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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2619/Del/2011
Assessment Year: 2004-05

DCIT, Circle-11(1), New Delhi.	Vs.	Exxon Mobil Lubricants P. Ltd., Ernst & Young Tower, B-26, Qutab Institutional Area, New Delhi. PAN AABCE0207H
(Appellant)		(Respondent)

Assessee by	:	Shri S.D. Kapila, Advocate Shri R.R. Maurya, Advocate
Revenue by	:	Shri H.K. Choudhary, CIT- DR

ORDER

PER R.K. PANDA, AM:

This appeal filed by the Revenue is directed against the order dated 24th March, 2011 of the CIT(A)-20, New Delhi, relating to the assessment year 2004-05.

2. Ground No. 1 by the Revenue reads as under:-

> ñ1. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of Rs.17,40,08,078/- made by AO on account of Armôs Length Price.ò

3. Facts of the case, in brief, are that the assessee is a 100% subsidiary of Mobil Petroleum Company Inc., USA. The assessee is engaged in the business of manufacture and trading of a range of lubricants in India. It filed its return of income on 30th October, 2004 declaring nil income after setting off of total income of Rs.21,94,478/- with brought forward losses. Since the assessee had entered into certain international transactions with its AEs, the AO made a reference to the TPO for determination of the ALP of the international transaction. The TPO, during the course of TP assessment proceedings, noted that the assessee has undertaken the following international transactions:-

S. No.	Description of transaction	Method	Value (In Rs.)
1.	Import of base oil	CPM	44,44,13,425
2.	Import of additives	CPM	9,18,37,885
3.	Import of lubricants	CPM	23,01,45,525
4.	Sale of marine lubricants	CPM	1,65,60,844
5.	Commission received for marketing support services	CPM	50,57,030
6.	Payment of service fee	TNMM	11,99,84,377
7.	Cost recharges paid by assessee	CUP	11,675,909
8.	Cost recharges received by assessee	CUP	12,769,244
	Total		93,24,44,239

4. He noted that the transactions from sl. No.1-5 have been benchmarked in aggregated format using cost plus method with gross profit/direct and indirect cost of production as profit level indicator. The financial result of the assessee is tabulated in Appendix G with a finding of Gross Profit ratio at 38.29%. This margin has been compared with the margin of four comparables (searched from Prowess and Capitaline databases), for the companies engaged in similar activities.

At page 46 of Transfer Pricing report the assessee has mentioned that arithmetic mean of gross profit ratio of these comparables comes to 33.03%. The assessee has used multiple year data in respect of these comparables. The detailed calculations of margin were not placed in documentation.

5. In respect of transactions on account of payment of service fees, the assessee had employed TNMM with operating profit/total cost as profit level indicator for benchmarking the ALP.

6. The TPO analysed the functional profile of the assessee. He observed that the assessee company is a manufacturer of lubricants. The raw material used for manufacturing lubricants is base oil which is imported from the AEs. The additives used are partly imported from the AEs and the balance is procured from third parties approved by Exxon Mobil, USA. The blending of base oil with additives is also not done by the assessee company, but, it is contracted out to third parties since the assessee does not own any manufacturing facility to this extent. The assessee pays blending fees to third party blenders.

7. Similarly, the TPO noted that the assessee has also purchased finished goods, i.e., lubricating oil and specialties from its AEs for sale in the domestic market. In addition to this, it has global arrangement with the AEs as well as shippers for supply of lubricants at different ports. As per this arrangement, the group companies are invoiced by the assessee and these transactions are shown as

sold finished goods to the AEs. The assessee also provide market support for which commission is paid to the assessee.

8. The TPO noted that the assesseee in its transfer pricing report has tabulated the risk profile analysis between the assessee and its AEs, the details of which are as under:-

Nature of risk	Exxon India	Exxon Group
Market risk	Yes	Indirectly
Product Liability risk	No for trading, Yes for manufacturing	No for manufacturing, Yes for trading
Technology risk	No	Yes
Credit risk	Yes	No
Inventory risk	Yes	No
Foreign Exchange risk	Yes	No
R&D	No	Yes

9. He noted that the assessee company is carrying out manufacturing activity by getting of blending of base oil and additives done by third parties and has paid an amount of Rs.4.40 crore as blending fees. He further noted that the assessee also incurred an expenses of Rs.14,62,74,000/- on transportation, storage and handling charges. These expenses, according to him, are nothing, but, in the nature of transportation and storage charges paid by the assessee. The details of such expenses as provided by the assessee are as under:-

Transportation, storage and handling charges	
	(in Rs.)
Raw Material	
Storage Cost in Tanks	12,390,740
Transportation from Tanks to Plant	17,655,769
Finished Goods	
Transportation to Clearing & Forwarding agents (CFAs) and Customers	84,336,317
Storage Charges at CFAs	31,890,898
Total	**146,273,724**

10. After analyzing the various functional profile of the assessee, the TPO observed that the profile of the assessee company is more than a simple manufacturer and trader in view of the fact that huge expenses on advertisement and publicity to the extent of Rs.6.43 crore is incurred. The assessee, according to him is promoting the products of the AE which is sharing the cost of both the related transaction entities.

11. The TPO rejected the functional and economic analysis conducted by the assessee and selected TNMM as the most appropriate method. The TPO adopted the following set of comparables for TNMM and determined the operating profit of the comparables at 6.95%, the details of which are as under:-

Sr. No.	Company Name	OP/OR
1	Bharat Shell	3.81
2	Castrol India	16.56
3	Chennai Petroleu	6.83
4	Cont. Petroleums	-2.16
5	Panama Petrochem	4.98
6	Sah Petroleums	13.55
7	Savita Chemicals	7.41
8	Tide Water Oil	5.10
9	Totalfinaelf India Ltd.	6.48
		6.95

12. On the basis of the comparability analysis and financial analysis of the above comparables which are engaged in similar trade and observing that these comparables are having operating profit margin over operating revenue of 6.95% on mean basis, the AO computed the ALP of the international transaction of the assessee at Rs.17,40,08,078/-, the details of which are as under:-

ñOperating revenue	2,12,86,63,000 (A)
OP/OR of comparables	6.95% (B)
Operating profit (A x B)	14,79,42,078
Operating Loss as per books	2,60,66,000
Difference	17,40,08,078

13. The TPO accordingly proposed upward adjustment of the armôs length price of the international transactions entered by the assessee with its associated enterprises at Rs. 17,40,08,078 as under in proportion of their book value:

S. No.	Description of transaction	Book Value	Difference	Arm's length value
1	Import of base oil	444413425	87244094	357169331
2	Import of additives	91837885	18028963	73808922
3	Import of lubricants	230145525	45180538	184964987
4	Payment of service fee	119984377	23554483	96429894
	Difference		**174008078**	

14. The AO accordingly mad addition of Rs.17,40,08,078/- to the total income of the assessee.

15. Before the CIT(A), the assessee challenged the addition made by the AO as proposed by the TPO. It was argued that the assessee company is engaged in the business of manufacturing and trading of a range of lubricants in India. It primarily imports raw material and finished goods from group companies. CPM

gives the gross profit mark up available after deducting the input cost. It is a good measure of the compensation for the performance of the manufacturing and selling functions and risks assumed thereof. Adoption of TNMM by the TPO/AO was vehemently opposed on the ground that the same is not applicable in the case of the assessee. The assessee also provided supplementary method in the form of CUP analysis for purchase of raw material during the impugned financial year and Resale Price Method for import of finished goods. It was argued that the AEs of the assessee supplied similar raw material as is sold to the assessee to other unrelated parties in India. The prices charged by the AEs from unrelated third parties serves as internal CUP for the transaction related to import of raw material. It was accordingly argued that the CUP is the most appropriate method in the hands of the assesseee. The various decisions of the Tribunal were also brought to the notice of the CIT(A) to the proposition that CUP is the most appropriate method for purchase of raw materials.

