

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "E" NEW DELHI)
BEFORE G.E. VEERABHADRAPPA, HON'BLE VICE-PRESIDENT
AND SHRI RAJPAL YADAV: HON'BLE JUDICIAL MEMBER

I.T.A. No.809/Del/2009

Assessment Year: 2002-03

M/s. Marubeni India Private Ltd., Vs. Additional CIT,
5th Floor, Barjaya House (Lotus Tower) Range-6,
Community Centre, New Friends Colony, New Delhi.
New Delhi.

(PAN: AAACM6413M)

(Appellant)

(Respondent)

I.T.A. No.919/Del/2009

Assessment Year: 2002-03

Deputy CIT, Vs. M/s. Marubeni India Private Ltd.,
Range-6, 5th Floor, Barjaya House (Lotus
New Delhi. Tower), Community Centre,
New Friends Colony, New Delhi.

(Appellant)

(Respondent)

I.T.A. No.935/Del/2009

Assessment Year: 2003-04

M/s. Marubeni India Private Ltd., Vs. Assistant CIT,
5th Floor, Barjaya House (Lotus Tower) Range-6,
Community Centre, New Friends Colony, New Delhi.
New Delhi.

(Appellant)

(Respondent)

I.T.A. No.1420/Del/2009

Assessment Year: 2003-04

Deputy CIT, Vs. M/s. Marubeni India Private Ltd.,
Range-6, 5th Floor, Barjaya House (Lotus
New Delhi. Tower), Community Centre,
New Friends Colony, New Delhi.

(Appellant)

(Respondent)

Appellant by: Shri Rajesh Malhotra, CA

Respondent by: Shri NK Chand, Sr. DR

ORDER

PER RAJPAL YADAV: JUDICIAL MEMBER

The assessee and revenue are in cross appeals against the orders of Learned CIT(Appeals) dated 31.12.2008 and 27.1.2009 in assessment years 2002-03 and 2003-04. The issues agitated in the appeals are inter-connected with each other, therefore, we heard them together and deem it appropriate to dispose of them by this common order.

2. The grounds of appeals taken by the assessee in assessment year 2002-03 are not in consonance with Rule 8 of the ITAT's Rules, they are descriptive and argumentative in nature.

3. Before advertng to the disputes raised by the respective parties in their appeals, it is necessary to take note of brief facts. It emerges out from the record that assessee Marubeni India (P) Ltd. (hereinafter referred to MIPL) is the 100% subsidiary of Marubeni Corporation, Japan (hereinafter referred to MCJ), who is holding 99.99% shares in the assessee company and the balance 0.01% shares are held by Mr. H.Tsuda, representative of MCJ. Its activities have been noticed extensively by the Learned CIT(Appeals) in paragraph 5 which read as under:

- ii. MIPL's operations primarily consist of representation service. MIPL liaises between various business divisions of Marubeni and their suppliers/customers in India. These operations include import, export, and off-shore trade, project management, and marketing of finished goods, market research and liaison work.
- iii. MIPL too, like MCJ trades in a broad range of industrial, agricultural land and consumer goods, commodities and natural resources.
- iv. The various business segments of MIPL are:
 - IT & Telecom
 - Utility & infrastructure
 - Plant & machinery
 - Transportation & Industrial Machinery
 - Energy & Petroleum
 - Metal & Mineral Resources
 - Iron & Steel
 - Chemicals
 - General Merchandise
 - Food & produce
 - TextilesMIPL undertakes the following types of activities:
 - Handling/Agency Business – MIPL acts as a representative of MCJ and Other Related Enterprises (ORE's). MIPL helps MCJ and ORE's in marketing their products in India. Its role is limited to brokering a deal between two companies and providing pre shipment & post shipment liaison services.

In almost all transactions one party would be overseas. Marubeni Group Company or client of overseas Marubeni Group Company. In most cases the Indian parties are very reputed industrial houses whose main procurement needs are regularly provided by Marubeni group or their products are marketed through MIPL.

For MIPL's services they are mainly paid commission by their overseas group partner/MCJ in foreign currency. Which may be fixed, by contract, or could be variable and a result of negotiations.

MIPL earns commission from related parties. The Commission is based generally on the invoice value and in some instances based on quantity- depends on the products that are being traded(could range from 0.1% to 5-6%).

Principal Business – Sometimes MIPL involves itself in trading i.e. export or import in its own name. Such transactions however are very few.

Project activities – MIPL has recently started some project-related activities either as supplier or subcontractor. No related companies are involved in this.

Market Research Services – MIPL enters into a contract with MCJ/other each year for studying the market & economic

situation in India. Under the R & D agreement MIPL provides information to MCJ on a periodic basis. This information is to help MCJ determine the market and economic situation in India. For rendering this service MIPL is paid a fixed fee every quarter/Year based on the decision at the time of entering into the agreement”.

