

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "I-1": NEW DELHI]**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No. 2486/Del/2015
(Assessment Year: 2010-11)

Dassault Systems India Pvt.Ltd., M-13 LGF, South Extension-II, New Delhi – 110 049. PAN: AACCD7672A	Vs.	DCIT, Circle : 7 (1) New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri Vishal Kalra, Advocate; Shri S. S. Tomar, Advocate; & Shri Ankit Sahni, Advocate.
Department by:	Shri Surender Pal [CIT] – DR;
Date of Hearing :	01/09/2021
Date of pronouncement :	08/11/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by Dassault Systems India Pvt.Ltd., appellant / assessee against the order passed by the Dy. Commissioner of Income Tax, Circle 7(1), New Delhi (the ld. AO) vide order passed under Section 143(3) of the Income Tax Act, 1961 (the Act) on 13.02.2015. The assessee filed its return of income on 28.09.2010 at Rs. 1,53,56,340/-. Draft assessment order in this case was made on 24th of March, 2014 at a proposed income of Rs. 12,60,36,810/-. The adjustment of Rs. 11,06,80,470/- was proposed on account of arms' length price of determination of international transaction of provision of technical consultancy services amounting to Rs. 31,63,40,461/- at Rs. 41,03,09,199/-. Thus adjustment of Rs. 9,39,68,738/- and further adjustment on account of interest receivable from outstanding of Rs. 1,67,11,132/- was proposed. The draft assessment order

was challenged before the Dispute Resolution Panel, who passed direction on 24.11.2014 wherein the DRP referred back the matter to the TPO. The ld. Transfer Pricing Officer repeated the same adjustment and thereafter an assessment order was passed determining total income of the assessee at Rs. 12,60,36,810/-.

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

“1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant for the relevant AY at INR 12,60,36,810 as against the returned income of INR 1,53,56,340.

Adjustment on account of provision of business support services

2.1 That on the facts and circumstances of the case and in law, the AO / Dispute Resolution Panel (“DRP”) / Transfer Pricing Officer (“TPO”) erred in making a transfer pricing adjustment of INR 9,39,68,738 on account of provision of business support services, alleging the same to be not at arm’s length in terms of the provisions of section 92C of the Act read with Rule 10D of the Income-tax Rules, 1962 (“the Rules”).

2.2 That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in rejecting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules and further erred in rejecting the functional, asset and risk (“FAR”) profile of the Appellant and arbitrarily re-characterizing the Appellant as a technical consultancy service provider instead of a business support service provider.

2.3 That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in arbitrarily rejecting the comparable companies identified by the Appellant alleging the same to be functionally not comparable and using arbitrary / subjective search filters.

2.4 That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in arbitrarily selecting comparable companies based on incorrect appreciation of functional, asset and risk profile, and using arbitrary / subjective search filters.

2.5 That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in rejecting / modifying the search process and filters adopted by the Appellant for the purpose of benchmarking its international transaction of rendition of business support services, in an arbitrary manner.

2.6 Notwithstanding and without prejudice on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in carrying out the transfer pricing adjustment at entity level and not

restricting the same qua the above transaction alleged to be not at arm's length.

2.7 That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in not providing appropriate economic adjustments, as required under Rule 10B(1)(e)(iii) of the Rules.

2.8 That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in treating forex gain / loss as non-operative in nature for the purposes of computing ALP margins.

3. Adjustment on account of receivables

3.1 That on the facts and circumstances of the case and in law, the AO/DRP/TPO erred in making a transfer pricing adjustments of INR 1,67,11,732 on account of receivables, alleging the same to be not at arm's length in terms of the provisions of section 92C of the Act read with Rule 10D of the Rules.

3.2 That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in making a TP adjustment, alleging that the delayed trade payments are in the nature of unsecured loans advanced to the Associated Enterprises ("AE"), and, therefore is an "international transaction" as per the provisions of section 92B of the Act.

3.3 That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in levying interest of Rs. 1,67,11,732 on the amount of outstanding receivables.

3.4 That on the facts and circumstances of the case and in law, the DRP / AO / TPO erred by applying imputed rate of interest for computing notional interest that the Appellant should have earned and is completely based on inaccurate assumptions / calculations.