16. So far as import of lubricants is concerned, it was argued that the assessee merely imports the lubricants and resells it further to unrelated parties. It does not add any value to the products imported and merely acts as a buy-sell agent. The segment constitutes only 32.21% to the total revenue of the assessee for the year under consideration. Rule 10B(1A) of the IT Rules, 1962 was also brought to the notice of the CIT(A). It was argued that gross profit margin earned by the comparable companies is 13.73% while that earned by the assessee is 32%. Thus,

the transactions undertaken by the assessee with respect to its trading segment are at armôs length as defined by the Indian transfer pricing regulations.

17. So far as the services transaction is concerned, it was argued that the assessee has used TNMM taking foreign AE as the tested party for determination of the armôs length price for payment of service charges. Relying on various decisions, it was argued that use of foreign associated enterprise as the tested party has been allowed in the said decisions. It was further argued that the TPO has neither in the order nor at the time of assessment proceedings, objected to the benchmarking analysis conducted by the assessee. However, at the time of framing the order, the TPO included the said transaction with the other transactions for the application of TNMM on a company-as-a-whole basis. Thus, the TPO did not provide the assessee with an opportunity of being heard on such a stand taken by him.

18. Based on the arguments advanced by the assessee, the ld.CIT(A) deleted the addition made by the AO as proposed by the TPO by observing as under:-

ñFINDINGS

> I have gone through the above submission of the Appellant and have also gone through the TP Documentation submitted by the Appellant. On perusal of the above, the first issue in hand in this case is adopting company as a whole approach as adopted by the TPO vs. segmental approach as adopted by the Appellant.
>
> On a careful consideration of the above, I am of the view that, each international transactions should be evaluated and analyzed separately by applying the most appropriate method in the manner as provided in Rule 10B and 10C of the Income tax Rules, 1962 (ñthe Rulesò) read with section 92C

of the Act. It is only under circumstances where the transactions are so closely interrelated that they are not capable of being evaluated separately, all the transactions may be grouped together. I have considered the submission of the appellant in this regard and I am of the view that Indian transfer pricing regulations requires each international transaction to be evaluated and analysed separately.

Further, in this regard the Hon'ble Mumbai ITAT has in case of Tecnimount ICB Pvt. Ltd. held that as per the provisions contained under sections 92 to 94, international transactions are to be taken into consideration. Therefore, segmental results are to be considered and not the profit at entity level.

Secondly with application of TNMM method, I agree with the submissions made by the appellant wherein, it has highlighted various business and commercial reasons for non-applicability of TNMM method. The appellant has highlighted the fact that during the phase it was recovering from cessation of joint venture between Mobil Corporation and Indian Oil Corporation Limited and hence, did not have a normal year of business operations as witnessed by other comparable companies" selected by the TPO. Further, I am of the view that any reliable adjustments cannot be made to account for these differences. Analysing the submission of the appellant further I am also of the view that in light of other alternatives available in form of other more direct methods an attempt should be made to analyse the same and understand their applicability to the case under consideration!

In this regard I also wish to examine Ld. Tribunal judgment in case of MSS India Pvt. Ltd. which lays out that traditional transactional methods such as CUP, CPM etc should be preferred over transactional profit methods i.e. TNMM.

Similarly as mentioned above, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TP Guidelines) have exhibited a distinct preference towards CUP over all other traditional and transactional methods. The OECD TP Guidelines provides:

Thus, even the Hon'ble Tribunal is of view that CUP being the most direct method should be considered as the method of choice and all efforts should be made to apply the said method wherever possible.

In backdrop of the above I proceed ahead to analyse the supplementary details submitted by the appellant.

Segmental Analysis
Manufacturing Segment - Import of Base oil

After considering the submission made by the Appellant I am of the view that the Appellant for benchmarking the international transaction of Import of base oil has used prices charged by the associate enterprise from unrelated third parties as internal CUP. I have carefully examined the information supplied by the appellant in application of CUP method and of the view that the transactions being compared are similar on account of several critical factors such as nature of goods, time period, contractual terms and port of origin and destination. Further, the information provided by the appellant clearly demonstrates that the AE have sold the similar goods to unrelated parties at a price higher than the price at which the same has been sold to the appellant.

Further, while comparing the transactions the appellant has taken care that the transactions being compared are similar in terms of their periodicity and volume. Thus, the Appellant has obtained the price charged by its AE for each grade of base oil from third parties in India and aligned it with identical purchases made by it. Further, considering the volatility of the base oil market, the Appellant has ensured that the comparison has been made at the approximately at the same time period. Further, I do not find any merit in the contention of the TPO that the appellant should demonstrate that it has procured the base oil from other unrelated parties at a higher price and not the other way round. The argument provided by the TPO does not find any merit, In this regard I wish to examine the specific provision contained in Rule 10B (1) of Income Tax Rules 1962:

Quote:

> (a) comparable uncontrolled price method, by which,ð
>
> (i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;
>
> (ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;
>
> (iii) the adjusted price arrived at under sub-clause (ii) is taken to be an armôs length price in respect of the property transferred or services provided in the international transaction;

On analysing the above information it is clearly evident that the only requirement of law for application of CUP method is comparison of controlled transactions with uncontrolled transactions, irrespective of the end

which is analysed. Thus, in my opinion the appellant has met all the condition for application of CUP method.

Therefore, I hold that the international transaction with respect to import of base oil should be benchmark by using comparable uncontrolled price which clearly demonstrates the armôs length nature of the transaction.

Trading segment - Import of Lubricants

After considering the submission made by the Appellant in this respect I am of the view that the Appellant for benchmarking the international transaction of imports the lubricants has segmented the same under trading segment and used RPM to determine the armôs length price.

I have gone through the functional profile of the Appellant. The appellant in its trading segment merely imports the lubricants and resells it further to unrelated parties. Thus, it does not add any value to the products imported and merely acts as a buy sell agent. This segment constitutes only 30.21% to the total revenue of the Appellant for the year under consideration.

In this regard, the Appellant has mention about the guidance note issued by Institute of Chartered Accountant on the applicability of RPM as discussed above.

