

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI**

Before Sh. N. K. Saini, AM and Smt. Beena Pillai, JM

IT(TP)A No. 5886/Del/2012 : Asstt. Year : 2008-09

Knorr-Bremse India Pvt. Ltd., 14/6, Mathura Road, Faridabad	Vs	Assistant Commissioner of Income Tax, Circle-1, Faridabad
(APPELLANT)		(RESPONDENT)
PAN No. AAACK4739P		

**Assessee by : Sh. Ved Jain, Adv. & Sh. Ashish, CA
Revenue by : Sh. Amrendra Kumar, CIT DR &
Sh. Subtra Kant Sahu, Sr. DR**

Date of Hearing : 24.06.2016	Date of Pronouncement : 23.08.2016
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ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 17.09.2012 passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Following grounds have been raised in this appeal:

“Based on the facts and circumstances of the case, Knorr-Bremse India Private Limited (here-in-after referred to as the 'Appellant') respectfully craves leave to prefer an appeal under section 253 of the Income-tax Act, 1961 ('Act') against the assessment order issued under section 143(3) read with section 144C(13) of the Act by Asstt. Commissioner of

Income-tax , Circle 1, Faridabad, ("here-in-after referred to as 'learned AO') in pursuance of the directions issued by Dispute Resolution Panel -I New Delhi ('here-in-after referred to as "DRP'). The appeal is preferred on the following grounds:

On the facts and in the circumstances of the case and in law, the learned AO based on directions of DRP:

General

1. erred in assessing the total income at Rs. 153,342,630/- as against total income of Rs. 124,680,920/- computed by the Appellant.

2. The AO, based on the order passed by the Additional Commissioner of Income Tax, Transfer Pricing Officer-I(3) ('here-in-after referred to as 'learned TPO') under section 92CA(3) of the Income Tax Act, 1961 ("the Act"), erred on the facts and circumstances of the case and in law in making adjustment of Rs. 34,967,980 to the total income of the appellant (before providing credit of Rs. 6,306,274, pursuant to DRP's directions, on account of the professional consultancy charges and management fees suo-moto disallowed by the Appellant in the computation of income) under section 92CA(4) of the Act.

The AO made the aforesaid adjustment on account of adjustment in arm's length price of the international transaction involving receipt of professional consultancy services, management services and the alleged international transaction

of payment of SAP consultancy charges ('here-in-after referred to as the 'impugned transactions').

Adjustment related to SAP Implementation charges

3. The TPO erred in determining the arm's length price ("ALP") of an alleged international transaction "SAP consultancy charges and other expenses" as NIL and directing the AO to make an adjustment of Rs. 3,539,236 to the income of the Appellant on account of this alleged international transaction by-

- i. ignoring that the Appellant did not enter into any such transaction during the year;*
- ii. ignoring that no such transaction was referred to him under section 92CA(1);*
- iii. acting with a pre-occupied mind to make similar adjustment as was done in the case of the appellant for AY 2007-08, and possibly assuming some other transaction and amount to be the "SAP consultancy charges and other expenses".*

4. The DRP erred in rejecting the objections filed by the Appellant and confirming the adjustment made by the TPO in relation to the alleged international transaction of "SAP consultancy charges and other expenses".

5. The Learned AO erred in facts and in law in making an adjustment of Rs. 2,123,541 to the total income of the appellant on account of 60%

depreciation on the alleged "SAP consultancy and other expenses'" by ignoring the facts.

Segregation of closely linked transaction and rejection of the TNMM

6. (a) erred in rejecting the Transactional Net Margin Method ('TNMM'), wherein closely linked; transactions were benchmarked together by the Appellant and instead adopting an approach of segregating closely linked transactions for the purpose of determination of the arm's length price ("ALP") of the following international transactions of the Appellant as NIL;

- i. Receipt of professional consultancy services;*
and
- ii. Receipt of management support services.*

(b) erred in not appreciating that receipt of management support services and professional consultancy services are closely linked to the overall business activities of the appellant and erred in analyzing the transaction separately for the determination of ALP.

