

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ “आई-1”, नई दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH ‘I-1’, NEW DELHI**

सुश्री सुषमा चावला, उपाध्यक्ष एवं श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, VP & SHRI PRASHANT MAHARISHI, AM

[THROUGH VIDEO CONFERENCING]

आयकर अपील सं. / ITA No.2846/Del/2016

निर्धारण वर्ष / Assessment Year 2009-10

Danisco India Pvt. Ltd.,
6th Floor, Tower C, DLF Cyber Greens,
Sector-25A, DLF City, Phase-II,
Gurgaon-122002.

PAN-AAACD8906D.

.....अपीलार्थी/ Appellant

vs

The DCIT,
Circle-10(1), New Delhi.

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Harpreet Ajmani, Adv. &
Sh. Rohan Khare, Adv.

प्रत्यर्थी की ओर से / Respondent by : Sh. M. Barnwal, Sr.DR

सुनवाई की तारीख/ Date of Hearing : 17.08.2020	घोषणा की तारीख / Date of Pronouncement: 07.10.2020
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आदेश/ORDER

PER SUSHMA CHOWLA,VP

The present appeal filed by assessee is against order of CIT(A)-44, New Delhi dated 02.12.2015 relating to assessment year 2009-10 against the order passed under section 144C(4)/143(3) of the Income-tax Act, 1961 (in short ‘the Act’).

2. The assessee has raised following grounds in this appeal:-

1. *That on the facts of the case, the order of the Learned Assessing Officer (AO) is bad in law, illegal and without jurisdiction.*
2. *The Ld. Commissioner of Income Tax (Appeals) ("CIT(Ar) has erred in fact and in law in not accepting the methodology adopted by the Appellant for benchmarking Management Services.*
3. *The Ld. CIT(A) has erred in law in confirming CUP as the most appropriate method for benchmarking the said services, which is not in accordance with Rule 108(1)(a) of the Income Tax Rules, 1962 ("the Rules").*
4. *The Ld. CIT(A) as well as TPO has erred in law by disregarding provisions of the Income tax Act, 1961, which provide that the condition precedent for claiming a business expense is that it should be incurred wholly and exclusively for the purpose of the business regardless of extent of benefit derived. Further, the Ld. TPO has jurisdiction only to determine the arm's length price of expenditure and not to disallow whole expense even if he is of the opinion that the expense is not necessary for business.*
5. *The Ld. CIT(A) failed to appreciate the fact that the Company is not guided by any motive to evade taxes and has in accordance with the provisions of the Income Tax Act adequately deducted taxes from payments made to AE's for services availed.*
6. *That the Ld. CIT(A) as well as Ld. TPO erred on facts in treating the Management Services as Shareholder Services."*

3. The issue raised in the present appeal is against the TP adjustment made on account of payment of management charges.

4. Briefly in the facts of the case the assessee had filed return of income declaring total income at NIL. The assessee company was incorporated in India on 21.01.1997 for manufacturing and marketing of food and non-food ingredients. The manufacturing facility was situated in Gurgaon, Haryana. The assessee was primarily engaged in production and delivery of stabilizers,

emulsifiers, blends of emulsifiers and/or stabilizers and enzymes for food, feed and technical application. The assessee was closely held company; majority shares of which were held by Danisco A/s Denmark. The assessee was engaged in various activities and had entered into several international transactions with its Associated Enterprises (in short 'AE'). The Assessing Officer made reference u/s 92CA(1) of the Act for benchmarking the Arm's Length Price (in short 'ALP') of the international transactions undertaken by the assessee. The assessee was issued show-cause notice by the TPO and various queries were raised in respect of Intra Group services (in short "IGS"). The assessee furnished its reply which is incorporated in the order of TPO. The assessee explained that in order to avail services of internal skills and experience available, Danisco Group had a system wherein centralized entity or identified employees in each divisional/regional/business units were to provide services to other AEs. The assessee accordingly had availed certain services from the group companies and the services were utilized in its operations and served as its business tool for running the business operations of assessee company. The assessee had paid service fee under the head "management services". The proof of description of services was provided under the head "management services" which were on account of :-

- (a) Corporate support;
- (b) Sales & marketing; and
- (c) Technical assistance & support.