Other Grounds

4. That on the facts and circumstances of the case and in law, the DRP / AO / TPO have erred by ignoring the provisions of Rule 10B(4) of the Rules and judicial pronouncements, which advocates the usage of multiple year data of comparable companies for the purpose of determination of the arm's length price as defined under section 92F of the Act.

5. That on the facts and circumstances of the case and in law, the DRP / AO / TPO erred in not providing the Appellant the benefit of (+/-) 5% range as provided by the proviso to section 92C(2) of the Act.

6. That on the facts and circumstances of the case and in law, the AO erred in not granting complete relief available to the Appellant in relation to tax credit as per the provisions of section 90 of the Act read with Article 23 of the Double Taxation Avoidance Agreement between India

and Japan ("DTAA").

7. That on the facts and circumstances of the case and in law, the AO has erred in charging interest under sections 234A, 234B and 234C of the Act.

Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before, or at, the time of hearing of the appeal. "

3. Assessee was incorporated on 12th September, 2007 and subsequently taken over by the Dassault Systems, S.A. with effect from 27th March, 2008. The assessee company is involved in provision of business, support services that includes incorporation of legal activities in relation to planning, development, execution of channel enabling programmes including value added re-sellers, co-marketing. The company also provides technical services to group clients on PLM activities. The assessee has entered into 7 different kind of international transactions adopting transactional net margin method as the most appropriate method adopting PLI of OP by OC. Assessee has chosen 4 comparables with weighted average margin of 2.64%. Assessee's margin was computed at 5.34% and thus it was claimed that international transactions entered into by the assessee are at arms' length.
4. The Id. Transfer Pricing Officer pointed out infirmities in the transfer pricing study report of the assessee, such as, adopting multiple year data, turnover filter service income, filter related party transaction filter etc. and thereafter other collaboration filters. The Id. TPO found that assessee has characterized itself as business service support provider whereas actually it is rendering technical services. The TPO held that this is so because of the information available in the T.P. study report as well as the reply submitted by the assessee in assessment proceedings. He further held that the product of three D product life cycle management clearly shows that it is a technical product. He further challenged that agreement is a merely one-sided letter from the AE to assessee to follow remuneration model for the services rendered. The TPO further stated that services rendered by the assessee require a technical base. He noted that the value added re-seller itself shows that assessee is adding value. He further held that the product

supplied by the parent to the clients in India is technical in nature. The technical product requires technical support prior to sale , at the time of sale and after the sales. He noted that assessee is having highly skilled competent manpower to provide such support. Therefore, he held that the marks up of the services are also not at arms' length. He further noted that there is no agreement for the service fee, but only one-sided letter from the AE is provided and further documentation in the services rendered has not been elaborated by the assessee. Accordingly, he rejected the T.P. study. Based on the functions noted by the Id. TPO he carried out the fresh search, granted an opportunity to the assessee to rebut the same and thereafter selected 12 comparables whose PLI OP/OC was determined at 13.7 percentage. He computed the margin of assessee at 5.76 percentage. Thereafter on operating cost of Rs. 29,91,02,784/- he applied the margins of the comparable to reach at arms' length price of Rs. 41,03,09,199/- for international transaction of Rs. 31,63,40,451/- and computed short-fall of Rs. 9,39,68,738/-. He also found that there is an outstanding receivable from associated enterprises for a period exceeding 30 days. He applied the interest rate @ 14.88% on such excess outstanding and computed interest chargeable of Rs. 1,67,11,732/-. He passed an order under Section 92CA(3) of the Act on 10.01.2014, which was incorporated in the draft assessment order.