Thus, on that basis of above I am of a view resale price method (ñRPMò) is most appropriate in a situation where the seller adds relatively little value to the goods.

Therefore, I hold that the international transaction with respect to import of lubricants should be benchmarked by using RPM to determine the armôs length price. Further, the TPO in his remand report dated March 15, 2010, has also not objected to the use of RPM for the trading segment of the appellant.

Thus, in view of the above I am inclined to accept the benchmarking study conducted by the Appellant to identify the companies comparable to the trading segment. Wherein, the gross margin earned by the comparable companies is 13.73%, while that earned by the Appellant is 32%. Thus, the international transactions undertaken by Appellant with respect to its Trading segment are at armôs length as defined by the Indian Transfer Pricing Regulations. The detailed search process and business description of the comparable companies is provided to both TPO and myself in submission dated November 9, 2009.

In view of the above the armôs length price paid for import of lubricants is ted and transfer pricing addition made by the TPO ought to be deleted.

Service Fee

I have carefully considered the submission and TP documentation made by the Appellant wherein, the Appellant has used TNMM taking foreign AE as the tested party, to determine the armôs length price for payment of service charges.

In this regard, as mentioned above, I wish to analyse the various ITAT judgments like Development Consultants India and Ranbaxy Laboratories which allows the use of foreign associated enterprise as the tested party for justifying the armôs length nature of international transaction.

In view of the above I do not find any flaw in the methodology adopted by the appellant to benchmark its international transaction related to payment of service fee.

Therefore, I hold that the international transaction with respect to payment of service charges should be benchmarked by using TNMM taking foreign AE as the tested party to determine the armôs length price.

Thus, in view of the above I am accepting the benchmarking study conducted by the Appellant to identify companies engaged in providing general management consulting and administrative services. Wherein, OP/TC achieved by the comparable companies is 11.21% as against 5% charged by the associated enterprise.

Based on the above I hold that international transactions related to payment of service fees was in accordance with the armôs length principle and transfer pricing addition made by the TPO ought to be deleted.

In view of the above the armôs length price charged by the appellant for its international transaction related is accepted and transfer pricing addition made by the TPO ought to be deleted.ò

19. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal.

20. The ld. DR strongly challenged the order of the CIT(A) in deleting the addition made by the TPO/AO. Referring to the last para of page 27 of the order of the CIT(A), he submitted that no finding has been given by the ld.CIT(A) as to

how TNMM is not applicable. He submitted that the CIT(A) has not at all examined the comparables proposed by the TPO and has not given valid reasons as to why internal CUP is not proper. He submitted that the assessee has not filed any CO or any cross appeal against the above observation of the CIT(A). He submitted that the CUP is not applicable in absence of sufficient data. Further, since full data is not available and availability of few items cannot be sufficient to adopt CUP method, therefore, the CUP adopted by the assessee has to be rejected.

21. So far as RPM is concerned, he submitted that the ld.CIT(A) has not discussed the same. He submitted that Resale Price Method or GP Method is also not acceptable since the ld.CIT(A) has not given any finding on the comparables and the assessee has neither filed any cross objection or cross appeal for non-adjudication. The ld. CIT-DR submitted that cost plus mark up has to be examined and cost base cannot be taken as sacrosanct. He submitted that the ld.CIT(A) has held the foreign AE as a tested party without any proper analysis. The ld. DR submitted that the assessee does not have data for additive as admitted by him for CUP analysis. As far as base oil is concerned, total data given is for Rs.21 crores whereas the total input is about Rs.44.44 crores. Thus, they have not provided the full data for the CUP analysis. Therefore, on these facts/evidences, decision can be taken here itself. He submitted that the TPO has rightly chosen TNMM and the ld.CIT(A) has taken cognizance of assesseeôs submission regarding CUP data which is glaring. He submitted that when there is insufficient data and when in the

TP report itself CUP was rejected as the most appropriate method, the Tribunal should not accept the CUP method as the most appropriate method. Therefore, the TPOôs action for benchmarking TNMM should be approved.

22. So far as trading segment (for import of lubricants) is concerned, the ld.CIT-DR submitted that the assessee for the first time has gone before the CIT(A) for segmental RPM for trading segment. This was not done in original TP study. Whatever comparables they have taken earlier they were for altogether different purpose. Here, there is no complete analysis. Therefore, they have to do complete analysis as to what are the filters applied, which are the comparables rejected/accepted and how many comparables finally selected. He accordingly submitted that the segmental RPM cannot be accepted unless fresh analysis has been done. Referring to objection of the TPO at para 3(i) of the remand report copy of which is placed at pages 501-509 of the paper book and copy of annual report placed at paper book pages 1-29, he submitted hat there is absolutely no comment by the assessee on the search process or segmental for comparables and non-disclosure on filters. He submitted that the cost base has not been verified as mentioned in the report of the TPO. He submitted that if TNMM is accepted in the manufacturing process, the same method can be applied for trading segment also. Further, there is no comment by the CIT(A) on common expenditure for segmental approach when there is specific remark by the TPO that cost base of comparables selected by the assessee is not given. He submitted that if RPM is approved, the

TPO should be given opportunity for analysis of cost base of comparables, segmental data and benchmarking process.

23. So far as service fee is concerned, he submitted that the assessee has to prove that the foreign AE is least complex and reliable data should be available in public domain or the assessee should give complete data of the same. He accordingly submitted that the order of the CIT(A) should be reversed and that of the order of the AO/TPO should be restored.

24. The ld. Counsel for the assessee, on the other hand, strongly supported the order of the CIT(A). Referring to page 28 of the order of the CIT(A), he drew the attention of the Bench to the finding given by the CIT(A) that TNMM analysis carried by the AO is full of flaws for which it cannot be followed. He drew the attention of the Bench to Rule 10B(1) and 10B(2) and submitted that no FAR analysis has been carried out by the TPO at all. He submitted that language of sub-rule (2) is mandatory with respect to assets employed. Referring to the financials of the assessee company, he submitted that the assessee does not own any land, building or factory. The value of plant & machinery is very negligible. The ld. Counsel for the assessee filed the following chart to substantiate that the assessee does not own any land and building and the fixed assets in shape of plant & machinery are meager:-

ñSCHEDULE OF FIXED ASSETS
(Refer Noes 1.2,1.5, 1.3 and 1.7 on Schedule 16)

(Rs.in ó000)