4. The assessee has filed its return of income for assessment year 2002-03 on 31.10.2002 declaring nil income. Similarly, in assessment year 2003-04, it has filed its return of income on 2nd December 2003 declaring an income of `97,74,806 under the head “income from business”. It has declared income from other sources at `1,93,95,460. The case of the assessee was selected for scrutiny assessment and a notice under sec. 143(2) dated 22.10.2003 was issued in assessment year 2002-03. A similar notice was issued in assessment year 2003-04. An assessment under sec. 143(3) was framed on 26.3.2005 in assessment year 2002-03 whereby Assessing Officer has determined the income of assessee at `2,35,01,470. Assessing Officer has made following additions/disallowances:

S.No.	Particulars	
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1.	Disallowance on account of construction activities	1,26,59,700
2.	Addition on account of Arm's length price	2,60,49,881
3.	Addition on account of interest to Income-tax Authorities	13,15,473
4.	Addition on account of Business Promotion Expenses	14,40,045
5.	Disallowance on account of Communication Expenses	79,82,798

5. In assessment year 2003-04, he determined the taxable income of the assessee at ₹4,79,36,297. Assessing Officer has made disallowances/additions to the returned income of ₹2,91,70,266. The additions made by the Assessing Officer are as under:

S. No.	Particulars	Amt (in ₹)
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1.	Addition on account of Income from International Transaction	98,63,206
2.	Addition on account of Business Promotion Expenses	8,93,040
3.	Addition on account of Communication Expenses	63,79,405
4.	Addition on account of interest paid to Income- tax Authorities	9,36,037
5.	Additional on account of Foreign Exchange Loss	9,36,037
6.	Disallowance on account of donation	2,00,000
7.	Addition on account of Legal and Professional charges.	3,93,328

6. First common issue is involved in cross appeals for assessment year 2002-03 and department's appeal for assessment year 2003-04. It pertains to determination of arms length price in respect of international transactions with the associate enterprises. The assessee has reported seven international transactions with its associates enterprises in assessment year 2002-03 and six international transactions with its associate enterprises in assessment year 2003-04. The details of the transaction and the method used for demonstrating the arms length price for the purpose of transfer pricing in respect of international transaction adopted by the assessee have duly been noticed by the Learned CIT(Appeals) in paragraph 4.1 of the order in both the assessment years. Assessing Officer has made a reference under sec. 92CA(1) of the Act to the TPO for computation of ALP in respect of all the international transactions. Learned TPO accepted all the transactions and the method used by the assessee except the one transaction, namely, agency and market research.

7. Learned TPO has recommended adjustment in only one international transaction which pertains to agency and market research services. The brief facts in respect to this transaction are that assessee had received

remuneration from various associate enterprises for providing the services of marketing support and facilitation. For bench marking this transaction, it has adopted Transactional Net Margin Method (TNMM) as the most appropriate method. The assessee has chosen operating profit margin on operating cost i.e. (OP/OC) as the PLI. The assessee had made itself as a tested party. According to the assessee, its margin in assessment year 2002-03 is 9% on cost and as per study of transfer pricing report, the arm's length margin is 8.37% on cost. In assessment year 2003-04, the assessee has pointed out that the arithmetical mean of the PLI of the eight comparable companies is 9.89%. It has shown the operating margin on operating cost at 24.25%. According to the assessee, the transactions are concluded to be at arm's length.

8. Learned TPO was not satisfied with regard to the computation of arm's length price with respect to the international transaction. In his opinion, assessee has erred in including interest income as a part of operating income while working out the arm's length price. Similarly, he observed that assessee failed to exclude certain expenses from operating expenses. In assessment year 2002-03, he recomputed the arm's length price in respect of this

international transaction at `22,10,47,646 as against `19,49,97,705 reported by the assessee. The difference comes out to `2,60,49,881. An addition of this amount accordingly, has been made in assessment year 2002-03. On similar analogy , learned TPO has determined the arm's length price of this international transaction at `17,36,71,139 as against `16,38,07,933 reported by the assessee in form 3CEB. The difference between the two works out to be `98,63,206. He recommended the addition of this amount to the Assessing Officer.

9. Learned CIT(Appeals) while considering this issue has propounded five issues to be adjudicated in assessment year 2002-03 which read as under:

- i. Whether the interest income of `1.72 crore is part of operating income or not.
- ii. Whether loss on sale of fixed assets, interest paid to income-tax, office closure cost, amount paid to telephone adalat are abnormal costs and are required to be excluded while computing the operating expenses.
- iii. Whether business promotion expenses disallowed by the A.O. and admitted by the appellant should also be excluded while computing the operating expenses

- iv. Whether, the appellant is entitled for adjustments to the operating profit, on account of differences in the working capital position and differences in the risks profile, between the appellant and the comparable companies.
- v. Whether the appellant is entitled to the benefit of +/- 5% range mentioned in Proviso 92C(2) while computing the Arm's Length Price."

