

*15. The learned AO / TPO/ DRP have erred by rejecting a comparable company (i.e. Ashco Niulab Industries Limited) identified by the appellant for having different accounting year.*

*Levy of Interest*

*16. The learned AO has erred in charging interest under Sections 234A and 234B of the Act.*

*Initiation of Penalty proceedings*

*17. The learned AO has erred in initiating penalty proceedings under Section 271(1)(c) of the Act against the Appellant for concealing the income through submission of inaccurate particulars in the tax return.*

*Each of the ground is referred to separately, which may kindly be considered independent of each other and 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 for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.*

**2.** Brief facts of the case are as under:

***Assessment year 2011-12***

Assessee was formerly known as JDSU India Pvt. Ltd. and presently known as Viavi Solutions India Pvt. Ltd. Assessee is engaged in import of high-technology, precision testing equipment from group companies for resale to various Government and Private Sector Companies in the Telecom Sector. Assessee provides indenting services to facilitate sale of its overseas group companies products in India, to those customers who desire to import such products directly from overseas companies on commission basis. It also provides services like installation, post installation support, maintenance services and warranty, post-warranty services for products that are sold in India by them, or by their group companies directly in India.

**2.1.** For the year under consideration assessee filed its return of income on 30/11/11, declaring total loss of Rs.1,09,86,398/- which were subsequently revised to a loss of Rs.1,71,61, 261/-. As there was international transaction entered into by assessee, a reference was made to the Ld.TPO for computing arm's length price of international transactions.

**2.2.** During assessment proceedings, Ld.TPO observed that assessee undertook following transactions, with its Associate Enterprise (A.E.) during relevant financial year:

| S.No. | Head | Value – Rs. |
|---|---|---|
| 1. | Purchase of traded goods/spares | 13,55,93,316/- |
| 2. | Purchase of demonstration equipment | 1,19,93,269 |
| 3. | Receipt of commission income | 3,79,24,796 |
| 4. | Cost recharges | 21,22,327 |
| 5. | Provision of MSS | 2,46,92,478 |
| | Total: | 19,96,02,836 |

Assessee used TNMM as most appropriate method, with PLI as OP/sales. The assessee computed its margin at 2% as against 3.95% of five comparables, selected by using multiple year data. Based on this, assessee submitted that the international transaction entered into with its AE was at arm's length price.

Ld.TPO observed that assessee had aggregated transaction of sale and purchase and service income and commission income. Ld.TPO rejected the aggregation of transactions of trading with AE and that of commission income from AE and treated it to be different transaction and benchmarked separately. The Ld.AO thus proposed to make an adjustment of Rs. 6,94,89,129/-.

Another change that was made by Ld.TPO was in rejecting most appropriate method adopted by assessee. Ld.TPO rejected TNMM applied by assessee on entity level by holding that assessee is engaged in separate transactions of trading and provision of services to its AE, in nature of market support. Ld.TPO excluded Niulab Industries Ltd., from final set of comparables selected by assessee on account of having different financial year. While computing the operating margin of assessee Ld.TPO excluded certain operating incomes like recharge income, bad debts recovered, excess provision written back and liabilities no longer required to be written back and included extraordinary expenses and value of inventory obsolescence in the cost base.

**3.** Aggrieved by the draft assessment order, assessee preferred Objections before DRP. DRP directed Ld. AO to grant working capital adjustment in each segment so as to facilitate the comparability. Other adjustments made by Ld.TPO were upheld by DRP.

**4.** Ld. AO then passed the final assessment order on the basis of the DRP directions, by making total Transfer Pricing adjustment of Rs.2,92,55,299/-. Ld.AO further disallowed a sum of Rs.4,36,938/-on account of provision on service tax on rent expenses, a sum of Rs.37,101/- on account of difference of income as per the P&L account and as reflected on 26 A-S and a sum of Rs.51,72,191/-on account of advances written off.

**5.** Aggrieved by final assessment order passed, the assessee as well as revenue are in appeal before us.

**6**. We shall first take up the assessee's appeal.

***ITA No. 1483/Del/2016***

**7.** At the outset Ld.AR submitted that **Ground No. 1-2** are general in the nature and therefore do not require any adjudication.

**8.** **Ground No. 3-15** are covered by order dated 02/04/2018 passed by coordinate bench of this Tribunal for assessment year 2010-11 in ITA No. 1120/Del/2015 along with CO No. 217/Del/2016.