5. The assessee explained that due to highly specialized nature of industry, technical experts were required to focus on specialized lines; team members travelled to various Danisco entities to provide assistance with new product development and repairs to customer's plants. In order to avail global expertise for its clients, the assessee had availed the aforesaid services. Documentary evidences for availment of services were filed on sample basis before the TPO. The assessee also explained that due to continued services received by it, the turnover had increased over period of years. The assessee also pointed out that it had conducted benchmarking analysis for the intra group services as part of its transfer pricing documentation. The assessee had selected itself as tested party and compared its margins with selected concerns. The assessee had applied Transactional Net Margin Method and transaction was at arm's length.
6. The TPO vide para 9 has commented on the business of the assessee and pointed out that the assessee had failed to provide service-wise details and has observed as under:-

9. *Remarks of the TPO*

(i) "I have gone through the submissions of the assessee. The assessee has failed to provide service wise details of payments. Only a broad outline of the nature of services have been filed. No contemporaneous documentary evidence has been submitted which may indicate that these services have actually been received by the assessee. In the name of evidence only some debit notes from the AE has been submitted.

Since the services have been specified, the quantum of payment vis-à-vis the service received remains unexplained. The assessee has failed to specify the services which have actually been relieved by it for which payment has been made.

(ii) *With respect to the charging mechanism it is submitted that all the costs incurred with respect to providing common services (shared costs) are accumulated in a cost pool and are then allocated to various Danisco entities on the basis of sales. These expenses are charged to Danisco entities on a cost to cost basis without any mark-up.*

The assessee has filed a copy of shared cost allocation agreement. As per the agreement, the cost actually incurred by the Danisco AS and its subsidiaries are to be treated as a cost pool."

7. Then reference was made to the relevant clauses of the Shared Cost Allocation Agreement and it was observed as under:-

9. *Remarks of the TPO*

.....

"The shared costs have been defined and it is stated that the service fees is to be determined by the AE and the subsidiaries share of the aggregate amount of pool shared cost as subject to allocation and computation in accordance with the allocation keys. The allocation key is the total revenue both internal and external.

However, the assessee has not filed any details/documentary evidence of the shared cost pool and the allocation of the costs on the basis of the allocation key. No cost sheet has been provided. Neither the details of payment made to the other subsidiaries nor the actual allocation amongst various entities has been filed. It is also not clear in which group the shared costs have been pooled.

In the absence of the corroborative details/data for the year under consideration, the payments cannot be verified. The payment is therefore not justified."

8. The TPO also observed that no cost benefit analysis had been undertaken by the assessee. The assessee also failed to furnish the details of benchmarking analysis done at the time of entering into agreement so as to compare the aforesaid payment vis-a-vis an independent party under similar circumstances. The TPO also stated that *"as regards the tangible and direct*

benefits derived by the assessee company, nothing has been put forward which may indicate that the assessee company has been benefitted by incurring such costs notwithstanding the assessee claims that it would have taken the services from third party or it would have performed the activity in house. Further, the reply of the assessee is general in nature and not backed by specific documentary evidence. It has tried to make out a case for the arm's length nature of the transaction by stating that it has gained in the form of higher sales and profit. However, the assessee has not been able to provide an empirical data that can draw a connection between increase in sales, or higher profits and the payment that it has made to the AE for the specific services rendered.....”.