	Gross Block				Accumulated Depreciation				Net Block	
Description	As at 1.4.2003	Purchases / Additions during the year	Disposals / Adjustments during the year	As at 31.3.2004	As at 1.4.2003	Deprec-iation for the year	Depre-ciation on assets sold/ assets written off	As at 31.03.2004	As at 31.3.2000	As at 31.03.2003
Plant and Machnery	16,776	166	6,687	10,255	3,715	1,649	2,561	2,803	7,452	13,061
Leasehold improvements	16,488	295	-	16,783	769	3,823	-	4,592	12,191	15,719
Moulds and tools	8,296	-	289	8,007	7,458	390	277	7,571	436	838
Furniture and fixtures	4,204	376	643	3,937	415	339	219	535	3,402	3,789
Computers	19,852	1,185	45	20,992	5,592	6,922	19	12,475	8,517	14,260
Office Equipment	4,232	2,221	802	5,651	1,940	1,135	500	2,575	3,076	2,292
Motor Vehicles	1,117	-	834	283	755	214	686	283	-	362
Telecommu-nications	2,618	4,580	-	2,198	87	610	-	697	6,501	2,531
TOTAL	73,583	8,823	9,300	73,106	20,73	15,082	4,282	31,531	41,575	52,852
Capital advances										2,182
GRAND TOTAL									41,575	55,034
Previous Year	76,134	43,271	45,822	73,583	44,975	7,545	31,789	20,731	52,852	

24.1. He also drew the attention of the Bench to the following chart giving details of some of the comparables adopted by the TPO which are not at all comparables:-

S.No.	Particulars	Exxon Mobil (Pg.17&18/ Vol.I	Castrol (Pg.873-980/ Vol.V)	Savita Chemical (Pg.1017/ Vol.V)	Tide Water Oil (Pg.1065 / Vol. V)	Arithme-tical mean of compara bles
A. i)	Total Sales	234.81 (Schd.11,13 & 14)	1171.15	456.42	193.18	-
ii)	Total Mfg. & Operating Cost	214.01	985.93	430.56	183.04	
B. a)	Blending Fee to sub-contractor	4.40	-	-	-	-
b)	Storage tank rent paid to third parties, transport of base oil	6.19 (1.24+1.76+ 3.19)	-	-	-	-
c)	Sales Promotion, Advertisement & Publicity	7.14	54.33	0.61	3.48	
	(a)+(b)+(c)	17.73	54.33	0.61	3.48	

C. i)	Percentage of (a+b+c) to Total cost	8.28%	5.51%	0.14%	1.90%	2.51%
ii)	Percentage of (a+b+c) to Total Sales	7.55%	4.64%	0.13%	1.80%	2.18%

25. He submitted that the business model of the assessee is completely different from that of the comparables. All those comparables have huge plant & machinery, land and building, etc., whereas the assessee does not have such huge assets.

26. Referring to the decision of the Hon'ble Bombay High Court in the case of PCIT vs. Aptara Technology Pvt. Ltd., 410 ITR 100 (Bom.), he submitted that the Hon'ble High Court in the said decision has held that where a company which outsources its work to sub-vendors as against the assessee carrying out its activity in-house should not be selected as a comparable. Referring to the decision of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. vs. CIT, 377 ITR 533, he drew the attention of the Bench to the following head note:-

> ñThe aim of the provisions of Chapter X of the Income-tax Act, 1961, is to compute the income in relation to a controlled transaction between an assessee and its associated enterprise having regard to the arm's length price, in order to nullify the effect of transfer of income to a jurisdiction outside India, if any, in respect of the controlled transaction. Circular No. 14 of2001111issued by the Central Board of Direct Taxes indicates that the provisions of sections 92 to 92F of the Income-tax Act, 1961, were introduced ñwith a view to provide a detailed statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India ò. The exercise of determining the arm's length price in respect of international transactions between related enterprises is aimed at determining the price which would have been charged for products and services, as nearly as possible, if such international transactions were not controlled by virtue of their being executed between related parties. The object of the exercise is, thus, to remove the effect of any influence on the prices or costs that may have been exerted on account of the international transactions

being entered into between related parties. It is, at once, clear that for the exercise of determining the armôs length price to be reliable, it is necessary that the controlled transactions be compared with uncontrolled transactions which are similar in all material aspects.

Section 92C of the Act provides for the provisions relating to computation of the arm's length price. Section 92C(l) of the Act provides for the methods of computing the armôs length price and section 92C(2) of the Act mandates that the most appropriate method that has been referred to in section 92C(1) be applied for determination of the arm's length price. Rule 10B of the Income-tax Rules, 1962, provides for the determination of the arm's length price under section 92C of the Act. Rule 10B(1) contains provisions in relation to various methods of calculation of the armôs length price as provided under section 92C . Paragraph 1.36 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations published in 2010 indicates the ñcomparability factorsôô which are important while considering the comparability of uncontrolled transactions or entities with controlled transactions or entities. Rule JOB (2) also mandates that the comparability of international transactions with uncontrolled transactions would be judged with reference to the factors indicated under clauses (a) to (d) of that sub-rule, which are similar to the comparability factors as indicated under the OECD Guidelines. These include characteristics of property or services transferred and functions performed.ò

27. The ld. Counsel for the assessee in his second alternate argument submitted that these are gestation years, the plant is yet to be erected and there is no capital work in progress. He submitted that the assessee is a small capital based company. He submitted that every company incurs expenditure on account of transportation and storage. Referring to the annual accounts of Castrol India Ltd., copy of which is placed at pages 829-894, Paper Book Volume V, he submitted that Castrol India owns freehold land valued at Rs.6.79 crores, leasehold land valued at Rs.0.64 crore, buildings at 54.92, Plant & machinery Rs.88.60 crores which is the net block, i.e., after depreciation. Referring to page 855 of the paper book, which is the part of the Directorôs Report, he drew the attention of the Bench to the

segmentwise/product wise performance according to which the said companyôs performance saw a significant turnaround during the second half of the year under review backed by a spate of relaunches in the commercial vehicle category.

28. Referring to the annual audited accounts of Chennai Petroleum Corporation Ltd., copy of which is placed at page 895-987 of the paper book, the ld. Counsel for the assessee, referring to various pages of the audit report drew the attention of the Bench to page 26 of the said report where it has been reported as under:-

> ñYour Company has a well-defined Manual on Delegation of Authority, based on which, the authorities exercise their powers. This Manual is reviewed periodically to cope with the changes necessitated by the needs of the organization. In addition to the Manual on Delegation of Authority, the Company's key departments have Departmental Manuals prescribing a checklist of activities and systems and procedures for carrying out such activities. These manuals further strengthen the internal control systems in the Company.
>
> PERFORMANCE AT A GLANCE
>
> Physical Performance
>
> The total crude processed by the Manali Refinery and Cauvery Basin Refinery during the year was 7.04 Million Metric Tonne (MMT). This compares favourably to 6.819 MMT processed during the previous year.
>
> Salient features of Manali refineryôs operation during the year include the following :
>
> ÅHighest ever throughput of 890.1 TMT in the FCC unit of Manali Refinery. Also, continuous run length of 19 months was achieved.
>
> ÅThe Energy Index (MBTU/BBL/NRGF) for Manali Refinery for the year 2003-2004 was 118.7, as compared to last year value of 119.
>
> ▪ To maximize freight economics, 14 Nos. of Suezmax crude tankers were received directly at Chennai Port. Co-loading of Upper Zakkum and Murban was carried out for the first time in a single Suezmax tanker.ò

29. He submitted that the said company owns an oil jetty at Cauvery Basin Refinery which was named as óChidambaranar Oil Jetty.ô Referring to page 80 of the annual accounts (page 976 of the paper book), he submitted that the generic names of three principal products/services of the company are: high speed diesel; low aromatic naphtha; and superior kerosene oil.