10. Similarly, in assessment year 2003-04, Learned CIT(Appeals) has propounded nine points which were required to be adjudicated. After going through the orders of the revenue authorities below and the grounds taken by the revenue in this year, in respect of determination of arm's length price, we are of the opinion that point Nos.1, 2 and 6 carved out by the Learned CIT(Appeals) are not at all relevant for discussion in the present order, because parties are not litigating on these issues. They are to the effect, whether Assessing Officer is justified to make reference to the TPO without recording reason whether the Assessing Officer mechanically accepted TPO's recommendations, whether g.p. of `81,098 realized on trading transaction with its AEs be included in the operating income etc. Therefore, the other points are as under:

“iii. Whether the interest income of Rs.1,93,95,460 is part of operating income or not. (Ground No.2 & 3).

iv. Whether expenses of Rs.1,21,75,804 incurred as indirect expenses should be allocable to the trading segment of the appellant for the purposes of computing the operating margin of the agency and marketing support services segment (Ground No.8).

v. Whether, the appellant is entitled for adjustments to the operating profit, on account of differences in the working capital position and differences in the risks profile, between the appellant and the comparable companies (Ground No.9).

vii. Whether expenses pertaining to interest paid to income-tax authorities amounting to Rs.936,037, ‘fixed assets written off’ amounting to Rs.149,507. Provision for gratuity amounting to Rs.1,487,150, and ‘loss on disposal of fixed assets (net)’ amounting to Rs.12,742, should be treated as abnormal and non operating costs and are required to be excluded while computing the operating expenses. (Ground Nos. 6, 7 & 11).

viii. Whether business promotion expenses amounting to Rs.8,93,040, donation expenses amounting to 2,00,000 and legal and professional charges amounting to Rs.3,93,328 disallowed by the AO and admitted by the appellant should also be excluded while computing the operating expenses.

ix. Whether the appellant is entitled to the benefit of $\pm 5\%$ range mentioned in Proviso 92C(2) while computing the Arm's Length Price. (Ground No.10).”

11. Learned First Appellate Authority has recorded findings in detail on all these issues independently. In assessment year 2002-03, he excluded following items for computing total cost for the purpose of calculating arm's length remuneration:

a) Loss on Sale of Fixed Assets/written off	Rs.17,20,389
b) Interest on account of Income-tax	Rs.13,15,473
c) Telephone Expenses (as per order of Telephone Adalat)	Rs.31,70,638
d) Business Promotion Expenses	<u>Rs.14,40,045</u>
Total	<u>Rs.76,46,545</u>

12. The revenue has accepted the order of Learned CIT(Appeals) in respect of exclusion of receipts representing loss on sale of (a) fixed assets; & (b) interest on account of income-tax.

13. Let us now considered the each item considered by the TPO for making adjustments in the arm's length remuneration of the assessee relating to international transaction. The first common item involved in both the

assessment years is whether interest income of `1.72 crores received by the assessee in assessment year 2002-03 and `1,93,95,460 should be formed part of operating income for working out the arm's length price. The learned counsel for the assessee at the time of hearing has placed on record a written note and advanced his arguments by referring the order of the Learned CIT(Appeals) in assessment year 2002-03. The learned counsel for the assessee while impugning the order of the Learned CIT(Appeals) contended that as per clause 21 of the Memorandum of Association, one of the objects of the assessee is to invest surplus funds of the company from time to time in deposits, government securities or other securities including shares, bonds and debentures time to time to be determined by the directors. As per clause 20 of the Memorandum of Association, the assessee is also permitted to lend money not immediately required for the business of the company, either with or without security and generally to such person and upon such terms and conditions as the company may think fit and is authorized to do so. The learned counsel for the assessee has apprised us with regard to assessee's business profile. He submitted that one of the activities of the assessee is of treasury function. Under this activity, the management accountants main task is in cementing these treasury's strategic role i.e. to facilitate communication

and understanding of strategic possibility and to aid implementation through the use of diagnostic and the development of gap and sustaining strategies. To attract and retain competitively sought after investors capital or in other words shareholders wealth. In today's world, investors capital has more choice and mobility than ever before, the key to co-operate survival and growth lies in organizational change initiatives that will contribute directly to the economic value of the firm and its ability to satisfy the financial return requirements of its investors. The main object of treasury function which cash management, management of bank account and debt management, financial planning and forecasting of cash flow financial assets management. He pointed out that parleying of surplus fund is an integral part of assessee's business. In the MOU, it has been provided that assessee will invest surplus in fixed deposits. The business module of the assessee also envisage the utilization of the surplus funds from time to time to generate operating revenue. Cost of earning the interest income is built into the operating cost of the assessee. In assessment year 2001-02, interest income earned by the assessee has been held as business income. The order of the ITAT was upheld by the Hon'ble Delhi High Court as well as by the Hon'ble Supreme Court. He referred pages 209, 232 and 246 of the paper book wherein

copies of the ITAT's order, Hon'ble High Court's order and Hon'ble Supreme Court's order in assessment year 2000-01 are available. Since the interest income in the earlier years has been treated as a income from business, it should form part of operating income for the purpose of determining the arm's length price. He relied upon vendors Tech nology (P) Vs. ACIT 131 TTJ 309 (ITAT Delhi) and contended that interest from advance from A.E. would effect profit margin.