9. The TPO also noted that the assessee had incurred cost of Rs.21,64,317/- on legal and professional charges. At the same time, it has also availed corporate tax advice and legal service. This indicates duplication of work as it has not been specified how the services rendered were different. The TPO was of the view that payment made on account of management services had to be separately analyzed to see whether the transaction was at Arm's Length Price or not. Reliance was placed on various decisions and TPO held that the TNMM method applied by the assessee was not been able to benchmark the international transactions relating to payment of IGS. The TPO also observed that *“the arguments of the assessee that the taxpayer’s agreement that it is not for the revenue authorities to decide what is necessary for an assessee and what is not and the TPO cannot question its commercial decision, is without any force.”*

10. Reference was made to the OECD Guidelines. Further plea of the assessee was that “there is no motive for Danisco group to shift profits out of India as the Corporate Tax Rate in Denmark is as high as 25% and also the fact that the company is paying Service Tax on same under 'Reverse charge mechanism, Hence the overall Tax Cost to the group shall be the same.”

11. The TPO concluded by holding as under:-

10. “I have examined facts of this case and have reached to following conclusions:-

(a) In this case, the assessee has failed to substantiate that services have actually been rendered to it and benefit has actually been derived by it on the basis of documentary evidence,

(b) The assessee has also made a claim that payments were made to AE as allocation for IT Costs and management services. However, it is mentioned that no evidence that these were at all cost to cost or that these services were rendered in contemporaneous terms have been demonstrated and that such services have been rendered in India.

(c) It is evident from facts recorded above that the assessee did not file any evidence to support a claim that these services were actually provided to the assessee at its request to meet the specific need of the assessee and that benefit had actually accrued to the assessee.

(d) In the comparable circumstances, in my view an independent enterprise would not have paid any third party without ascertaining a cost base and corroborating facts. Anyone not being able to demonstrate these facets, can only be assumed not to have received these services.

(e) I have noted from details contained in the transfer pricing report of the assessee submitted under Rule 100 that the assessee had not conducted FAR analysis in regards to these alleged services and had failed to justify the functions performed by the AE for these payments. Even after specific query, the assessee has not carried out any benchmarking in regard to these transactions. This is probably a reason that the receipt of alleged services has been aggregated under TNMM.

(f) The assessee also failed to substantiate that payment amounting to Rs 1,94,75,937 made by the assessee company to its AEs was for any services or for any liability of the assessee company.”

12. The TPO thus applying Comparable Uncontrolled Price method determined the Arm's Length Price of the transaction at NIL and proposed an upward adjustment of Rs.1,94,75,937/-.

13. The Assessing Officer passed the assessment order u/s 144C(iv)/143(3) of the Act dated 10.05.2013 making the aforesaid adjustment of Rs.1,94,75,937/-. The CIT(A) upheld the order of Assessing Officer/TPO against which the assessee is in appeal before us.

14. The Ld.AR took us through the order of the TPO and the CIT(A) and pointed out that the assessee had two segments i.e. trading segment and manufacturing segment. He further pointed out that the management services availed were bifurcated between the two segments. He pointed out that as far as aggregating approach of various international transaction is concerned, the same was accepted and only payment of IGS was disturbed. The question which arises was whether services were actually rendered and what benefit did the assessee derive from such availment of services. It was pointed out by the Ld.AR that the basis for making the aforesaid adjustment by the TPO was that

- (a) No service wise details were filed;
- (b) No contemporaneous evidence to indicate services were availed was filed;
- (c) What benefit did the assessee derive?
- (d) Whether there was duplication of work?

15. The Ld.AR for the assessee pointed out that the said services were specialized services provided from common pool and was charged on cost to

cost basis. He further pointed out that TDS was deducted and even service tax was paid. The Assessing Officer had not made any disallowance u/s 37(1) of the Act. He also pointed out that there was no merit in shifting the profits to Denmark as the rates of taxation in Denmark were higher. Our attention was drawn to the evidences filed with regard to the services rendered. First reference was made to pages 133 to 137 of the Paperbook with regard to provision of admin services and 0.3% of the total cost of DKK 423165 was allocated to the assessee at DKK 1111. Then, he referred to the details of technical services at pages 138 & 141 and evidences of services rendered placed at pages 142 to 153 of the Paper Book. Further, he referred to the details of sales and support services availed which are tabulated in Chart form at pages 154 & 155 of the Paperbook with supports upto pages 221 of the Paperbook. Our attention was drawn to corporate services availed which are tabulated at pages 222 to 226 of the Paperbook with supports at pages 227 to 360 of the Paperbook. The Ld.AR for the assessee stressed that extensive details of services received were filed, which show the nos. of persons involved in the benefit arising to the assessee and cost allocation was justified. He then referred to the Shared Cost Allocation Agreement placed at pages 471 onwards and it was pointed out that the agreement was w.e.f. 01.05.2007 which was entered on 15.01.2009. The Ld.AR for the assessee referred to the list of companies being part of the shared cost allocation agreement placed at page 478 of the Paperbook i.e. multiple entities were providing services. He then referred to pages 491 to 494 of the Paperbook i.e. Challan of tax deducted at