30. So far as Savita Chemicals Ltd. is concerned, the ld. Counsel for the assessee drew the attention of the Bench to page 1016 of the paper book and submitted that the said company derives income from sales at Rs.45,24,566/- lakhs and processing income at Rs.100.38 lakhs. Referring to page 32 of the audited accounts of Savita Chemicals Ltd., copy of which at page 1021 of the paper book, he submitted that no segmental details are given and at page 35 of the annual accounts, it is simply mentioned ópetroleum products.ô Therefore, in absence of segmental details, Savita Chemicals Limited cannot be considered as a good comparable.

30.1 So far as Totalfina C&F is concerned, the ld. Counsel for the assessee submitted that the assessee has originally selected this company under CPM on the basis of limited information available on Prowess. However, not it is seen from the website that it belongs to Total Group which is a French Giant Company. It has a wide spread marketing network in South India since early nineties. Its annual report for F.Y. 2003-04 and 2004-05 are not available in public domain. Further, it has three distinct business segments, namely, (1) Lubricant; (2) Speciality fluids

like pesticides and insecticides for agricultural use and (3) LPG for domestic and industrial use. However, no segmental details are available. Further, the extent of related party transactions are also not available. Therefore, Totalfina C&F India Ltd. cannot be considered as a comparable.

31. Referring to the annual accounts of Tide Water Oil Company (India) Ltd., copy of which is placed at pages 1032 to 1079 of the paper book, the ld. Counsel for the assessee drew the attention of the Bench to page 1031 and submitted that this is the 75th year of the company. Further, five state-of-the-art plants have come up as per the annual report. He submitted that the companyôs products primarily marketed under the óVEEDOLô brand name are well accepted and acknowledged in the industry for their quality and range.

32. So far as Saha Petroleum is concerned, the ld. Counsel submitted that its annual report is not available in public domain. It was a partnership firm earlier which subsequently became a company in May, 2004. Till that time its accounts were opaque. The TPO went ahead with the said information which the assessee did not have nor the same was furnished to the assessee. He submitted that even if we apply TNMM, none of the companies selected by the TPO can be considered as comparable. He submitted that this is the initial period of the company and therefore, the benefit has to be given to the assessee. The ld. Counsel for the assessee also referred to the following decisions:-

i) Rampgreen Solutions P. Ltd. vs. CIT, 377 ITR 533 (Del);

ii) Aptara Technology Pvt. Ltd., 410 ITR 100 (Bom);

iii) CEVA Freight India (P) Ltd. vs. DCIT, 90 taxmann.com 120 (Del-Trib.)

33. Referring to the decision of the Delhi Bench of the Tribunal in the case of HCL Technologies BPO Services Ltd. vs. ACIT reported in 172 TTJ 1, he submitted that the Tribunal in the said decision has held that in course of transfer pricing proceedings, while computing the operating cost, abnormal costs incurred on account of start up of business like salary, rent and depreciation, etc. have to be excluded.

34. Referring to the decision of the Pune Bench of the Tribunal in the case of Amdocs Business Services (P) Ltd., vide ITA No.1412/PM/2011, for A.Y. 2007-08, he submitted that the Tribunal, in the said decision has held that where the assessee had incurred certain expenditure which are start up costs and cannot be fully recovered in the instant year itself and such an expenditure has abnormally affected the profit margins, then economic adjustment such as capacity utilization and expenditure relating to start up cost should be made.

35. The ld. counsel for the assessee in his third alternate arguments submitted that the functions undertaken, assets employed and risks assumed in case of Castrol India, Savita Chemicals, Tide Water Oil Company (India) Ltd. are not available and, therefore, these companies should be excluded from the list of comparables. Similarly, in case of Totalfina C&F India Ltd., and in case of Saha Petroleum, complete data is not available and, therefore, these companies are also to be

excluded. The ld. Counsel for the assessee further submitted that in the subsequent assessment year 2005-06, the asssessee furnished similar evidences to the TPO during the course of the TP proceedings copy of which is placed at page 224-238 of the Volume II of the paper book which the CIT(A) accepted. However, the TPO simply chose to ignore these evidences and blindly followed the order of his predecessor. He submitted that although the Revenue has taken a general ground No.1 for A.Y. 2005-06 making an overall objection to the additions made of the ALP, however, it has not objected to the application of CUP and RPM method applied by the CIT(A) to import of base oil and packaged ready-to-sell special lubricants, respectively. He submitted that RPM is the most appropriate method. The objection of the TPO in the remand report is that RPM is not a proper method for finding ALP of purchase and sale of lubricant containers. He submitted that the CIT(A) has held that since transactions under these segments consists of distribution and resale of imported finished goods without value addition, RPM is the most appropriate method. He submitted that the TPO in the second remand report dated 15th March, 2010 does not object to the use of RPM for the trading segment. He submitted that the decision of the CIT(A) is fully supported by various decisions of the Tribunal.

36. So far as payment of service fee segment is concerned, the ld.CIT(A) has held that 5% mark up of cost is reasonable. The TPO, in his remand report is silent on this issue. He submitted that the ld.CIT(A) has not decided the assesseeôs

objections against inclusion/exclusion of certain comparables by TPO as this question had become infructuous. In any case, artificial allocation to various distinct business segments is not permissible under Rule 10. He submitted that in respect of service fee paid to Singapore AE, the assessee had furnished service agreement dated 01.08.2002 along with schedules giving nature of services, fee allocation key, remittances along with auditorôs comments, etc. The TPO has not at all considered these evidences. Referring to the decision of the Honôble Delhi High Court in the case of EKL Appliances, he submitted that the action of the TPO is contrary to the above decision. He accordingly submitted that the order of the CIT(A) be upheld and the ground raised by the Revenue be dismissed.

37. The ld. DR, in his rejoinder, drew the attention of the Bench to the last para of page 27 of the order of the CIT(A) and submitted that no finding has been given by the CIT(A) that TNMM is not applicable. Even the ld. Counsel has also not given any justification for non-application of TNMM. He submitted that the comparables adopted by the TPO were not examined by the CIT(A) nor any decision has been given regarding inclusion/exclusion of certain comparables. He submitted that the ld.CIT(A) has further given a finding that internal CUP is not appropriate and the assessee has neither filed any cross objection nor any cross appeal against the finding of the CIT(A). He submitted that CUP is not applicable since sufficient data is not available. The available data of AE is also not given nor full data of the assessee was given. He submitted that CUP has to be rejected as

such in absence of complete data and in absence of any substantive argument of the ld. Counsel. So far as RPM is concerned, he submitted that the ld.CIT(A) has not discussed this issue. So far as Resale Price Method is concerned, he submitted that the same is not acceptable since in manufacturing there is no resale and profit split method is not before us. Further, the assessee in its TP study itself has taken itself as a manufacturer. So far as comparables are concerned, the ld. DR submitted that he has no objection if the matter is restored to the file of the TPO for re-examination of the comparables. So far as the argument of the ld. Counsel for the assessee regarding start up is concerned, he submitted that it is not a start up, but, it is a joint venture between IOC and Exxon Mobil.