14. On the other hand, Learned DR submitted that assessment of interest income as a business income is altogether a different aspect. For the purpose of determining the value of international transaction as arm's length price, one has to see whether interest income has played any role in either generating receipts for international transaction or had any influence over those transactions. He relied upon the order of the Learned CIT(Appeals).

15. We have duly considered the rival contentions and gone through the record carefully. There is no dispute that in assessment year 2000-01, interest income earned on the deposits made out of surplus fund was held to be a business income. There may not be any dispute with regard to the objects available in the MOU that assessee shall invest surplus fund in fixed

deposits. The core issue for our adjudication is whether receipts shown by the assessee from international transaction with its associates enterprises are comparable to the receipts earned by any other assesseees with independent party. As per the transfer price regulation, the purpose of the TPO is to determine the arm's length price of the transactions of the assessee with its associates by comparing the same with uncontrolled comparable and while doing so this exercise the TPO has to consider all the components which are part of the operating income and from which one has to reduce the cost incurred in earning operating income. The issue before us is not to decide whether a particular receipt is an income from business or an income from other sources for the purpose of the Income-tax Act, 1961. From the record, we find that Learned CIT(Appeals) has discussed the business profile of the assessee which we have also noticed in foregoing paragraphs. He recorded a finding that earning of the interest income has never been the primary operating income generating activity, in fact, interest income is prima facie earned as a result of finance activity by investing the surplus funds and it is not the result of an operating activity. The basic object of the Chapter X of the Income-tax Act, 1961 is to determine and arrive at the arm's length price by comparing the operating profits of the controlled transaction with the

uncontrolled transaction. According to the Learned CIT(Appeals), it is a universal practice under TP Regulation that interest income is to be excluded from the operating revenue for computing the net profit from the operating activity. However, situation would be different if the earning of interest itself is the main activity for which ALP is to be determined. The nature of service provided by the assessee to its holding companies i.e. MCJ and other associate concerns is in respect of marketing support and facilitation according to which it provides information to MCJ on a periodic basis. This information has helped MCJ to determine the market and economic situation in India. This activity is all together different then earning interest income. The TPO was supposed to examine the profit earned from the provisions of administration and commercial support business of the assessee. Thus, the profit of a particular operation cannot be clubbed with the earning of any other revenue stream. For rendering of services, the TPO was to determine the arm's length price, which has to be computed by keeping in mind the return on cost. If interest is included as a part of the operating revenue, then it would mean to compute the return on investment which is an inappropriate profit level indicator for a service provider. Thus, for computing operating margin on cost, neither the interest income nor interest expenses is a relevant

factor. The essential element for consideration is the cost incurred for the operating activity which has to be taken into account. We find that Learned CIT(Appeals) has examined the issue with different angles also. The assessee has incurred expenses for earning interest income at `1.22 crores in assessment year 2002-03. It has shown interest income at `1.72 crores. Both these factors have to be taken into consideration before inclusion of any interest income in the operating income for the purpose of ALP. On due consideration of the order of the Learned CIT(Appeals), we are of the opinion that Learned First Appellate Authority as well as learned TPO has examined this aspect elaborately and has rightly held that interest income is not a relevant receipt which has any influence on the operating income of the assessee for working out the ALP. Therefore, this receipt has rightly been excluded in both the assessment years.

16. Now, we take the other items influencing the international transaction and considered by the learned revenue authorities in assessment year 2002-03. The first two items which have been excluded by the Learned CIT(Appeals) from the computation of total cost for the purpose of calculating arm's length remuneration are `31,70,638 and `14,40,045. The first item

represent a payment made to telephone department against the demand raised by it. The second item relates to business promotion expenses. The Telephone Department has raised a demand upon the assessee which was disputed by it in a telephone adalat but ultimately it has to pay the amount. According to the Learned CIT(Appeals), the payment made to telephone department is in the nature of abnormal item which is not regularly incurred in the ordinary course of business. The learned counsel for the assessee on the strength of ITAT's decision in the case of SAB Laboratory India Pvt. Ltd. Vs. ACIT reported in 6 ITR (Trib.) page 88 contended that the Learned First Appellate Authority has rightly given the credit of this expenditure and has rightly excluded this expenditure for calculating the operating cost. Learned DR on the other hand relied upon the order of the TPO.