source which relates to period prior to period of date of agreement. He also told us that due declaration in this regard was made in the P&L A/c, notes to accounts, in Form No.3CED and also in TP study report. Our attention was drawn to the order of CIT(A) where in the Remand Report, the TPO stated that the services are incidental in nature.

16. The Ld.AR for the assessee stressed that where the expenses were intrinsically on the part of trading and manufacturing segments; the same has to be aggregated with other international transactions. Reliance was placed on the decision of Hon'ble Delhi High Court in case of CIT vs Sony Ericson Mobile Communication India Pvt. Ltd., reported in [2015] 55 taxmann.com 240 (Del.). Our attention was drawn to the order of CIT(A) and it was pointed out that there was self contradiction in his order, first he states that there was no rendition of services; and then he says it can either be shareholder expenditure or is duplicating in nature. As far as professional and traveling expenses were concerned, the Assessing Officer had disallowed 30% of the same, but he CIT(A) allowed in entirety. The Ld.AR for the assessee stressed that there is no merit in the order of TPO in holding that there is duplication of services. It was stressed that the services were rendered by arrangement through common pool and costs allocated through allocation key; since the services were rendered, hence the reimbursements on cost to cost basis. There is no duplication of services. Our attention was drawn to the order of CIT(A) relating to Assessment Year 2010-11 wherein there is categoric finding that there were no duplication of services in the provision of technical support services and sale

support services. He also deleted the addition made on account of disallowance of administrative expenses. The Ld.AR for the assessee extensively referred to the order of CIT(A) in Assessment Year 2010-11. He then placed reliance on the order of the Tribunal in assessee's own case relating to Assessment Year 2007-08 in ITA No.244/Del/2012, order dated 17.08.2015. In the facts of the said case, the assessee paid Rs.61,62,872/- towards allocation of information technology cost against which the adjustment was made by the TPO, on the ground that no services were actually received, as no evidences were filed before Assessing Officer. The second reason for disallowance was that it was a device of profit shifting and Arm's Length Price of the transaction was determined at NIL under Comparable Uncontrolled Price method. The Tribunal allowed the claim of the assessee. Further reliance was placed on the decision of Pune Bench of Tribunal in Emerson Climate Technologies (India) Ltd. [2018] 90 taxmann.com 125 (Pune-Trib.). The Ld.AR for the assessee also relied on CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi) wherein it was held that benchmarking of cost to cost reimbursement was not within TPO's jurisdiction, while calculating Arm's Length Price u/s 92CA of the Act.

17. The Ld. DR for the Revenue placed heavy reliance on the orders of the TPO and made special reference to paras 9 to 11 of the TPO's order. The Ld.DR for the Revenue stressed that there was an oral arrangement from 2007 and it took the parties long time to enter into the agreement. Referring to the evidences filed i.e. e-mails, Ld.DR for the Revenue pointed out that it was only

filed emails, which related to product details. He stressed that the CIT(A) had analyzed all facts of the additional evidences vide para 9.21 and held them to be shareholder activity.

18. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the upward adjustment made on account of payment made for management services availed by the assessee. The assessee claimed that as it was part of an international group and in order to maintain international standards, certain Intra Group Services were availed by it out of common pool, wherein specialized services were provided by selected entities. The Ld.AR for the assessee has drawn our attention to the details of the services availed under the head “administrative services”, sales support service and technical services & support, in this regard. It is the case of the assessee that the payment has been made on cost to cost basis for availment of such services. Further, the cost has been allocated out of the total cost incurred by AEs applying suitable allocation key. The assessee had filed evidences in support before the lower authorities in this regard and even before us, which are pointed to in paras above.

