INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI A.T.VARKEY, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
ITA No. 5882/Del/2010(Assessment Year: 2006-07)
ITA No. 5816/Del/2011(Assessment Year: 2007-08)
ITA No. 6282/Del/2012(Assessment Year: 2008-09)

GE Money Financial Services Pvt. Ltd., 401, 402, 4th Floor, Aggarwal Millennium Tower, E-1,2,3, Netaji Subhash Place, Pitampura, New Delhi PAN:AAACC0642F	Vs.	ACIT, Circle-12(1), C.R.Building, New Delhi
(Appellant)		**(Respondent)**

Assessee by :	Sh. Sachit Jolly, Adv Sh. Rahul Sateja, Adv Sh. Gautam Swanibi, Adv
Respondent by :	Sh. Amendra Kumar, CIT DR

Date of pronouncement 02.05.2016

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These captioned appeals for three assessment years are preferred by assessee against the orders of Assessing Officer (In short 'The AO') passed u/s 143(3) read with section 144C of the Income Tax Act, 1961(In short 'The Act'). In this appeal, common issues are involved and are therefore same are disposed of by this common order.
2. In Appeal for AY 2006-07, Assessee raised following grounds of appeal:-

General

1.1 On facts and circumstances of the case and in law, the Ld. AO erred in passing the impugned assessment order dated December 9, 2009 (the 'Draft Assessment Order') and the Hon'ble Dispute Resolution Panel ('Hon'ble DRP1) erred in passing directions under Section 144(C) of the Income-tax Act, 1961 (the 'Act') confirming the Draft Assessment Order. On the facts and circumstances of the case and in law, the learned AO erred in assessing the income of the Appellant at Rs.1,51,19,62,870/- as against the returned income of Rs.99,70,75,770/-.

1.2 The Ld. AO erred in proposing and the Hon'ble DRP further erred in confirming the addition of Rs.51,48,87,100/- to the Appellant's returned income of Rs.99,70,75,770/-.

1.3 On the facts and circumstances of the case and in law, the order passed by the Ld. AO under the directions passed by the Hon'ble DRP under section 144C(5) of the Act is wrong and bad in law.

B. Disallowance of depreciation on leased vehicles

2 On facts and circumstances of the case and in law, the Ld. AO has erred in proposing and the Hon'ble DRP has further erred in confirming the disallowance of depreciation of Rs.2,90,56,780/- claimed by the Appellant u/s 32 of the Act on vehicles leased out to customers, by holding that the Appellant is not the beneficial owner of these vehicles.

C. Addition on account of Interest on sticky loans

3.1 On facts and circumstances of the case and in law, the Ld. AO has erred in proposing and the Hon'ble DRP has further erred in confirming the addition of Rs.8,08,14,506/- towards interest on sticky loans and advances which was not recognised as income by the Appellant in accordance with the mandatory Prudential Norms issued by the Reserve Bank of India.

3.2 Without prejudice to the above, the Ld. AO grossly erred in rejecting and the Hon'ble DRP has further erred in confirming the rejection of Appellant's alternate submissions that write off of Rs.7,61,11,049/- in respect of interest on sticky loans and advances of which the principal amount itself had been written-off during the year ended March 31, 2006 should be allowed as deduction under section 36(1)(vii) read with section 36(2) of the Act.

D. Disallowance of loss on sale of Repossessed Assets

4 On facts and circumstances of the case and in law, the Ld. AO has erred in proposing and the Hon'ble DRP has further erred in confirming the disallowance of Rs.22,33,25,067/-representing actual loss on sale of repossessed assets, and forming an integral part of the money-lending business activity of the Appellant.

E. Transfer Pricing Adjustment

5.1 On the facts and circumstances of the case and in law, the learned Transfer Pricing Officer (hereinafter referred to as 'Ld. TPO') and the Ld. AO have erred in proposing and the Hon'ble DRP has further erred in confirming the arm's length price for international transactions pertaining to availing of intra-group services, i.e. Consulting, Administrative and IT services at Rs NIL under section 92CA(3) as against the sum of Rs.21,20,48,533/- determined by the Appellant.

5.2 That the Ld. TPO and the Ld. AO erred on facts in alleging and the Hon'ble DRP further erred in confirming -

a) that no economic and commercial benefits were derived by the Appellant from receipt of the intra-group services and that the Appellant failed to furnish evidences to demonstrate that the services were actually rendered by the Associated Enterprises (AEs), not appreciating the details, explanations and evidences submitted by the Appellant;

b) That services received from the AEs were incidental or duplicate in nature, not appreciating that the services were not similar to those performed in-house and were essential for Appellant's business operations;

c) That all intra-group services were in the nature of shareholder and stewardship activities, ignoring the fact that all the shareholder and stewardship activities were separately identified by the AEs and no amount for such activities had been paid by the Appellant.

d) That the Appellant failed to satisfactorily explain the basis of allocation of expenses, not appreciating the details submitted by the Appellant.

5.3 On the facts and in the circumstances of the case and in law, the Ld. TPO and the Ld. AO erred in holding and the Hon'ble DRP further erred in confirming that the AEs did not have infrastructure and manpower situated in India for rendering such services, ignoring the fact that since the services were rendered from outside India, there was no requirement for the AEs to maintain any infrastructure and manpower in India.

5.4 On the facts and in the circumstances of the case and in law, the Ld. TPO and the Ld. AO erred in rejecting and the Hon'ble DRP further erred in confirming the rejection of Transfer Pricing documentation maintained by the Appellant as per Rule 10D of the Income-tax Rules, 1962 based on conjectures and surmises.

5.5 On the facts and in the circumstances of the case and in law, the Ld. TPO and the Ld. AO erred in rejecting and the Hon'ble DRP further erred in confirming the rejection of the arm's length price computation undertaken by the Appellant, on the ground that foreign comparables and foreign AEs were considered for the arms length analysis.

5.6 On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in not appreciating that the AEs have lodged their tax return in India on the taxable income derived from the Appellant.

F. Levy of Interest under Section 234D of the Act

6 On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest of Rs.2,65,93,351/- under section 234D of the Act as a consequence to the above disallowances confirmed by the Hon'ble DRP.

G. Withdrawal of Interest granted under section 244A of the Act

7 On the facts and circumstances of the case and in law, the Ld. AO erred in withdrawing interest of Rs,2,03,74,067/- granted to the Appellant under section 244A of the Act as a consequence to the above disallowances confirmed by the Hon'ble DRP.

H. Initiation of penalty proceedings under Section 271 (1)(c) of the Act

8 On the facts and circumstances of the case, the Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of the income, without appreciating the fact that the Appellant has made full disclosures in respect of its claims and did not furnish any inaccurate particulars of its income.

I. Non processing of the revised return of Income

9 On the facts and circumstances of the case and in law, the Ld. AO has erred in not processing the revised return of income filed by the Appellant for the subject year.

3. First we take up appeal for AY 2006-07 in ITA No. 5882/Del/2010(Assessment Year: 2006-07) on various grounds raised.

4. For AY 2006-07, Brief facts of the case are that the assessee returned income of Rs.1,00,22,48,054/- on 30.11.2006. This return of income was revised on 28.03.2008 to Rs.99,70,75,767/-. Assessee, engaged in the business of consumer and automobile finance, had entered into the international transaction(In short IT) with its associated enterprises (In short AE). These transactions were referred to The Transfer pricing officer (In short 'The TPO'). Ld. TPO vide its order dated 30.10.2009 passed the order u/s 92CA (3) of the Act. In pursuance to the order of the Ld. TPO draft order u/s 144C of the Act was passed by the ld. AO on 09.12.2009. Against the draft order assessee filed objection on 18.01.2010 before Dispute Resolution Panel-I, New Delhi (In short 'DRP') who issued direction on 21.09.2010. Pursuant to those directions, the assessment order u/s 143(3) read with section 144C of the Act was passed by the ld. AO on 26.10.2010, which is in appeal before us on several counts.

5. Ground No.1.1 to 1.3 of the appeal are supportive and general in nature and no specific arguments by the parties were advanced on these grounds therefore these are dismissed.

Corporate Tax Issues

6. The ground No. 2 of the appeal is against the disallowance of depreciation of Rs.*2,90,56,780/-* claimed by the appellant u/s 32 of the Act for vehicles leased out to customers. The ld. AO disallowed the depreciation on vehicles as they were registered in the name of the respective lessees and not in the name of the lesser i.e. assessee company. Ld. AO was of the view that transaction is in effect a finance transaction i.e. Loan Transaction and not lease transaction. On perusal of relevant clauses of lease agreement, Ld. AO held that assessee has entered into a finance arrangement under the guise of lease. According to him, vehicles are directly delivered to the lessee and he bears insurance, holds the warranty, and retains the right to exclusion of even lessor. As per agreement repairs are to be carried out by the lessee at his expenses and sale invoice is raised in the name of the lessor i.e. only on namesake basis. At the end of the lease the assets never taken back by the assessee , therefore relying on the instruction No.1978 of The CBDT , AO was of the view that the assessee' s lease transaction are in effect finance transactions and hence depreciation on the assets financed cannot be allowed as assesse is not the owner of the assets.

7. The ld. DRP did not intervene in the matter, as according to them the issue is a matter of disallowance in past assessment year and it has not reached the finality. Therefore, the ld. AO confirmed the disallowance in final order hence assesse is in appeal on this ground.

8. In appeal before us, the ld. AR of the assessee contended that now this issue is squarely covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of ICDS Ltd vs. CIT 350 ITR 527. It was further submitted that no disallowance has been made by the AO himself for Assessment Year 2011-12 where the claim of the assessee was made in the return of income. Therefore, in subsequent years revenue has accepted the claim of the assessee. Therefore, he submitted that disallowance may please be deleted.

9. The ld.DR supported the orders of lower authorities AO.

10. We have carefully considered the rival contention on this ground. The issue is that the assessee is engaged in the business of leasing of vehicles as non-banking financial company that provides assets on lease to various customers. These assets are not capitalized in the books of account in accordance with AS-19 issued by Institute of Chartered Accountants of India, which provides that assets acquired under the finance lease are required to be capitalized in the books of the lessee. It is undisputed fact that the assessee only has made the claim of depreciation and it is not the case of the AO that lessee has also claimed the depreciation. According to CBDT Circular No.1978, dated 31st December 1999 it is instructed that in a case of lease transaction it is to be ensured that the claim of depreciation is not disallowed to both the lessor and the lessee. According to the provision of section 32 of the act the depreciation is allowable to the assessee who

    i. owns , wholly or partly, assets and
    ii. uses it for the purpose of its business.

Regarding the (ii) condition of 'user of the assets' the issue is now no more in dispute in view of decision of Honourable Supreme court in ICDS Limited V CIT 350 ITR 527 where in it is held that :-

> "**14.** The Revenue attacked both legs of this portion of the section by contending: *(i) that the assessee is not the owner of the vehicles in question and (ii) that the assessee did not use these trucks in the course of its business. It was argued that depreciation can be claimed by an assessee only in a case where the assessee is both, the owner and user of the asset.*
>
> ***15.*** *We would like to dispose of the second contention before considering the first. Revenue argued that since the lessees were actually using the vehicles, they were the ones entitled to claim depreciation, and not the assessee. We are not persuaded to agree with the argument. The Section requires that the assessee must use the asset for the "purposes of business". It does not mandate usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of business of the assessee, the requirement of Section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee. In the present case before us, the assessee is a leasing company which leases out trucks that it purchases. Therefore, on a combined reading of Section 2(13) and Section 2(24) of the Act, the income derived from leasing of the trucks would be business income, or income derived in the course of business, and has been so assessed. Hence, it fulfills the aforesaid second*

requirement of Section 32 of the Act viz. that the asset must be used in the course of business.

16. *In the case of Shaan Finance (P) Ltd. (supra), this Court while interpreting the words "used for the purposes of business" in case of analogous provisions of Section 32A(2) and Section 33 of the Act, dealing with Investment Allowance and Development Rebate respectively, held thus: -*

"9. Sub-section (2) of Section 32-A, however, requires to be examined to see whether there is any provision in that sub-section which requires that the assessee should not merely use the machinery for the purposes of his business, but should himself use the machinery for the purpose of manufacture or for whatever other purpose the machinery is designed. Sub-section (2) covers all items in respect of which investment allowance can be granted. These items are, ship, aircraft or machinery or plant of certain kinds specified in that sub-section. In respect of a new ship or a new aircraft, Section 32-A(2)(a) expressly prescribes that the new ship or the new aircraft should be acquired by an assessee which is itself engaged in the business of operation of ships or aircraft. Under sub-section (2)(b), however, any such express requirement that the assessee must himself use the plant or machinery is absent. Section 32-A(2)(b) merely describes the new plant or machinery which is covered by Section 32-A. The plant or machinery is described with reference to its purpose. For example, sub-section (2)(b)(i) prescribes "the purposes of business of generation or distribution of electricity or any other form of power". Sub-section (2)(b)(ii) refers to small-scale industrial undertakings which may use the machinery for the business or manufacture or production of any article, and sub-section (2)(b)(iii) refers to the business of construction, manufacture or production of any article or thing other than that specified in the Eleventh Schedule. Sub-section 2(b), therefore, refers to the uses to which the machinery can be put. It does not specify that the assessee himself should use the machinery for these purposes. In the present case, the person to whom the machinery is hired does use the machinery for specified purposes under Section 32-A(2)(b)(iii). That person, however, is not the owner of the machinery. The High Courts of Karnataka and Madras have held that looking to the requirements specified in Section 32-A the assessees, in the present case, fulfil all the requirements of that section, namely, (1) the machinery is owned by the assessees; (2) the machinery is used for the purpose of the assessees' business and; (3) the machinery is as specified in sub-section (2).

10. We are inclined to agree with this reasoning of the High Courts of Karnataka and Madras."

17. *The same judgment commented on the analogous nature of Section 33 on Development Rebate and clarified that the phrase "used for the purpose of business" does not necessarily require a usage of the asset itself. It held thus:*

"11. The provisions relating to investment allowance are akin to the provisions under Section 33 of the Income Tax Act, 1961 relating to development rebate…

** ** **

12. Since the provisions of Section 33 dealing with development rebate are similar to the provisions of Section 32-A, it is necessary to look at cases dealing with the grant of development rebate under Section 33. In the case of CIT v. Castlerock Fisheries [1980] 126 ITR 382 the Kerala High Court considered the case of an assessee which temporarily let out its cold-storage plant to a sister concern. The income derived by such letting was assessed by the Income Tax Officer in the hands of the assessee as business income of the assessee for the relevant accounting years. The assessee claimed development rebate in respect of the cold-storage plant. The High Court said that it was accepted by the department that in letting out the plant and machinery, the assessee was still doing business and the hire charges which it had received, had been assessed as business income of the assessee. Hence the assessee had complied with all the conditions for the grant of development rebate including the condition that the assessee had used the machinery for the purposes of its business. The High Court said that it must, therefore, necessarily be assumed that the conditions laid down in Section 33(1)(a) that the machinery or plant is wholly used for the purposes of the business carried on by the assessee, is duly satisfied and the assessee is entitled to development rebate. In appeal before this Court, a Bench of three Judges of this Court upheld the decision of the Kerala High Court in the above case in CIT v. Castle Rock Fisheries [1997] 10 SCC 77. This Court also held that since the department has proceeded on the explicit basis that despite the fact that the plant had been temporarily let out by the assessee to a sister concern, the plant and machinery was nevertheless being used by the assessee for its business purpose by treating the income derived by the assessee by such letting out as business income of the assessee, the development rebate must be considered as having been rightly granted. Therefore, where the business of the assessee consists of hiring out machinery and/or where the income derived by the assessee from the hiring of such machinery is business income, the assessee must be considered as having used the machinery for the purposes of its business.