17. On due consideration of the facts and circumstances, we are of the view that in computing the ALP, the expenses in the nature of abnormal items are not to be looked into. This expenditure is not of a routine nature. It is not ascertainable from the record, whether it is for actual user of the telephone or for some other reasons. Assessing Officer or TPO has not brought sufficient material on the record which can exhibit that this amount was directly inter-

linked with the international transaction, therefore, in our opinion, Learned CIT(Appeals) has rightly excluded this amount from calculation of operating cost. As far as the other items disputed by the revenue is concerned, we find from the discussion of the Learned CIT(Appeals)'s order that the Assessing Officer has made a disallowance of ₹14,40,045 on account of business promotion expenses. He has disallowed 25% of the total expenses under this head on the ground that element of personal nature is involved. The assessee did not dispute this disallowance before the Learned CIT(Appeals). It only prayed that it be excluded from the operating expense. On due consideration of the Learned CIT(Appeals)'s order, we are of the view that once it is considered that this amount represents expenses of personal nature then it may not have any bearing on the international transaction. Learned CIT(Appeals) has rightly excluded this amount from the operating cost. In the result, the solitary grievance raised by the revenue in assessment year 2002-03 is de void of any merit. It is rejected. The other grounds raised by the revenue are general in nature and do not require any specific adjudication.

18. In the assessee's appeal, the next item relates to inclusion of following amounts in the operating cost:

*Compensation for disclosure of business ₹12,19,764

units in Delhi Office

* Compensation for closure of business unit	₹ 6,24,221
* Compensation for closure of Chennai office	<u>₹ 50,54,007</u>
Total	<u>₹ 68,97,992</u>

19. The learned counsel for the assessee at the very outset submitted that the Learned CIT(Appeals) has confirmed inclusion of the above amount in the operating cost on the ground that the assessee is primarily engaged in contract service provider to its AE which means that continuity of business is ensured to the MIPL. If the associate enterprises intends to break the relation of which it has enjoyed concessional fruit over the year then on closure of certain branches, the A.E. ought to have adequately compensate the assessee for such severance of relation. The assessee has closed these three offices in order to reduce the surplus staff, to reduce the different profile i.e. consolidation of business unit. The assessee has to see economic environment available in the market and to reduce the losses, it thought, it fit to close certain branches.

20. The learned counsel for the assessee submitted that Learned First Appellate Authority has failed to appreciate the facts and circumstances in right perspective. The assessee is an independent juridical entity. It is not guided by its A.E. for taking all such administrative decisions. It has been running its business in India as an independent unit. The decision to close certain offices was taken by the executive management in India. He pointed out that effort of the TPO as well as of the Learned CIT(Appeals) is to tax the A.E. in the garb of assessee. These items are abnormal items. They are not regular operating expenditure, therefore, these ought to have been excluded from the operating cost while working out the ALP of international transaction. He again relied upon the decision of ITAT, Bangalore in the case of SAB Lab India (P) Ltd. (supra). He also relied upon the order of the ITAT in the case of Mc Donald reported in 3 SOT page 240.

21. Learned DR on the other hand contended that the assessee is a captive company of its AE. The AE runs the whole risk. MCJ is paying the assessee cost plus 10%. Thus, the closure of business would automatically reduce the cost of AE . It is a relevant issue for inclusion in the operating cost.

22. We have duly considered the rival contentions and gone through the record carefully. Learned First Appellate Authority has observed that if the business in certain branches was closed as per the independent decision of the assessee then it may not be a relevant factor which can influence the international transaction. But if the business was closed by the influence exercised at the end of AE then this issue would be a relevant issue for the purpose of ALP. Learned CIT(Appeals) directed the assessee to produce documentary evidence where it has been decided to close down these branches. The assessee failed to submit those details. Learned DR has demonstrated that closure of these branches would automatically reduce the cost of A.E. In such situation, it is a relevant item for consideration for the transfer pricing issue. The argument of the assessee that by inclusion of these receipts, revenue is drawing to tax the A.E., in our understanding this

submission is not on a sound footing. The learned counsel for the assessee contended that if this stand of the revenue is accepted then there will never be a loss to an entity in India rather in other words higher the loss the revenue will expect higher income-tax on those losses by treating it as an operating expenses and expecting higher margin on that which would be against the principle of natural justice. It is not the case. The ITAT in the case of Mentorgraphic reported in 109 ITD 101 has observed that transfer pricing is not an exact science. One has to evaluate the transaction and it is difficult to arrive at a certainty, in that process. Element of guess-work would always be there. The analysis carried out by the adjudicating authority should be judicious one and that should be carried out after taking into consideration all the relevant facts and circumstances of the case. In the present case, the compensation received by closure of certain units may not be a regular phenomena. But by virtue of closing down certain branches, assessee has reduced the cost of A.E. It means that closure has a direct link with the international transaction. Assessee has been receiving the certain charges at cost plus 10%. In such circumstances, this type of receipts would always be considered in the operating expenses. Learned First Appellate Authority has rightly held that cost of closure is not to be excluded from computing the

operating expenses. The ground Nos. 6 & 7 raised by the assessee in this regard are rejected.

23. The next item disputed by the assessee in ground No.8 is that Learned CIT(Appeals) has erred in using the current year data for comparable purposes and not relying on the date of preceding two years. The learned counsel for the assessee did not press this ground of appeal on the ground that Special Bench's decision of the ITAT in the case of Aztectech Software & Technology is against the assessee. This is against the assessee. This decision is reported in 107 ITD 141 and it has been reaffirmed in the case of Mentorgraphic (109 ITD page 101). Hence, this ground of appeal is rejected.