19. The first issue which has been raised before us is that where the services have been availed by it and they are connected to the main activities, then whether availment of services is to be benchmarked on standalone basis and not aggregated with the other international transactions undertaken by the assessee? The second issue which is arising before us is against the

jurisdiction of the TPO for benchmarking the international transaction to determine the benefit derived by the assessee out of services availed and whether or not the assessee has availed the said services.

20. The assessee company was subsidiary of Danisco A/s Denmark, which were holding 99.99 % shares of assessee as on 31.03.2009. The Danisco group was one of the world's leading producers of food ingredients, enzymes and bio-based solutions. It developed and produced functional ingredients primarily for the food and beverage industries and also for some non-food sectors. The group had presence in 47 countries. It was actively engaged in research and development and held more than 7,854 active patents and patent applications. As per assessee, the group supplied food ingredients to virtually all industries operating within the food industry like:-

- * Bakery
- * Beverages
- * Confectionary
- * Dairy
- * Frozen desserts
- * Fruits preparations
- * Fats and Oils
- * Processed meats and seafood
- * Soups & sauces

21. The assessee was engaged in two segments wherein first is trading and second is manufacturing. The assessee has availed management support services from its AEs, which were reimbursed on cost to cost basis. The Assessing Officer/TPO had made adjustment on account of availment of IT services which has been deleted by the CIT(A) and the appeal of the Revenue

dismissed for low tax effect. As far as availment of management services were concerned, the case of the assessee was that the entities of Danisco group had the expertise available within the group and the cost of availment of such services were allocated to the entities on cost to cost basis applying suitable allocation key. The services were rendered pursuant to the arrangement between the assessee and its AEs through common pool. The case of the assessee before us is that the services were actually rendered and there was no duplication of services. The CIT(A) in Assessment Year 2010-11 after going through list of services availed by the assessee in three segments i.e. Admin segment, technical support services and sales support services, has given a finding that no adjustment needs to be made with regard to the same. The basis of the disallowance made in the hands of the assessee is that no services have been actually rendered and the second contrary aspect is that there is duplication of services. The Assessing Officer/TPO cannot sit in judgment over the manner in which business have to be carried on by the businessman. The domain of the TPO is limited to check whether services have been availed. The assessee referred to the evidences filed in this regard to availment of services. The cost allocation sheet for availment of admin services is placed at pages 136 to 137 of the Paperbook. Out of the total cost of Danisco Group of amount in DKK 423165, assessee's share is at DKK 1111. The details of technical support services and its availment are placed at pages 138 to 141 of the Paperbook alongwith supports at pages 142 to 153 of the Paperbook. Similarly the assessee has furnished the details with regard to the sales and support

services availed which are tabulated at pages 154 & 155 of the Paperbook alongwith support at pages 166 to 220 of the Paperbook. Further the corporate services availed by the assessee are tabulated at pages 222 to 226 of the Paperbook alongwith supports at pages 227 to 360 of the Paperbook. In the present set of facts, the assessee has filed extensive evidences with regard to availment of services and it is not the jurisdiction of the TPO to question whether such availment of services is to be made by the assessee for better management of its business. The assessee company is part of an international group and to maintain its international standards such availment of services from the group entities, in order to maintain international standards for carrying on its business, is a business decision and such decision of the businessman cannot be questioned. The Assessing Officer/TPO also cannot sit in judgement as to what benefits are derived by the assessee from availment of such services.