38. We have considered the rival arguments made by both the sides, perused the orders of the AO/TPO/CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the TPO in the instant case made TP adjustment at entity level and, thereafter, allocated the addition to various segments in proportion of revenue the details of which are given at para 13 of this order. We find the TPO made adjustment of Rs.10.52 crores in the manufacturing segment, Rs.4.51 crores in the trading segment and Rs.2.35 crores in the service segment. We find, the ld.CIT(A), after considering the additional evidences filed before him and on the basis of two remand reports, held that the set of transactions involving base oil from AE are independent of the transactions involving import of additives from unrelated MNC. He held that

voluminous transactions of sale involving substantial value of same grade of base oil were contemporaneously made by the Singapore AE to unrelated parties in India. According to him, the price paid by the assessee during the relevant period for same grades of base oil compares well with the price paid by the independent parties. Further, the Singapore AE had given all instances of sale to unrelated parties in India. Most of these parties are, in fact, comparables chosen by the TPO and the TPO has not pointed out a single instance of sale which is not reported.

39. We find the ld.CIT(A) held that the transactions falling in three business segments, namely, manufacturing of lubricants, resale of pre-packaged lubricants and payments or receipt of fee for services are distinct and independent. According to him, in respect of import of base oil CUP method and in respect of the packaged lubricants RPM are most appropriate method for determining ALP. He held that ALP under CUP method should apply to imports of base oil and additives keeping in view numerous instances of contemporaneous sale of similar items made by the Singapore AE to various unrelated parties in India. According to him, RPM is to be applied to import of pre-packed lubricants in retail containers as no value addition is made to the assessee. He further held that application of TNMM at entity level is inappropriate.

40. It is the submission of the ld. CIT-DR that cost plus mark up has to be examined and cost base cannot be taken as sacrosanct. According to the ld. CIT-DR, the assessee has not furnished sufficient data for additive. So far as base oil is

concerned, total data given is for Rs.21 crore when the total input is for Rs.44.41 crore and, thus, they have not provided the full data for the CUP analysis for purchase of base oil. Similarly, for additives absolutely no data was given. It is also his submission that in absence of sufficient data and when the assessee in its TP report itself has mentioned that CUP was rejected as the most appropriate method, therefore, CUP method cannot be applied. So far as trading segment is concerned, it is his submission that here also there is no complete analysis of data regarding the nature of filters to be applied and list of final comparables. It is his submission that segmental RPM cannot be accepted unless fresh analysis has been done. It is also the submission of the ld. CIT-DR that if TNMM is accepted for manufacturing process, the same is to be applied for trading segment. So far as service fee is concerned, it is his submission that the assessee has first to prove that the foreign AE is a least complex party and reliable data should be made available to the TPO. Further, there is no finding by CIT(A) that TNMM is not applicable. It is also his submission that the ld.CIT(A) has not at all discussed regarding various comparables taken by the AO/TPO.

41. We find some force in the arguments of the ld. DR. We find the ld.CIT(A) has not given any categorical finding that TNMM is not applicable. We find the ld.CIT(A) at page 27 and 28 of his order has simply mentioned that he agrees with the submissions made by the appellant wherein it has highlighted various business and commercial reasons for non-applicability of TNMM method. He has not given

any categorical finding that TNMM is not the most appropriate method under the facts and circumstances of the case. Further, the assessee has not given full data for applicability of CUP as the most appropriate method. From the various details furnished by the assessee in the paper book, we find the assessee has not given full data for additives for application of CUP as the most appropriate method. So far as base oil is concerned, the assessee has given data for Rs.21 crore whereas the total input is of Rs.44.44 crores and, therefore, in absence of full details, CUP analysis could not have been done for the base oil. So far as trading segment is concerned, we find the assesseee for the first time has gone before the CIT(A) for segmental RPM for the trading segment. This was not there in the original study. There is absolutely no complete analysis of the data. Further, the various comparables selected by the TPO has not at all been considered by the CIT(A). Further, we are of the opinion that if RPM is approved, then, the TPO should be given opportunity for analysis of cost base of comparables, segmental details and benchmarking process. So far as service fee is concerned, the assessee has to first prove that the foreign AE is the least complex party and relevant data should be available in public domain or the assessee should give full details. However, nothing is coming out of record regarding the submission of the details. Under these circumstances and considering the fact that these are the initial years of transfer pricing proceedings, we deem it proper to restore the issue to the file of the AO/TPO for deciding the issue afresh and in accordance with the law after giving due opportunity of being heard to the assessee. We hold and direct accordingly.

Ground of appeal No.1 by the Revenue is accordingly allowed for statistical purposes.

42. Ground of appeal No.2 raised by the Revenue reads as under:-

> ñ 2. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs. 4,28,878/- on account of expenditure on foreign travel.ò

43. Facts of the case, in brief, are that the assessee company incurred expenditure of Rs.21,44,386/- on foreign travel. The AO subsequently asked the assessee to give proof of business purposes for the said foreign travel, the list of persons who visited the countries abroad and the purpose of travel. Although the assessee filed details of foreign travel, however, no proof of business purpose of the aforesaid travel was furnished. In view of the above, the AO, relying on various decisions, disallowed an amount of Rs.4,28,878/- being 20% of such expenditure on the ground that the assessee did not establish that the amount in question was an expenditure laid out wholly and exclusively for the purpose of business.

44. In appeal, the ld.CIT(A) deleted the addition by holding as under:-

> ñFINDINGS
>
> I have carefully considered the submissions and the details filed by the appellant. Also, the appellant vide its letter dated 21 March 2011 filed details of the foreign travel of some of the employees wherein it is evident that the employees of the appellant provides an undertaking that the foreign travel expenditure is towards the business purpose only and the same had also been approved by the senior to whom the relevant employee reports to. Therefore, after analyzing the facts and the supporting documents submitted by the appellant I found that the foreign travel expenditure of Rs. 2,144,386 incurred

> by the appellant is towards its business purpose and should be allowed as normal business expenditure under section 37 of the Income-tax Act. This ground is decided in favour of the appellant.ò

45. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal.