13. A similar view has been taken by the Andhra Pradesh High Court in the case of CIT v. Vinod Bhargava [1988] 169 ITR 549 (AP) where Jeevan Reddy, J. (as he then was) held that where leasing of machinery is a mode of carrying on business by the assessee the assessee would be entitled to development rebate. The Court observed (p. 551):

"Once it is held that leasing out of the machinery is one mode of doing business by the assessee and the income derived from leasing out is treated as business income it would be contradictory, in terms, to say that the machinery is not used wholly for the purpose of the assessee's business."

***18.** Hence, the assessee meets the second requirement discussed above. The assessee did use the vehicles in the course of its leasing business. In our opinion, the fact that the trucks themselves were not used by the assessee is irrelevant for the purpose of the section."*

In this case also assessee has offered lease rent which is charged to tax by the revenue as a leasing company. Coming to the first issue of the ownership the honourable supreme court has held that:-

> ***"19.*** *We may now advert to the first requirement i.e. the issue of ownership. No depreciation allowance is granted in respect of any capital expenditure which the assessee may be obliged to incur on the property of others. Therefore, the entire case hinges on the question of ownership; if the assessee is the owner of the vehicles, then he will be entitled to the claim on depreciation, otherwise, not.*
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> ***20.*** *In Mysore Minerals Ltd. v. CIT [1999] 106 Taxman 166 (SC), this Court said thus:*
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> *"…authorities shows that the very concept the depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset is utilizing the capital asset and thereby losing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time."*
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> ***21.*** *Black's Law Dictionary (6th Edn.) defines 'owner' as under:*
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> *"Owner. The person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right of enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.*
>
> *The term is, however, a nomengeneralissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the terms also included one having a possessory right to land or the person occupying or cultivating it.*
>
> *The term "owner" is used to indicate a person in whom one or more interests are vested his own benefit. The person in whom the interests are vested has 'title' to the interests whether he holds them for his own benefit or the benefit of another. Thus the term "title" unlike "owner".."*
>
> *It defines the term 'ownership' as -*
>
> *"Collection of right to use and enjoy property, including right to transmit it to others.... The right of one or more persons to possess or use a thing to the exclusion of others.The right by which a thing belongs to some one in particular, to the exclusion of all other persons.The exclusive right of possession, enjoyment or disposal; involving as an essential attribute the right to control, handle, and dispose."*
>
> *The same dictionary defines the term "own" as 'To have a good legal title'.*

These definitions essentially make ownership a function of legal right or title against the rest of the world. However, as seen above, it is "nomengeneralissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied."

22. *A scrutiny of the material facts at hand raises a presumption of ownership in favour of the assessee. The vehicle, along with its keys, was delivered to the assessee upon which, the lease agreement was entered into by the assessee with the customer. Moreover, the relevant clauses of the agreement between the assessee and the customer specifically provided that:*

(i) The assessee was the exclusive owner of the vehicle at all points of time;

(ii) If the lessee committed a default, the assessee was empowered to re-possess the vehicle (and not merely recover money from the customer);

(iii) At the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee;

(iv) The assessee had the right of inspection of the vehicle at all times.

For the sake of ready reference, the relevant clauses of the lease agreement are extracted hereunder:-

"2. Lease Rent

The lessee shall, during the period of lease punctually pay to the lessor free of any deduction whatsoever as rent for the assets the sum of moneys specified in the Schedule 'B' hereto. All rents shall be paid at the address of the Lessor shown above or as otherwise directed by the Lessor in writing. The rent shown in Schedule 'B' shall be paid month on 1st day of each month and the first rent shall be paid on execution thereof.

4. Ownership

The assets shall at all times remain the sole and exclusive property of the lessor and the lessee shall have no right, title or interest to mortgage, hypothecate or sell the same as bailee

9. Inspection

The Lessor shall have the right at all reasonable time to enter upon any premises where the assets is believed to be kept and inspect and/or test the equipment and/or observe its use.

18. Default

If the lessee shall make default in payment of moneys or rent payable under the provisions of this agreement, the Lessee shall pay to the Lessor on the

sum or sums in arrears compensation at the rate of 3% per month until payment thereof, such compensation to run from the day to day without prejudice to the lessor's rights under any terms, conditions and agreements herein expressed or implied. All costs incurred by the Lessor in obtaining payment of such arrears or in endeavoring to trace the whereabouts of the equipments or in obtaining or endeavouring to obtain possession thereof whether by action, suit or otherwise, shall be recoverable from the lessee in addition to and without prejudice to the lessors right for breach of this lease.

19. Expiration of Lease:

Upon the expiration of this Lease, the Lessee shall deliver to the Lessor the assets at such place as the Lessor may specify in good repair, condition and working order. As soon as the return of the asset the Lessor shall refund the amount of security deposit. If the lessee fails to deliver the equipment to the Lessor in accordance with any direction given by the Lessor, the Lessee shall be deemed to be the tenant of the assets at the same rental and upon the same terms herein expressed and such tenancy may be terminated by the Lessor immediately upon default by the lessee hereunder or upon 7 days notice previously given.."

23. *The Revenue's objection to the claim of the assessee is founded on the lease agreement. It argued that at the end of the lease period, the ownership of the vehicle is transferred to the lessee at a nominal value not exceeding 1% of the original cost of the vehicle, making the assessee in effect a financer. However we are not persuaded to agree with the Revenue. As long as the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. A scrutiny of the sale agreement cannot be the basis of raising question against the ownership of the vehicle. The clues qua ownership lie in the lease agreement itself, which clearly point in favour of the assessee. We agree with the following observations of the Tribunal in this regard:*

"20. It is evident from the above that after the lessee takes possession of the vehicle under a lease deed from the appellant-company it (sic.) shall be paying lease rent as prescribed in the schedule. The ownership of the vehicles would vest with the appellant-company viz., ICDS as per clause (4) of the agreement of lease. As per clause (9) of the Lease agreement, M/s. ICDS is having right of inspection at any time it wants. As per clause (18) of the Lease agreement, in case of default of lease rent, in addition to expenses, interest etc. the appellant company is entitled to take possession of the vehicle that was leased out. Finally, as per clause (19), on the expiry of the lease tenure, the lessee should return the vehicle to the appellant company in working order.

21. It is true that a lease of goods or rental or hiring agreement is a contract under which one party for reward allows another the use of goods. A lease may be for a specified period or in perpetuity. A lease differs from a hire purchase agreement in that lessee or hirer, is not given an option to purchase the goods. A hiring agreement or lease unlike a hire purchase agreement is a

contract of bailment, plain and simple with no element of sale inherent. A bailment has been defined in S.148 of the Indian Contract Act, as "the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

22. From the above discussion, it is clear that the transactions occurring in the business of the assessee-appellant are leases under agreement, but not hire purchase transactions. In fact, they are transactions of 'hire'. Even viewed from the angle of the author of 'Lease Financing and Hire Purchase', the views of whom were discussed in pages 16 and 17 of this order, the transactions involved in the appellant business are nothing but lease transactions.

23. As far as the factual portion is concerned now we could come to a conclusion that leasing of vehicles is nothing but hiring of vehicles. These two aspects are one and the same. However, we shall discuss the case law cited by both the parties on the point."

***24.** The only hindrance to the claim of the assessee, which is also the lynchpin of the case of the Revenue, is Section 2(30) of the MV Act, which defines ownership as follows: -*

""owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of a hypothecation, the person in possession of the vehicle under that agreement."

***25.** The general opening words of the Section say that the owner of a motor vehicle is the one in whose name it is registered, which, in the present case, is the lessee. The subsequent specific statement on leasing agreements states that in respect of a vehicle given on lease, the lessee who is in possession shall be the owner. The Revenue thus, argued that in case of ownership of vehicles, the test of ownership is the registration and certification. Since the certificates were in the name of the lessee, they would be the legal owners of the vehicles and the ones entitled to claim depreciation. Therefore, the general and specific statements on ownership construe ownership in favour of the lessee, and hence, are in favour of the Revenue.*

***26.** We do not find merit in the Revenue's argument for more than one reason: (i) Section 2(30) is a deeming provision that creates a legal fiction of ownership in favour of lessee only for the purpose of the MV Act. It defines ownership for the subsequent provisions of the MV Act, not for the purpose of law in general. It serves more as a guide to what terms in the MV Act mean. Therefore, if the MV Act at any point uses the term owner in any Section, it means the one in whose name the vehicle is registered and in the case of a lease agreement, the lessee. That is all. It is not a statement of law on ownership in general. Perhaps, the repository of a general statement of law*

on ownership may be the Sale of Goods Act; (ii) Section 2(30) of the MV Act must be read in consonance with sub-sections (4) and (5) of Section 51 of the MV Act, which were referred to by Mr. S. Ganesh, learned senior counsel for the assessee. The provisions read as follows: -

"(4) No entry regarding the transfer of ownership of any motor vehicle which is held under the said agreement shall be made in the certificate of registration except with the written consent of the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement.

(5) Where the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement, satisfies the registering authority that he has taken possession of the vehicle from the registered owner owing to the default of the registered owner under the provisions of the said agreement and that the registered owner refuses to deliver the certificate of registration or has absconded, such authority may, after giving the registered owner an opportunity to make such representation as he may wish to make (by sending to him a notice by registered post acknowledgment due at his address entered in the certificate of registration) and notwithstanding that the certificate of registration is not produced before it, cancel the certificate and issue a fresh certificate of registration in the name of the person with whom the registered owner has entered into the said agreement:

Provided that a fresh certificate of registration shall not be issued in respect of a motor vehicle, unless such person pays the prescribed fee:

Provided further that a fresh certificate of registration issued in respect of a motor vehicle, other than a transport vehicle, shall be valid only for the remaining period for which the certificate cancelled under this sub-section would have been in force."

Therefore, the MV Act mandates that during the period of lease, the vehicle be registered, in the certificate of registration, in the name of the lessee and, on conclusion of the lease period, the vehicle be registered in the name of lessor as owner. The Section leaves no choice to the lessor but to allow the vehicle to be registered in the name of the lessee Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle; and (iii) if the lessee was in fact the owner, he would have claimed depreciation on the vehicles, which, as specifically recorded in the order of the Appellate Tribunal, was not done. It would be a strange situation to have no claim of depreciation in case of a particular depreciable asset due to a vacuum of ownership. As afore-noted, the entire lease rent received by the assessee is assessed as business income in its hands and the entire lease rent paid by the lessee has been treated as deductible revenue expenditure in the hands of the lessee. This reaffirms the position that the assessee is in fact the owner of the vehicle, in so far as Section 32 of the Act is concerned.

> ***27.*** *Finally, learned senior counsel appearing on behalf of the assessee also pointed out a large number of cases, accepted and unchallenged by the Revenue, wherein the lessor has been held as the owner of an asset in a lease agreement. CIT v. A.M. Constructions [1999] 238 ITR 775 (AP); CITv. Bansal Credits Ltd. [2003] 259 ITR 69/126 Taxman 149 (Delhi); CIT v. M.G.F. (India) Ltd. [2006] 285 ITR 142/[2007] 159 Taxman 335 (Delhi); CIT v. Annamalai Finance Ltd. [2005] 275 ITR 451/146 Taxman 627 (Mad.). In each of these cases, the leasing company was held to be the owner of the asset, and accordingly held entitled to claim depreciation and also at the higher rate applicable on the asset hired out. We are in complete agreement with these decisions on the said point.*
>
> ***28.*** *There was some controversy regarding the invoices issued by the manufacturer - whether they were issued in the name of the lessee or the lessor. For the view we have taken above, we deem it unnecessary to go into the said question as it is of no consequence to our final opinion on the main issue. From a perusal of the lease agreement and other related factors, as discussed above, we are satisfied of the assessee's ownership of the trucks in question.*
>
> ***29.*** *Therefore, in the facts of the present case, we hold that the lessor i.e. the assessee is the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of Section 32 of the Act and hence, is entitled to claim depreciation in respect of additions made to the trucks, which were leased out."*

11. Therefore, the issue of the ownership of the assets is also covered squarely in favour of the appellant assessee, if after examination of the agreement it is found that it satisfied the criteria laid down in the decision of Honourable Supreme court. Further it is submitted that assessee has shown these assets under its wealth tax return and it has been charged to wealth tax as assets of the assessee for the wealth tax purpose. This fact is not controverted by the Ld. DR. Accordingly the wealth tax Act only the assets which are 'owned' by the assessee are chargeable to tax. Therefore,now in Income tax Act it cannot be disputed that the assets are not owned by the assessee. Ld. DR has also not shown us any reasons to say that the meaning of the word 'owned' in wealth tax Act and its meaning as per section 32 of the Income Tax Act for claim of depreciation are different. It was further submitted that no disallowance has been made by the AO himself for Assessment Year 2011-12 where the claim of the assessee was made in the return of income. Therefore, in subsequent years revenue has accepted the claim of the assessee. This fact is also not controverted by ld. DR. We are of the

view that if there being no change either in facts or in law, as compared to this year and later on years where the claim of the assessee of depreciation is accepted , the disallowance in this year cannot be sustained. In assesses' s own case for AY 2000-01 and 002-03 in ITA No 3192 & 2445/del 2007 dated 21/06/2013, ITAT decided this issue vide Para no 8 setting aside the issue back to the file of AO to examine the claim of the assessee with the terms of lease agreement entered into in light of decision of Honorable supreme court in case of ICDS limited. Further MA Nos 81 & 82/del/2013 preferred by assessee in those appeals were also dismissed by order dated 13/01/2014.In view of the decision of the Coordinate bench on this issue, we restore this issue back to the file of AO to decide claim of depreciation of Rs.2,90,56,780/-u/s 32 of the Act denovo in view of the decision of Hon'ble Supreme Court in case of ICDS Ltd (Supra) and our observation made above. In the result ground, no .2 of the appeal is allowed with above direction.

12. Ground No.3 is regarding confirmation of the addition of Rs. *8,08,14,506/-* towards interest of sticky loans and advances, which was not recognized as income by the appellant in accordance with the mandatory prudential norms issued by the Reserve Bank of India.

13. During the year under consideration the assessee has not recognized interest income in respect of non-performing assets amounting to Rs.*8,08,14,506/-*. According to the assessee, it is hypothetical income, which has not accrued to the assessee. The ld. AO has made this addition because according to him the accounts of the assessee company are required to be maintained u/s 209 of The Companies Act, 1956 on accrual basis. According to AO, interest income on sticky loans has accrued to the assessee during the year and therefore is chargeable to tax. The AO was also adopting consistent view according to assessment-framed u/s 143(3) of the Assessment Year 1998-99.

14. Ld. AR of the appellant submitted that non-recognizing interest income on sticky loans and advances is in accordance with the provision of Companies Act as well in accordance with the income tax also. He argued that assessee is following this method consistently. He submitted that the assessee is a non-banking finance company and therefore is required to follow the guidelines issued by Reserve

Bank of India and not recognizing interest on sticky loans and advances is as per the guidelines of RBI. He further submitted that this issue is covered in favour of the assessee by the decision of TAT in the past years in assessee's own case. Therefore, he submitted that disallowance/ addition be deleted.