Adopting the Comparable Uncontrolled Price method as the most appropriate method

*7. erred in upholding the adoption of Comparable Uncontrolled Price ('CUP') method as the most appropriate method for determining the arm's length price in respect of the appellant's international transaction **without identifying any***

comparable uncontrolled transaction(s) for the computation of the ALP.

8. erred in law by upholding the determination the ALP of the international transaction as NIL without following the manner of applying the CUP method prescribed under Rule 10B(1)(a) of the Income Tax Rules, 1962.

Transfer pricing adjustment based on incorrect assumptions

9. erred in passing an order that is perverse in law when he ignored the relevant submissions, information and documents provided by the Appellant to substantiate the receipt of services, and based on a preoccupied mind reached at an inappropriate conclusion that the arm's length value of the impugned transactions should be Nil.

*10. erred in questioning the commercial rationale of the legitimate business expenses incurred by the taxpayer and not restricting the scope of assessment under section 92CA to determining the **arm's** length price of the international transaction by adopting one of the prescribed methods only.*

11. erred in facts and in law by concluding the following, without providing any material on record to substantiate the basis of concluding so-

i. certain accounting, financial support and controlling services rendered by the AEs are at best duplicate services for which no separate payment needs to be made.

ii. certain IT services rendered by the AE can be easily outsourced in India at lower cost, and that no independent party would pay for such services.

iii. certain Human Resources services rendered by the AE are shareholder activity for the benefit of the group or incidental services.

iv. no independent enterprise would have made such payments for similar services rendered by another enterprise.

Benefit of +/-5%

12. Without prejudice to above grounds, erred in not providing the benefit of +/-5% under proviso to Section 92C of Act for purposes of computing the arm's length price in respect of international transaction;

The above grounds are independent and without prejudice to each other unless mentioned specifically.

The Appellant prays for leave to add, alter, amend, the grounds mentioned herein above at or before the time of hearing.”

3. Ground No. 1 is general in nature, Ground Nos. 6 & 12 were not pressed so these grounds do not require any comments on our part.

4. Vide Ground Nos. 2 & 7 to 11, the grievance of the assessee relates to the addition on account of professional consultancy charges and management fees amounting to Rs.3,49,67,980/- and adjustment of Rs.35,39,236/- on account of adjustment in Armø Length Price pertaining to the international transaction ÷SAP consultancy charges and other expensesø.

5. Facts of the case in brief are that the assessee is wholly owned subsidiary of Knorr-Bremse Asia Pacific (holding) Ltd. and deals in air brake sets of passenger cars & wagon coaches, shock absorbers for passenger cars & locomotives, distributor valves (DV), computer control brake system, tread break unit, brake accessories and other related products. The assessee also imported certain brake systems for distribution in India to the domestic customers. As the assessee entered into international transactions with Associated Enterprises (AEs) within the meaning of Section 92B of the Act, the AO referred the case to the Transfer Pricing Officer (TPO) as per the provisions of Section 92CA(1) of the Act. Subsequently, the TPO passed the order u/s 92CA(3) of the Act on 31.10.2011 by proposing an adjustment of Rs.3,63,83,675/- attributable to difference in Armø Length Price of the international transactions entered

by the assessee with AEs. The TPO noticed that various international transactions undertaken by the assessee with its AEs were as under:

No.	Nature of Transaction	Amount (Rs, in Crores)		Method of Benchmarking
		Received/ Receivable	Paid/ Payable	
1	Purchase of raw material & consumables		193,900,264	Transactional Net Margin Method ('TNMM')
2	Sale of finished goods	131,609,573		
3	Purchase of finished goods		100,980,196	
4	Import of capital items		55,345,423	
5	Provision of SAP Development Support Services	12,787,704		
6	Provision of Design Assistance Services	3,492,000		TNMM
7	Provision of Technical Assistance Services	1,727,455		
8	Receipt of Management and other services		16,637,947	
9	Receipt of Professional Consultancy Services		16,206,492	
10	Reimbursement of Expenses		3,539,236	
11	Recovery of Expenses	18,676,064		Comparable Uncontrolled Price Method ('CUP')
12	Receipt of materials / samples and technical know-how services free of cost		NIL	Arm's length compliance as per Section 92(3) of the Act
13	Supply of materials / samples on free of cost basis	NIL		