5. The assessee preferred objection before the Id. Dispute Resolution Panel. The learned DRP upheld the order of the learned transfer-pricing officer with respect to the characterization of the services. The learned DRP held as Under:-

“ 6. We have noticed that all the objections except the objections relating to the addition/adjustment proposed on receivables raised year and reiterated in the submission before us were also raised before the dispute resolution panel (DRP) during the proceedings relating to the AO wide thousand nine – 10. The assessee submission including all case law relied upon in respect of grounds of objection numbered 1 to 8 as mentioned above in para 3 have been dealt in/thread by in the DRP is orders for assessment year

2009 – 10. In view of the DRP's order for assessment year 2009 – 10, we are of the considered opinion that the assessee's case, in principle, is squarely covered by the decision of the DRP in the assessee's case in the AO by 2009 – 10 in respect of the grounds of objections numbered 1 to 8 as mentioned above in para 3 as there is no factual difference in the present case to that of the FY 2009 – 10 except the selection of few new comparables by the learned TPO than that of the AO wide 2009 – 10 and rejection of all comparable selected by the assessee (which are totally different than that of the AO wide 2009 – 10) and therefore, following the decisions of the DRP in the assessee's case for the assessment year 2009 – 10 and the reasoning given therein, we hereby decline to interfere with the AO was finding that the assessee is engaged in providing technical services instead of business support services to its associated enterprise. Accordingly, we also agree with the AO was finding based on the detailed reasoning that the assessee is up service provider mainly in high-end technical, technological using high-end software skills, a significant factor for comparability analysis. Further, we also notice from the details mentioned in the impugned order that the assessee is comparable are different as the assessee's : "functions, assets, and risk analysis (FAR) are not in proper perspective. Accordingly, we are of the considered view that the TPO has rightly conducted a fresh economic analysis to determine the ALP of the international transactions entered into by the assessee after recharacterise in the nature of services rendered by the assessee is technical support service in rejecting the assessee is comparables."

6. The learned DRP gave a direction to revise the computation of the margin. With respect to the addition/adjustment on receivables, it also upheld the action of the learned TPO. Based on this the final assessment order u/s 143

(3) of the act was passed. The assessee is aggrieved and therefore is in appeal.

7. The learned authorised representative submitted that that appellant is a part of the Dassault group and manages marketing article within the group, which supports to the GEO PLATFORM in the marketing support activity. It constitutes the front-end organization in the country to manage and support channel business for the Geo platform. It performs mainly marketing activity does commercial support activities. With respect to the commercial support activity, assessee is responsible for managing the operational aspects of the VAR network channel activities. It is responsible for the local activity for planning/development/execution of marketing channel-enabled programs. Therefore, it was submitted that the functions performed by the assessee are those of marketing support services. He further submitted that assessee itself is characterized its business activity as business/market support service provider and the same has never been challenged by anybody. He further stated that appellant's international transaction pertaining to provision of business support services have been subjected to the transfer-pricing audit in subsequent assessment years as well and duly accepted to be at arm's-length. He submitted that for assessment year 2011 – 12 onwards till 2017 – 18, on the similar agreement there is no adjustment proposed with respect to the characterization of the assessee with respect to the market support services. He stated that in all these assessment years i.e. assessment year 2011 – 12 till 2016 – 17 these transactions have been accepted at arm's-length. In assessment year 2017 – 18, the functional profile of the assessee was accepted and there was no sale challenge to that however, the adjustment was made with respect to other aspects of the international transaction. It was therefore submitted that the characterization of business support services of the assessee was not at all disputed by the learned transfer-pricing officer and accepted by the learned dispute resolution panel throughout this decade. Therefore, in view of this there is no reason that the learned transfer-pricing officer as well as the learned dispute resolution panel could have deviated from the functional profile of the assessee. He further assailed the order of the learned transfer-pricing officer as well as the direction of the learned dispute

resolution panel on several counts. In the end, he submitted that the functional profile of the assessee has been rightly characterized as the management support services. It has also been accepted by the revenue in subsequent years.

8. The learned departmental representative vehemently supported the order of the learned transfer pricing officer and direction of the learned dispute resolution panel. It was stated that the learned transfer pricing officer has given its detailed reason for characterizing the services of the assessee as technical support services instead of the business and marketing support services provided. He submitted that the product supplied by the assessee to clients is technical in nature, the software business solution is powered by three-dimensional. It needs the technical support at presale, post sale and for sale. These services are also required to be provided by highly skilled competent and qualified manpower. He further stated that the markup for the services rendered by such highly skilled manpower is not at arm's-length. He further referred that the agreement entered into by the assessee for the services remuneration is merely a one-sided letter. It was further stated that the documentation provided by the assessee on behalf of the appellant associated enterprises has not been elaborated by the assessee in its transfer pricing study report. He stated that the transfer pricing study report has been rejected by the learned TPO and has correctly characterized the services of the assessee as highly technical services. He further stated that the learned dispute resolution panel, which has followed its direction for assessment year 2009 – 10.
9. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that identical issue arose in the case of the assessee for assessment year 2009 – 10 before the coordinate bench which has decided this issue Vide order dated 22 January 2015 in ITA number 2594 Del 2014 in assessee's own case which has followed by the learned dispute resolution panel in this year and the learned transfer pricing officer also framed the transfer pricing order similarly for this year also as Under:-