15. Ld. DR relied on the order of the lower authorities.

16. We have carefully considered the rival contentions. We do not agree with the contention of the Ld. AO that as the company is required to maintain its books of accounts as per section 209 of the Companies Act it is mandatory for the appellant to recognize that interest. Section 209 (3) (b) of The Companies Act requires the books of accounts to be maintained on accrual basis. The Meaning of accrual cannot be different in different statues unless specifically mentioned. Honorable; Supreme court in 358 ITR 295 in CIT V Excel Industries has held that Income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee. In case of Non performing assets even the principal amounts is also doubtful of recovery or has failed to serve the interest ion those loans. Now this issue in this case of the assessee has already been decided by ITAT in ITA No.4069/Del/2011 for the Assessment Year 2003-04 vide its order dated 31st October 2011 in that decision the coordinate Bench of this Tribunal has held as under:-

> *"5. We have heard both the sides on this issue. This issue is squarely covered by the decision of ITAT in the case of GE Capital Service India, cited supra, wherein the ITAT has decided the issue as under :-*
>
> *"13. Admittedly the assessee is a non-banking financial company governed by the provisions of the RBI Act and the NBFCs Prudential Norms (Reserve Bank) Directions, 1998. Section 45Q of the RBI Act reads as under: -*
> *"45Q Chapter III-B to override other laws - The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*
>
> *Thus, this section takes precedence over any other law and, therefore, section 145 has to be read subject to provisions in the RBI Act.*
> *The assessee company being NBFC was bound by the provisions of RBI Act. The RBI has issued a notification, in exercise of its powers u/s 45JA,*

on NBFCs Prudential Norms (RBI), 1998. The revenue's contention is that on account of reversal of interest income, the assessee has in effect resorted to cash system of accounting, which is in contravention to the provisions of section 145, as assessee was following mercantile system of accounting. This plea cannot be accepted because of the specific provisions contained in the Reserve Bank of India Act, which primarily administer the functioning of assessee. There is no dispute that assessee had reversed the income in respect of NPA as per the "Prudential Norms". The assessee had to comply with the requirements of RBI norms and, therefore, could not account for the income in respect of assets, which had become NPA. Therefore, section 145 could not be resorted to for accounting income purely on accrual basis. We find that this issue is squarely covered by the decision of Hon'ble Delhi High Court in CIT vs. Vasisth Chay Vyapar Ltd., 330 ITR 440 (supra), wherein Hon'ble Delhi High Court has observed as under: -

"We have considered the respective submissions in their proper perspective. Before we embark on the discussion on these arguments, it would be useful to extract the relevant provisions of the RBI Act and the NBFCs Prudential Norms (Reserve Bank) Directions, 1998. Section 45Q of the RBI Act, which starts with non obstante clause, reads as under :
"45Q Chapter III-B to override other laws - The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

it is not in dispute that on the application of the aforesaid provisions of the RBI and the directions, the ICD advanced to M/s Shaw Wallace by the assessee herein had become NPA. It is also not in dispute that the assessee company being NBFC is bound by the aforesaid provisions.
Therefore, under the aforesaid provisions, it was mandatory on the part of the assessee not to recognize the interest on the ICD as income having regard to the recognized accounting principles. The accounting principles which the assessee is indubitably bound to follow are AS-9. The relevant portion of the said accounting standard reads as under:

9. Effect of uncertainties on revenue recognition - 9.1 Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of the service it would not be unreasonable to expect ultimate collection.
9.2 Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved. In such cases, it may be appropriate to recognize revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection, revenue is recognized at the time of sale or rendering of service even though payments are made by installments.

9.3 When the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded. 9.4 An essential criterion for the recognition of revenue is that the consideration receivable for the sale of goods, the rendering of services or from the use of others of enterprise resources is reasonably determinable. When such consideration is not determinable within reasonable limits, the recognition of revenue is postponed.
9.5 When recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognized."
In this scenario, we have to examine the strength in the submission of learned counsel for the Revenue that whether it can still be held that income in the form of interest though not received had still accrued to the assessee under the provisions of the Income-tax Act and was, therefore, exigible to tax. Our answer is in the negative and we give then following reasons in support:

(1) First of all we would discuss the matter in the light of the provisions of the I.T. Act and to examine as to whether in the given circumstances, interest income has accrued to the assessee. It is stated at the cost of repetition that the admitted position is that the assessee had not received any interest on the said ICD placed with Shaw Wallace since the AY 1996-97 as it had become NPAs in accordance with the Prudential Norms which was entered in the books of account as well. The assessee has further successfully demonstrated that even in the succeeding assessment years, no interest was received and the position remained the same until the AY 2006-07. Reason was adverse financial circumstances and the financial crunch faced by Shaw Wallace. So much so, it was facing winding up petitions which were filed by many creditors. These circumstances, led to an uncertainty in so far as recovery of interest was concerned, as a result of the aforesaid precarious financial position of Shaw Wallace. What to talk of interest, even the principal amount itself had become doubtful to recover. In this scenario it was legitimate move to infer that interest income thereupon has not "accrued". We are in agreement with the submission of Mr. Vohar on this count, supported by various decisions of different High Courts including this court which has already been referred to above. (2) In the instant case, the assessee-company being NBFC is governed by the provisions of the RBI Act. In such a case, interest income cannot be said to have accrued to the assessee having regard to the provisions of section 45Q of the RBI Act and Prudential Norms issued by the RBI in exercise of its statutory powers. As per these norms, the ICD had become NPA and on such NPA where the interest was not received and possibility of recovery was almost nil, it could not be treated to have been accrued in favour of the assessee.
As noted above, Mr. Sabharwal, argued that the case of the assessee was to be dealt with for the purpose of taxability as per the provisions of the Act

and not the RBI Act which was the accounting method that the assessee was supposed to follow. We have already held that even under the Income-tax Act, interest income had not accrued. Moreover, this submission of Mr. Sabharwal is based entirely on the judgment of the Supreme Court in the case of Southern Technology [2010] 320 ITR 577. No doubt, in first blush, reading of the judgement gives an indication that the court has held that the RBI Act does not override the provisions of the Income-tax Act. However, when we examine the issue involved therein minutely and deeply in the context in which that had arisen and certain observations of the apex court contained in that very judgment, we find that the proposition advanced by Mr. Sabharwal may not be entirely correct. In the case before the Supreme Court, the assessee a NBFC debited Rs.81,68,516/- as provision against NPA in the profit and loss account, which was claimed as deduction in terms of sec. 36(1)(vii) of the Act. The Assessing Officer did not allow the deduction claimed as aforesaid on the ground that the provision of NPA was not in the nature of expenditure or loss but more in the nature of a reserve, and thus not deductible u/s 36(1)(vii) of the Act. The AO, however, did not bring to tax Rs.20,34,605 as income (being income accrued under the mercantile system of accounting). The dispute before the apex court centered around deductibility of provision for NPA. After analyzing the provisions of the RBI Act, their Lordships of the apex court observed that in so far as the permissible deductions or exclusions under the Act are concerned, the same are admissible only if such deductions/exclusions satisfy the relevant conditions stipulated therefore under the Act. To that extent, it was observed that the Prudential Norms do not override the provisions of the Act. However, the apex court made a distinction with regard to "income recognition" and held that income had to be recognized in terms of the Prudential Norms, even though the same deviated from the mercantile system of accounting and/or section 145 of the I.T. Act. It can be said, therefore, that the apex court approved the real income theory which is engrained in the Prudential Norms for recognition of revenue by NBFC."
14. Respectfully following the decision of Hon'ble jurisdictional High Court, the assessee's claim of reversal of income, aggregating to Rs.45,78,232/- is allowed.
15. In the result, this ground is allowed."
Respectfully following the decision of the aforesaid decision of ITAT, Delhi Bench 'C', New Delhi, we dismiss the ground taken by the revenue.

17. Both the parties agreed that issues involved in this ground and the issue decided by ITAT in that order is identical. Further Now Honourable Delhi high court in case of CIT V Vishisth Chay Vyapar Co Limited 196 taxman 169 where in it is held as under (Head notes from taxmann. Com)

"It was not in dispute that on the application of the provisions of the RBI Act and the 1998 Directions, the ICDs advanced to 'S' by the assessee had become

NPA. It was also not in dispute that the assessee-company being NBFC was bound by the aforesaid provisions. Therefore, under the aforesaid provisions, it was mandatory on the part of the assessee not to recognize the interest on the ICDs as income having regard to the recognized accounting principles. The accounting principles, which the assessee was indubitably bound to follow, were AS-9. [Para 16]

Therefore, it could not be said that income in the form of interest, though not received, had still accrued to the assessee under the provisions of the Income-tax Act and was, therefore, exigible to tax. It was so for the reasons:

(1)The assessee had not received any interest on the said ICDs placed with 'S' since the assessment year 1996-97 as it had become NPA in accordance with the Prudential Norms, which was entered in the books of account as well. The assessee had further successfully demonstrated that even in the succeeding assessment years, no interest was received and the position remained the same until the assessment year 2006-07. Reason was adverse financial circumstances and the financial crunch faced by 'S'. So much so, it was facing winding up petitions which were filed by many creditors. Those circumstances led to an uncertainty insofar as, recovery of interest was concerned, as a result of the aforesaid precarious financial position of 'S'. What to talk of interest, even the principal amount itself had become doubtful to recover. In that scenario, it was legitimate move to infer that interest income thereupon had not 'accrued'.

(2)The assessee being an NBFC was governed by the provisions of the RBI Act. In such a case, interest income could not be said to have accrued to the assessee having regard to the provisions of section 45Q of the RBI Act and Prudential Norms issued by the RBI in exercise of its statutory powers. As per these Norms, the ICDs had become NPA and on such NPA where the interest was not received and possibility of recovery was almost nil, interest could not be treated to have been accrued in favour of the assessee. [Para 17]

Therefore, decision of the Tribunal was correct in law".

Therefore, respectfully following the decision of Honourable Delhi high court in CIT V vashisth Chay Vyapar limited (Supra) and decision of coordinate bench in case of the assesse for AY 2003-004, we direct the AO to delete the addition of *Rs. 8,08,14,506/-* towards interest of sticky loans and advances which was not recognized as income by the appellant in accordance with the mandatory prudential norms issued by the Reserve Bank of India. In the result ground no 3 of the appeal is allowed.

18. Ground No.4 of the appeal of the assessee is against confirmation of disallowance of Rs. 22,33,25,067/- representing the actual loss of sale repossessed assets and forming an integral part of the non-banking financial activity of the appellant.
19. Assessee has claimed an amount of Rs. 22,33,25,067/- as expenses arising out of loss on sale of repossessed assets. Assessee Company is engaged in the business of providing financial assistance to various customers against hypothecation of automobile or consumer durable products as security. In the event of default by the customers, such assets are repossessed by assessee from the lessses. Since these are repossessed assets, it is included in the balance sheet in the current assets as stock and credit is passed to the account of borrowers.Therefore, by passing this entry the assessee replaced the debtors by repossessed assets. When these assets are sold, excess or shortfall is booked as profit or loss in the profit and loss account and it is claimed as loss as a revenue loss/ profit. During the year, the ld. AO has disallowed this loss holding that this loss has not been actually incurred by the assessee. For disallowing this AO relied on the decision of the Hon'ble Allahabad High Court in the case of Motor and General Sales Pvt. Ltd. vs. CIT 226 ITR 137.
20. The ld. AR submitted that this is real loss incurred by the assessee and not a hypothetical loss. It is just like writing off the bad debts in the books of the company. The ld. AR further submitted that this issue is squarely covered in the case of the assessee by the decision in the case of CIT Vs.Citicorps Maruti finance Limited In ITA No 1712& 1714/2010 dated 09-11-2010. He submitted that therefore loss is rightly allowable.
21. The ld. DR submitted that there is no real loss incurred by the assessee and he vehemently relied on the orders of the AO.
22. We have carefully considered the rival contention and we are of the view that the assessee is entitled to claim of loss on sale of repossessed assets. In view of the decision, Hon'ble Delhi High Court in the case of CIT Vs. Citicorp Maruti Finance Ltd in ITA No.1712 and 1714 wherein it is held that loss of repossessed vehicle sold is also deductible to the assessee. The above decision of Hon'ble Delhi High Court has further been upheld by Hon'ble Supreme Court in CC 22330/2011 dated 13.01.2012. Therefore, respectfully following the decision of Hon'ble

supreme court we allow the claim of the assessee of loss arising on sale of repossessed vehicle, delete the disallowance madeby ld. AO, and confirmed by DRP. Ground No.4 of appeal is allowed.

Transfer pricing Issues

23. Ground No 5 relates to transfer pricing adjustments made in the hands of the assessee of Rs 21,20,48,533/- .

24. The assessee is engaged in the business of consumer financing services in India registered as non-banking financial company. It is engaged in the business of loans for automobile, consumer goods and personal loans. It entered into following international transaction with its AE during the Financial Year 2005-06 justified arm's length price as under:-

S. N.	Nature of transaction	Value of transaction	Method applied	PLI	No of comparables	Arm's Length Results	Results of Assessee
1.	Leasing of motor cars	506,469	CUP	NA	4	-	*
2.	Receipt of foreclosure charges	1,955	CUP	NA	NA	-	*
3.	Receipt of residual value	3,302	CUP	NA	1	-	*
4.	Availing of consulting administrative and IT services from GECC	70,322,844	TNMM	OP/OC	Consultancy-19	13,96%	11%
					IT- 17	4.90%	7%
					Administrative-32	6.37%	6.7%
	Availing of consulting administrative and IT services from GECF Inc.*	30,068,780	TNMM	OP/OC	Consultancy-19	13.96%	11%
					IT- 17	4.90%	7%
					Administrative 32	6.37%	1. 70%

	Availing of consulting administrative and IT services from GECT*	111,659,909	TNMM	OP/OC	Consultancy-24	28.60%	11%
					Administrative-34	2.98%	5.7%
5.	Provision of consultancy services	43,278,924	TNMM	OP/OC	5	8.98%	11%
6.	Interest paid on unsecured loan	59,623,221	CUP	NA	1	Libor+100 -120BP	Libor. + 100BP
7.	Availing Oracle support (data	16,351,785	NA	NA	NA	NA	NA
	processing						
	services)						
8	Reimbursement	24,028,546	NA	NA	NA	NA	

25. There is no dispute regarding the international transaction with respect to other items except for item at serial no. 4 which is Intra Group services.

26. However with respect to services availed by the assessee from AE amounting to Rs.21,20,48,533/- for availing consulting and administrative and IT service, ld. TPO on following reasons determine the arm's length price of these service at Rs. NIL as under :-

> *"7. Determination of arm's length price of international transaction: In view of above discussions and findings of the facts as recorded in paragraph 6.7 to paragraph 6.10 of this order, I have reached to following conclusions:*
>
> > *(a) It is evident from above discussions that the assessee has not filed any evidence that alleged services in lieu of cost recharge or reimbursement were actually required by its and that these services were actually rendered to meet specific requirements of the assessee.*
> >
> > *(b) In most of the cases the assessee did not file any evidence if these services were actually rendered by AE to it.*

(c) In none of the cases the assessee could furnish any evidence to prove that it has derived any economic and commercial benefit from these alleged services.

(d) The assessee has failed miserably to furnish basis for selection of allocation keys and reason for allocation of various expenditure on the basis of these keys for eg. Expenses that are administrative in nature have been allocated following various keys as evident from table in paragraph 6.1 of this order.