6. The TPO also noticed that the assessee in its TP study had selected TNMM as most appropriate method for benchmarking the international transactions and had divided its operation into manufacturing and distribution segments. The TPO also pointed out that the assessee in the manufacturing segment earned margin of 9.26%, selected five comparable companies and by using three year financial data computed the margin of the comparable at 8.40%. The TPO also pointed out that the assessee for distribution segment computed the tested party margin at 15.21% as compared to average margin of six comparable companies using three years financial data at 3.96% and claimed that the major international transactions were at Arm's Length Price. For reimbursement of expenses, the assessee stated that those were actual cost incurred by group companies and the same were reimbursed to the group companies on the basis of actual cost. The assessee linked the payment of professional consultancy to the manufacturing segment and benchmarked under TNMM. As regards to the import of capital items, the assessee stated that the depreciation charge with respect to those items was included as operating expenses in respective manufacturing/distribution segment and the transaction had been benchmarked under TNMM as the most appropriate method. The assessee also claimed the

transaction relating to payment of License fees in advance in the nature of advance which had not been bench marked. As regards to the payment of SAP charges, it was stated that the said amount was with respect to provision of training charges in connection with SAP through employees of the assessee and those transactions had been included in capital work-in-progress which did not impact the income/expenses of the assessee. Therefore, this transaction had not been bench marked. The TPO noticed that the assessee had made certain payments to its AE under the following heads:

<i>Professional consultancy</i>	<i>Rs.16,206,492</i>
<i>Management fee for support services</i>	<i>Rs.16,637,947</i>
<i>Purchase of raw materials and consumables</i>	<i>Rs.193,900,264</i>
<i>Purchase of finished goods</i>	<i>Rs.100,980,196</i>
<i>Import of capital items</i>	<i>Rs.55,345,423</i>
<i>Total</i>	<i>Rs.383,070,322</i>

7. The assessee aggregated the above said transactions under TNMM and stated that as this transaction was closely linked with other transactions, the same were aggregated under TNMM. However, the TPO was of the view that each class of transactions had to be examined independently having reference to the Arm's Length Principle by applying the most appropriate method and the assessee cannot choose

method which does not provide the most reliable measure of an arm's length price in relation to the international transaction. The TPO was also of the view that the TNMM cannot actually prove that the services have been received and that this method certainly does not put a value to the services, it only compares the margin of tested party with other such comparables engaged in similar transactions. Therefore, the TNMM is not a most reliable method to measure the Arm's Length Price of the international transaction for receipt of the services. He, therefore, analyzed the transactions separately under CUP method and asked the assessee to submit necessary documents in respect of each of the transaction entered into by the assessee. The TPO was not satisfied with the explanation given by the assessee and TPO held that the assessee has not been able to demonstrate that an independent party would have made such payments. The TPO also held that the assessee had not been able to substantiate that the payment for these services has actually increased the profits of the assessee and that the assessee should have been able to show that the level of increase in profit, post the services agreement in April, 2006 has increased. The TPO held that there was actually no basis for the assessee to make a claim that its clientele has actually

increased pursuant to the payment of Business Service. He accordingly proposed the following additions:

<i>Professional consultancy</i>	<i>16,637,947</i>	<i>Debited to Profit & Loss Account</i>
<i>Management fee for support services</i>	<i>16,206,492</i>	
<i>SAP consultancy charges and other expenses</i>	<i>3,539,236</i>	<i>Capitalized in Fixed asset schedule</i>
<i>Total</i>	<i>3,63,83,675</i>	

8. On the basis of the order of the TPO the AO passed draft assessment order by making an addition of Rs.3,28,44,439/- on account of professional consultancy and management fee for support services. However, the AO in respect of SAP consultancy charges proposed by the TPO allowed 60% depreciation and disallowed a sum of Rs.21,23,541/- (60% of SAP consultancy charges and other expenses amounting to Rs.35,39,236/- paid to AEs).