“7. We have heard the rival submissions and perused the material on record. Before we address the specific issues which have been referred to for our consideration we would first extract from the

DRP's order the Business Profile of the Group and the taxpayer and also the ownership structure:- 2. "Business Profile of the Group & the taxpayer:- Group Profile In 1977, Avions Marcel Dassault developed CAD/CAM Software in 3D, Computer-Aided Three-dimensional Interactive Application ("CATIA"). A major legal entity, Dassault Systems S.A ("DS SA" or "the Group") in France was created in order to develop new generations of CATIA which later on became parent company of the organization. In order to market, sell and promote CATIA solutions, OS SA a worldwide partnership with IBM, which sold, marketed, and supported CADAM. The Group is engaged in Product Lifecycle Management ("PLM") software solutions powered by 3D, the Group's applications and services enable businesses of all sizes in all industries around the World to digitally define and simulate products, as well as the processes and resources required to manufacture, maintain and recycle those products and improve the environment The Group's solutions facilitate the design, simulation and production of extremely complex systems, such as cars or aircraft, and enhance the manufacturing facilities used to produce them. These solutions are also employed to design and manufacture articles for everyday life, from tableware and household appliances to jewellery. The PLM offering from the Group is organized around the CATIA, ENOVIA, DELMIA and SIMULIA brands. It is marketed worldwide, particularly through the network of its long-standing partner, IBM. Taxpayer's Profile Dassault Systems India Private Limited ("DSIPL" or the "Company") was incorporated on September 12, 2007 which was fully owned subsidiary of 3DPLM Software Solution limited and subsequently converted into Private Limited vide application dated January 18, 2008 and fully takeover by DS SA with effect from March 27, 2008. The Company's services to its AEs include coordination of the local activities in relation to planning, development, execution, and channel enablement programs including value added reseller ("VAR"), co -marketing and leading management in alignment with the Geography global marketing operations including presales support services and Level I technical support services in the local language. The Company also provides technical support services to the Group's client in India on PLM activities.

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7.2. The record further shows that the multiple year data used by the assessee in its T.P. Report being contrary to the income tax provisions was not upheld by the TPO and the said issue has not been agitated before us. Considering the replies of the assessee to

the show cause notices to justify its claim the TPO concluded the issue as under:-

“The above discussion can be summarized as follows:-

- a) The product supplied by the parent AE to the clients in India is technical in nature.
- b) The product offers software business solutions and is called product life cycle management (PLM) software solutions powered by 3D.
- c) The technical product requires technical support at presale level, Sale level and After sale level.
- d) The assessee is having highly skilled competent and qualified manpower at his disposal to provide such support.
- e) The markup of Cost plus 10% on the services rendered by such highly skilled manpower is not at arm's length.
- f) There is no agreement for the service fees and services provided but one sided letter from the parent AE to the assessee to follow a particular remuneration model.
- g) The personnel of the assessee are not only highly qualified but are handsomely paid as well. The average salary of engineer is ₹ 18 lacs p.a. with the highest salary among engineers is more than ₹ 45 lacs p.a. in some cases.
- h) There are CAs and MBAs and other Post Graduate degree holding persons in the employees list who are also very well paid and qualified thus, a markup of 10% on such manpower is apparently is on the lower side.
- i) The documentation of the services rendered on behalf of the parent AE has not been elaborated by assessee, he has only given invoices where the fee has been mentioned on quarterly basis without there being any basis for determining the quantum of fees other than the cost plus 10% which is not determined on the basis of dealing with between two parties dealing with each other on independent basis on the basis of the concept of separate entity.”