46. We have heard the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We find the AO, in the instant case, disallowed an amount of Rs.4,28,878/- being 20% of the foreign travel expenses on the ground that the assessee could not file any proof of business purpose of the persons who visited foreign countries. We find the ld.CIT(A) deleted the addition on the ground that the employee of the assessee provided an undertaking that foreign travel expenditure is towards the business purpose only and the same had also been approved by the senior to whom the relevant employee reports to. We find identical issue had come up before the Tribunal in assesseeôs own case for the immediately preceding assessment year. We find the Tribunal in ITA No.2403 and 1561/Del/2008 for A.Y. 2003-04 and vide ITA No.1216/Del/2008 (filed by the Revenue for A.Y. 2003-04), order dated 2nd April, 2009, has decided the issue wherein the AO had disallowed 20% of such foreign travel expenses. In appeal, the ld.CIT(A) not only upheld the action of the AO, but enhanced the same. However, the Tribunal deleted the enhanced amount on the ground that no notice

of enhancement was given by the CIT(A), but, in principle upheld the disallowance of 20% made by the AO by observing as under:-

> ñ8. We have heard the parties and considered the rival contentions. It is true that some of the e.mails were not furnished by the assessee but in view of the details furnished by the assessee, it cannot be said that the expenditure is not incurred or not allowable at all. On the facts and circumstances of the case, in our opinion, the Assessing Officer was justified in disallowing only a sum of Rs.3,99,120/- in absence of full details and the CIT (Appeals) is not justified in enhancing the assessment by substituting the disallowance to Rs.16,05,837/- as against Rs.3,99,120/- disallowed by the Assessing Officer. The order of the CIT (Appeals) is accordingly reversed and that of the Assessing Officer is restored.ò

47. Respectfully following the decision of the Tribunal in assesseeôs own case for the immediately preceding assessment year, we set aside the order of the CIT(A) on this issue and restore the order of the AO. This ground of appeal of the Revenue is accordingly allowed.

48. Ground No.3 raised by the Revenue reads as under:-

> ñ 3. On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs. 17,25,71,749/- on account of u/s 40(a)(i) on expenditure incurred in foreign currency for which no TDS has been deducted.ò

49. Facts of the case, in brief, are that the AO, during the course of assessment proceedings noted from Schedule-17, i.e., Notes to Accounts filed with the Profit & Loss Account that the assesseee has debited an expenditure of Rs.17,25,71,749/- incurred in foreign currency, the details of which are as under:-

1.	Professional Fee	Rs. 3,36,243/-
2.	Royalty	Rs. 18,14,531/-
3.	External Allocations	Rs.15,35,57,470/-
4.	Salary	Rs. 1,52,10,574/-

5. Other exp.	Rs.	16,52,931/-
Total	Rs.	17,25,71,749

50. Applying the provisions of section 40(a)(ia) and in absence of details as to why no TDS has been made as per the provisions of section 195, the AO disallowed the entire expenditure of Rs.17,25,71,749/- and added the same to the total income of the assessee.

51. In appeal, the ld.CIT(A) deleted the addition so made by the AO by observing as under:-

> ñFINDING
>
> I have carefully considered the submission / information filed by the appellant. My observations are as follows:
>
> The assessing officer disallowed the entire payment of foreign currency amounting to Rs. 172,571,749 (relating to Professional Fee, Royalty, External allocations, Salary and Other expenses) as highlighted in Note 11(h) of the F notes to accounts. However, such amount pertains to the payment made by the appellant which also includes the expenditure pertaining to the year prior to the financial year 2003-04. Therefore, it is wrong on assessing officerôs part to disallow the entire foreign exchange payment without identifying the payment pertaining to the actual accrual made during the year.
>
> Without prejudice to the above, my observations towards the expenditure accrued during the year pertaining to the payment of foreign exchange made during the year are as under:
>
> Professional fees
>
> y Out of Rs. 336,243 paid by the appellant, only the amount of Rs. 321,164 was accrued during the year under reference and debited to the profit and loss account for that year.
>
> y The professional fees of Rs. 321,164 include Rs. 254,468 pertaining to the services rendered in Mauritius by Key Finance Services Ltd. (a Mauritius entity) towards branch operations of the appellant in Mauritius and Rs. 49,662 pertaining to testing services rendered by ASTM International (a USA entity) in USA.

- Since the professional fees of Rs. 321,164 is paid by the appellant for the services which were utilized in the business of the appellant carried on outside India, the same is covered under section 9(l)(vii)(b) of the Income-tax Act and the same will not be regarded as income deemed to accrue or arise in India in the hands of non-resident recipient. Therefore, no withholding tax is required to be deducted on such payments.

y Therefore, the addition of Rs. 336,243 made by the assessing officer is deleted.

Royalty

- The payment of Rs. 1,814,531 (net of withholding taxes) as reported in Note 11(h) of Notes to Account (Schedule 17) consist of royalty amount of Rs. 2,268,164 (gross amount) which was accrued during the year under reference and debited to the profit and loss account for that year.

- The appellant had deducted withholding tax of Rs. 453,632 at 20% on the gross amount of Rs. 2,268,164 and paid the withholding taxes during the year. The appellant produced the copy of challans for the payment of such withholding taxes of Rs. 453,632 at page no. 159 - 161 of the paper book filed ori'4J5 May 2010.

y Since the withholding tax has already been deducted and paid by the appellant as per section 40(a)(i) of the Income-tax Act, therefore, it is wrong on assessing officerôs part to again disallow the same under section 40(a)(i) of the Income-tax Act. Therefore, the addition of Rs. 1,814,531 made by the assessing officer is deleted.

External Allocation

y The assessing officer disallowed the ôExternal Allocation expensesô of Rs. 153,557,470 based upon the reporting as per Note 11(h) of Notes to Account (Schedule 17 of the financial statements of the appellant). The amount of ôExternal Allocation expensesô of Rs. 153,557,470 disallowed by the assessing officer do not pertain to the financial year 2003-04 and the amount of ôExternal Allocation Expensesô actually debited to the profit and loss account do not include the amount of Rs. 153,557,470 .

y Further, the appellant actually accrued the ôExternal allocation expensesô of Rs. 119,984,377 during the previous year 2003-04 and the invoices were raised by ExxonMobil Asia Pacific Pte. Ltd. which is a Singapore group entity.

ÿ ExxonMobil Asia Pacific Pte. Ltd, Singapore has provided the services to the appellant such as controllers, treasurers, public affairs, tax, human resources, law, safety health and environmental services, medical, security, global procurement, business line, etc. which are in the nature of administrative services. The appellant vide its letter dated 1 July 2010 explained the nature of services received by it from ExxonMobil Asia Pacific Pte. Ltd highlighting types of services received, invoice raised by ExxonMobil Asia Pacific Pte. Ltd against each of services, basis of allocation, and detail of services availed from ExxonMobil Asia Pacific Pte. Ltd, manner in which services are rendered and the details of benefits derived against each of such services. Such details are enclosed in the paper book (i.e. Annexure-3 of the letter dated 1 July 2010). The appellant also have submitted the copy of invoices raised by ExxonMobil Asia Pacific Pte. Ltd with explanation about the services availed by it. All such details are enclosed in the paper book (i.e. Annexure-4 of the letter dated 1 July 2010).

- I have gone through such nature of services availed by the appellant as explained to me. It is evident that the services received by the appellant are in the nature of controllers, treasurers, public affairs, tax, human resources, law, safety health and environmental services, medical, security, global procurement, business line, etc. which are in the nature of administrative services.