On the contrary Ld. DR relied upon order of Ld. TPO/DRP and submitted that assessee is involved in trading and marketing support services. It was submitted that assessee earns profits from trading segment and commission from market support services which has to be separately benchmarked.

**9.** We have perused the submissions advanced by both the sides in the light of records placed before us. We have also perused order passed by Co-Ordinate Bench of this Tribunal for immediately preceding Assessment Year (A.Y.) in assessee's own case (supra).

**9.1**. From the facts of present case, it is observed that Ld. TPO discarded the economic analysis of assessee, by segregating two activities. It is observed that for A.Y. 2009-10, DRP as well as Coordinate Bench of this Tribunal (supra) upheld determination of arm's length price of international transaction by treating TNMM as most appropriate method to benchmark the international transactions at entity level. It is also observed that for the year under consideration the same international

transactions are benchmarked and the business model of the assessee is identical without there being any change in the FAR analysis.

**9.2.** The relevant observation of this Tribunal in the immediately preceding A.Y. in assessee's own case for assessment yea 2009-10(supra) are as under:

*"15. We have carefully gone through the record in the light of the submissions on either side. Though the learned DR submitted that issues relating to the Asstt. Years 2007-08 to 2009-10 are different in so far as transfer pricing adjustment is concerned, no document is placed on record to controvert the findings of the Id. DRP vide paragraph no.7.2 of their order. However, Order u/s 92CA(3) of the Income-tax Act for AY 2007-08, order u/s 92CA{3) of the Act for AY 2008-09 and order u/s 92CA(3) of the Act for AY 2009-10 in assessee's own case clearly establish that the same international transactions are bench marked and the business model of the assessee is identical and there is no change in the FAR analysis for AY 2010-11 and in the previous assessment years. The very same comparable companies were chosen to benchmark the international transactions. Nothing is placed on record to discredit the observations of the Id. DRP that for AY 2009-10 the Id. DRP upheld the view of the AO of determining the arm's length price of the international transaction by treating the TNMM as the most appropriate method to benchmark the international transaction.*

*16. It could be seen from the order of the Id. TPO, he segregated the financials of the assessee into trading and commission segments in proportion to sales by the assessee in distribution business and commission income. Assessee seriously objects to this approach and submitted that the approach of the Id. TPO is against the established principle of law. According to him, bringing the commission from indenting segment and the turnover in the trading segment on one platform for comparison is bad.*

*17. On the other hand, it is submitted on behalf of the assessee that if at all, the Id. TPO thinks it necessary to bifurcate the same, he should have taken the gross profit from the distribution business minus the cost related to the maintenance of the inventory, risk and other related cost to be compared with the gross commission from the indenting activities as has been approved in the case of M/s Bayer Material Science P. Ltd. (ITA 7977/Mum/2010). It was further submitted, in the alternative, that the expenses could be bifurcated on the basis of sales made by the assessee in trading segment vis-a-vis the sales made by the AE's to final customers for which the assessee earns commission income. It is demonstrated before the Id. DRP that under either of the methods, the international transactions in respect of both the segments meet the arm's length standards.*

*18. As a matter of fact, Id. DRP incorporated all these details in their order and having considered the entire gamut of contentions of the assessee, he held that the past history of the assessee shows that the Ld. DRP in AY 2009-10 upheld the view of the AO of determining the arm's length price of the international transaction by treating the TNMM as the most appropriate method to benchmark the international transactions. It further held that in the year under consideration, the same international transactions are benchmark and the business model of the assessee is identical and there is no change in the FAR analysis for the year under consideration as well as in the preceding year. Ld DRP further observed that the Ld. AO/TPO had not given any compelling reasons as to why in the year under consideration, the TNMM has been rejected and CUP has been applied to benchmark the commission income separately. Having observed so, Id. DRP concluded that the method adopted by the Id. TPO was not acceptable and directed the TPO to apply the TNMM and work out the arm's length price of the international transactions in consonance with the decision of the DRP taken in the preceding Asstt. Year 2009-10.*

19. *As has been observed by us in the preceding paragraphs, no compelling reasons are forthcoming even before us as to why the Ld. TPO should discard the method of TNMM which has been consistently and continuously adopted in the last three preceding years. From the order of the Id. TPO for the Asstt. Year 2008-09, we find that there is commission income during that year also. Ld. TPO observed that rule of consistency cannot be applied forever when facts were not considered and discussed in the earlier years. He further stated that the higher appellate authorities have not decided on the issue at all and, therefore, there is no question of accepting the stand of the assessee that the aggregation approach was accepted in the earlier years.*