24. The learned counsel for the assessee also not pressed ground No.10, hence it is rejected.

25. In ground No.9, assessee has contended that Learned CIT(Appeals) has rejected its claim for risk adjustment. According to the assessee, the comparable companies data comes to be adjusted to account for the

functional and risk level difference in order to improve reliability of the transfer pricing analysis. The learned counsel for the assessee pointed out that that assessee company does not take any financial risk while providing services of agency. At the same time, assessee does not hold any patent and intangible, therefore, low profit/commission are earned by the assessee. On the strength of ITAT's decision in the case of Sony India Vs. DCIT reported in 114 ITD 448. He submitted that in this case an adjustment of 20% to the comparable margin to adjust for difference in risk and ownership on intangible has been accepted. In the case of assessee, same ratio is to be applied. On the other hand, Learned DR relied upon the order of the Learned CIT(Appeals).

26. We have duly considered the rival contentions and gone through the record carefully. Learned CIT(Appeals) has rejected this argument of the assessee on the ground that assessee failed to bring any evidence on the record to show that there exists any difference in the risk profile of the comparable companies vis-à-vis the assessee. According to the Learned CIT(Appeals), in order to take benefit of this adjustment, information should be submitted along with details under Rule 10D maintained by the assessee.

We find that Learned CIT(Appeals) has discussed in detail and observed that under section 92D(i) of the Act provide that every person entering into an international transaction, is required to keep and maintain such information and document in respect of thereof as is being prescribed under rule. Rule 10D(1) of the IT Rules. This rule requires maintenance of a record of the analysis performed to evaluate comparable as well as a record of the actual working carried out for determining the ALP. Rule 10D(4) of the Rules requires that the information and documentation to be maintained under Rule 10D(1) should be contemporaneous as far as possible and should exist latest by the due date of filing of the return. With regard to adjustment on account of risk, according to the Learned CIT(Appeals), assessee failed to file the details exhibiting risk born by comparables. In the absence of that comparability, it is difficult to make adjustment. As far as the decision of the ITAT is concerned, that relates to facts situation of that case. In a given circumstance, some estimated mark upon may be applied for risk adjustment. The assessee ought to have demonstrated this factor before the learned TPO as well as before the Learned CIT(Appeals). Thus, in the absence of exact details, exhibiting the risk born by the comparable vis-à-vis the risk in running the business taken by

the assessee, it is difficult to give any benefit on that account. Ground No.9 raised by the assessee is, therefore, rejected.

27. In ground No.11, assessee has submitted that there is a general recession in the international market, because of general recession, assessee could not achieve the desired business target. The learned counsel for the assessee submitted that assessee has placed on record economic survey of Government of India for the financial year 2001-02 and pointed out that industrial growth during first nine months was only 2.3% as compared to 5.8% during the corresponding period of the previous year. There was an international recession in this period. Thus, a reasonable benefit be given to the assessee in its overall profit. The learned counsel for the assessee also submitted that assessee has provided these factors in its written submissions filed before Learned CIT(Appeals), but Learned CIT(Appeals) failed to record any finding on this issue. Learned DR on the other hand contended that determination of arm's length price is not the result of any solution of mathematic precision. There is no exact conclusive scientific formula. It is an estimated working based on principle of natural justice coupled with the

procedure provided in Chapter X of the Income-tax Act, 1961 and in the I.T. Rules.

28. We have duly considered the rival contentions and gone through the record carefully. This issue appears not to have been raised before the TPO but in the written submissions before the Learned CIT(Appeals) assessee has raised this issue. In our opinion, it is an issue raised on general conditions of the market. But the adjustment recommended by the TPO is based on the result shown by the comparable in uncontrolled transactions. That comparison has taken into consideration the general factor available to the assessee vis-à-vis to the comparable in the market. Therefore, no separate adjustment deserves to be made because of the general conditions of the market at that relevant point of time. It may be a corroborative factor for determination of ALP in the case of assessee, but it is difficult to work out the exact influence of the market condition in the profit making of the assessee. TPO has considered the results of the comparable cases and thereafter recommended adjustment, therefore, we do not deem it appropriate to make any ad hoc adjustment on the basis of this argument at this stage. This ground of appeal is rejected.

29. In ground No.12, grievance of the assessee is that benefit of proviso appended to section 92C of the Income-tax Act, 1961 has been denied to the assessee. The arithmetic mean of profit level indicator of five comparable is 9.33%. If benefit of minus five i.e. range under the proviso is given to the assessee on the PLIs determined by the Learned CIT(Appeals) then arithmetic mean of the PLI would be 3.8%. Similarly, if plus five is added then it would be 14.8%. According to the learned counsel, benefit of this proviso ought to have been extended to the assessee. Learned DR on the other hand pointed out that benefit of minus 5% provided in the proviso is not a standard deduction. He relied upon the order of the ITAT in the case of Global Vantage (P) Ltd. vs. CIT reported in 2010 Tax India Online page 24. He placed on record copy of the ITAT's order. He also relied upon the order of the ITAT Mumbai in the case of DCIT vs. Basf India Ltd. reported in 41 SOT 10.