The assessee being aggrieved by the draft assessment order filed an application before the Id. DRP and submitted that the TPO had ignored all the facts and evidences submitted by the assessee company. It was further stated that the TPO failed to provide any instance where a service provider was sending its employees, incurring travel costs and other overheads and still the third party service provider did not pay anything. It was further stated that the TPO while applying CUP method, instead of identification of the price

charged or paid for property transferred or services provided in comparable uncontrolled transaction, has taken a view that no independent person would be making such a payment, without analyzing whether the payment was at Arm's Length or not.

9. The Id. DRP after considering the submissions of the assessee observed that intra group services are considered on the following broad parameters:

- “1. Evidence that services have been rendered.*
- 2. Whether the assessee has benefitted from them.*
- 3. Are they duplicate in nature?*
- 4. Whether the assessee would have paid the same charges to an unrelated party?”*

The Id. DRP pointed out that the TPO had considered the reply of the assessee and concluded as under:

“The assessee has stated that these services payments have contributed to the improved client services and profitability of the assessee. The assessee has however not been above to substantiate that the payment for these services has actually increased the profits of the assessee. The assessee should have been able to show that the level of increase in profit post these services agreement in April 2006 has increased. It has been unable to do that. The assessee has only mentioned that the gross profit has increased. Regular increases in profits are a normal incidence in business. Besides that, it has

been pointed out earlier that the payment of these services is actually a payment for services. Therefore, there is actually no basis for the assessee to make a claim that its clientele have actually increased pursuant to the payment of 'Business Service'."

10. The ld. DRP agreed with the reasoning of the TPO and rejected the objection raised by the assessee. Thereafter, the AO passed the impugned order and made the addition of Rs.3,28,44,439/- on account of professional fees and management fee for support services and also made the addition of Rs.21,23,541/- by computing depreciation @ 60% on account of professional consultancy charges paid on account of management fee for support services.

11. Now the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee during the course of hearing before the TPO, explained each and every issue raised by him and submitted not only explanation but also evidences in support of the services availed by it on account of professional as well as management from its AEs. But the TPO despite the comprehensive details and evidences still drew adverse inference and proposed the impugned adjustment. It was

further submitted that the assessee again before the ld. DRP clarified each and every issue on which the TPO had drawn adverse inference but the ld. DRP not only ignored the explanation and evidences but also clarification on each and every issue, given by the assessee in respect of both the services. A reference was made to page nos. 44 to 56 of the appeal folder filed by the assessee in respect of the management support services. It was contended that the assessee by availing the services from the AE was benefited as per following details:

- *Increase in Exports*

The exports increased by 196% in March 2007, increased by 59% in March 2008 and further increased by 50% in March 2009, thus, resulting in overall increase of 606% over a period of 3 years. Therefore, the benefit of the professional services accrued to the assessee over a period of times resulting in increase in exports.

- *Increase in Gross Margin*

The gross margin of the assessee from the manufacturing segment also increased.

<i>Year ending</i>	<i>Gross Margin (INR)</i>
<i>Mar-07</i>	<i>209,961,271</i>
<i>Mar-08</i>	<i>329,595,310</i>
<i>Mar-09</i>	<i>384,734,647</i>

The assessee submits that it is unable to understand that for the services rendered in relation to improvement of production processes and development of better procedures to make the products sellable in international markets, what other benefits should have accrued to the assessee.ö