*20. A bald statement that in the earlier years the facts were not considered or discussed cannot be a ground to disturb a consistent view taken by the Revenue. In this matter, the support services like installation, warranty and maintenance to the customers is the responsibility of the assessee not only for the so called trading segment, but it is also there where the assessee provides indenting services to facilitate sale of its overseas companies' products in India to those customers who wish to import these products directly from the overseas group companies. Basing on this, the assessee submits that in telecom industry like most of the contracts, the transactions of the assessee are composite in nature with the business profile of the assessee being closely integrated and services are performed for both the activities with common management strategies, employees and facilities."*

*21. We are in agreement with the ld. DRP and the ld. AR to hold that in this situation segregation of accounts solely basing on the income but without reference to either gross profit or sales is most unreliable and the adoption of TNMM method at entity level is safe and plausible method. Unless and until there are compelling reasons to disturb this functional integrity of the assessee, merely because it is possible to have two segments theoretically*

*separate, it is not safe to bifurcate the financials arbitrarily. The contention of the assessee that the excess profits earned in commission segment have to be given set off while determining the adjustment for trading segment cannot be brushed aside. Perhaps keeping all this in view, ld. DRP found that in the backdrop of similarity of the international transactions to be bench marked and the business model of the assessee over the past few years, in the absence of any compelling reasons, the consistently applied TNMM should not have been rejected and CUP method should not have been applied to bench mark the commission income separately. We do not find any reason to disagree with the ld. DRP in view of the fact that the view taken by the ld. DRP is also one of the plausible views amongst the several options put forth before them by the assessee which are reflected in the order of the ld. DRP. We, therefore, uphold the finding of the ld. DRP and find ground No.1 devoid of merits.*

**9.3.** Since there is no factual and functional difference in the activities of assessee for the year under consideration as compared to the Previous Year, respectfully following the above observation of Co-Ordinate Bench in assessee's own case for A.Y.2009-10, we direct Ld.TPO to benchmark international transactions by using TNMM as most appropriate method at entity level.

**10. Accordingly these grounds raised by assessee stands allowed.**

**<u>11. Corporate tax issue</u>**

**Ground No. 18-20** are in respect of addition made by Ld.AO on account of provision for service tax on rent expenses in the books of accounts.

**12.** Ld.AR submitted that during the year, assessee made provision for service tax on rent, amounting to Rs.4,36,938/-, out of which an amount of Rs.3,21,360/- pertained to Gurgaon

premises and Rs,1,15,578/-pertains to Bangalore premises. It was submitted that landlord of Gurgaon premises raised a consolidated invoice for recovery of service tax during the year 2012 for the period 2009-2012. And in respect of the Bangalore premises it was submitted that the amount has not been paid by assessee as the same was not claimed by the landlords.

**12.1.** Ld.AO treated the entire amount as an unascertained liability and disallowed it.

**12.2.** It was submitted by Ld.AR that assessee had only paid rent during the relevant period and as the landlord had raised the bills to recover service tax during the financial year relevant to the assessment year under consideration the same was paid upon receipt of the bill. It was submitted by the Ld.AR that as the applicability of service tax on rental income was in dispute the landlords of the premises did not charge service tax on their rent invoice. It was submitted that it was because of the unsettled legal position, assessee had made provision for service tax on rent in its accounts.

**12.3.** On the contrary Ld. DR placed reliance upon orders of the Assessing Officer (A.O.).

**13.** We have perused the submissions advanced by both sides in the light of the records placed before us.

**13.1.** Considering the legal position of applicability of service tax on rental income, the liability to collect and deposit service tax on rent income was on the landlord which was in dispute before Hon'ble High Courts for a considerable period of time. It is an admitted position that assessee has made payment of Rs.3,21,360/- as per invoice raised by landlord in Assessment

Year under consideration for Gurgaon premises whereas insofar as the Bangalore premises are concerned no payment was made as the invoice was not released. We therefore direct Ld.A.O, to verify if service tax liability towards Bangalore premises has been made by assessee as subsequently the law was absolutely clear and the burden was cast upon the landlord to mandatorily collect service tax, to be deposited with Government.