(e) Admittedly, the assessee is engaged in business of consumer financial services in India since 1994 and it has 33 Offices with network of over 3500 dealers across the India and 5000 retail distribution network. The assessee employs huge technical workforces and has incurred personnel cost of Rs. 81.92 crore. It has its own Hums Resources department, It is matter of record that the assessee has infrastructure and a team of skilled manpower's in India for project and operation, marketing, commercial operation, logistic, credit research, PR and Communication, legal and professional advice, client management and human resources development etc. Whereas, these AEs do not have any infrastructure or manpower in India to render above services. It is pertinent to mention here that consumer behavior in the business of retail finance in India is quite different from USA where AEs are located. Accordingly, these alleged services require customization to ….domestic requirement however, even that is not possible due to absence of infrastructure and manpower of the AEs in India. During course of proceeding before me the assessee did not furnish any evidence to prove that the AE had actually rendered these alleged services to the assessee. In the comparable circumstances, in my view any independent enterprise would not have either undertaken these activities internally or would not have been willing to pay an independent third party 10 do so. Since neither of these alternatives holds true, the OECD guidelines as mentioned above, take the view that the activity should not regarded as an intra-group service.

(g) A careful comparison of infrastructure and activities carried on by the assessee for carrying out its business with nature of services allegedly rendered to the assessee has revealed that these AEs have provided duplicate services, business development, e-commerce, client relational management facilities mid operation which the assessee is already performing internally. The OECD guidelines in paragraph 7.1 1 of chapter VII has dealt with duplicate services us under:

> *"7.11 In general, no mint-group service should in found for activities undertaken by one group member that merely duplicate a service that another group member is performing for itself, or that is being performed for such other group members by a third party. An exception may be whether the duplication of services is only temporary, for example, where an MNE group is reorganizing to centralize its management functioning. Another exception would be*

where the duplication is undertaken to reduce the risk of wrong business decision (e.g. by getting a second legal opinion on a subject.

It is evident from the guidelines that as a general rule, where one group company provides a service to another which duplicates what the recipient is already performing; internally or is acquiring from a third party provider, that service would not qualify as a valid intragroup services and should not, therefore, carry a charge. However, exceptions to this general Rule have been provided in above guidelines. The OECD guidelines cite as examples the obtaining of a second legal opinion in order to reduce the risk of a wrong business decision and where the duplication of the service is required only temporarily during a transition period, such as when a function is being reorganized from a local operation to a centralized one. I have carefully examined the nature of alleged services rendered by the AEs these services neither reduced the risk of wrong business .decision nor were related to business reorganisation. Accordingly, these- duplicate services do not fall within exception as provided in above referred to the guideline. In view of above discussion I am of considered view that these services are duplicate services and should not therefore carry a charge on the assessee.

(h) I agree with a view that it is not impossible however, for a group member to benefit incidentally from infrastructure maintained by the principal AE to monitor and control the group entities. For example in this case, the assessee might be benefited from supervisory activities under taken by the AE. However, such incidental benefits are not regarded as giving rise to arrangement subject to arm's length pricing as stipulated in OECD TP guidelines paragraph 7.13 under chapter VII. These findings lead to an irresistible conclusion that cost contribution and reimbursement of expenses to the AE are not at arm's length price

(i) 1 have noted from detailed contained in the transfer pricing report of the assessee under Rule 10D that the assessee had not conducted FAR analysis in regards to these alleged services and had failed to justify the functions performed by the AE for these payments. This is probably a reason that the receipt of alleged services have not been benchmarked under any of the five method prescribed under the Act in the Transfer Pricing report but the assessee has bench marked the profit margin charged by the ARs on these services.

(j) It is pertinent to mention here that I have reach to a conclusion that these services are not intragroup services which require arm's length remuneration accordingly the issue of charging profit markup up the cost of services does arise this reason I have not tested the arms length price of mark up levied by the AE on these services."

27. Therefore on perusal of the order of Ld. TPO it is apparent that Ld. AO has alleged that :-

i. Assessee could not establish whether such services were needed by the assessee (i.e. Need Test)

ii. Whether such services are rendered to the assesse by AE (I.e. Rendition test)

iii. Whether the assessee has derived any economic or commercial benefit from these services (i.e. Benefit test)

iv. Basis of allocation

v. These services are duplicative in nature

vi. There is only incidental benefit from these services.

28. Against this the draft objection filed before DRP who confirmed the finding of the TPO as under:-

> *"2.1 In the transfer pricing order passed u/s 92CA(3) of I.T. Act, the TPO has made an upward adjustment of Rs. 21,20,48,533/- in the arm's length price of international transactions. While making this adjustment, the Assessing Officer has observed that the assessee has made payment of Rs.21,20,48,533/- under head "cost contributions to the AE's" for duplicate services and incidental benefit and not for intra-group services. Since no intra-group services are found to exist in this case the arrangements are not subject to arm's length pricing and the arm's length prices of these alleged services had accordingly been held to be nil.*
>
> *2.2. The assessee has not accepted the above adjustments in the Arm's length price of International Transactions and has objected to the same. It has been submitted that the ALP of the assessee's international transactions pertaining to availing of consulting, administrative and IT services from its associated enterprises have wrongly been held to be nil, against the sum of Rs.21,20,48,53s/-. It has been submitted that the TPO erred by disregarding the ALP as determined by the assessee in the TP documentation. The assessee has submitted that the intra-group services were rendered by the AE's for which the assessee received economic and commercial benefit thus requiring remuneration at ALP and were not incidental or duplicate services and were not covered under cost .contribution as alleged by the TPO. It has been submitted that the TPO erred by holding that certain services like human resource, legal, compliance, risk management, quality, consultation and*

training etc. were in the nature of shareholder services and are not allowable. The assessee has submitted that the TPO has wrongly held that the AE's did not have any infrastructure and manpower situated in India to render various services to the assessee.

2.3 The findings of the TPO and the submissions made by the assessee have been taken into consideration. In the body of transfer pricing order the TPO has discussed in detail the reasons of determining of arm's length price of international transactions. The TPO concluded that the assessee failed to prove by furnishing required evidences that the services in lieu of cost recharge or reimbursement were actually required by the assessee and that these were actually rendered. The assessee could not conclusively prove that it has derived any economic and commercial benefit from these services. The basis of allocation of expenses towards various heads could not be satisfactorily explained. The TPO has explained that the assessee has huge distribution network, technical work-force including human resource department, business development and client management departments and has incurred huge expenses on credit investigation and legal and professional charges, sales promotion and communication. As against to the same, the associated enterprises based abroad did not have sufficient infrastructure to satisfactorily prove rendering of services to the assessee. Looking into the nature of services, their adaptation and customization to suite domestic requirements and lack of required man power of the claimed AE's in India is a reasonable circumstantial evidence of not rendering of commensurate services. Relying on the OECD guidelines, the TPO has explained that the alleged services rendered by AE's are neither meant to reduce the risk of wrong business decisions nor related to business re-organization to be categorized as exceptional and temporary ones for which duplication of services is not objectionable. The assessee could also not satisfactorily prove that requisite FAR analysis was conducted in case of these services. The receipts of these services have also not been benchmarked under any of the prescribed methods of the I T Act. In the light of these facts, brought out by the TPO, we find no compelling reasons to interfere with the order of TPO and the Assessing Officer and hence the same are confirmed."

Therefore Ld. DRP has also confirmed the findings of ld. TPO and did not issue any direction in favour of the appellant. Therefore assessee is in appeal before us for all three years.

29. For advancing, the arguments both the parties referred the matters and documents filed for AY 2008-09 also and therefore they are referred here because all the three appeals involve these common grounds.

30. Before us the LD AR of the assessee submitted following arguments :-

i. He submitted that ld. TPO has rejected (confirmed by DRP] the TNMM method applied by the Assessee to justify the payment made to GECF Inc. and GECF Asia and also held that a foreign party cannot be treated as the Tested Party because the service recipient, i.e., the Assessee is in India. aforesaid action of the TPO is unsustainable in law and in contradiction to the various decisions of the Tribunal. The Delhi Bench of the Tribunal, in the case of Ranbaxy Laboratories Vs. ACIT - 299 ITR (AT) 175(Del), the Ahmedabad Bench of the Tribunal in General Motors India Pvt. Ltd. Vs. DCIT (2013] 27 ITR (Trib.) 373 and the Calcutta Bench of the Tribunal in the case of Development Consultancy Vs. DCIT - 115 TTJ 577, have held that the foreign associated enterprise can be taken as a Tested Party provided that the relevant data for comparison is available in public domain or furnished to the Tax Administration. Assessee had furnished foreign comparables along with the relevant back up documentation to justify the price charged by GECF Inc. and GECF Asia for the services rendered by them. It has also not been demonstrated by the ld. TPO as to how and why only the service recipient can be the tested party.

ii. It was submitted that in Para no 4.6 of the Direction of The DRP for AY 2008-09 u/s 144C of the Act dated31.8.2012, it is accepted that services have been rendered and received but the assessee could not show the benefit derived by it. Further, in case of E-commerce services ld. DRP has held that such services could have been availed locally. Further order of DRP specifically held that financial services could have been provided to the assessee. Further, it was also held that risk management services were doubted for the reason that how the sharing of best practices by exchange of business leaders across countries could provide legal help to the assessee. After discussion , DRP came to the conclusion that some quantum can be attributed to the expenses incurred by the assesseeand since the payments are not cost based but allocation of expenses it was difficult to quantify them and therefore Ld. DRP held

that 5 % of the total cost allocated to the assessee can be considered for the business purposes of the assessee for computing ALP. Therefore, it was submitted that when the DRP itself has computed ALP of the services received by the assessee against "Nil' Computed by Ld. TPO, the issue of rendering of services receipt of services cannot be doubted by ld. TPO. Therefore it was submitted that question whether the services were actually rendered or not does not survive any more as ld. DRP itself has accepted in its direction for AY 2008-09 that services have been rendered.

iii. Regarding the allegation of Ld. AO regarding the services being duplicative in nature, he submitted that the services being rendered by AE and received by the assessee are not duplicative in nature as they are specific services which assessee is not performing. For this he took us to the various service wise details to show that these services were very specific and also specialized in nature. Therefore allegation of the ld. AO that these services are duplicative in nature is incorrect.

iv. He submitted that only issue remains is whether these services are required by the assessee and whether the benefit is received by the assessee or not. It was further submitted that the benefit derived by the assessee could not be subject to the satisfaction of revenue as revenue cannot dictate about the business requirement of the assessee as well as regarding the selection of suppliers from services should have been procured from whom. For this he relied on the decisions of

i. CIT V Walchand & CO Limited 65 ITR 381 (SC)
ii. Sasoon J David& co P Ltd V CIT 118 ITR 261 (SC)
iii. Hive Communications P Ltd V CIT 201 Taxman 99 (Del)
iv. CIT V EKL Appliances 345 ITR 241 (Del)

It was further submitted that several tribunals have held that TPO cannot question the commercial wisdom of the assessee.

i. Dresser-Rand India Pvt. Ltd. v. ACIT [2012] 13 ITR (Trib.) 422 (Mum)

ii. Ericsson India (P) Ltd. v. DCIT [2012] 146 TTJ 708 (Del)

iii. AWB India Pvt. Ltd. v. ACIT: ITA No.4454/Del/2011 (Del-ITAT); AY 2007-08

iv. SC Enviro Agro India Ltd. v. DCIT [ITA No.2057-2058/Mum/2009]

v. Abhishek Auto Industries Ltd. v. DCIT: ITA No.1433/Del/2009 – AY 2004-05

vi. McCann Erickson India Pvt. Ltd. v. ACIT: ITA No.5871/Del/2011 – AY 2007-08

vii. DSM Anti- Infectives India Ltd. v. ACIT: ITA Nos. 1139/Chd/2011 and 1290/Chd/2012 –AY 2007-08; 2008-09

viii. TNS India Pvt. Ltd. V. ACIT: (2014) 32 ITR (Trib.) 44 (Hyd.) –AY 2003-04; 2004-05; 2005-06

ix. Atotech India Ltd. v. ACIT: ITA No.104/Del/2012 –AY 2007-08

x. Nippon Leakless Talbros v. ACIT: I.T.A. No. 5931/Del/2012 – AY 2008-09

xi. Nippon Leakless Talbros v. ACIT: IT(TP)A No. 475/Del/2015 – AY 2010-11

xii. Hughes Systique India P. Ltd. v. ACIT: [2013] 25 ITR (Trib) 556 (Delhi) - AY 2007-08, 2008-09

xiii. Knorr-Bremse India (P.) Ltd. v. ACIT: [2013] 56 SOT 349 (Delhi) - AY 2007-08

xiv. Thyssen Krupp Industries India (P.) Ltd. v. ACIT: [2013] 55 SOT 497 (Mumbai) - AY 2007-08

xv. LG Polymers India P. Ltd. v. ACIT: [2012] 16 ITR (Trib) 240 – AY 2006-07

v. He submitted that assessee had availed services from GE Capital Finance Inc., USA ("GECF Inc") under a Master Service Agreement ("MSA") and Information Technology Services Agreement ("ITSA"). The Assessee had also availed services from GECG Asia Ltd. ("GECF Asia"] under a separate MSA. Both GECF Inc. and GECF Asia had provided services to the Assessee under three broad heads viz., Consulting, IT and

Administrative Services. The Assessee had paid a sum of Rs. 35,85,80,010/- to the aforesaid two entities for availing the Consultancy, IT and Administrative services as per the following mark ups:

i. IT :-Cost Plus 7%

ii. Administrative Services :-Cost Plus 3.73%

iii. Consulting Services :-Cost Plus 11%

Therefore , it is submitted that mark up earned by AE on these services are also more than prescribed mark up Under Safe Harbor Rules farmed by CBDT. Therefore, they are appropriate and proper.

vi. Further, the TPO has selectively applied OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration without appreciating that in terms of para 7.14, the exact same services which the Transfer Pricing Officer has held to be in the nature of stewardship activity are treated by the OECD as substantial services which even an independent enterprise would have been willing to pay for. It is settled law that such selective application of commentaries and decisions is impermissible. (Refer the decision of the Supreme Court in CIT v. Sun Engineering: 198 ITR 297 (SC) and the Order of the Delhi Bench of the Tribunal in the case of Whirlpool India Holdings v. DDIT: 140 TTJ 155.

vii. He submitted that there is no challenge to allocation keys applied for the cost allocation to the assessee. For this, he submitted that for AY 2008-09 there is no challenge to the same and therefore same are accepted by Ld. TPO/ AO and DRP.

31. Ld. DR submitted vehemently supported the order of AO and DRP for AY 2006-07 and 2008-09 and submitted that:-

i. Assessee has not been able to demonstrate that the services are rendered by AE and received by the assessee. Assessee did not prove before Ld. AO / TPO and DRP.

ii. Regarding the submission made by the assessee before Ld. AO/ TPO in case of various services such as Information technology, Quality management, Finance and Risk and Human Resources management, it

was submitted that these are samples only and does not give full picture of the services rendered by AE and received by assessee.

iii. He further relied on OECD guidelines reproduced by TPO stating that the service in respect of Information technology etc. is incidental in nature and therefore AE should not have been remunerated for the same.

iv. He submitted that services rendered now need a fresh look in view of the evidences and therefore matter should be set aside to the file of TPO/ AO.

v. He further submitted following judgments to support his arguments

i. Dressser – rand India P limited V ADDl CIT 13 ITR (Trib) 422 (Mumbai)

ii. Gillet India Limited V ACIT 2015-TII-340-ITAT –jaipur-TP

iii. Petro Araldite P Ltd V DCIT 2013-TII-182-ITAT-MUM-TP

iv. Gem Plus India Private Limited V ACIT 2010-TII-55-ITAT-Bang-TP

v. Knorr Bermese India P Ltd V ACIT 2012-TII-138-ITAT-DEL-TP

vi. Bombardier Transportation India Pvt Ltd Vs DCIT 1626/del /2015

32. In rejoinder ld. AR Submitted that :-

i. Regarding rendition of services he submitted that segment wise paper book is filed before TPO for Finance, QC, HR and Risk. He referred to Para no six of the TPO order where in it is mentioned that the none of the benefit are tangible or real. Therefore, now there is no dispute about the rendition of services. He submitted that order of Ld. DRP for AY 2008-09 clearly proves that services are rendered and received by the parties and therefore only 5 % of the cost is computed by Ld. DRP as ALP.

ii. Regarding benefit test, he submitted that, before Ld. DRP a detailed presentation was submitted showing the benefit received from each of the services received by the assessee from its AE.These details he further referred filed before us vide page no 2847 to 2849 and further charts were shown filed in paper book no VI before us.

iii. He further submitted that when the ld. DRP itself has accepted that there is rendering of service by AE and receipt of services by assessee

and then computing ALP the decision of DRP is binding on ld. AO and ld. TPO both being the decision of higher Authorities of the revenue.

iv. He also referred the order of Ld. TPO where he has admitted that there is a foreseeable benefit but not the immediate benefit. It was submitted that benefit analysis cannot be rejected on the ground that there would be foreseeable benefit. According to him benefit is to be seen from the eyes of the receiver and the provider of services and even future befit also satisfies the benefit test, even if it is applicable.

v. He further submitted that according to OECD commentary at Para no 7.14 describes what is the intra group services, which are independent activity and not incidental activities, and it can be that there would be expected benefit to the assessee.