- It is the contention of the appellant that various services as mentioned aforesaid provided by ExxonMobil Asia Pacific Pte. Ltd, Singapore to the appellant are managerial in nature and cannot be considered to be technical or consultancy services. Those services, therefore, fall outside the ambit of article 12 of Indo-Singapore tax treaty.

- It is also argued by the appellant that even assuming that the above-mentioned services involve technical and consultancy services but the essential ingredient per clause 12 of the Indo-Singapore tax treaty is not satisfied because ExxonMobil Asia Pacific Pte. Ltd, Singapore by rendering such services does not ómake availableô any technical knowledge, experience, skill or know-how to the appellant. The concept of ómake availableô has been explained in the memorandum of Indo-USA tax treaty. Such memorandum whilst explaining the concept of ómake availableô has clarified that the technology can be said to have been made available when the person acquiring the services is enable to apply the technology. The fact that the provision of service may require technical inputs by the person providing the services does not per se means that the technical knowledge, skill etc. are made available to the person purchasing the services. Similarly, the use of the product which embodied technology shall not per se be considered to make the technology available.

y In the instant case, ExxonMobil Asia Pacific Pte Ltd., Singapore provided the services in the nature of controllers, treasurers, public affairs, tax, human resources, law, safety health and environmental services, medical, security, global procurement, business line, etc. which would be regarded as administrative in nature and therefore, will not qualify as fees for technical services as prescribed under article 12 of Indo-Singapore tax treaty and therefore will not be taxable in India as tax treaty provisions override the provisions of domestic tax laws. Here the reliance may be placed on the judgments of Invensys Systems Inc. (AAR 796 of 2009), Cushman 8s Wakefield(s) Pte Ltd (AAR 757 of 2007) and Raymonds Ltd. (ITAT Mumbai, 80 TTJ 120).

y Further, in the absence of permanent establishment of ExxonMobil Asia Pacific Pte Ltd., Singapore as observed form the CA certificates dated 19 March 2004 obtained from Suni Nutan & Co., Chartered Accountants, such payment of external allocation will not be subject to tax under Article 7 of the Indo-Singapore tax treaty as business income.

▪ Therefore, the amount of ôExternal allocation expensesô of Rs. 119,984,377 actually incurred by the appellant during the previous year 2003-04 against the invoices raised by ExxonMobil Asia Pacific Pte. Ltd. (which is a Singapore group entity) is not taxable in India and no withholding is required to be deducted under section 40(a) (i) of the Income-tax Act.

y It is also observed that the appellant has taken CA Certificate towards remittance of external allocation expenses of Rs. 153,557,470 from Suni Nutan & Co., Chartered Accountants (page 182-187 of the paper book filed on 5 May 2010) wherein such chartered accountant has certified that such payment of Rs. 153,557,470 is not subject to tax in India by virtue of Indo-Singapore tax treaty and hence not subject to the incidence of TDS in India.

y In view of the above, the ground of the appellant is accepted and hence the addition of Rs. 153,557,470 made by the assessing officer is deleted.

Salary

y The salary of Rs. 15,210,574 were paid to non-resident employees for the services rendered in India for the financial years 2002-03 and 2003-04 on which withholding taxes were properly withheld and deposited. The challans of TDS of Rs. 5,129,781 were also submitted by the appellant at page no. 189-203 of the paper book filed on 05 May 2010.

y Therefore, the addition of Rs. 15,210,574 made by the assessing officer on the basis of Note 11(h) of Notes to Account (Schedule 17)) for

non-deduction of TDS under section 40(a)(i) of the Income-tax Act is deleted.

Other Expenses

- Other expenses of Rs. 1,660,545 include foreign exchange gains/ losses, testing expenses, travelling expenses and sales promotion expenses.

- The testing expenses of Rs. 427,090, training expenses of Rs. 578,277 and sales promotion expenses of Rs. 283,250 were merely reimbursement of expenses incurred by the associated enterprises outside India and therefore no withholding tax was required to be deducted on reimbursement of such expenditure to the associated enterprises of the appellant.

y Further, no withholding is required to be deducted on the foreign exchange gain / losses of Rs. 371,928.

y Therefore, the addition of Rs. 1,660,545 made by the assessing officer on the basis of Note 11(h) of Notes to Account (Schedule 17) for non-deduction of TDS under section 40(a)(i) of the Income-tax Act is deleted.

Therefore, the above grounds are decided in favor of the appellant.

ISSUE 11; Whether the AO has gravely erred in disallowing the expenditure in foreign currency as reported in the Notes to Accounts on a payment basis, aggregating Rs. 172,571,749, to the extent that this amount includes expenditure that has been adjusted by the TPO in arriving at an armôs length profit of Rs. 174,008,078 in his order dated December 6, 2006. While on the one hand, the AO has disallowed the expenditure, on the other hand he has also considered the same expenditure while determining the armôs length profit. As a result, there is a double effect in the additions made to the taxable income.

The detail submissions and arguments raised by the Appellant in respect of the above are as under:

It is argued by the appellant that the amount of expenditure in Foreign currency shown in Note 11(h) of Notes to accounts of Rs. 172,571,749 towards various payments to non-residents are to the extent which has already been adjusted by the Transfer Pricing Officer to the extent of Rs. 23,554,483 in arriving at an armôs length profit of Rs. 174,008,078 in his order dated December 6, 2006 and therefore further disallowance of entire payment of foreign exchange expenditure of Rs. 172,571,749 made by the assessing officer is tantamount to double disallowance to the extent of Rs. 23,554,483.

FINDING

I have considered the submission made by the appellant and found that the disallowance of foreign exchange expenditure of Rs. 172,571,749 made by the assessing officer is tantamount to double disallowance to the extent of Rs. 23,554,483 which is also disallowed by the Transfer Pricing Officer. Therefore, this ground is allowed in favor of the appellant.ò

52. Aggrieved with such order, the Revenue is in appeal before the Tribunal.

53. We have heard the rival arguments made by both the sides and perused the record. We find, in the instant case, the AO disallowed the entire expenditure made in foreign currency amounting to Rs.17,25,71,749/- on the ground that the assessee could not substantiate regarding non-deduction of tax u/s 195 of the IT Act, the payment of which has been made in foreign currency. We find, the ld.CIT(A) deleted the addition on the ground that substantial amount of expenditure pertained to the year prior to the financial year 2003-04 and, therefore, the AO is not justified in disallowing the entire foreign exchange payment without identifying the payment pertaining to the actual accrual made during the year. Even otherwise, the ld. CIT(A) has threadbare analysed each and every item and given justification for deletion of the same, the operative para of which has already been reproduced in the preceding paras. The ld. DR could not point out any error in the order of the CIT(A) on this issue so as to take a contrary decision. Since the ld.CIT(A) has given justifiable reasons for deleting the addition made by the AO, therefore, in absence of any contrary material brought to our notice by the ld. CIT-DR, the order

of the CIT(A) on this issue is upheld and this ground raised by the Revenue is dismissed.

54. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 12.06.2020.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: 12th June, 2020

dk

Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi