Compendium of

Transfer Pricing and International Tax Rulings

[Covering over 400 rulings pronounced in India from January to October 2016]

Sunil Moti Lala A.C.A., LL.B.
Advocate & Tax Counsel

ABOUT THE AUTHOR

Sunil Moti Lala is an Advocate & Qualified Chartered Accountant practicing as a Tax Counsel having over 21 years of experience in the field of Taxation. He has been advising as well as representing cases of several MNCs before the Courts, Tribunals and AAR, most of which have been reported.

He is currently recognised as one of the Tax Controversy Leaders in India by the International Tax Review for the 3rd year in a row. In the past, he also headed the Tax Dispute Resolution practice at Advaita Legal, Attorneys & Advocates (as Co-Founding Partner), KPMG & PwC (West).

He is / has been an office bearer / managing committee member of IFA / ITAT Bar Association and has presented Papers at various forums and contributed several Articles in various well reputed publications and financial dailies.

He is currently practising from his Chamber, the co-ordinates of which are given below:

SML tax chamber
64-A, Mittal Court,
Nariman Point,
Mumbai 400021
Website : www.smltaxchamber.com
Email : sunilmotilala@smltaxchamber.com
Telephone : 2202 6200 / 6400 / 6600

Compendium of

Transfer Pricing
and
International Tax Rulings

[Covering over 400 rulings pronounced in India from January to October 2016]

Sunil Moti Lala A.C.A., LL.B.
Advocate & Tax Counsel

Compendium of
Transfer Pricing and
International Tax Rulings
[Covering over 400 rulings pronounced in India from January to October 2016]

Sunil Moti Lala A.C.A., LL.B
Advocate & Tax Counsel

DISCLAIMER :

The contents of this publication should not be construed as legal opinion. It provides general information existing at the time of preparation. It is intended as a case law update and the author neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this update. It is recommended that professional advice be taken based on the specific facts and circumstances. The Compendium does not substitute the need to refer to the original pronouncements.

1st Edition : December, 2016

Printed by Art Vision, Mumbai

Preface

Over the last 21 years that I have been in practice, whether it is for "arguing" a case or "advising" a client, I endeavour to research upto the "latest" case law available on the issue, and by "latest" I mean the judgment delivered as recent as a day before the "hearing" or the "conference", as the case may be. However, I have realised that the research for the current year's judgments / Rulings is the most time consuming as they are never found in one book in the said year itself. In order to simplify the research, without compromising on the quality of the same, I have attempted to summarize the **Rulings pronounced by the Indian Courts, Tribunals & AARs between January to October 2016 on Transfer Pricing & International tax** issues and classify them into user friendly categories in this Compendium.

I have covered **434 Rulings** in the field of Transfer Pricing and International Tax spanning **500 findings / ratios**. In my opinion, India would be amongst the very few, if not the only country, wherein such a huge volume of rulings have been pronounced in the said field in less than a year. I hope that you find the Compendium useful and if you have any suggestion to improvise the same for the subsequent publication, please feel free to write in to me @ sunilmotilala@smltaxchamber.com.

Also, I would like to thank **Professor Roy Rohatgi** and **Mr. Kiran Umrootkar**, the respected Trustees of the Foundation for International Tax ('FIT'), for providing me with the opportunity to not only update my knowledge but to also share the same in the form of this Compendium with the learned delegates at the Joint Conference in co-operation between **FIT** and **International Bureau of Fiscal Documentation ('IBFD')**. I would also like to thank my junior, **Tushar Hathiramani**, who has ably assisted me in preparing the Compendium.

A month-wise Compendium of Transfer Pricing and International Tax judgments post the month of October 2016 will be uploaded on a regular basis on my website www.smltaxchamber.com. Please feel free to access and share the same with your friends and colleagues just the way I am doing right now.

As they say "**Sharing is Caring**" and remember "**What goes around ...comes around**".