12. The Id. Counsel for the assessee submitted that the assessee by merely spending Rs.1,62,06,492/- was able to achieve an increase in exports of Rs.7,22,50,646/- in just one year and earned a margin of 9.26% on the operating revenue and therefore, by virtue of increase in exports alone, the benefit accruing to the assessee in just two years was at Rs.68,34,911/- which was effectively 42% of the cost of the services. It was pointed out that an increase in gross margin of Rs.11,96,34,039/- in financial year 2007-08 and Rs.5,51,39,337/- in financial year 2008-09 further substantiated that the decision of availing the services was correct and the increase in gross margin was joint result of a better and transparent vendor policy which reduced the cost of purchases and increased the sales in domestic business due to better quality. It was further submitted that in the light of the quantum of benefits accruing to the assessee, the decision of paying for the services was for business expediency and the AO was not justified in considering the cost of the services as Nil. It was also submitted that a similar issue has

already been adjudicated by the Honorable Punjab & Haryana High Court in assessee's own case in ITA No.182/2013 for the preceding assessment year 2007-08 and the observation given therein are in favour of the assessee (copy of the said order dated 06.11.2015 was furnished which is placed on record). It was also pointed out that the cost paid by the assessee in relation to the services under consideration was nothing but the cost for improvement of its production processes and had it availed such services from third party, it would have incurred almost the same costs and if the assessee would have engaged its own employees to do such work, it would have paid them atleast the specific cost attributable to such services. It was stated that the AE, in fact, was merely recovering the cost from the assessee and had not earned any mark-up. Therefore, the observation of the TPO that there was no increase in the profit of the assessee by making the payment for these services was not correct because there was a regular increase in the gross profit of the assessee. It was stated that the assessee had clearly established that there had been any increase of over 600% in the export sales from 2007 to 2009 and gross margin of the assessee had also doubled during this period and the said increase of 600% in exports and 100% in the profits, could not have been said to be normal by any stretch of

imagination as alleged by the TPO. It was accordingly submitted that the expenses incurred by the assessee for procuring the services were for the business exigency and were allowable. The reliance was placed on the decision of the ITAT Hyderabad Bench in the case of TNS India Pvt. Ltd. in ITA No. 944/Hyd/2007, ITA No. 194/Hyd/2008, ITA No. 74/Hyd/2008 and ITA No. 793/Hyd/2009 reported at 2014(2) TMI 894.

13. In his rival submissions the ld. DR reiterated the observations made by the authorities below and strongly supported the impugned order passed by the AO. It was further submitted that the assessee made the payments for the services to its AE but no cost benefit analysis or independent benchmarking of the transaction was done by the assessee. It was further submitted that as per clause 7.29 of OECD Transfer Pricing Guidelines dated 22.07.2010 issued for determining the Arm's Length Price in relation to intra-group services, the matter should be considered both from the perspective of the service provider and from the perspective of the recipient of the service and in this respect, the relevant considerations include the value of the service to the recipient and it is to be seen that how much charge would have been made and accepted between independent

enterprises in comparable circumstances, as well as the costs to the service provider. It was further submitted that it is necessary to consider not only the minimum impact of a service but also its long term effect, bearing in mind that some costs will never actually produce the benefits that were reasonably expected when they were incurred and the taxpayer should have been prepared to demonstrate the reasonableness of its charges to AEs in such cases. The Id. DR further submitted that in an Arm~~ø~~s Length transaction, an independent enterprises normally would see to charge for services in such a way as to generate profit rather than providing the services merely at cost and that the economic alteration available to the recipient of the services also needs to be taken into account in determining the Arm~~ø~~s Length charge. Therefore, it need not always be the case that an Arm~~ø~~s Length Price will result in a profit for AE i.e. performing an intra-group service. It was further submitted that the AO was justified in making the addition on the recommendation of the TPO which were rightly confirmed by the DRP. The reliance was placed on the following case laws:

- *M/s Gem Plus India Pvt. Ltd. Vs ACIT reported at (2010) TII 55 ITAT (Bang) (TP)*
- *Cranes Software International Ltd. Vs DCIT (2014) 52 Taxmann.com 19 (Bang. Trib.)*

- *CIT Vs M/s Cushman and Wakefield in ITA 475/2012 order dated 23.05.2014*
- *Bombardier Transportation India Pvt. Ltd. Vs DCIT in ITA No. 1626/Del/2015 order dated 04.11.2015*

14. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is not in dispute that the assessee made the payments to its AE for the services on account of professional consultancy management fee for support services. The assessee also purchased raw material and consumable, finished goods and imported capital items. The TPO proposed the adjustment on account of Armø Length Price in professional consultancy and management fee. The claim of the assessee was that the service charges were paid in respect of the services availed from the AE which were the actual expenditure incurred by the AE and no element of profit was involved. The assessee furnished the various details relating to segmental account, detail of recovery of expenses, valuation of capital assets purchased from the AE, justifications of technical assistance service, management and other service and professional consultancy services (copy of which are place at page nos. 251 to 365 of the assessee's paper book). The assessee explained the various issues raised by the TPO during the course of hearing

before him and furnished the evidences in support of professional as well as management services availed by it from its AE which is evident from the various documents placed in the assessee's paper book at page nos. 44 to 168.

15. An identical issue was a subject matter of adjudication before the Honorable Jurisdictional High Court in assessee's own case in ITA No. 182/2013 for the assessment year 2007-08 wherein vide order dated 06.11.2015, their lordships in paras 20 to 23 observed as under:

“20. A reading of the orders of the TPO, the DRP and of the Tribunal makes it clear that one of the main reasons for not accepting the assessee's case was that the assessee had not been able to substantiate that the payment for the services had actually increased its profits. As we noted earlier, the TPO, in fact, further held that the assessee should have been able to show the level of increase in profit post the said transactions.

21. We are unable to agree with this finding. The answer to the issue whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. This would be contrary to the established manner in which business is conducted by people and by enterprises. Business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do result in a loss. The question whether the

decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into bona fide or not or whether it was sham and only for the purpose of diverting the profits.

22. The TPO observed that regular increase in profits is a normal incidence in business. This is entirely incorrect. All businesses are not profitable. All decisions do not enhance profitability. Losses are also an incidence of business. Many are the failed business ventures of people and enterprises.

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."

16. From the above observation it is clear that as to 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*, that is the transaction itself and the profit is only a possibility of the desired result with or without the aid of international transaction. In the present case, the export of the assessee increased by 196% for the year ending 31.03.2007 and gross margin at Rs.20,99,61,271/-. It further increased by 59% in March 2008 and the gross margin to Rs.32,95,95,310/-. Thereafter, for the year ending on 31st March, 2009, the increase in export turnover was 50% while the gross margin increased to Rs.38,47,34,647/- which clearly shows that the assessee was benefited by getting the services from its AE. In the present case, the expenses incurred by the assessee for availing the services were at Rs.1,62,06,494/- while the increase in the export was of Rs.7,22,50,646/-. Since the assessee achieved increase in the export as well as in gross margin, therefore, the decision of availing the services from the AE was correct decision for betterment of the business. In the present case, nothing was brought on record to substantiate that the assessee incurred the expenses on the services received from the AE at a higher rate than the similar facilities available from other persons. The submissions of the assessee that the AE had not

earned any mark-up and the cost paid by the assessee in relation to these services was nothing but the cost of improvement of its production processes and what had been incurred was almost the same which could have been incurred for availing the similar services from a third party had not been rebutted. The Honorable Punjab & Haryana High Court in the aforesaid referred to case of the assessee vide para 23 of the order dated 06.11.2015 held that 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.

17. In the present case, the assessee had established that there had been an increase in the export sales from the financial year 2007-08 to 2009-10 and the gross margin of the assessee had also increased and almost doubled during that period. The assessee had maintained the minutes of the meeting to substantiate the involvement of Mr. George Moll an employee of the AE and the services provided by him (copy of the said minutes was furnished by the assessee before the TPO). The assessee company has explained the services it has obtained from its Associated Enterprises in respect of its projects with Indian Railways and Metro. It was explained that the assessee company does not have any in-

house research team and does not have the requisite knowhow and accordingly sought support of its Associated Enterprises in respect of following:-

- a) To avoid derailing of rails which was a challenge being faced by the India Railway.
- b) Oil free compressor project which it has obtained from its Associated Enterprises for Indian Railways.