30. We have duly considered the rival contentions and gone through the record carefully. Learned First Appellate Authority rejected the claim of the assessee on the ground that the benefit cannot be considered to be a standard universal deduction allowed in each and every case which the assessee exceeds the permissible limit and falls outside the arm's length

range. The proviso provides a relief to the taxpayer at the time of determining ALP. In effect, the transfer price shown by the assessee was not to be disturbed if it was within +/- 5% mean ALP range than the arm's length price determined by the Assessing Officer based on the arithmetical mean of the prices. In the case of the assessee, it does not fall within that mean. Learned First Appellate Authority also observed that this option is available to the assessee but it is available only when assessee is computing the ALP and not when the A.O./PTO is computing the ALP. Learned CIT(Appeals) has made an elaborate discussion on the issue. Considering the two orders of the ITAT, coupled with the findings of the Learned CIT(Appeals), we do not find any merit in this ground of appeal. It is rejected.

31. In the next ground of appeal, grievance of the assessee is that Learned CIT(Appeals) has not recorded specific finding for granting set off of brought forward less and unabsorbed depreciation. With the assistance of learned representatives, we have gone through the record carefully. We find that Learned CIT(Appeals) has left this issue open for the Assessing Officer which is to be adjudicated when Assessing Officer, will give effect to his order or of the higher authority. In our understanding, Learned First Appellate Authority

has not committed any error because as and when Assessing Officer will determine the income of the assessee he will see the brought forward business losses and unabsorbed depreciation. He will treat both these items in accordance with law. Thus, this ground is pre-matured one at this stage. It is rejected.

32. The learned counsel for the assessee at the time of hearing raised an alternative argument. He submitted that if interest income is excluded from operating income for the purpose of computing ALP then estimated expenses on account of administrative, salary etc. be computed and excluded from the operating cost. He made a reference to the decision of Hon'ble Kerala High Court in the case of CIT vs. Wandoor Jupiter Chittry. He pointed out that in this case, 10% of expenses have been estimated for earning interest income. He claimed that at least 10% of interest income be considered towards interest cost. This issue was not raised before the learned revenue authorities below. To some extent, arguments of the learned counsel for the assessee is logical one. We remit this issue to the file of the Assessing Officer for readjudication and grant necessary benefit to the assessee. In view of the

above discussion, the appeal of the assessee in assessment year 2002-03 is partly allowed whereas appeal of the revenue is dismissed.

33. In assessment year 2003-04, as observed earlier, only revenue is disputing the determination of the ALP. We have extracted the relevant points expounded by the Learned CIT(Appeals) for determination of ALP in paragraph 10 page 11 of this order. The first item is exclusion of interest income from operating income. This issue we have already adjudicated while adjudicating this issue in assessment year 2002-03. Learned CIT(Appeals) has held that interest income cannot be considered as forming part of operating income. This finding is against the assessee and assessee is not challenging this issue in its appeal. The next item relates to exclusion of interest paid to income-tax, value of fixed assets written off, provisions for gratuity etc. These items were included by the assessee in the operating cost. Learned CIT(Appeals) has held that these are to be excluded. The assessee is not disputing this factor and revenue could have not any grievance. The only grievance of the revenue is that Learned CIT(Appeals) has erred in holding that expenses of ₹1,21,75,804 as related to trading segments and it cannot be considered in the commission segments for the purpose of ALP. Other

issues have been decided against the assessee. By exclusion of this amount, the arm's length revenue worked out on the basis of TPO's report comes out to ₹16,31,25,719 which is less than the actual revenue shown by the assessee at ₹16,38,07,933. Therefore, according to the Learned CIT(Appeals), no adjustment is required in this year. Let us consider whether expenses of ₹1,21,75,804 is a relevant figure this year or not. The brief facts of the case are that in the financial year 2002-03, assessee took two projects, namely, TISCO Project and Purlia Project. It had incurred total expenses of ₹2,82,92,590. Out of these expenses, a sum of ₹1,61,16,786 is direct site expenses for both these projects. The other amount is the indirect expenses/overheads. The assessee has pointed out that these two contracts has nothing to do with the agencies support services rendered by the assessee to its A.E. Therefore, these expenses are not to be considered while determining the ALP of the assessee. Learned CIT(Appeals) after taking note of assessee's submissions and also considering the details of project expenses on page 31 has excluded this amount from commission segments. The findings apart from the details of expenses read as under:

“9.2 I have gone through the above submissions, the appellant's case is that they have incurred an expenditure of ₹2,82,92,590 on TISCO

and Purulia projects which relates to the trading segments of the appellant's business. As part of the Trading activities the appellant has incurred direct site expenses to the tune of ₹1,61,16,786 and the balance ₹12,175,804 (₹2,82,92,590 - ₹1,61,16,786) is towards of allocation of indirect expenses/overheads. The TPO did not allow the allocation of indirect expenses towards the trading segment and instead treated these expenses as part of the Commission segment only.