**13.2.** Assessee is directed to provide all the bills/invoices raised by the landlord in respect of both the premises and A.O. is directed to verify actual payment made and to allow as per law.

**14.** Accordingly this ground raised by assessee stands allowed for statistical purposes.

**15. Ground No. 21** is in respect of the disallowance of service tax amounting to Rs.51,72,191/- considering it as prior period expenses.

**16.** Ld.AR at the outset brought to our notice order dated 27/09/10 passed by Asst Commissioner Service Tax Division-2, New Delhi in assessee's case. The issue that was considered by the ACST-II was in respect of rebate claim of Rs.51,72,191/- filed by assessee. By relying upon order passed by Service Tax Department, Ld.AR submitted that these were subject matter of verification before Service Tax Department. It was submitted that these expenses were booked by assessee for current year, do not arise from any omission or errors, but due to crystallisation of expenses based on unfavourable orders from Service Tax Department.

**17.** On the contrary Ld. DR placed reliance upon the orders of the A.O.

**18**. We have perused the submissions advanced by both the sides in the light of the records placed before us.

**19.** On perusal of order passed by Service Tax Department (copy of order placed at page 455 of paper book), a categorical observation of the authority is as under:

*"12. On the issue (d) the party has submitted copies T R-6 challan, evidencing payment of service tax and says amounting to Rs.83,58,030/- as detailed below:*

*............................*

*However, the party has claimed a rebate of Rs.51,72,191/- which is not corresponding with the amount of service tax and cess paid by the party during the material period. As the party has not submitted copies of ST-3 returns of the relevant period, it is not a certain double how the duty element, rebate of which is claimed has been discharged by the party."*

**20**. We therefore direct Ld.AO to verify the actual amount paid by assessee and accordingly allow the claim.

**21.** Accordingly this ground raised by assessee stands allowed for statistical purposes.

**22. Ground No. 22** is in respect of the TDS credit disallowed amounting to Rs.7,12 544/-.

**23.** Ld.AO observed from reconciliation submitted by assessee that TDS credit of Rs.7,12,544/-has been made in the return of income for year under consideration, corresponding to income of Rs.1,20,01,006/-. Ld.AO was of the opinion that since assessee has not offered income to tax, it was not eligible for credit of TDS, to the extent of Rs.7,12,544/-.

**24.** Ld.AR submitted that customers of assessee had duly deducted and deposited taxes to the extent of Rs.7,12,544/- while making payment to assessee, which is why it is reflected in the form 26 AS of assessee.

**25.** Ld. DR placed reliance upon the orders of authorities below.

**26**. We have perused the submissions advanced by both the sides in the light of the records placed before us.

**27.** We direct Ld. AO to verify the claim of TDS credit and allow as per law.

**28.** Accordingly this ground raised by assessee stands allowed for statistical purposes.

**29.** **Ground No. 23** is in respect of mismatch of TDS as per profit and loss account and form 26 AS.

***30.*** Ld.AR submits that this ground is not pressed. Accordingly this ground stands dismissed.

**31.** **Ground No. 24** is on account of levy of interest which is consequential in nature and **Ground No. 25-26 are** in respect of initiation of penalty proceedings which is premature at this stage. Accordingly these grounds are not adjudicated.

**32. In the result appeal filed by assessee stands allowed as indicated above.**

***<u>33. ITA No.1478/Del/2016</u>***

The only issue raised by revenue is in respect of working capital adjustment that has been granted by Ld. DCIT at the direction of DRP.

It has been submitted that this issue has been dealt with by Coordinate Bench of this Tribunal in assessee's own case for assessment year 2010-11 (supra) as under:

*22. Now coming to the 2nd ground in revenue's appeal, it relates to the direction given by Ld. DRP to the Ld. AO/LD. TPO to give working capital adjustment while working out the average margins of the parables. It could be seen from the impugned order, Ld. DRP opined that in view of rule 10 B (3), to improve the compatibility in the facts of the case by comparing margins of the 11 tested party with the incomparable, adjustment should be made for the working capital for which the reliable data has to be provided by the taxpayer. While directing the taxpayer to provide the necessary Data/details with computation of the working capital of the tested party and comparables, Ld. DRP directed the Ld. TPO to give the working capital adjustment. For this purpose Ld. DRP took strength from the decisions in the cases of Mentor graphics (109 ITD 101), Sony India (288 ITR 52 Delhi-ITAT) and Philips software (26 SOT 226 Bangalore-ITAT).*

*23. In view of the impact of the trade receivables, trade payables and inventory on the interest cost and depending upon the interest cost the margins change their volumes; we do not find any illegality or irregularity in the directions given by the Ld. DRP in respect of the working capital adjustment. We see no reason to interfere with such a direction. This ground of appeal is, accordingly, dismissed.*

**34.** As there is no difference in the FAR analysis as well as the factual matrix for year under consideration vis-a-vis Assessment Year 2009-10, we do not find any infirmity in granting working capital adjustment of tested party and comparables, provided the necessary details/data have been provided by assessee.

**35.** Respectfully following the same we do not find any reason to interfere with the directions.

**36.** Accordingly this ground raised by revenue stands dismissed.

**37. In the result appeal filed by the revenue stands dismissed.**

**38. Assessment Year :2012-13**
**ITA No. 231/Del/2017**

It has been submitted by both the parties that there is no change in the functions, assets and risk profile (FAR) of the assessee for the year under consideration vis-a-vis 2011-12.

**39.** Assessee for the year under consideration filed its return of income on 31/03/14 declaring a loss of Rs.64,69,150/-. The draft assessment order was passed on 17/03/16 under section 143(3) of the Act, by making transfer pricing adjustment and corporate tax additions totalling to Rs.5,31,28,301/-. Against draft assessment order, assessee preferred objections before DRP.

DRP justified segregation of financials into distribution and commission segment, as compared to combined transaction approach adopted by assessee. Ld.AR submitted that DRP decision for Assessment Year 2009-10 wherein a direction was issued to Ld.TPO to adopt consistent method applied by assessee, has also been ignored.

**40.** Ld.DCIT passed final assessment order by making adjustment of Rs.3,63,76,118/-.

**41.** Aggrieved by order of Ld.DCIT, assessee is in appeal before us now.

**42.** It has been submitted by Ld.AR that **Ground No. 1 and 2** are general in nature.

**43. Ground No. 3-15** deals with the transfer pricing adjustments.

**44.** Both sides submitted that all the issues contested in these grounds are similar and identical to Ground Nos. 3-17 raised in Assessment Year 2011-12.

**45.** In the foregoing paragraphs we have already decided these issues in favour of assessee by placing reliance upon the order of Coordinate Bench of this Tribunal in assessee's own case for assessment year 2009-10 (supra). The relevant observation of this Tribunal for assessment year 2009-10 (supra) are as under:

*"15. We have carefully gone through the record in the light of the submissions on either side. Though the learned DR submitted that issues relating to the Asstt. Years 2007-08 to 2009-10 are different in so far as transfer pricing adjustment is concerned, no document is placed on record to controvert the findings of the Ld. DRP vide paragraph no.7.2 of their order. However, Order u/s 92CA(3) of the Income-tax Act for AY 2007-08, order u/s 92CA{3)*

*of the Act for AY 2008-09 and order u/s 92CA(3) of the Act for AY 2009-10 in assessee's own case clearly establish that the same international transactions are bench marked and the business model of the assessee is identical and there is no change in the FAR analysis for AY 2010-11 and in the previous assessment years. The very same comparable companies were chosen to benchmark the international transactions. Nothing is placed on record to discredit the observations of the Ld. DRP that for AY 2009-10 the Ld. DRP upheld the view of the AO of determining the arm's length price of the international transaction by treating the TNMM as the most appropriate method to benchmark the international transaction.*

*16. It could be seen from the order of the Ld. TPO, he segregated the financials of the assessee into trading and commission segments in proportion to sales by the assessee in distribution business and commission income. Assessee seriously objects to this approach and submitted that the approach of the Id. TPO is against the established principle of law. According to him, bringing the commission from indenting segment and the turnover in the trading segment on one platform for comparison is bad.*

*17. On the other hand, it is submitted on behalf of the assessee that if at all, the Id. TPO thinks it necessary to bifurcate the same, he should have taken the gross profit from the distribution business minus the cost related to the maintenance of the inventory, risk and other related cost to be compared with the gross commission from the indenting activities as has been approved in the case of M/s Bayer Material Science P. Ltd. (ITA 7977/Mum/2010). It was further submitted, in the alternative, that the expenses could be bifurcated on the basis of sales made*

*by the assessee in trading segment vis-a-vis the sales made by the AE's to final customers for which the assessee earns commission income. It is demonstrated before the Id. DRP that under either of the methods, the international transactions in respect of both the segments meet the arm's length standards.*

*18. As a matter of fact, Id. DRP incorporated all these details in their order and having considered the entire gamut of contentions of the assessee, he held that the past history of the assessee shows that the Ld. DRP in AY 2009-10 upheld the view of the AO of determining the arm's length price of the international transaction by treating the TNMM as the most appropriate method to benchmark the international transactions. It further held that in the year under consideration, the same international transactions are benchmark and the business model of the assessee is identical and there is no change in the FAR analysis for the year under consideration as well as in the preceding year. Ld DRP further observed that the Ld. AO/TPO had not given any compelling reasons as to why in the year under consideration, the TNMM has been rejected and CUP has been applied to benchmark the commission income separately. Having observed so, Id. DRP concluded that the method adopted by the Id. TPO was not acceptable and directed the TPO to apply the TNMM and work out the arm's length price of the international transactions in consonance with the decision of the DRP taken in the preceding Asstt. Year 2009-10.*

19. *As has been observed by us in the preceding paragraphs, no compelling reasons are forthcoming even before us as to why the Ld. TPO should discard the method of TNMM which has been consistently and continuously adopted in the last three preceding*

*years. From the order of the Id. TPO for the Asstt. Year 2008-09, we find that there is commission income during that year also. Ld. TPO observed that rule of consistency cannot be applied forever when facts were not considered and discussed in the earlier years. He further stated that the higher appellate authorities have not decided on the issue at all and, therefore, there is no question of accepting the stand of the assessee that the aggregation approach was accepted in the earlier years.*

*20. A bald statement that in the earlier years the facts were not considered or discussed cannot be a ground to disturb a consistent view taken by the Revenue. In this matter, the support services like installation, warranty and maintenance to the customers is the responsibility of the assessee not only for the so called trading segment, but it is also there where the assessee provides indenting services to facilitate sale of its overseas companies' products in India to those customers who wish to import these products directly from the overseas group companies. Basing on this, the assessee submits that in telecom industry like most of the contracts, the transactions of the assessee are composite in nature with the business profile of the assessee being closely integrated and services are performed for both the activities with common management strategies, employees and facilities."*

*21. We are in agreement with the ld. DRP and the ld. AR to hold that in this situation segregation of accounts solely basing on the income but without reference to either gross profit or sales is most unreliable and the adoption of TNMM method at entity level is safe and plausible method. Unless and until there are compelling reasons to disturb this functional integrity of the assessee, merely*

*because it is possible to have two segments theoretically separate, it is not safe to bifurcate the financials arbitrarily. The contention of the assessee that the excess profits earned in commission segment have to be given set off while determining the adjustment for trading segment cannot be brushed aside. Perhaps keeping all this in view, ld. DRP found that in the backdrop of similarity of the international transactions to be bench marked and the business model of the assessee over the past few years, in the absence of any compelling reasons, the consistently applied TNMM should not have been rejected and CUP method should not have been applied to bench mark the commission income separately. We do not find any reason to disagree with the ld. DRP in view of the fact that the view taken by the ld. DRP is also one of the plausible views amongst the several options put forth before them by the assessee which are reflected in the order of the ld. DRP. We, therefore, uphold the finding of the ld. DRP and find ground No.1 devoid of merits."*

**46.** Since there is no factual and functional difference in the activities of assessee for the year under consideration as compared to the Previous Year, respectfully following the above observation of Co-Ordinate Bench in assessee's own case for A.Y.2009-10, we direct Ld.TPO to benchmark international transactions by using TNMM as most appropriate method at entity level.

**47. Accordingly these grounds raised by assessee stands allowed.**

**48. Ground No. 16** is on account of levy of interest which is consequential in nature and **Ground No. 17** is in respect of

initiation of penalty proceedings which is premature at this stage. Accordingly these grounds are not adjudicated.

**49. In the result appeal filed by assessee stands allowed as indicated above.**

**Order pronounced in the open court on 11.07.2018.**

| **Sd/-** | **Sd/-** |
|---|---|
| **(P.M.JAGTAP)**<br>**ACCOUNTANT MEMBER** | **(BEENA A PILLAI)**<br>**JUDICIAL MEMBER** |

Dt. 11th July, 2018

- Manga

Copy forwarded to: -
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

**ASSISTANT REGISTRAR**
ITAT Delhi Benches