The assessee company has also submitted evidences substantiating receipt of localization support and the allocation of the cost. Therefore, the internal data was very helpful particularly when the allocation key was based on cost accounting system. The assessee explained that there was strong co-relation between the creation of the profit and the time spent by the employees of the AE. The assessee also furnished task sheets to the TPO to substantiate that the services were provided by the AE with a vision to decrease direct purchases cost of the assessee which is evident from the submissions of the assessee dated 04.08.2011 (copies of which are placed at page nos. 76 to 166 of the assessee's paper book). The employees of AE, namely Mr. George Moll and Ms. Rita Ricken helped the assessee in material development, development of the product as per European standard, maintenance of CNG machines and technical support to the assessee. For that purpose the AE charged only

the salary and related costs of the employees but no mark-up had been charged by the AEs on the said transaction. Therefore, eventually the payment made by the assessee traveled back to the employees who were a third party. As such, the transaction was in the nature of reimbursement of expenses. In the present case, the AE provided the employees to the assessee without any charge or profit accruing to the AE itself. Therefore, the expenses incurred by the assessee were its business expenses. It is well settled that the transfer pricing provisions can be inferred only if there is a related party payment, but in the present case, the expenses incurred by the assessee were paid to the third party employees although those employees were the employees of the AE. In the instant case, the assessee was in need of employees which were provided by its AEs, without any charge of profit accruing to the AE itself. Therefore, it should have been treated in the nature of third party business expenses incurred by the assessee. Moreover, the revenue was earned by the assessee through joint contribution of all the resources and personnel employed by an organization. Therefore, it was not possible to attribute revenues to each and every employee to demonstrate the cost benefit of each employee. In the present case, the employee of the AE provided on job training to the staff of the assessee and they were also engaged in

knowledge sharing with the existing employees during the meetings, minutes of which were furnished by the assessee before the authorities below. The AE charged the actual cost of services rendered by the specific employee and to substantiate the same, the assessee furnished invoices as documentary evidences. In the instant case the TPO placed his reliance on para 7.24 of the OECD Guidelines which states that "to satisfy the arm's length principle, the allocation method chosen must lead to a result i.e. consistent with what comparable independent enterprises would have been prepared to accept". In the present case, the TPO was unable to provide any cogent reason for the determination of arm's length value of professional consultancy at Nil. On the contrary, the assessee explained the benefits received by it on account of the services received from AE.

18. As regards to the application of method for determining the Arm's Length Price, we are of the view that the method to be used to determine arm's length price for intra-group services should be in accordance with the guidelines in Chapter-I, II & III of the "OECD Transfer Pricing Guidelines" which provides the various methods to be applied and the CUP method is likely to be a most appropriate method where there is a comparable service

provided between independent enterprises in the recipient's market or by the AEs providing the services to an independent enterprise in comparable circumstances. In the present case, the TPO although applied the CUP method but nothing was brought on record to substantiate that the AE provided the similar services to an independent enterprise in comparable circumstances. He also did not bring on record any instance where comparable services were provided to an independent enterprise in the recipient market. Therefore, in our opinion, in the assessee's case the CUP method was not the most appropriate method. On the contrary, the assessee rightly applied the TNMM method as most appropriate method because it was difficult to apply the CUP method or the cost plus method. Therefore, the TNMM was the most appropriate method in the absence of a CUP which is applicable where the nature of the activities involved, assets used, and risk assumed are comparable to those undertaken by an independent enterprise.

19. In the present case, the assessee divided its operation in the manufacturing and distribution segment. In the manufacturing segment, the net profit margin (OP/Sales) was disclosed at 9.26%, assessee has selected 5 comparable companies and using three years financial data margin of

comparables had been computed at 8.40%. In the distribution segment, the assessee has selected TNMM as most appropriate method and the tested party margin had been computed at 15.21% as compared to average margin of 6 comparables using 3 years financial data at 3.96% and the international transactions were claimed at arm's length. We, therefore, keeping in view the aforesaid discussion are of the view that the impugned addition made by the AO on account of the adjustment made in the receipt of professional consultancy services and management support services rendered by the employees of the AE, was not justified. In that view of the matter we delete the impugned addition.