22. The Pune Bench of the Tribunal in Emerson Climate Technologies (India) Ltd. vs DCIT (supra) held that the TPO cannot question the same on the ground that no contemporaneous records were produced to indicate such need was identified, which preceded the availment of such services. In such facts, it was held on perusal of various evidences filed by the assessee i.e. contemporaneous data available on record reflected that services were highly technical and the same had been used by the assessee for carrying on its business activities. In these facts, the TPO need not determine whether the price paid by the assessee for services availed is what an independent

enterprises would have paid for same services. The TPO was not justified in questioning the benefits arising to the assessee on availing such services and the same was outside the scope of transfer pricing provision. The Tribunal in Emerson Climate Technologies (India) Ltd. vs DCIT (supra) vide paras 20 to 27 held as under:-

20. *“Another aspect of the issue which needs to be kept in mind is the developing scenario of carrying on the business in the country. The said business is carried on by the entities which have presence outside India and have certain standards, which are attached to its brand name. In order to maintain its brand value, arrangements are made with different entities across the globe by holding companies, so that different entities operating in different parts of the world adhere to specific rules and regulations while carrying on business under the said brand. The assessee is 100% subsidiary of Copeland Corporation, which admittedly, has presence in various Countries. The assessee has placed on record that besides the assessee entering into agreement with Emerson HK, Emerson TH, various entities of other countries had entered into such agreements. The terms of the agreement are similar for providing services, wherein a particular formula is designed by the person providing the services i.e. the basis for remuneration is the cost incurred by way of man hours charged to the entity with mark up of 5.8%. Such method of charging and remunerating was identical in the case of all the entities which were availing the services from Copeland Corporation through Emerson HK and Emerson TH. The assessee had also furnished on record the basis for charging cost by the two entities from the assessee. No doubt, the complete details of operations of the said concerns worldwide had not been filed, but that had no relevance to the activities or services availed by the assessee. There is no merit in the order of TPO in rejecting the segmental details of AEs filed by the assessee vis-à-vis services availed by it. What is to be considered in the hands of assessee is the services it had availed from Emerson HK and Emerson TH and not the whole activities undertaken by the said two concerns worldwide. The assessee had put on record that not only the assessee but many other concerns were availing same services from the two entities and even the basis for remuneration to the said concerns was the same in respect of all the countries. In such circumstances, there is no merit in the order of TPO in holding that as to*

whether the said concerns have given services or whether they are qualified to give the services and the cost incurred by AEs. First of all, this is outside the domain of TPO. Under the Transfer Pricing Regulations what the TPO has to determine is whether the services which have been provided by associated enterprises are at arm's length price. Accordingly, we find no merit in this part of the order of TPO. 21. In this regard, we find support from the ratio laid down by the Hon'ble High Court of Delhi in Hive Communication Pvt. Ltd. in Income Tax Appeal had entered into such agreements. The terms of the agreement are similar for providing services, wherein a particular formula is designed by the person providing the services i.e. the basis for remuneration is the cost incurred by way of man hours charged to the entity with mark up of 5.8%. Such method of charging and remunerating was identical in the case of all the entities which were availing the services from Copeland Corporation through Emerson HK and Emerson TH. The assessee had also furnished on record the basis for charging cost by the two entities from the assessee. No doubt, the complete details of operations of the said concerns worldwide had not been filed, but that had no relevance to the activities or services availed by the assessee. There is no merit in the order of TPO in rejecting the segmental details of AEs filed by the assessee vis-à-vis services availed by it. What is to be considered in the hands of assessee is the services it had availed from Emerson HK and Emerson TH and not the whole activities undertaken by the said two concerns worldwide. The assessee had put on record that not only the assessee but many other concerns were availing same services from the two entities and even the basis for remuneration to the said concerns was the same in respect of all the countries. In such circumstances, there is no merit in the order of TPO in holding that as to whether the said concerns have given services or whether they are qualified to give the services and the cost incurred by AEs. First of all, this is outside the domain of TPO. Under the Transfer Pricing Regulations what the TPO has to determine is whether the services which have been provided by associated enterprises are at arm's length price. Accordingly, we find no merit in this part of the order of TPO.