Cheers!

Sunil Moti Lala
Advocate & Tax Counsel

Dedicated to
My loving parents
Smt. Neeta & Late Shri. Moti Lala

CONTENTS

Transfer Pricing

CHAPTER - 1

INTERNATIONAL TRANSACTIONS / SPECIFIED DOMESTIC TRANSACTIONS / ASSOCIATED ENTERPRISE

1.1 International Transaction :

1. The Tribunal held that the impugned transaction i.e. the routing of an amount through the AE, which was immediately paid to a third party as an advance for purchase of film rights did not fall within the purview of international transaction under section 92B since the transaction was not between two associated enterprises, but in fact between the assessee and a third party and that too for the acquisition of rights and not as a loan or source of finance. Further, it held that since the transaction did not give rise to any income / benefit to the assessee or the AE, the transfer pricing provisions were not applicable and therefore deleted the addition made by the TPO on account of notional interest on such advances.

KSS Ltd v DCIT - TS-651-ITAT-2015 (Mum) - TP

2. The Tribunal held that R&D Cess and tax paid on technical know-how royalty could not be treated as an international transaction and since royalty payment was at arm's length price, no disallowance could be made by the TPO.

Johnson & Johnson Limited v Add CIT- TS-19-ITAT-2016 (Mum) - TP

3. The Tribunal held that amendment in definition of International transaction u/s 92B, to the extent it pertains to issuance of corporate guarantee being outside scope of 'international transaction', could not be said to be retrospective in effect and has to be necessarily treated as effective from at best the assessment year 2013-14. It further held that merely because

Legislature described an amendment as 'clarificatory' in nature, a call would have to be taken by the judiciary whether it was indeed clarificatory or not.

Siro Clinpharm (P)Ltd & Anr v DCIT - [2016] 46 CCH 0485 (Mum)- Trib

4. The Tribunal held that the interest free advances given by the assessee to its overseas subsidiary by incurring expenditure on behalf of the AEs without charging interest or without recovering the said amount, was to be considered as an international transaction under clause (c) of Explanation (i) to section 92B of the Act. The Tribunal further held if the assessee would not have entered into such type of transaction with unrelated parties, then the transaction between the related parties could not be considered at arms' length. Accordingly, the Tribunal directed the AO / TPO to compute interest on the said advance at the rate of LIBOR + 300 basis points.

Strides Shasun Ltd v ITO - TS-277-ITAT-2016 (Mum) - TP

5. The Tribunal held that transaction between head office in India and branch office in Canada cannot be subject to ALP determination so as to make TP addition and any under or over invoicing between head office and branch office is always income-tax neutral because on aggregation of accounts, income of head office will be set-off with equal amount of expense of branch office, leaving thereby no separately identifiable income on account of this transaction. However, in reverse situation, a transaction between a foreign enterprise and its Indian branch, would be considered as international transaction as Indian branch of foreign enterprise is an 'enterprise' under section 92F.

Aithent Technologies Pvt Ltd -TS-752-ITAT-2016(DEL)-TP-ITA No. 6446/Del/2012

6. The Tribunal held that where the transactions between the assessee and its AE fell within the ambit of the definition of international transaction as provided under section 92B of the Act, then the mere fact that the transactions with the associated enterprise were in relation to projects carried out in India as a result of which the AE was a tax resident of India, would not justify the plea of the assessee that the international transactions ought not to be covered by the transfer pricing provisions since there was no profit shifting / base erosion.

United Engineers (Malasia) Berhad Quorum [TS-827-ITAT-2016 (Bang- TP] (IT(TP)A.1204 & 1205IBang/2012)

7. The Tribunal held that in the absence of an agreement between the assessee and its AEs for the sharing of AMP expenses, the TPO was incorrect in concluding that the AMP expenses incurred by the assessee were for the benefit of its AEs and accordingly the AMP expenses could not be treated as an international transaction. The Tribunal noted that the very nature of the business of the assessee was such that it had to incur huge expenses for establishing its product in the Indian markets and therefore held that the arguments of the TPO / AO that the AMP expenses were incurred primarily for the benefit of the AEs were without merit. Accordingly, it held that the TPO had wrongly applied the provisions of Chapter X to the AMP expenses of the assessee.