7.3. The contention of the assessee that the computer asset ratio is very small for technical support was considered to be not relevant as the engineers could visit the premises of the customer and perform the services there. Accordingly it was concluded that the FAR in the TP study does not analyze the assessee properly. Considering the fact that the functions performed in India by a team of qualified and trained professionals were very critical to the product supplied by the AE and considering the fact that the services by the assessee start from even the presales stage and continued beyond sales and also the fact that the assessee constitutes the seminal

interface of the Dassault Group with the customers including the present, past and future customers the TPO concluded that for such functions adequate compensation, more than routine, was considered to be required. As a result thereof the TP Study was rejected and the 6 comparables of the assessee were rejected and adjustment was proposed making a comparison with 18 comparables selected by the TPO taking the function performed of a technical service provider. 7.4. Before the DRP it is seen the assessee was required to provide copies of the Agreement with its AE which was not done and in the absence of the same the issues was considered in the following manner:- “To further, delve into the matter, the taxpayer was requested by this Panel to provide the copies of agreement with its AE for all the international transactions. While no agreement has been filed, a letter dated 25th September 2008 signed by Mr. Xavier Hermen, Chief Financial Officer (Dassault Systems KK) and Mr. Mukul Agarwal, Director, Finance and Administration (Dassault Systems India Private Limited) was submitted. As per the Appendix A to this letter, the services to be provided by the tax payer are:- You shall provide our customer with the following services in compliance with our quality standards: You shall be generally responsible for: 11/2/21, 1:15 PM M/s Dassault Systems India Pvt. Ltd. Versus DCIT, Circle-10(1), New Delhi https://www.taxmanagementindia.com/Print/print_case_laws.asp?ID=255865 10/12 · Marketing You shall be generally responsible for the local activity for planning, development execution of marketing and channel enablement programs, including Value-Added Re-seller (VAR) co-marketing and lead management if applicable, in alignment with Geography global marketing operations. Channel Pre-sales support Monitoring/Management of the VARs network in their territory: Creation of VAR and customers records and management of VAR claims; Handling of customer claims when escalated from VARs (relayed and sending them to Geo platforms from further management); Checking information in requests in OS systems for supplying products to customers served through this channel (specific Bid Offering request. license key requests. Media request. etc) and Communication and enforcement of DS rules. regulation and guidelines for VARs.” While the agreement with the AE would have further substantiated the analysis of the TPO, even from the above letter, it is observed “You shall provide out customers with the following support services in compliance with our quality standards”. From the above, it can be construed that the nature of assignment with the customer being highly technical, the support services will definitely be

technical in nature. This can also be substantiated by the TP documentation wherein the activity of the group has been mentioned to be “the Group’s solutions facilitate the design, simulation and production of extremely complex systems, such as cars or aircraft, and enhance the manufacturing facilities used to produce them.” To support such file definitely there is requirement of technical skill. Even the profile of the taxpayer in the TP documentation has been mentioned to be “The Company’s services to its AEs include coordination of the local activities in relation to planning, development, execution and channel enablement programs including value added reseller (“VAR”), co-marketing and leading management in alignment with the Geography global marketing operations including presales support services and Level I technical support services in the local language. The Company also provides technical support services to the Group’s client in Indi on PLM activities.” Based on all the above factors this Panel upholds the action of the TPO in re-characterizing the activity of the taxpayer with its AAE as technical support services.” 7.5. In the light of the above facts and on considering the arguments of the parties before the Bench, we hold that the plea of the assessee that it is conducting its affairs in India based simpliciter on the letter dated 25.09.2008 of the C.F.O Mr. Xavier Herman as the only document available cannot be accepted. No doubt the transfer pricing issues may still be called to be in the nascent stage as far as the tax collectors and the tax payers are considered however withholding material informations can only compound the problem. It is beyond the realms of credulity even to imagine, let alone to hold that a conglomerate of this stature can function without having any written agreements setting out the respective duties and responsibilities of the assessee vis-à-vis the holding companies at geo-platforms for whom services are stated to be performed as a result of direct sales by the AEs or indirect sales through VARs. The documentary framework on the basis of which rendering of services which would trigger the generation of bills must be available as it cannot be presumed to have left this vital area to the undefined whimsical fancies of the parties. In the facts of the present case it is evident that complete facts have not been placed on record by the tax payer. Accordingly the conclusion arrived at on the basis of limited information provided may have resulted in incorrect characterization of the assessee. In view thereof we deem it appropriate to restore the issue back to the TPO as the Revenue also has not called for the relevant evidences like the Memorandum of Association and Article of Association. It is