20. As regards to the decisions of the various benches of the ITAT is concerned, it is noticed that those decisions are distinguishable on facts, in the case of Cranes Software International Ltd. Vs DCIT, Circle-11(2), Bangalore, the ALP was taken at Nil because the assessee had not been able to bring anything on record that the services had been actually rendered by AE. However, in the present case, there is no allegation either by the TPO/AO or the DRP that the services had not been actually rendered by the AE, similar was the position in the case of M/s Gemplus India Pvt. Ltd.

Vs ACIT, Circle-11(4), Bangalore. Moreover in the said case, the assessee provided the services while in the present case, the assessee company had received services from the AE and it is not the case of the TPO/AO that the services had not been received from the AE. In view of the above the cases relied by the Id. CIT DR are distinguishable on facts from the assessee's case.

21. Similarly, in the case of Bombardier Transportation India Pvt. Ltd. Vs DCIT (supra), the assessee just explained in generic nature about the benefits vis-à-vis the intra-group services payment to its AEs and the adjustment made was upheld by. In the present case, the assessee had not explained the services provided by the AEs in generic nature rather the assessee filed detailed evidence and explained about the specific services provided by the AEs alongwith evidences. Therefore, this case is also distinguishable

22. The next issue vide Ground Nos. 3, 4 & 5 relates to the adjustment of Rs.21,23,541/- on account of 60% depreciation on the SAP consultancy and other expenses.

23. The facts related to this issue in brief are that the assessee claimed 60% depreciation on SAP consultancy charges and other expenses amounting to Rs.35,39,236/- paid

to its associated enterprises. The assessee capitalized the SAP consultancy fees and other expenses. The assessee also filed the details regarding the SAP logistic and services vide submission dated 18.10.2010, 19.10.2010 and 22.06.2011. The TPO observed that since the depreciation was being claimed and charged to P & L A/c by the assessee, therefore, this item was having bearing on profitability, as such the claim of the assessee with respect to the capitalized nature of the SAP fee was not acceptable. The TPO observed that India is the hub of the Global IT and ITEs, so it was not believable when the assessee stated that there were certain terms that the AE solved and it would not have been able to do so. According to the TPO, the assessee need not have made any payment on account of this service. Accordingly, the TPO proposed the addition of Rs.35,39,236/-. The AO implemented the proposed addition in his draft assessment order. The assessee filed the objection before the DRP who held that there was no infirmity in the order of the TPO. The AO also did not find merit in the explanation of the assessee in view of the findings given by the TPO. However, an amount of Rs.21,23,541/- (60% of SAP consultancy charges and other expenses amounting to Rs.35,39,236/- paid to its AEs) was added to the business income of the assessee.

24. Now the assessee is in appeal. The Id. Counsel for the assessee submitted that no such expenditure was incurred on SAP consultancy charges by the assessee during the year under consideration and that the TPO had copied the order from the preceding year and substituted the figure with the figure of the reimbursement of the expenses. It was stated that there being no expenditure on account of SAP consultancy charges incurred during the year under consideration, therefore, the adjustment was factually incorrect.

25. In his rival submissions the Id. CIT DR strongly supported the orders of the authorities below.

26. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is not clear as to whether the SAP consultancy charges which were alleged to be capitalized were incurred by the assessee during the year under consideration or those pertained to the earlier years. Therefore, this issue requires a fresh adjudication at the level of the AO/TPO. Accordingly, this issue is set aside to the file of the AO/TPO to be adjudicated afresh in accordance with

law after providing due and reasonable opportunity of being heard to the assessee.

27. In the result, the appeal of the assessee is partly allowed for statistical purposes.

(Order Pronounced in the Court on 23/08/2016)

Sd/-
(Beena Pillai)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 23/08/2016

Subodh

Copy forwarded to:

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

ASSISTANT REGISTRAR