Loreal India Pvt Ltd v DCIT - (2016) 47 CCH 0015 (Mum-Trib)
Heinz India Pvt Ltd v Add CIT-TS-194-ITAT-2016 (Mum)-TP Goodyear India Ltd v DCIT - TS-226-ITAT-2016 (Del) - TP

8. The Tribunal held that in the absence of an agreement between the Indian entity and foreign AE whereby the Indian entity was obliged to incur AMP expenditure of a certain level for the foreign AE for the purpose of promoting the brand value of its products, no international transaction could be presumed and that mere presence of incidental benefit to the foreign AE would not imply that the AMP expenses incurred by the Indian entity were for promoting the brand of the foreign AE.

Essilor India Pvt Ltd v DCIT - (2016) 68 taxmann.com 311 (Bang - Trib)

9. The Tribunal held that in the absence of any direct evidence of incurrence of AMP expenses by the assessee for the benefit of its AE or on behalf of its AE, the AMP expenses could not be treated as an international transaction under section 92B of the Act. It held that probable incidental benefit to the AE would not make the transaction an international transaction. Accordingly, it deleted the addition made by the TPO arrived at by benchmarking the AMP expenses of the assessee with the industry mean AMP expenses to total revenue.

Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) - TP

10. The Tribunal, held that the royalty paid by the assessee to Jockey International Inc (JII) was not an international transaction and therefore could

not be subjected the provisions of Chapter X since Jockey was not an AE of the assessee as per Section 92A of the Act. It held that the assessee was a mere licensee of the brand-name 'Jockey' and that there was no participation of JII in the management and capital of the assessee and therefore did not satisfy the conditions of Section 92A(1) of the Act. It further held that both sub-sections viz. 92A(1) and 92A(2) have to be fulfilled together. Accordingly, it deleted the TP addition made by the TPO on account of the royalty paid.

Page Industries Ltd v DCIT - TS-382-ITAT-2016 (Bang) - TP

11. The Court dismissed assessee's petition challenging AO's reference to TPO for AY 2013-14 and held that where there was prima facie material suggesting that the directors of the Petitioner company, in aggregate, held more than 20% of the shares in voting power in Writers & Publishers Pvt Ltd and the aggregate of transactions entered into by the assessee (expense, loan and interest, etc.) with such company exceeded Rs. 5 crores, the transfer pricing procedure adopted by the TPO was to be allowed. It rejected the contention of the assessee that since the individual shareholding of directors and their relatives in Writers & Publishers Pvt Ltd was less than 20 percent, the alleged AE did not constitute a related party under section 40A(2)(b) because the Petitioner company by itself held an aggregate shareholding of more than 20 percent. However the Court kept open legal issues relating to consideration of aggregate shareholding for applicability of Section 40A(2)(b) and whether AO can subsequently invoke basis of Section 40A(2)(b).

D B Corp Ltd vs DCIT [TS-607-HC-2016(GUJ)-TP] SPECIAL CIVIL APPLICATION NO. 5035 of 2016

1.2 Deemed International Transaction :

12. The Tribunal held that for the purpose of falling under the definition of international transaction, at least one of the parties had to be a non-resident and therefore the purchase of know-how by the assessee, a joint venture between an Indian company (Matrix) and a South African company (Aspen), from the Indian company (Matrix) pursuant to an tri-partite agreement between the three aforesaid companies could not be considered as a deemed international transaction since both transacting parties were residents in India and the contention of the TPO that the transaction was a deemed international

transaction on the basis that Aspen being a party to the agreement dictated the terms and conditions of the transaction, was invalid.