9.3 During the appellate proceedings the appellant submitted that they are maintaining segmental accounts of the Trading and Commission business, especially the projects which are part of the Trading segment. Since apart from the direct costs incurred on a project, there are other indirect costs which are incurred for the overall supervision of these projects, the cost of which cannot be directly identified and allocated, therefore, it is reasonable to conclude that some portion of these indirect costs also known as corporate overheads need to be allocated to the trading segment as well as particular project department. Hence, I agree with the appellant's contention that in the absence of any allocation of such expenses it is prudent to use income as the appropriate "allocation key" to allocate such overheads/indirect expenses to the Trading segment".

34. On due consideration of the findings of the Learned CIT(Appeals), we are of the view that these expenses have no relation with the international

transactions of the assessee, therefore, they cannot be considered while computing the ALP of the assessee. Learned CIT(Appeals) has examined the other aspects in detail. We have considered those issues also i.e. whether last year data has to be taken into consideration or multiple years data. We have considered this issue while dealing with the determination of the ALP in assessment year 2002-03. Similarly, we have considered the issue in respect of business promotion expenses etc. discussed by the Learned CIT(Appeals) on page Nos. 47 & 48 of the impugned order. On an analysis of the Learned CIT(Appeals)'s order we do not find any reason to interfere in it on the issue of determination of transfer pricing in assessment year 2003-04.

35. In the result, the appeal filed by the revenue is dismissed.

36. The assessee in the first ground of appeal for assessment year, has pleaded that Learned CIT(Appeals) has erred in denying the benefit of brought forward to unabsorbed depreciation allowance of `1,55,34,911. In assessment year 2002-03, we have considered this issue and we have observed that Learned CIT(Appeals) has rightly left this issue open for the Assessing Officer. Assessing Officer shall consider this effect when he will give effect to the order in the past year. Thus, in our opinion, it is a

consequential issue which will be considered by the Assessing Officer as when he will give effect to the order of the Learned CIT(Appeals) or the higher authorities.

37. In ground No.2, assessee has submitted that Learned CIT(Appeals) has erred in upholding the charging of interest under section 234B and 234D. The learned counsel for the assessee submitted that charging of interest under sec. 234B is consequential in nature, however, interest under section 234D is not chargeable upon the assessee in view of the Special Bench's decision of the ITAT rendered in the case of ITO Vs. Ekta Promoters reported in 113 ITD 719.

38. On due consideration of the facts and circumstances, we are of the opinion that section 234D has been brought on statute book from 1.6.2003. The Special Bench of the ITAT has held that it is applicable from assessment year 2004-05. Thus, interest under section 234D is not chargeable in this year. We allow the ground of appeal raised by the assessee partly and direct the Assessing Officer not to charge interest under sec. 234D of the Act.

39. In ground No.3, assessee has pleaded that learned revenue authorities have erred in withdrawing the interest granted under sec. 244A of the Act. At the time of hearing, learned counsel for the assessee did not press this ground of appeal, hence it is rejected.

40. The assessee has moved an application under Rule 11 of the IT Rules for admission of additional ground of appeal in both the years. It is pleaded in the application that assessee has been showing interest income as income from business. Assessing Officer did not accept this stand of the assessee and the dispute traveled up to the ITAT. The ITAT has held that interest income is to be treated as business income. Revenue took the matter in the Hon'ble High Court and thereafter to the Hon'ble Supreme Court. Hon'ble Supreme Court has accepted the stand of the assessee and in assessment year 2000-01, it has been held that interest income would be assessed as business income. In order to avoid litigation, assessee in this assessment year has offered interest income as income from other sources but in view of the Hon'ble Supreme Court's decision, its interest income is to be assessed as business income.

41. Learned DR on the other hand opposed the prayer of the assessee and submitted that it itself has shown the interest income as an income from other sources, therefore, it cannot change its stand. We have duly considered the rival contentions and gone through the record carefully. In view of the Hon'ble Supreme Court's decision in the case of NTPC Ltd. reported in 229 ITR 383, we permit the assessee to raise this ground. Since in assessment year 2000-01, the stand of the assessee that interest income is to be assessed as a business income has been accepted by the ITAT and thereafter the order has been upheld by the Hon'ble High Court as well as Hon'ble Supreme Court. Since this issue was not available before the Assessing Officer or before the Learned CIT(Appeals), factual details are to be verified, therefore, we remit this issue back to the file of the Assessing Officer for verification and readjudication in these years.

42. In the result, appeals of the assessee are allowed for statistical purposes whereas the appeals of the revenue are dismissed.

Decision pronounced in the open court on 18.03.2011

(G.E. VEERABHADRAPPA)
VICE-PRESIDENT

(RAJPAL YADAV)
JUDICIAL MEMBER

Dated: 18/03/2011
Mohan Lal

Copy forwarded to:

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

ASSISTANT REGISTRAR