33. We have carefully considered the rival contentions. Before us, the LD AR has submitted VI paper books where in the submissions made before the ld. TPO and Ld. DRP were submitted. He further relied on several judicial precedents on the issues. Ld. DR also submitted several judicial precedents, which are also noted in his submissions. We have considered them in detail.

34. The brief facts are that the rendering of intra group services for which Assessee has paid Rs.*21,20,48,533/-*TPO has determined ALP at NIL holding that the assessee did not obtained any benefit of such services and the services provided by the foreign AE were either not required , these are incidental or stewardship services or duplicate services and hence unwarranted. Since, in his opinion, the assessee failed to provide any evidence about the services rendered by the AE necessitating the payment of such charges, he computed the ALP of this international transaction at Rs. Nil. Ld. TPO has simply held that as there is no benefit from the services for which payments has been made in determined the ALP of this international transaction at Nil without carrying out any FAR analysis of this intra-group services.

35. The Income tax Act provides computation of Arm's length price of any international transaction as under .

Computation of income from international transaction having regard to arm's length price.

92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

Explanation.—For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

(2) Where in an international transaction [or specified domestic transaction], two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

36. According to the above provisions following principles emerge:-

i. An international Transaction is entered in to between two or more associated enterprises for jointly acquiring or developing some property or for obtaining services.

ii. The parties to transaction enter in to mutual agreement or arrangement to share cost or expenses incurred or to be incurred in respect of joint property.

iii. The cost or expenses incurred should be in connection with a benefit or services of facility provided or to be provided to any one or more of such enterprise. The expectation of mutual benefit is important consideration for the acceptance of arrangement for pooling of resources by the enterprises.

iv. The enterprises would require that each participant's proportionate share of the contribution is consistent with the proportionate share of overall benefits expected to be received from the arrangement.

v. Transfer price of cost or expenses allocated or apportioned to such enterprise or contributed by such enterprise shall be determined having regard to Arm's length price of such benefit, service or facility received by the enterprise. In order to satisfy the arm's length price a participant's contributions must be consistent with the what an

independent enterprise would have agreed to contribute under comparable circumstances considering the benefits it expects to derive from the agreement.

37. Now we proceed to examine these transaction with respect to the provision of section 92(2) of the Income Tax Act as under :-

a. These transactions are backed by the three agreements entered in to by the assessee

(i) Master Service agreement between General electric Consumer Finance Inc. for the various services provided in Para no 2 and schedule 3 of that agreement

(ii) Information Technology service agreement with general electric Consumer finance inc for providing information technology services which are prescribed in schedule 3 of that services

(iii) Master service agreement with GECF Asia Limited for services prescribed under schedule 3 of that agreement at page no 38 of the agreement . Therefore, all the services are backed by the agreement between the service provider and the company being one of the group companies.

b. Regarding the need test vide submission dated 7th April 2011 assessee submitted that it needs the following services because the assessee has vast business operations and for managing operations of such a business effectively, specialized and experienced services are required across all the departments like HR, legal, Finance, Risk compliance, IT, etc. Therefore, for running the business expeditiously, various services from the AEs in the nature of consultancy, administrative and IT are required by the assessee. It is pertinent to note that the services being extremely essential for the business operations, had these services been not availed from the AEs, the

assessee either himself or from a third party would have received these services which would have attracted additional expenditure. With respect to each of the above services the assessee explained the services and shown and why it is needed. For each of the services explanation was given by the assessee. Regarding Finance function it was submitted that helps the businesses to develop management information that enables them to effectively manage their business. It helps in developing business plans and interpreting information. Regarding HR Functions, it was submitted that human resource is the most vital asset. Human Resource function helps in developing strategies for recruitment, remuneration, promotion and training of personnel. Regarding E Commerce services assessee explained that it has tremendous opportunities for the growth of GE Money. It is expected to rapidly change how entities deal with vendors, partners, and customers. It focuses on how current products and practices can be redeveloped in light of the growing importance of the Internet and helps in setting up Internet platforms and strategies. For Legal & compliance services assessee submitted that it manages policy and compliance issues and works to ensure that, the GE Money businesses utilize the best practices and policies of GE's legal approach. It helps to identify, quantify and mitigate the risks of various legal matters. The Compliance function reviews local regulatory requirements and works with the local business to ensure that the legal entity is in compliance with all local regulatory requirements. Regarding risk management assessee explained that It helps in developing global credit risk strategies, coordinating risk assessment and regulatory and internal reporting, analyzing the credit risks associated with acquired entities and their portfolios, managing counter-party risk and the allocation of risk capital to GE Money entities worldwide. Regarding quality improvement assessee established the need for that service showing that Quality initiative is pivotal to sustaining growth and maximizing operating effectiveness.

GE Money differentiates itself through superior customer focus and continuous improvement. As part of this process, GE Money is assisted by quality consultants in implementing Six Sigma quality initiatives throughout the business entities. Regarding business Development sales and marketing services assessee submitted that this function encompasses a range of activities focused on expanding GE Money's business, either by identifying opportunities for market growth through strategic acquisitions or through new product/market support. These activities include evaluating prospective acquisitions, negotiating tentative purchase agreements with acquisition targets, initiating the due diligence process to evaluate the target company, and completing the final acquisition negotiations. Regarding CRM Services it is submitted that focus of this function is on projects (new and in progress) that deliver quantifiable results in the areas of insurance, strategic pricing, new business improvements, campaign management, profitability-based service, credit line increase, auto cross-sell and cash access. The objective is to develop market tests aimed at expanding and optimizing product offerings, maximizing revenue opportunities and improve the flow of best practices between markets. Regarding CEO function assessee explained that this function provides advice & assistance on strategic management & development of the GE Consumer Finance business and implementation of GECF corporate initiative within GECF as how to best develop the GECF business in Asia with regard to the participation in the operational reviews of business metrics & review of business performance & driving necessary changes determined from the process with regard to all aspects of the business planning cycle. Regarding operation and sourcing facilities it justified that Operations help in looking for opportunities for improvements in process & productivity with local management. Sourcing supports in the review of planning budgets. An annual review of existing contracts is undertaken to determine

whether deals are at market best. Regarding IT Services assessee justified the need submitting that Information Technology and Systems Support encompasses activities ranging from the strategic business use of IT to the systems support necessary for the hardware and software on which GE Money relies. It co-ordinates and support projects to ensure that the IT infrastructure is secure. Regarding communication and Public Relation services it justified that these services are required as It helps in enhancement of communication profile and brand protection which is necessary for existence of any business. On appreciation of the above facts it is apparent that looking to the size of the business of the assessee and also for the continuous growth of the services assessee has justified that such services are required. It is pertinent to note that requirement of the services should be judged from the viewpoint of the appellant as a businessman. Therefore in this regard we are of the view that assessee has substantiated that these services are required by it. As the company is one of the parties as service receiver of that agreement it proves that the such services were required by the assessee. Further the assessee is part of the MNE organization, which has provided the service to many companies across the globe. As all other companies situated in all together different companies and operating in different geographies have also received and used these services which is evident from the allocation list submitted by the assessee therefore this itself proves that for the assessee to remain competitive in its business such services are required. Therefore the assessee satisfied the need test which is alleged by ld. TPO to have not been satisfied by the assessee. We reject this view of the ld. TPO and ld. DRP.

c. Regarding rendering of those services by the service provider appellant has submitted before the Ld. TPO the evidences in the form of e-mails exchanged in day-to-day operations, correspondences, documents received, planning studies conducted, strategies developed

etc. by the AEs for the assessee, demonstrating the actual receipt of these services. For each of the services assessee has submitted comprehensive details showing that what are those services, what the need of those services is and what is the benefit derived by the assessee from those services. Regarding IT Services assessee has shown that the systems, platforms and software that either is developed by the HQ or had been sourced by HQ from external vendors centrally. Indian business along with other GE Money businesses access and uses these tools in their day-to-day business operations. These tools are:

S. No.	Tools: Systems, Platforms, Software	Description
1.	AML / Actimize	AML/Actimize is a tool/solution used to monitor transactions for behavior indicative of Money Laundering. HQ performed the hosting, management and operation of the AML Shared Service environment including GIS infrastructure, Disaster Recovery, GDC Support, Software Licenses and maintenance.
2.	Active Directory	Active Directory (AD) is a Microsoft technology which provides various network services like Authentication, windows client management, DNS Software security, server maintenance, authentication of servers. HQ provides support & hosting for AD. AD is used by businesses globally and has about 130 Domain Controllers (Servers which host AD database). There are some Domain Controllers, software and supporting servers which are owned and managed by HQ. The Domain Controllers hosted at the business locations are owned by the business.
3.	Asia Network Hub (Collapsed with Global Network)	The Asia Network hub provides MPLS (Multiprotocol Label Switching) & Internet connectivity in addition to providing a bridge to the GIS (Geographical Information System)

		Network and services in Asia for all Capital Businesses. MPLS is designed to be a reliable transport for Critical systems (currently Vision+ to Clayton). DIA internet connectivity is designed to provide the following services - Internet Hosting (inbound & outbound), internet GRE tunnels for low cost/backup WAN, Internet Proxy, 2 layer (internal & external firewalls) and 3rd Party connectivity.
4.	Business Objects	The SAP Business Objects portfolio provides comprehensive solutions that can empower businesses to optimize their business performance through intelligent reporting. The following licenses can be procured from the OTS License Support team: • BOXI Enterprise Professional Licenses for Crystal Reports • BOXI Enterprise Professional Licenses for OLAP Intelligence • BOXI Enterprise Professional Web / Deski Intelligence Licenses • Crystal Reports Developer • Business Objects OLAP Intelligence
5.	Connect Direct	Connect Direct is a software product that performs large file transfers. Connect Direct is supported and maintained by HQ. Businesses procure the licenses and install the tool at their businesses.
6.	Experian	It is a strategy manager tool.
7.	Fermat – Basel II	It is a regulatory compliance risk reporting tool.
8.	Global Architecture	HQ conducts Architecture Reviews on site, support for PAR reviews and project distress.
9.	Global ESB	The Global ESB is the Enterprise Service Bus. It has been designed to be reliable / resilient and supports audit and security requirements.
10.	Network	HQ performs network circuits, hosting and equipment maintenance at shared data center locations. It also performs business firewall maintenance renewals.

		Circuits - Circuits provide connectivity into the shared data centre and network hubs sites such as CSC Clayton & Pyrmont, and Cincinnati; *Equipment Maintenance* - Hardware maintenance on the Cisco devices in the shared data centre and network hub sites such as CSC Clayton & Pyrmont, and Cincinnati; *Hosting* - Hosting the network equipment at the CSC shared data centers in Clayton and Pyrmont; *Firewall Licensing* - Renewing the Checkpoint software subscription and support contract on the firewall in respective businesses.
11.	IDM Infrastructure	HQ sets up and maintains infrastructure for memory, servers and new DR RUN. It also performs security reviews and enhancements to central products.
12.	Security Services	Security services provided by HQ include database scanner and technical security compliance assessment.
13.	IG-iSeries Security Ops	HQ procured license for Bsafe security operations software and provided it to various GE Money businesses. In addition, HQ maintained the software and provided 2nd and 3rd level of operational support.
14.	IG Mainframe Security Ops	Mainframe security operations support included RACF (System Access Approvals) security for shared service LPARS.
15.	MS Premier	HQ entered a global pre-paid service contract for MS Premier Support contract with Microsoft for problem resolution. A block of support hours are purchased each year by HQ which can be utilized for the following services: - *Problem Resolution Support (PRS)*: Provides assistance for problems with specific symptoms encountered while using Microsoft products, where there is a reasonable expectation that the problem is caused by the MS Product. - *Support Assistance*: Provides short-term advice and guidance for problems

		not covered with PRS. It primarily is a consulting function to help projects in the design / development / deployment stage which involve Microsoft Technologies / products. Support assistance is provided 24x7.
16.	OTS	Offshore Technology Support (OTS) is support and maintenance for the support provided by Genpact and Satyam workforce. It also includes help for setting OHR ID and Email ID at active directory.
17.	Postilion	Support, Maintenance, Server Infrastructure & License for Postilion Application that is a data processing tool.
18.	SAS	SAS is an analytical reporting tool utilized by GE businesses globally. HQ maintains the SAS software on behalf of all businesses including India.
19.	Vision Plus	Vision Plus support provided by HQ includes license, maintenance, compliance, BAU support teams and Gold Source Hosting.
20.	ITAM Infrastructure	Hosting and maintenance for ITAM Shared infrastructure, including Production, preproduction and Testing environments for UAPM, ITAM T1, Asset Intelligence, Oracle Reporting and Database servers.

Regarding the receipt of such services assessee has shown the date wise details of such services rendered by AE and received by the assessee as under:-

Reference Name	Date	Description
GEMFSL_Benefits Document_#1_GE Money Tech Stack with Telco updates May 22nd 08.xls	May 2008	HQ has entered into global contracts with third party vendors for supply of various IT & IT infrastructure related items. Businesses including India can

		leverage the global contracts and purchase items by entering a sub-contract in their respective countries. Benefits of having global contracts are following: • Indian business pays the lowest possible price for software and hardware; • Indian business do not have to utilize their resources and time in locating the vendor, negotiating the terms and conditions including payment terms; Various products and services / areas that are available to Indian business through global contracts entered by HQ are: • Client hardware • Client software • Server software • Server hardware • Network • Application technology • Applications • Security • Call centre
GEMFSL_Benefits Document_#2_ GE Information Security Awareness Training 1.doc		HQ developed program for businesses including India on the data and information security. The program was

GEMFSL_Benefits Document_#3_ GE Information Security Awareness Training 2.doc		applicable to all the employees of all countries. After rolling out the program, HQ prepared the data and information security awareness training. These trainings were made available to all the employees in GE Money India so that they can themselves understand and implement the data security tools and processes. With such program and training available, Indian business did not have to set up similar program on their own.
GEMFSL_Benefits Document_#4_ IT Clearance_Assets Handover process.doc		HQ helped Indian business set up a IT helpdesk where an employee can raise a IT issue, which can be tracked for the actions taken and would be closed once the IT issue has been resolved. HQ also developed a SOP (Standard of Practice) which can be readily used by the employees for logging a IT issue. The illustrated SOP shows the process to be followed for seeking IT clearance while doing handover of IT assets.