hoped that the opportunity so provided is utilized by the assessee in its own interests by placing the evidences in support of its claims before the tax authorities as in the absence of relevant information the Revenue cannot be faulted with for arriving at a conclusion at variance with the assessee's claims. 7.6. We also deem it necessary to observe that the conclusion of the Revenue in regard to the employment of 37 engineers out of a total staff of 69 cannot also per se lead to the conclusion that technical services are necessarily being provided. Similarly, we are also of the view that the remuneration paid to them for the services rendered by itself also cannot be said to be a reflection on their nature of services being performed. We have seen that both the parties before the Bench have submitted that employment of engineers is a necessity for the assessee as the product of the AE is a highly complex sophisticated software which can be used in manufacturing and designs etc in the field of Aerospace, Architecture and Construction, Automotive, Consumer Goods, Consumer Packaged Goods, Hightech, Industrial Equipment, Life Sciences, Power Process and Petroleum, Shipbuilding and Services where as the assessee has contended. However the conclusion on this common stand of necessity of having engineers in its employment differs. Whereas the tax payer states that the product being marketed must be understood by the business service provider the Revenue claims that technical services are being provided. In order to address the above controversy we are of the view that documentation addressing the functions performed by the tax payer as the necessary evidences need to be considered. The claims and counter claims of the need to have expert technical staff/engineers considering the nature of product marketed by the tax payer does to an extent support the tax payers claim as we agree that the person providing business support services necessarily needs to first understand the product being marketed and also be capable of explaining/demonstrating its capabilities/utility and working to the potential customer. The knowledge on the part of the service provider to judge whether technical service is necessitated or not in a situation to deal with the consumer's complaint of a product mal-functional can necessarily be judged only by a competent person who may then need to send forth a report that technical support to address the glitch or malfunction is required. However we are also alive to the claims of the Revenue that site visits to address the glitches/malfunction etc. would come in the realm of technical service which necessarily can be performed by engineers only. Thus the functions taken on by

the tax payer need to be addressed. It is seen that the tax payer has been required by the TPO to address the duties assigned to the personnel and it is seen that the same has not been addressed.

7.7. We have also held that the assessee's Memorandum of Association be also taken into consideration as the said document not only addresses the name and place of the registered office but also enshrines the Objects of its Incorporation. It is the basic document which brings the Company into existence as it contains the Objects of purposes of the incorporation of the Company. Similarly the Articles of Association also need to be considered as these would contain the rules/bye-laws and regulations for internal management of a Company, and would throw light on how the day to day business of the assessee is to be conducted. The relationship between the holding companies, between the company and its members including their relationship inter se vis-à-vis the tax payer needs to be addressed. These basic documents it is seen have not been taken into consideration and we direct the production of the same before the TPO.

7.8. Addressing the invoice placed on record claimed to be explaining the manner in which billing is done we hold that the evidence relied upon is incomplete. Nothing has been placed on record by the tax payer qua the sample invoices filed so as to explain how they create both the liability to pay and the entitlement to receive payment as supporting documents assigning duties, responsibilities standards against which these are to be judged have not been placed before the authorities. An invoice without supporting documents justifying the narration and the manner how amounts have been set out therein would be a document having no evidentiary value. It is only a relevant evidence if the person relying on the same can explain the contents of its narration when questioned so as to address the narrations set out therein fixing liability to pay and the entitlement to receive the payment on the part of the other person. The same needs to be addressed by a documentary framework governing the inter-se roles and responsibilities of the parties. The same is found missing. In the course of the hearing we have already attempted to dwell on the probable possible documents which may address the issue in the face of general assertion on the part of the parties before the Bench. Giving our consideration to the arguments in the light of the responses to the question in the hearing we have attempted to address that the probable document at the first instance which may trigger and set into motion the rendering of the services by the tax payer vis-à-vis direct and also indirect sales is probably the requisition of services to be performed, which may refer to a pre-