21. In this regard, we find support from the ratio laid down by the Hon'ble High Court of Delhi in Hive Communication Pvt. Ltd. in Income Tax Appeal No.306/2011, wherein it has been held that the legitimate business needs of the company must be judged from the view point of the company itself and must be viewed from the point of view of a prudent businessman. It was further held by the Hon'ble High Court that it was not for the Assessing Officer to dictate what the business needs of the company

should be; it is businessman who can only judge the legitimacy of the business needs of the company from the point of view of prudent businessman. Hence, the benefit derived and accruing to the company must also be considered from the angle of prudent businessman. The Hon'ble High Court clearly held that the term "benefit" to a company in relation to its business has a very wide connotation and it was difficult to accurately measure these benefits in terms of money separately. The said principle laid down by the Hon'ble High Court has been applied by the Delhi Bench of Tribunal in McCann Erickson India P. Ltd. Vs. Addl.CIT (supra) to hold whether the benefits derived by the assessee, in view of the evidences in respect of management service charges and client coordination fees, cannot be found fault with.

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

23. The next stand of the TPO is two-fold; as to what benefits have been received by the assessee against the said support services and intricacy value of services given by the associated enterprises. The said aspect is linked to the issue of whether there is any need for services and in the absence of its establishing the same, whether the TPO / Assessing Officer is correct in determining the arm's length price of transactions at Nil. The assessee had entered into an agreement with its associated enterprises for availing the services because of business benefits arising from such an understanding. Law does not require the assessee to demonstrate the need for availing the services. The assessee is best person to arrange its affairs to conduct the business in the manner it wants and Revenue cannot step into the shoes of businessman to decide what is necessary for the businessman and what is not. The TPO is not empowered to question the decision of assessee to avail support services from the associated enterprises. The decision taken by the assessee in the course of carrying on its business is commercial decision and the TPO cannot question such

commercial wisdom of assessee's decision. The second linked issue which has been raised is that the assessee did not benefit from such support services where the assessee has shown losses during the year.

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

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

26. Another aspect which needs to be kept in mind is that it was not only the assessee but other entities in different parts of the world which were availing similar services from the said two entities. The assessee had filed on record the copies of agreement with the said concerns and when compared with terms of agreement with the assessee, the same were at par. In such scenario, where the benefit of services was availed by different entities which in turn, were remunerated by different entities on the basis of cost worked out on man hours basis plus mark up, which was at same level, then the same cannot be questioned. The allocation key applied by AE to allocate cost of services provided to different entities i.e. on man hour basis is one of the accepted methods and the same could not be brushed aside without bringing on record any adverse evidence. Now coming to the issue of bench working the said transaction. The assessee in the present case had taken the associated enterprise as tested party and had pointed out that the remuneration of support services was at arm's

length price by applying the TNMM method, where the ITA No.2182/PUN/2013 ITA No.211/PUN/2015 concerns providing similar services, were taken as comparable. Under the transfer pricing provisions, it is incumbent upon both the assessee and the authorities to select the most appropriate method to benchmark the international transactions. The Indian Tax provisions provided various methods for benchmarking the international transactions but it is the most appropriate method, which has to be selected for benchmarking international transactions. The assessee had picked up the TNMM method as most appropriate method since in the present case, the foreign associated enterprise was providing similar services to different entities and was taken as tested party. The said associated enterprise was allocating cost to all entities to which it was rendering services. The role of assessee in such scenario was to show whether the marginal support services provided to it were at arm's length price. The role of the TPO in this regard was also to determine that the price paid by the assessee for availing support services was at arm's length price. Secondly, the assessee has referred to the information filed before the TPO/Assessing Officer under which the allocation of cost on the basis of time spent on a particular project had been worked out and cost allocated to different countries. The said details for Emerson HK concern are at page 941 and for Emerson TH at page 1017 of the Paper Book. The said details were filed by the assessee before the TPO. However, he rejected the same as complete financials of total operations of said entities were not filed. The assessee pointed out that certified details of relevant services rendered were given, wherein both the entities were engaged in other business operations, which were not relevant for deciding the issue of support services received by the assessee, hence complete details were not relevant. However, the TPO brushed aside the same on the ground that complete details had not been given.