GEMFSL_Benefits Document_#5_V+ mannual		VisionPlus (V+) is a platform that was developed by HQ and provided to all GE Money business including India. V+ is a one source global solution for credit cards, loans and payment processing. HQ got the system developed from PaySys Inc in the USA. V+ has multiple features and capabilities; which includes but not limited to offering new account processing, merchant administration, cardholder billing and management, collections, risk management, promotions and co-branding capabilities. It is a comprehensive tool that provides extensive loans functionality. HQ initially got the system developed; subsequently it provided detailed manuals to the businesses including India on implementation of the system and its usage.
GEMFSL_Benefits Document_#6_VisionPlus For Finance Users.ppt	September 2006	HQ conducted training for Indian business on the functionality and capabilities of the V+. The training would help GE Money India employee to quickly grab

		pace in relation to using and implementing V+ in their day-to-day operations.
Few instances of IT support received from HQ in recent years. As the support from HQ is a continuous support, similar policies, data, support is applicable to prior years as well.		
GEMFSL_Benefits Document_#7_ Digital Guardian - IT Compliance Communication.htm	August 18, 2010	HQ rolled out software called Digital Guardian. This software helps the business protecting proprietary and confidential data from accidental loss and unauthorized removal.
GEMFSL_Benefits Document_#8_ Money AD Account Re-conciliation (Defect).msg	September 1, 2010	HQ initiated a process to compare GE Money Active Directory Accounts and reported any defects on a monthly basis. This would result in secure application and clean up inactive accounts to optimize performance.
GEMFSL_Benefits Document_#9_ AD Accounts Report-Password Never Expires.msg	September 2, 2010	HQ processed all AD accounts in GE Money to check for all the accounts where the secured access passwords are not refreshed after regular intervals. This will help GE Money India in reducing the risk of password being compromised.
GEMFSL_Benefits	October 5,	HQ reviewed the

Document_#10_ Appropriate fields to mask for mitigating risk under financial services regulatory expectations .msg	2010	available literature on appropriate fields to mask for mitigating risk under financial services regulatory expectations. Based on their review they guided businesses on the fields that should be masked. With implementation of the suggestions from HQ, business would also be regulatory compliant.
GEMFSL_Benefits Document_#11_ LSL EMEA call 1-oct-2010 .msg	October 5, 2010	HQ has shared best practices on data security and how to create awareness for data and information security among all the employees of the business.
GEMFSL_Benefits Document_#12_ Security Operations .msg	November 3, 2010	HQ has proposed to set up some security operations for the Indian business for which Indian business has asked for guidance. HQ then provided the process to roll out Digital Guardian security tool. HQ also set up level 1 and level 2 helpdesk so that employees from Indian business can seek real time help. Further HQ prepared training and manual on how to seek help from the helpdesk.

GEMFSL_Benefits Document_#13_GECC Information Security Policy Approved.msg	November 11, 2010	HQ framed and rolled out Information Security Policy for all businesses. With implementation of this policy, business would be more secure and compliant with various regulatory requirements.
GEMFSL_Benefits Document_#14_!!!IMMEDIATE ATTENTION!!! Firewall ports for Snare installation.msg	December 3, 2010	HQ initiated and installed new firewall in the computer systems of the employees of GE Money India in order to make the systems more secure with the most updated security applications.
GEMFSL_Benefits Document_#15_ Change Control Policy.msg	December 7, 2010	HQ rolled out new change control policy for all businesses including India. This policy would ensure that all the systems used by business and any changes undertaken in them are secure and complaint with the regulatory requirements.
GEMFSL_Benefits Document_#16_ NTP Re-configuration on OTS managed Proxy Servers.msg	December 9, 2010	HQ introduced running sync for proxy servers multiple times a day. HQ proposed to change the sync process because the earlier system was not completely successful in syncing data, which resulted in information loss for

		business.
GEMFSL_Benefits Document_#17_GE Security Services Blog - Post by Bradley Freeman (228012).msg	December 18, 2010	HQ has created an online space where best practices, important information, updation are posted by HQ. This space can be access by employees of GE Money India to check for data relevant for them.

d. Similarly for each of the services assessee has submitted the date wise chart, which is part of its submission in paper book page no 66 to 131, which are also part of the submission of the assessee before ld. TPO and ld. DRP, vide its letter dated 7/11/2011. For the purposes of substantiating the services rendered by the assessee it has submitted the details of all the service rendered by the AE to the assessee as in the paper book same are placed on sample basis. Therefore, assessee has placed substantial material evidencing the receipt of the services. Regarding the receipt of the services from AE, the assessee can be asked to maintain and produce the evidence of receipt of services, which a businessman keeps and maintains regarding services related from the third party. The burden cannot be higher on the assessee for evidencing the receipt of services of higher level merely because the services have been rendered by its AE. Against these overwhelming evidence placed by the assessee before the lower authorities ld. TPO has merely stated that assessee has not been able to provide any evidence n that the AE has provided such services to the assessee. We could not find any instances placed in the order of LD, TPO where it held that the evidence placed by the assessee are not substantiated by rendition of service by the AE. In TNS India Private Limited 2014-TII-24-ITAT-HYD-TP Coordinate

bench has dealt with the rendition test of Intra Group services for AYs 2003-04 to 2005-06 and held as under:

"16. We have considered the issue. We are unable to accept the contention of the Assessing Officer/TPO with reference to the services provided by AEs. Assessee has provided the agreements which were entered not during the year but in earlier year and has been paying the service fee termed as management fee accordingly. This claim is not arising for the first time in this year but, is also there in earlier years and later years. Assessee is part of a worldwide group and they have placed some corporate centers for guidance of various units run by them across the globe. It was submitted that the costs being incurred by the centers are being shared by various units and assessee's share in this year has come to 5% of the receipts payable to NFO Worldwide Inc USA and at 4% to NFO Asia Pacific Ltd. Hongkong on the net revenues. These amounts are within the norms prescribed for payment of fees to various group companies of similar nature. There is no dispute with reference to services being provided by the group companies to assessee and assessee also paid various other amounts including royalty. As submitted by assessee, even though some correspondence was placed on record with reference to the advise given to assessee, providing a concrete evidence with reference to the services in the nature of specific activities is difficult, like proving the role of an anesthesian in an operation conducted by a surgeon. There may be an evidence of operation being performed by the Doctor in the form of sutures or scars etc, which can be proved later but the role of an anesthesian before operation and after gaining consciousness is difficult to prove as that is not tangible in nature. Likewise, for the advise given by various group centers to the group companies in day-to-day manner is difficult to place on record by way of concrete evidence but the way business is conducted, one can perceive the same. Assessee has given a detailed write-up as well as the services provided and benefit obtained which were not contradicted. The Assessing Officer did not believe the same in the absence of concrete evidence. Unless the Assessing Officer steps into assessee's business premises and observes the role of these companies/ assessee's business transactions, it will be difficult to place on record the sort of advice given in day-to-day operations. What sort of evidence satisfies the AO is also not specified. Assessee has already placed lot of evidence in support of claims. Therefore, on that count, we are not in agreement with the Assessing Officer and TPO that services were not rendered by the group companies to assessee.

(underline supplied by us)

Hence in view of the overwhelming evidence placed by the assessee for receipt of services and following the decision of coordinate bench respectfully , we are of the view that rendering of services must be seen from the view point of the assessee and further assessee cannot be asked to keep and maintain evidences of services rendered by AE higher than which is expected from a businessman receiving services from an unrelated provider. Therefore, we reject the view point of Ld. TPO and Ld. DRP that assessee has not shown the receipt of the services. In view of above we are of the view that assessee has justified the receipt of services and satisfied the rendition test.

e. Looking to the nature of services rendered by the AE which are of specific nature and are not available with the assessee on its own or these are not being already received by the assessee from other parties hence these services cannot be said to be duplicative in nature. Ld. AR of the assessee submitted that the letter dated 7.11.2011 shows that though some activities similar to these intra-group services, however, there is a varied difference in the nature of activities performed by the assessee himself and services availed from the AEs. The services are not identical and are availed from the AEs based on the requirement of the assessee. It was also his submission that that these intra-group services have not been availed from the independent parties and there is significant difference in the activities performed in-house and those performed by the AEs. Therefore according to the assessee there is no duplication of services/ activities. Ld. TPO and Ld. DRP has not held that the similar kind of services are already available with the assessee with any concrete evidence. Acceptably independent parties cannot remunerate these kinds of services if duplicative in nature. Howsoever in absence of any instances of services provided by the AE and services availed by the assessee from independent parties are similar in nature and it creates any redundancy, we rejected the viewpoint of Ld. TPO and Ld. DRP on duplicity test and we are of the view that services provide by the AE to the assessee are not duplicative services in nature.

f. Further, in allocation sheet submitted by the assessee, the parts of the services have been stated to be shareholders activity and assessee in 5th column of the allocation chart has itself identified those services. Therefore the view of the ld. TPO and Ld. DRP that all these services other than those identified by the assessee are shareholder's activity cannot be accepted. This is clear from the submission of the assessee vide letter dated 7/11/2011. Generally shareholder services are those services which are not

   a. required by the assessee i.e. does not fulfill the need test but are required by the ownership for the purposes of maintaining and safeguarding its own interest
   b. which are not actually received by the assessee and those services are received by the owner for safeguarding ownership interest
   c. which does not have any potential possible and foreseeable benefit likely to accrue to the assessee as it gives benefit to the owner

   Undisputedly if the services are shareholder activity for safeguarding the benefit of ownership it cannot be remunerated by the independent parties. However if it is not a shareholder's services, other conditions are satisfied, they needs to be remunerated. In the case of services received by the assessee they are satisfying the need test, rendition test and also benefit test and therefore these services cannot be said to be shareholder activities. Though ld. TPO and Ld. DRP both have held that these services are shareholder activities however, there is not a single instance pointed out in the order stating the nature of services that how they are resulting in to safeguard interest of the owner.

g. The view mentioned by the Ld. TPO and Ld. DRP is that there is no tangible benefit accruing to the assessee. Before ld. AO and ld. DRP assessee has submitted a detailed benefit analysis with respect to

each services vide submission dated 7/11/2011 where in the benefit accruing to the assessee from each services is demonstrated. However, ld. TPO and Ld DRP has held that assessee has not shown that the assessee has received some tangible and direct benefit. In general considering the complex business environment in which business are operated it is difficult to operate the business successfully for sustainable period without receipt of various services which carry huge intrinsic and creative value to the assessee. Before ld. TPO and ld. DRP assessee has submitted what are the business benefit derived by the assessee as under :-

S. No.	Nature of services	Illustrative summary of the services rendered and benefits derived
1	Finance	• Advice and assistance on business strategies and future plans • Sharing, development and implementation of best accounting and finance practices • Advice and assistance in achieving net earnings and assets growth • Developing internal audit tools and controls
2	Human Resources	• Advice and assistance in developing HR strategies • Advice and assistance in meeting staffing requirement and talent development • Advice and assistance on Best HR practices and policies • Recruitment and coaching of top level executives • Rendering due diligence support and harmonizing employment terms and conditions • Management of incentive plans, share option schemes, appraisals etc. • Management of employee secondments and transfers

S. No.	Nature of services	Illustrative summary of the services rendered and benefits derived
3	e-Commerce	• Management support in the use of search engines, emails, online marketing • Advice on optimising website designs • Development and maintenance of regional infrastructure (Asia) • Development of local infrastructure (India), marketing tools and other applications • Development of GE Money web design toolkit • Sharing of best e-business practices
4	Legal and Compliance	• Development of Regulatory Compliance Program • Execution of operational policies and procedures • Advice and assistance in risk assessment exercise • Sharing of best practices by exchange of business leaders across countries • Liasoning with external counsels on legal and compliance matters • Support in M&A deals • Development of various policies and procedures to be followed across the operational region • Development of training programmes on various legal and compliance procedures • Advice and Assistance in conducting periodic reviews
5	Risk Management	• Advice and assistance in implementation of various risk strategies • Advice and assistance in formulation of risk assessment policies and procedures • Providing expertise in all areas of risk

S. No.	Nature of services	Illustrative summary of the services rendered and benefits derived
		management • Sharing of best practices with regard to risk management • Advice and Assistance in recruitment, training and development of local risk personnel
6	Quality	• Rendering consultancy to improve business practice and processes • Sharing of best practices in the area of quality control and management • Assistance in identifying more efficient means of operation of key processes
7	Business Development, Sales and Marketing	• Identifying opportunities for market growth through strategic investments and product development • Sharing and assisting for execution of GE Internal material, presentations and solutions which were used in proposals made to client • Providing business leads in Indian markets • Conducting reviews and providing inputs on deal structures • Advices and assistance on venture funding activities • Sharing of best practices pertaining to sales model for each market • Providing guidance, assistance and ongoing support to local sales and business development teams through interactions, trainings, reviews, development of databases of contacts, deals etc • Providing experts with detailed product knowledge and experience • Advice and assistance in branding strategies and campaigns
8	Customer	• Developing and maintaining relationship with

S. No.	Nature of services	Illustrative summary of the services rendered and benefits derived
	Relationship Management	trade partners • Support for new businesses/ products • Sharing of strategic resources and best practices • Sharing benefits of global agreements • Advise and assistance in branding strategies and initiatives
9	CEO	• Determining overall business strategies • Reviewing businesses and assisting local management in determining operational profile • Advise and assistance on current and future products • Advices and assistance on best practices
10	Operations and Sourcing/ facilities	• Reviewing opportunities for process improvements • Conducting operational reviews • Advise and sharing best practices • Advise and assistance in business acquisition process (due diligence etc)
11	Information Technology	• Design development of common operating and business systems • Ensuring compliance with global internal corporate standards • Implementation of global IT best practices • Developing and support appropriate infrastructure/ framework • Support in recruitment and development of IT staff • Execution of Global, National and Regional IT contracts • Licensing of various software and programs

S. No.	Nature of services	Illustrative summary of the services rendered and benefits derived
12	Communication and PR	• Advise and assistance on enhancement of communication profile • Advise and assistance in brand protection • Advise and sharing of best practices

However ld. TPO as well as Ld. DRP has held that assessee has not demonstrated that it has received tangible , special, exclusive and direct benefit received from the above services. As we have already quoted the provision of section 92 (2) of the act which specifically speaks that Transfer price of cost or expenses allocated or apportioned to such enterprise or contributed by such enterprise shall be determined having regard to Arm's length price of **such benefit**, service or facility received by the enterprise. In view of this it is necessary that arms' length price is required to be determined of an international transaction with respect to the benefit. Therefore, the benefit test is necessary part of determining arm's length price of any international transaction. This is so because if there is no need of any services(i.e. need Test) , it would not be paid by the independent parties. Similarly if the services are not rendered(rendition test) , independent parties will definitely not pay for it, and thirdly if the services though required and are rendered but are not beneficial to the receiver (benefit test) than naturally the independent parties will not pay for such services. Similarly, the services, which one already is availing , independent parties may not pay for it as it amounts to redundancy. Therefore as ld. TPO is only empowered to determine arm's length price of international transaction, as per provision of section 92 (2) of the act he is required to consider all the above aspects of the services for which AE is remunerated. In absence of all these criteria satisfied cumulatively

for services, it is incomprehensible that any independent party would pay for the services i.e.

i. if services are not required,
ii. if they are not rendered ,
iii. if they are not benefitting the recipient
iv. if they are duplicative in nature
v. if they are for the safeguarding interest of owner .i.e. shareholder activity

And if it were so, there would not be any comparable instances for similar kind of services and the purpose of determining arms length price of the International transaction will most probably fail.

h. Honourable Punjab & Haryana High court in Knorr Bermesse India P Ltd V ACIT 2015-TII-51-HC-P&H-TP has held that

"23. Enterprises, businessmen and professionals constantly experiment with different business models, theories and ventures. The aim indeed is to further the business, to enhance their profits. So long as that is the aim, it is sufficient for the purpose of the Income Tax Act. In a given case, profit may not even be the motive. Even so it would not indicate that the transactions in question are not at an arm's length price. Whether a transaction is entered into at an arm's length price or not must depend upon the facts of each case relating to the transaction per se, i.e., the transaction itself. Profit is only a possibility and a desired result with or without the aid of an international transaction. Every business venture is not necessarily profitable or successful. All business ventures do not succeed equally or uniformly. Indeed, if an assessee is able to establish financial or other commercial benefits arising from a transaction, it would further strengthen its case. But if it cannot do so, it does not weaken it.