existing rules and practices and may be always or sometimes modified as per the peculiar needs of the purchaser of the product. This would necessitate the existence of some document which sets out the duties and responsibilities of the concerned parties wherein the standards and procedures to be adhered to would have been set out on the basis of which performance of services claimed to have been performed are judged resulting in the generation of the internal bill which is honoured by the other party. We are alive to the claims and counter claims of the parties that there may be an element of technical services in the business support services as site visits to address glitches and malfunctioning of the product may also have been provided as claimed by the Revenue. However to arrive at any possible conclusive finding conclusions dehorse material facts on record is not appropriate. The tax payer needs to explain how billing has been done whether it is by way of man hours for site visits if so what function was performed during the site visits it is only then it can be decided whether a technical function was being performed or was it a routine business support services to get feed back etc. after the sales. Thus the function responsibilities and the duties undertaken by the employees is an important area for consideration. Considering which it may turn out that part of the services performed are technical support services and part of the services performed are business support service as the claim that computer asset ratio of the company is less for a technical service provided may not be a relevant factor for deciding the issue as in the absence of any material whatsoever of the nature of services rendered the possibility of the engineers visiting the premises of the customers and performing technical support services on their computers cannot be ruled out.

8. In view of the above detailed findings and reasons considering the evidence filed and the arguments on behalf of the parties, we deem it appropriate to restore the issue back to the file of the TPO with the direction that the assessee shall place a copy of the Articles & Memorandum of Association before the TPO and address the primary object for which the assessee was incorporated. The assessee shall also categorically take a stand whether there is any other agreement linked to address its stated claim of providing sales and support services sales made through AEs or VARs. The taxpayer shall ensure that it is made available to the TPO. All the relevant evidences including the specific document on the basis of which the services have been called upon for rendering and the basis on which the invoices have been raised needs to be made available to the Revenue. The evidence placed on record in the absence of any explanation as to how the figures have been arrived at in the invoice cannot be said to be sufficient and cogent evidence. Needless to say

that apart from above direction the TPO is at a liberty to call for any other document as proof of evidence which he so considers it necessary for deciding the issue. Similarly the assessee is also at liberty to place fresh evidence if any in support of its claim. The TPO thereafter shall consider the same and shall pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard. Needless to say that the TPO after a FAR analysis characterizing the assessee shall carry out the exercise of search for comparables in order to decide whether the transaction is at arm's length or not."

10. On careful consideration of the order of the coordinate bench in assessee's own case for assessment year 2009 – 10, the learned DRP also relied upon the direction given by it to the learned transfer pricing officer for assessment year 2009 – 10, the coordinate bench has as per paragraph number 8 has set aside the issue back to the file of the learned assessing officer/transfer pricing officer. For this reason is and respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10 we also restore the matter back to the file of the learned AO/TPO with similar direction for this year also. This is also so for the reason that in subsequent years the characterization of the assessee has been accepted by the learned transfer-pricing officer. This direction also takes care of the fresh search for comparables. Accordingly, ground number 2 and all other sum grounds are allowed for statistical purposes.
11. Coming to ground number 3 with respect to the adjustment on account of receivables the TPO held that receivable outstanding from the associated enterprise appearing in the books of accounts of the appellant are of the nature similar to a loan given to an associated enterprises. The learned transfer-pricing officer imputed the interest at the rate equal to prime lending rate of state bank of India +300 basis point i.e. 14.88% on outstanding receivable. Accordingly the adjustment of ₹ 252,547/- was made with respect to the amount outstanding for which the invoices have been raised during the year but outstanding is for more than 60 days. He also found that there is an outstanding balance of the preceding financial year amounting to ₹ 110,612,802/- and therefore the interest on thereon was also imputed for 12 months amounting to Rs 1 64,59,185/-. Thus the total adjustment was made of Rs 1 67,11,732/-. The DRP upheld the

observation of the learned transfer pricing officer. The assessee is aggrieved by ground number 3.