27. The assessee also pointed out that the companies were providing information of complex nature to the assessee for carrying on the business and when there is certain amount of confidentiality in the same, the same cannot be shared with the third party, as the business model of the assessee was at stake. In such scenario, where the entity is providing similar services to various entities and following scientific method of allocating cost and charging the same with mark up, then there is no merit in the order of Assessing Officer / TPO in rejecting the calculation and submissions filed by the assessee in this regard. The details relevant to compute the cost allocation on account of services has been certified and

filed before the Assessing Officer; the same cannot be brushed aside on the ground that complete details have not been filed when the balance details were not relevant for deciding the issue; where the entities are engaged in different lines of business, then there is no merit in the stand of TPO in this regard. We thus hold that the AE in such circumstances is to be taken as tested party, for benchmarking the arm's length price of International Transaction. The assessee further pointed out that it had also furnished complete financials of comparables which were selected by it to benchmark its international transactions. The said details are available at pages 1019 to 1046 of the Paper Book along with description of services. The said concerns were selected by search on foreign data base OSIRIS and comparable companies were identified and the financial information statements along with description of services extracted from the said data base were provided. In such scenario, where the TNMM method is to be applied, then international transaction is to be compared with independent comparables and once such exercise has been undertaken by the assessee, the same cannot be brushed aside. Accordingly, we hold that the approach of TPO/Assessing Officer in applying CUP method to determine the arm's length price of said international transactions was inappropriate, where the TPO has failed to identify the comparison of controlled transactions with comparable uncontrolled transactions. The TPO on the other hand, had determined the arm's length price on the basis of need and benefits of services to the assessee and not by benchmarking on any uncontrolled transactions which were comparable to the assessee. Such a methodology adopted by the TPO under the garb of CUP is not permissible in law. Accordingly, we hold that determination of arm's length price by the TPO at Nil is bad in law."

23. In the present set of facts where the assessee was availing specialized services which were provided by the AEs from common pool and the evidences in this regard have been filed by the assessee and where the services were charged on cost to cost basis, there is no merit in the order of the Assessing Officer in questioning the availment of services and the benefit derived by the assessee. It may be pointed out that the Assessing Officer in the alternate held that there was duplication of services. The CIT(A) in the final analysis

held it to be shareholder activity. All the above said observations of the authorities below, establish the availment of services. We have also perused the data of evidences filed by the assessee to establish its case of availment of services; under law the benefit, if any, arises to the assessee or not cannot be questioned. Hence, the payment made by the assessee being cost to cost reimbursement of the services availed from common pool is duly allowable as a business expenditure in the hands of the assessee. The TPO has exceeded his jurisdiction in holding the value of the said international transaction at NIL. The Hon'ble Delhi High Court in CIT v. EKL Appliances Ltd. (supra) had held that benchmarking of cost to cost reimbursement of expenses was not within the jurisdiction of the TPO while computing the arm's length price of the international transaction u/s 92CA of the Act. In such facts, we direct the Assessing Officer/TPO to allow the claim of the assessee in entirety. The Ground of appeal Nos. 1 & 2 are allowed. The Ground of appeal Nos. 3 & 4 being alternative are dismissed. The Ground of appeal No.5 being premature is dismissed.

24. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 07th October, 2020.

Sd/-
(PRASHANT MAHARISHI)
लेखासदस्य/ ACCOUNTANT MEMBER

दिल्ली / दिनांक Dated : 07th October, 2020

Amit Kumar

Sd/-
(SUSHMA CHOWLA)
उपाध्यक्ष / VICE PRESIDENT

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

1. **अपीलार्थी** / The Appellant
2. **प्रत्यर्थी** / The Respondent
3. **आयकर आयुक्त(अपील)** / The CIT(A)
4. **मुख्य आयकर आयुक्त** / The Pr. CIT
5. **विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,दिल्ली** / DR, ITAT, Delhi
6. **गार्ड फाईल** / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति//True Copy//

सहायकरजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली
Assistant Registrar, ITAT, Delhi