24. The profit earned by an assessee could be for reasons other than those relating to the international transactions or by virtue of

international transactions as well as by virtue of other factors. In that event, the assessee having profited from the venture involving the international transactions, obviously, would not establish that the arm's length price was correct or justified.

25. It would make no difference even if the profit is entirely on account of the international transaction. In fact, even if it is established that on account of an international transaction an assessee's venture has profited, it does not necessarily establish that the transaction was entered into at an arm's length price. Mere profitability does not indicate that the transaction which was responsible for the enhancement of the profits was at an arm's length price. That an international transaction has enabled an assessee to earn profit is one thing and the price paid for the same is another thing altogether. Profit is a motive and the aim of a venture. The factors that are involved in achieving this objective are the means of achieving this end. Absent any special term in the contract, the seller of goods or the provider of services is not concerned whether its purchaser profits from the use that the goods or services are put to. It is concerned with the same only as far as **the usefulness of its products and services enhances the value thereof** and **consequently furthers its own commercial interests.** Merely because an assessee profits by the use of the goods supplied or the services rendered, it does not follow that the same were sold or supplied at an arm's length price. Conversely, merely because an assessee does not profit from the use of the goods or services it does not follow that they were not sold at an arm's length price.

26. A view to the contrary would cause considerable confusion and lead to arbitrary, if not illogical, results. A view to the contrary would then raise a question as to the extent of profitability necessary for an assessee to establish that the transaction was at

an arm's length price. A further question that may arise is whether the arm's length price is to be determined in proportion to the extent of profit. Thus, while profit may reflect upon the genuineness of an assessee's claim, it is not determinative of the same."

From the above decision of Honourable High court it is apparent that the user of the services are concerned with the usefulness of its services which enhances the value thereof and consequently in furtherance of its commercial interest. Merely profitability cannot be the criteria for benefit, it is much more than what is determinable in monetary terms. Therefore while determining ALP of IA , usefulness, enhancement in value and furtherance of business interest is required to be seen. The issue now arises that from whose perspective these tests can be seen. Honourable Delhi high court in case of Hive Communication P Ltd V CIT 12 taxmann.com 287 has held that :-

"7. The question whether the expenditure is excessive or unreasonable in a given case has to be examined keeping in mind the services (with which we are concerned in the present case) for which payment is made. In the process the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to the assessee from such services is also to be kept in mind. After applying this test if it is found that the expenditure is excessive or unreasonable excess, excess or unreasonable portion of the expenditure is to be disallowed. We have also kept in mind the provisions of sub-section 2(b) of section 40-A of the Act as per which the burden is upon the assessee to establish that the price paid by it is not excessive or unreasonable as in this case Mr. Sushil Pandit was holding substantial portion of share namely 65 per cent in the assessee company."

"13. In CIT v. Edward Keventer (P.) Ltd. [1972] 86 ITR 370 , the Calcutta High Court considering identical provision in 1922 Act, it was held that the section places two limitations in the matter of exercise of the power. The section enjoins the Assessing Officer in forming any opinion as to the reasonableness or otherwise of the expenditure incurred must take into consideration (i) the legitimate business needs of the company and (ii) the benefit derived by or accruing to the company. The legitimate business needs of the company must be judged from the viewpoint of the company itself and must be viewed from the point of view of a prudent businessman. It is not for the Assessing Officer to dictate what the business needs of the company should be and he is only to judge the legitimacy of the business needs of the company from the point of view of a prudent businessman. The benefit derived or accruing to the company must also be considered from the angle of a prudent businessman. The term "benefit" to a company in relation to its business, it must be remembered, has a very wide connotation and may not necessarily be capable of being accurately measured in terms of pound, shillings and pence in all cases. Both these aspects have to be considered judiciously, dispassionately without any bias of any kind from the view-point of a reasonable and honest person in business."

i. In view of the above decision, it is apparent that "benefit Test" needs to be satisfied but same shall be judged from the viewpoint of assessee and with business prudence. All the decision cited by the ld. AR says that ld. TPO does not have right to question the wisdom of the assessee and he is not required to see whether the assessee is getting direct, tangible, substantial benefit from the services by replacing the view of ld. TPO in place of views of assessee. Ld. DR also says that these tests may be examined. Now the above two decisions

of honourable high court has held that the benefit test cannot be applied from the perspective of revenue and ld. TPO does not have the right to question the wisdom of the assesse. Therefore it is apparent that assessee cannot be asked to demonstrate it with 100 % mechanical precision. If assessee has expected potential benefits out of his business prudence at the time of receipt of services which he can demonstrate from commercial point of view, according to us that satisfies the benefit test for intra Group services. Meaning thereby that the 'benefit" needs to be identified from the view point of the assessee which can be potential, reasonably foreseeable, may not be quantifiable in money alone, may be strategic but it cannot be incidental. The benefit also cannot have the qualification such as "substantial" , "direct" and 'tangible" because we do not find any such words in the provision of section 92 (2) of the act. But where the assessee's contentions are bereft of any documentation to show that at the time of availing the services about benefits which were expected, foreseen, visualized, we are of the view that conditions of provision of section 92 (2) of the act Arms' length price of such payments for services are not satisfied because in such circumstances such services will not have any value and no independent party would pay for such services. All the decision cited by the assessee that benefit cannot be judged from the view point of the revenue also supports the above propositions.

j. For the above proposition we also get support from the OECD Guidelines 2010 which provides as under

"7.6 Under the arm's length principle, the question whether an intra-group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance its commercial position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in- house for itself. If the activity is not one for which the independent enterprise would have been willing

to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle.

7.23 In such cases, MNE groups may find they have few alternatives but to use cost allocation and apportionment methods which often necessitate some degree of estimation or approximation, as a basis for calculating an arm's length charge following the principles in Section B.2.3 below. Such methods are generally referred to as indirect-charge methods and should be allowable provided sufficient regard has been given to the value of the services to recipients and the extent to which comparable services are provided between independent enterprises. These methods of calculating charges would generally not be acceptable where specific services that form a main business activity of the enterprise are provided not only to associated enterprises but also to independent parties. While every attempt should be made to charge fairly for the service provided, any charging has to be supported by an identifiable and reasonably foreseeable benefit. Any indirect-charge method should be sensitive to the commercial features of the individual case (e.g. the allocation key makes sense under the circumstances), contain safeguards against manipulation and follow sound accounting principles, and be capable of producing charges or allocations of costs that are commensurate with the actual or reasonably expected benefits to the recipient of the service."

k. Recently honorable Delhi high court in case of Cushman Wakefield Limited in 46 taxmann.com 317 has held that

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/13 taxmann.com 82 (Mum.):

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do

this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an

independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO. This aspect was made clear by the ITAT in Delloite Consulting India (P.) Ltd. v. Dy. CIT/ITO [2012] 137 ITD 21/22 taxmann.com 107 (Mum):

'37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find

that the Bangalore Bench of the Tribunal in Gemplus India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 352 (Bang.) of 2009, dated 20-10-2010] held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price.

38. In the case on hand, the Transfer Pricing Officer has determined the arm's length price at "nil" keeping in view the factual position as to whether in a comparable case, similar payments would have been made or not in terms of the agreements. This is a case where the assessee has not determined the arm's length price. The burden is initially on the assessee to determine the arm's length price. Thus, the argument of the assessee that the Transfer Pricing Officer has exceeded his jurisdiction by disallowing certain expenditure, is against the facts. The Transfer Pricing Officer has not disallowed any expenditure. Only the arm's length price was determined. It was the Assessing Officer who computed the income by adopting the arm's length price decided by the Transfer Pricing Officer at "nil".'

This is a slender yet crucial distinction that restricts the authority of the TPO. Whilst the report of the TPO in this case ultimately noted that the ALP was 'nil', since a comparable entity would pay 'nil' amount for these services, this Court noted that remarks concerning, and the final decision relating to, benefit arising from these services are properly reserved for the AO.

36. In this case, **the issue is whether an independent entity would have paid for such services. Importantly, in reaching this conclusion, neither the Revenue, nor this Court, must**

question the commercial wisdom of the assessee, or replace its own assessment of the commercial viability of the transaction. The services rendered by CWS and CWHK in this case concern liaising and client interaction with IBM on behalf of the assessee - activities for which, according to the assessee's claim - interaction with IBM's regional offices in Singapore and the United States was necessary. These services cannot - as the ITAT correctly surmised - be duplicated in India insofar as they require interaction abroad. Whether it is commercially prudent or not to employ outsiders to conduct this activity is a matter that lies within the assessee's exclusive domain, and cannot be second-guessed by the Revenue."

[Underline and bold supplied by us]

In above decision honourable court has also held that the Duty of Ld. TPO is restricted to determine ALP of the International transaction and he cannot replace his own views with the views of the assessee. Therefore ld. TPO is empowered only to view the benefit mentioned in section 92 (2) of the act from the perspective of the assessee only.

l. Therefore, in view of above discussion and the binding precedents cited above we are of the view that benefit test for determination of Arms length Price is to be viewed from the perspective of the assessee and businessman and not from the perspective of revenue. In this case appellant has demonstrated the benefit which it is expected to derive from the various services rendered by its AE and ld. TPO has erred in replacing with its own judgment of the benefit derived by the assesse, we reject this approach.

m. For determination of arms Length pricing assessee has adopted TNMM as the most appropriate method and has chosen the foreign AE as the tested party . Ld. TPO has rejected this approach and has held that as these services have been availed in India hence, assessee should be taken as tested party and secondly the method

applied should be CUP method. For this ld. TPO has not given any reasoning. Before us the assessee has contested that the foreign AE should be taken as the tested party as the Foreign AEs are least complex and comparable data are available. We have also perused the reason given by the Ld. TPO that as the services are rendered in India then only the India party can be tested party. This reason is flawed and cannot be accepted. In fact the tested party should be the least complex of the transacting parties and for which the data is available for comparability analysis. Therefore, with this issue we direct the ld. TPO to examine the relevant documents as per rule 10B submitted by the assessee and then to decide the issue of tested party, Most appropriate method and comparability analysis.

n. Before parting we state that we have considered all the decision of various coordinate benches. However we have respectfully followed the principles laid down by above sated decisions of Honourable high courts in deciding the issue.

38. In view of the above findings we are of the view that for these services the assessee has demonstrated and satisfied the Need Test, Evidence Test or rendition test and benefit test as envisaged u/s 92 (2) of the act and the services provided by the AE are neither duplicative or shareholder's activity, therefore the LD. AO/ ld. TPO is directed to determine Arms' length price of these services based on the documents submitted by the assessee by determining 'tested party', determination of 'most Appropriate method' and 'Comparability analysis'. For these purposes these grounds of transfer pricing is set aside to the file of Ld. TPO.

39. We also take note of the arguments advanced by the ld. AR of the appellant against the issue being set aside to the file of Ld. AO/ TPO relying on decision of ITAT in case of Zuari Leasing and Finance Corp. Ltd V ITO 112 ITD 205(Delhi) (TM) where in it is held that

> ***"10.*** *It is clear from above that primary power, rather obligation of the Tribunal, is to dispose of the appeal on merits. The incidental power to remand, is only an exception and should be sparingly used when it is*

not possible to dispose of the appeal for want of relevant evidence, lack of finding or investigation warranted by the circumstances of the case. Remand in a casual manner and for the sake of remand only or as a short cut, is totally prohibited. It has to be borne in mind that litigants in our country have to wait for long to have fruit of legal action and expect the Tribunal to decide on merit. It is, therefore, all the more necessary that matter should be decided on merit without allowing one of the parties before the Tribunal to have another inning, particularly when such party had full opportunity to establish its case. Unnecessary remands, when relevant evidence is on record, belies litigant's legitimate expectations and is to be deprecated. Having regard to aforesaid principle, it is necessary to look into records to see whether there is sufficient material on record to dispose of the issue on merit and there is no need to remand the issue to provide a fresh inning to the revenue."

In this case, the issue is being set aside to follow the ratio laid down by the jurisdictional high courts and therefore there are adequate reasons, which are just and proper in this case to set aside this issue back to the file of AO**.** Further ld. TPO has not carried out the exercise of Comparability analysis, has adopted the Appellant as Tested party instead of claim of the assessee of foreign AEs as tested party and also adopted CUP as most appropriate method against the claim of the assessee as TNMM without given any reasons**.** Therefore, we reject the argument of the LD. AR against setting aside the above stated limited issues with respect to determination of ALP of International Transactions.

40. In the result ground no 5 of the appeal is allowed with above direction.

41. Ground No 6 and 7 are against charging of interest u/s 234D and withdrawal of interest u/s 244A of the Income tax Act. These are consequential provisions and no separate arguments were advanced against and for these grounds. Therefore, they are dismissed.

42. Ground No 8 is against the initiation of penalty proceedings u/s 271(1) (c) of the act which is premature at this stage and no arguments were advanced against or for this ground hence, same is rejected.

43. Ground No 9 of the appeal is regarding non-consideration of revised return filed by the assessee.

44. It was submitted before us that assessee has filed the revised return of income however facts relating to revised return are not coming out from the order of AO or DRP. Ld. DR did not express any objection if the revised return is in accordance with the law. Therefore, if the revised return is filed by the assessee is in accordance with the provisions of section 139(4) of the Income tax Act, we direct ld. AO to consider the same and process accordingly.

45. In the result appeal for AY 2006-07 ITA No. 5882/Del/2010(Assessment Year: 2006-07) is partly allowed.

46. Now we come to appeal no 5816/Del/2011 for A. Y. 2007-08 preferred raising following grounds of appeal.

Grounds for the Assessment Year 2007-08

General

1.1 On facts and circumstances of the case and in law, the Ld. AO erred in passing the assessment order dated December 16, 2010 (the 'Draft assessment order') and the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') erred in passing directions under Section 144(C) of re Income-tax Act, 1961 (the 'Act') confirming the Draft assessment order. On the facts and circumstances of the case and in law, the learned AO erred in assessing the income of the Appellant at Rs.1,02,06,71,340/- as against the returned income of Rs.47,14,28,736/-.

1.2 The Ld. AO erred in proposing and the Hon'ble DRP further erred in confirming the addition of Rs.54,92,42,604/- to the Appellant's returned income of Rs.47,14,28,736/-.

1.3 On the facts and circumstances of the case and in law, the assessment order passed by the Ld. AO under the directions passed by the Hon'ble DRP under section 144C(5) of the Act is wrong and bad in law.

B. Disallowance of depreciation on leased vehicles

2. On the facts and circumstances of the case and in law, the Ld. AO has erred in proposing and the Hon'ble DRP has further erred in confirming the disallowance of depreciation of Rs.44,62, 431/- claimed by the Appellant u/s 32 of the Act on vehicles leased out to customers, by holding that the Appellant is not the beneficial owner of these vehicles.