12. The learned authorised representative submitted that the learned transfer pricing officer has disregarded the intercompany pricing arrangement and has not appreciated the fact that unlike a loan or borrowing outstanding receivable is not an independent international transaction which can be viewed on standalone basis and needs to be examined with the commercial transaction as a result of which the debit balance has come into existence. For this proposition, he relied on the first of judicial precedents. He further submitted that Shri characterization of outstanding receivable is in secured loan is also not proper he referred to the OECD guidelines stating that in other than exceptional cases the tax administration should not disregard the actual transactions. He further submitted that the appellant had undertaken working capital analysis by adjusting for difference in working capital and thereby profitability of each comparable company was adjusted to reflect these differences. Therefore, he submitted that once the working capital adjustment is carried in margin of comparable companies the same should take into account the fact of outstanding receivable and no separate adjustment is warranted on this account. He further stated that even otherwise the interest to be imputed only on amount outstanding for more than six months and LIBOR it should be applied. Alternatively, he also submitted that in case any interest is to be imputed on the amounts outstanding receivable from the associated enterprise, the amounts payable to such associated enterprise should also be deducted from the total amount of the receivable and interest should be charged only on the net receivable amount. He further stated that relying on the principle of consistency in case of the assessee similar intercompany arrangement in preceding in succeeding years have not been raised disregarded by the learned TPO. Even otherwise, he submitted that the learned transfer-pricing officer has without providing an opportunity to the assessee computed the interest on the outstanding of ₹ 110,612,802 arbitral considered the period of one year as a period for which search receivables were outstanding. It was submitted that the outstanding were received within 80 days from the start of the impugned financial year accordingly he submitted that the above

adjustment made by the learned transfer pricing officer and confirmed by the learned dispute resolution panel deserves to be deleted.

13. The learned DR vehemently supported the orders of the lower authorities.
14. We have carefully considered the rival contention and perused the orders of the learned transfer-pricing officer as well as the directions of the learned dispute resolution panel. We find that the learned transfer pricing officer has stated that an amount of ₹ 110,612,802/- is outstanding for more than 12 months. We also find that there are outstanding more than 30 days in case of the assessee and on that the interest has been imputed at the rate of 14.88% amounting to ₹ 252,547/-. We find that there is no justification available on record of lower authorities with respect to the outstanding balance of preceding financial year on which the interest is imputed of Rs 164,59,185/- and further what is the reason that assessee is outstanding from associated enterprise exceeding more than 30 days. The assessee has also contested that the learned transfer pricing officer has ignored the loan amount received from associated enterprise. It was also contested that no proper opportunity of hearing was given by the learned transfer-pricing officer. Further, the assessee has also submitted that it has undertaken working capital analysis by adjusting for difference in working capital and thereby profitability of each comparable company was adjusted to reflect these differences. As we have already set aside the issue of characterization of the functions of the assessee back to the file of the learned transfer pricing officer and to carry out the fresh search of comparables, this issue is also required to be set-aside to the file of the learned transfer pricing officer with a direction to the assessee to submit the fresh comparables as per paragraph number 8 of the order of the coordinate bench for assessment year 2009 – 10 in case of the assessee, the learned TPO is directed to examine the case of the assessee for imputation of the interest on outstanding receivable thereafter. He may also consider the argument of the assessee with respect to the outstanding loan received from associated enterprises if any. Accordingly, ground number 3 of the appeal is also set-aside to the file of the learned AO/TPO.
15. The learned authorised representative did not press ground number 4, submitted that ground number 5 is consequential, ground number 6 was

not pressed as rectification order has already been passed and submitted that ground number 7 is consequential in nature. This is not disputed by the learned departmental representative. Accordingly, ground numbers 4 – 7 are dismissed.

16. Accordingly, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on : 08/11/2021.

**Sd/-
(KUL BHARAT)
JUDICIAL MEMBER**

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated : 08/11/2021.

MEHTA

Copy forwarded to

1. Appellant;
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	08.11.2021
Date on which the typed draft is placed before the dictating member	08.11.2021
Date on which the typed draft is placed before the other member	08.11.2021
Date on which the approved draft comes to the Sr. PS/ PS	08.11.2021
Date on which the fair order is placed before the dictating member for pronouncement	08.11.2021
Date on which the fair order comes back to the Sr. PS/ PS	08.11.2021
Date on which the final order is uploaded on the website of ITAT	08.11.2021
date on which the file goes to the Bench Clerk	08.11.2021

Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	