C. Addition on account of Interest on sticky loans

3. On the facts and circumstances of the case and in law, the Ld. AO has erred in proposing and fee Hon'ble DRP has further erred in confirming the addition of Rs.13,79, 24,461/- towards Merest on sticky loans and advances which was not recognised as income by the Appellant in accordance with the mandatory Prudential Norms issued by the Reserve Bank of India.

D. Disallowance of loss on sale of Repossessed Assets

4. On the facts and circumstances of the case and in law, the Ld. AO has erred in proposing and tie Hon'ble DRP has further erred in confirming the disallowance of Rs.21,64,06,930/- presenting actual loss on sale of repossessed assets, and forming an integral part of the banking financing activity of the Appellant.

E. Transfer Pricing Adjustment

5. On the facts and in the circumstances of the case and in law, the learned Transfer Pricing (hereinafter referred to as 'Ld. TPO') and the Ld. AO have erred in proposing and the DRP has further erred in confirming the arm's length price for international pertaining to availing of intra-group services, i.e. Consulting, Administrative and at Rs NIL under section 92CA(3) as against the sum of Rs.17, 94,92, 688/- determined by the Appellant.

6. That the Ld. TPO and the Ld. AO erred on facts and in law in alleging and the Hon'ble DRP erred by not considering appropriate to interfere with the order of the Ld. TPO and in confirming

a) that no economic and commercial benefits were derived by the Appellant from receipt of the intra group services and that the Appellant failed to furnish evidences to demonstrate that the services were actually rendered by the Associated Enterprises (AEs), not appreciating the details, explanations and evidences submitted by the Appellant;

b) that services received from the AEs were incidental or duplicate in nature, not appreciating that the services were not similar to those performed in-house and were essential for Appellant's business operations;

c) that all intra-group services were in the nature of shareholder and stewardship activities, ignoring the fact that all the shareholder and stewardship activities were separately identified by the AEs and no amount for such activities had been paid by the Appellant;

d) that the Appellant failed to satisfactorily explain the basis of allocation of expenses, not appreciating the details submitted by the Appellant even though the Hon'ble DRP has itself observed that the allocation keys for some of the services were supported by evidence.

7. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in holding that analysis of rationale and justification of each allocation key adopted by the appellant and supporting evidences were absent, not appreciating the justification, details arc explanations submitted by the Appellant.

8. On the facts and in the circumstances of the case and in law, the Ld. TPO and the Ld. AO in rejecting and the Hon'ble DRP further erred in confirming the rejection of the arm's price computation undertaken by the Appellant, on the ground that foreign comparables and foreign AEs were considered for the arms length analysis.

9. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in not that the AEs have lodged their tax return in India on the taxable income derived re Appellant.

F. Levy of Interest under Section 234Dof the Act

10. On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest of Rs.3,48,01,780/- under section 234D of the Act as a consequence to the above disallowances by the Hon'ble DRP.

G. of Interest granted under section 244A of the Act

11. On the facts and circumstances of the case and in law, the Ld. AO erred in withdrawing interest of Rs 2.40 56.534 granted to the Appellant under section 244A of the Act as a to the above disallowances confirmed by the Hon'ble DRP.

H. Initiation of penalty proceedings under section 271(1)(c) of the Act

12. On the facts and circumstances of the case, the ld AO erred in initiating penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of the income, without appreciating the fact that the Appellant has made full disclosures in respect of its claims and did not furnish any inaccurate particulars of its income.

47. Ground No 1 is general and supportive in nature, no specific arguments were advanced for, and against this ground, and therefore it is dismissed.

48. Ground no 2 is against the disallowance of depreciation on leased vehicles amounting to Rs 2,44,62,431/-.

49. Both the parties agreed that this ground is identical to ground no 2 in the appeal of the assessee for AY 2006-07 disposed of by this common order. Therefore following our findings given in AY 2006-07 in ground no 2 of that appeal, we restore this issue back to the file of AO to decide the issue of claim of depreciation of Rs. *2,90,56,780/-* u/s 32 of the Act in view of the decision of Honourable Supreme Court in case of ICDS Ltd. In the result ground, no .2 of the appeal is allowed accordingly.

50. Ground No 3 of the appeal is against addition of Rs 13,79,24,461/- on account of interest on stocky loans which was not recognized as income of the assessee.

51. Both the parties agreed that this ground is identical to ground no 3 in the appeal of the assessee for AY 2006-07 disposed of by this common order. Therefore, following our findings in AY 2006-07 in ground no 2 of that appeal where we, following the decision of coordinate bench in case of the assesse for AY 2003-004, directed the AO to delete the addition. Similarly, for this year also we direct AO to delete the addition of Rs. *Rs. 13,7924,461/-* towards interest of sticky loans and advances, which was not recognized as income by the appellant in accordance with the mandatory prudential norms issued by the Reserve Bank of India. In the result ground no 3 of the appeal is allowed.

52. Ground No 4 of the appeal is against disallowance of Rs 21,64,06,930/- on account of actual loss on sale of repossessed assets.

53. Both the parties agreed that this ground of appeal is identical to ground no 4 of the appeal of the assessee in AY 2006-07. Therefore, following our findings in ground no 4 of the appeal of the assessee which is also disposed of by this common order, we respectfully following the decision of Hon'ble Delhi High Court, allow the claim of the assessee of loss on account of sale of repossessed vehicle and delete the disallowance made by AO and confirmed by DRP of Rs. 21,64,06,930/-. Ground No.4 is allowed.

54. Ground No 5 to 9 of the appeal are against the Transfer pricing adjustments made by the TPO and confirmed by DRP against the Intra Group service charges of Rs 17,94,92,688/- where the TPO has determined ALP of the same at NIL.

55. Both the parties agreed that ground No 5 of this appeal is also identical in facts and circumstances as ground no 5 of the appeal of the assessee for AY 2006-07. We have already decided the ground no 5 of the appeal for AY 2006-07 by this common order. We have set aside the issue of TP adjustments back to the file of TPO/AO to determine the ALP of these transactions. Therefore, following our decision we set aside this ground of appeal on this score and remit the matter to the file of AO/TPO for deciding it in conformity with above direction.

56. Further, as ground no 6 to 9 of that appeal are also intertwined with ground no 5 of the appeal of the assessee for this year. Because of that reason , we also send them back to the file of the AO for deciding them afresh, as in the original assessment TPO has determined ALP at Nil only on the basis of qualitative test and not on the basis of comparability and availability of data.

57. In the result ground, no 5 to 9 are allowed accordingly with directions.

58. Ground No 10 and 11 are against the interest charged u/s 234D of the act and withdrawal of interest allowed u/s 244A of the act respectively. No separate arguments against and for of them are raised before us and as they are consequential in nature, we dismiss them.

59. Ground No 12 of the appeal is against the initiation of penalty u/s 271(1) (c) of the Act. This ground is premature and therefore it is dismissed.

60. In the result, appeal of the assessee for AY 2007-08 ITA No 5816/Del/2011 is partly allowed.

61. Now we come to appeal no 6282/Del/2012 for A. Y. 2008-09 preferred raising following grounds of appeal:-

Grounds of appeal for Assessment Year 2008-09

A. General

1.1 On facts and circumstances of the case and in law, the Ld. DCIT erred in passing the assessment order dated December 19, 2011 ('Draft assessment order') and the Hon'ble Dispute Resolution Panel ('DRP') erred in passing directions under section 144(c) of the Income Tax Act, 1961 (the 'Act'), confirming the Draft Assessment Order, subject to TP adjustment. On the facts and circumstances of the case and in law, the Ld. DCIT erred in assessing the income of the Appellant at Rs.49,02,19,720/- as against the revised returned income declaring a loss of Rs.21,00,37,579/-.

1.2 The Hon'ble DRP further erred in confirming the addition of Rs.700,257,300/- to the Appellant's returned income of (Rs.21,00,37,579).

1.3 On the facts and circumstances of the case and in law, the assessment order passed by the Ld. DCIT under the directions passed by the Hon'ble DRP under section 144C(5) of the Act is bad in law.

B. Transfer pricing Adjustment

2.1 On the facts and circumstances of the case and in Law, the Learned Transfer Pricing Officer (TPO1) and the Learned AO have erred in proposing and the Hon'ble DRP has further erred in confirming the arm's length price for international transactions pertaining to availing of inter-group services, i.e. Consulting, Administrative and IT Services at Rs.1,79,29,000/- under Section 92CA(3) as against the sum of Rs.35,85,80,010/- determined by the appellant.

2.2 That on facts and in law, the DRP and the TPO erred in presumptively holding that the revenue authorities are empowered to question the commercial decision of the Assessee and in not appreciating the jurisprudence that the DRP and the AO/ TPO cannot go beyond their powers to question the business decision of the company.

2.3 That on facts and in law, the DRP has erred in confirming that TPO has discharged his statutory onus by establishing that the conditions specified in clause (a) to (d) of Section 92C (3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price himself.

2.4 On the facts and circumstances of the case and in law, the DRP and AO/TPO have erred in determining the arm's length price for international transactions pertaining to availing of intra-group services, i.e. consulting, administrative and IT services at ad-hoc cost of only 5% of the total cost thereby making / upholding adjustment of Rs.34,06,51,010/-

without applying /following any prescribed method in complete disregard to transfer pricing regulations and judicial precedence.

2.5 That on the facts and circumstances of the case and in law, the DRP and AO/TPO have erred in observing that out of the total international transaction of intra-group services received by the appellant, ad-hoc cost of 5% can only be allowed to the Appellant despite acknowledging that services have been received by the Appellant and stewardship cost has not been allocated.

2.6 That on the facts and circumstances of the case and in law, the DRP and AO/TPO have erred by not appreciating the business model of the Appellant and by observing that:

a. That intra-group services could have been availed by the Appellant locally in local currency.

b. That the benefit of intra-group services is difficult to identify

c. That all services claimed by the Appellant have not passed the benefit test from the point of recipient.

2.7 That on the facts and circumstances of the case and in law, the DRP and AO/TPO have erred in holding that the rejection of the arm's length price computation undertaken by the Appellant, on the ground that foreign comparables and foreign associate enterprises were considered for the arm's length analysis.

2.8 That on the facts and circumstances of the case and in law, the DRP and AO/TPO have erred in not appreciating that the AEs have lodged their tax return in India on taxable income derived from the Appellant and there was no intention/occasion whatsoever on the part of the Appellant to shift profits outside India.

C. Disallowance of depreciation on leased vehicles

3. On the facts and circumstances of the case and in law, the Ld. DCIT has erred in proposing and the Hon'ble DRP has further erred in confirming the disallowance of depreciation of Rs.12,74,54,846/- claimed by the Appellant u/s 32 of the Acton vehicles leased out to the customers, by holding that the Appellant is not the beneficial owner of these vehicles.

D. Addition on account of interest on sticky loans

4.1 On the facts and circumstances of the case and in law, the Ld. DCIT has erred in proposing and the Hon'ble DRP has further erred in confirming the addition of Rs.32,94,40,444/- towards interest on sticky loans and advances which was not recognized as income by the Appellant in accordance with the mandatory Prudential Norms issued by the Reserve Bank of India.

4.2 The Ld. DCIT grossly erred in rejecting and the Hon'ble DRP has further erred in confirming the rejection of Appellant's alternate submission that write-off of Rs.13,79,24,461 in respect of interest on sticky loans and advances of which the principal amount itself had been written-off during the year ended March 31, 2008 should be allowed as deduction under section 36(1)(vii) read with section 36(2) of the Act.

E. Levy of interest under Section 234D of the Act

5. On the facts and circumstances of the case and in law, the Ld. DCIT erred in levying interest of Rs.22,89,108 under section 234D of the Act as a consequence to the above disallowance confirmed by the Hon'ble DRP

F. Withdrawal of interest granted under Section 244A of the Act

6. On the facts and circumstances of the case and in law, the Ld. DCIT erred in withdrawing interest of Rs.77,55,372/- under section 244A of the Act as a consequence to the above withdrawal confirmed by the Hon'ble DRP.

G. Initiation of penalty proceedings under Section 271 (1)(c) of the Act

7. On the facts and circumstances of the case and in law, the Ld. DCIT erred in initiating proceedings under Section 271(1)(c) of the Act for furnishing inaccurate particulars of the income, without appreciating the fact that the Appellant has made full disclosure in respect of its claims and did not furnish any inaccurate particulars of its income.

62. Ground No 1 is general and supportive in nature and no specific arguments were advanced for and against this ground therefore same is dismissed.

63. Ground No 2 is against the transfer pricing adjustment made by TPO on account of various Intra Group services amounting to Rs 35,85,80,010/- which of which ld. TPO determined ALP at Nil and DRP has determined the ALP at 5 % of Rs 35,85,80,010/- i.e. Rs. 1,79,29,000/-.

64. Both the parties agreed that ground No 2 of this appeal is also identical in facts and circumstances as ground no 5 of the appeal of the assessee for AY 2006-07. We have already decided the ground no 5 of the appeal for AY 2006-07 by this common order. We have set aside the issue of TP adjustments back to the file of ld. TPO/AO to simply determine the ALP of this international transaction. Therefore following our decision we set aside this ground of appeal on this score and remit the matter to the file of AO/TPO for deciding it in conformity with our above direction. Further, the issues raised regarding consideration of foreign comparables for determining ALP are also intertwined with transfer pricing issues of the appeal of the assessee for this year. Because of that reason , we also send them back to the file of the AO for deciding them afresh, as in the original assessment TPO has determined ALP at Nil only on the basis of qualitative test and not on the basis of comparability and availability of data. In the result ground, no 2 is allowed accordingly with directions.

65. Ground no 3 of the appeal is against the disallowance of depreciation on leased vehicles amounting to Rs 12,74,54,846/- .

66. Both the parties agreed that this ground is identical to ground no 2 in the appeal of the assessee for AY 2006-07 disposed of by this common order. Therefore following our findings given in AY 2006-07 in ground no 2 of that appeal we also restore this issue back to the file of AO to decide the issue of claim of depreciation of Rs.12,74,54,846/- u/s 32 of the Act in view of the decision of Honourable Supreme Court in case of ICDS Ltd. In the result ground, no .3 of the appeal is allowed with that direction.

67. Ground No 4 of the appeal is against addition of Rs 32,94,40,444/- on account of interest on stocky loans which was not recognized as income of the assessee.

68. Both the parties agreed that this ground is identical to ground no 3 in the appeal of the assessee for AY 2006-07 disposed of by this common order. Therefore, following our findings in AY 2006-07 in ground no 2 of that appealand following the decision of coordinate bench in case of the assesse for AY 2003-004, we direct the AO to delete the addition of Rs. *Rs. 32,94,40,444/- towards* interest of sticky loans and advances which was not recognized as income by the appellant in accordance with the mandatory prudential norms issued by the Reserve Bank of India. In the result ground no 4 of the appeal is allowed.

69. Ground No 5 and 6 are against the interest charged u/s 234D of the act and withdrawal of interest allowed u/s 244A of the act respectively. No separate arguments against and for of them are raised before us and as they are consequential in nature, we dismiss them.

70. Ground No 7 of the appeal is against the initiation of penalty u/s 271(1) (c) of the Act. This ground is premature and therefore it is dismissed.

71. In the result, appeal of the assessee for AY 2008-09 ITA No 6282/Del/2012 is partly allowed.

72. In nutshell all the above three appeals of the assessee for AY 2006-07 to 2008-09 are partly allowed.

(Order Pronounced in the Court on 02/05/2016)

-Sd/-
(A.T.Varkey)
JUDICIAL MEMBER

-Sd/-
(Prashant Maharishi)
ACCOUNTANT MEMBER

Dated: 02/05/2016
Ajay keot

Copy forwarded to:

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

ASSISTANT REGISTRAR