Astrix Laboratories Ltd v ACIT - (2016) 67 taxmann.com 28 (Hyd)

13. The Court relying on its earlier decisions in CIT v EKL Appliances and Sony Ericsson Mobile Communications India Pvt Ltd v CIT, (wherein it was held that where form and substance of the transaction were the same but the arrangements when viewed in totality differed from those adopted by an independent enterprise behaving in a commercially rational manner), held that the TPO was correct in considering the assessee's transaction of import of raw materials from an intermediary as a deemed international transaction, where the assessee, as opposed to purchasing the components from the manufacturer (which was an AE), chose to import components from an intermediary (over whom the AE had significant influence) and such imports constituted over 85 percent of all raw materials imported.

Further, it held that even if TNMM was found acceptable as regards all other transactions, it was open to the TPO to segregate a portion and subject it to an entirely different method i.e. CUP if the assessee did not provide satisfactory replies to his queries.

Denso India Ltd v CIT - (2016) 95 CCH 0057 (Del)

14. The Tribunal held the assessment order passed was invalid since absent an international transaction with Associated Enterprise ("AE"), normal assessment was to have been completed without making reference to TPO. It rejected the stand of the Revenue that Cummins Turbo USA (majority importer of plates manufactured by assessee), being able to regulate the price at which goods were sold by the assessee, was a deemed AE u/s 92A(2) of the Act, and held that the pricing between Cummins and the assessee was fixed as per mutual understanding between the two and in case Cummins found an alternate supplier who was offering competitive cost, the assessee was to be given 30 days' time to respond to the competitive threat failing which a mutually acceptable phase out would be negotiated between the parties and thus it could not be concluded that Cummins controlled the price at which goods were sold by the assessee. It further observed that there was no connection whatsoever by way of participation in management or control or capital by the entities or its

subsidiaries (either directly or indirectly) and therefore both the enterprises had not fulfilled the conditions laid down in Sec 92A(1) and were not AEs.

JCIT v Suttati Enterprises(P)Ltd - TS-234-ITAT-2016(PUN)-TP

15. The Court held that where the assessee sold its imaging business to another Indian company during the year under review and the holding companies of both the assessee and the buyer Indian company had entered into a global agreement for the sale of business, as per Section 92B(2) prevalent during the relevant assessment year, the transaction would not fall within the definition of deemed international transaction since the global agreement did not control the terms and conditions of the actual transaction between the assessee and the buyer.

CIT v M/s Kodak India Pvt Ltd - TS-471-HC-2016 (Bom) - TP - ITA NO.15 OF 2014

1.3 Specified Domestic Transaction :

16. The Court set aside the order passed by the AO making a domestic TP assessment reference to the TPO stating that donations made by the assessee to a charitable institution were specified domestic transactions as the definition of specified domestic transaction contained in Section 92BA of the Act includes any transaction referred to 80A of the Act, on the ground that the AO had not considered the submissions filed by the assessee and had not applied his mind to the objections contained therein and failed to substantiate how exactly the said transaction fell under the definition of specified domestic transaction under section 92BA of the Act.

DSP Adiko Holdings Pvt Ltd v DCIT - TS-622-HC-2016 (Bom) - TP WRIT PETITION NO.1424 OF 2016 WITH WRIT PETITION NO.1573 OF 2016

1.4 Associated Enterprise :

17. The Tribunal remitted the matter to the file of the AO with the direction to determine whether the non-resident with whom the assessee had entered into international transactions was an AE of the assessee since the assessee had less than 26 percent interest in the said company and was not holding any

controlling interest in management and finance and the DRP had incorrectly presumed that since the assessee was pricing the sale of material, it had controlling interest over the said non-resident.

Dun & Bradstreet Technologies & Data Services Pvt Ltd v ACIT - TS-524-ITAT-2016 (Chny) - TP I.T.A.No.760/Mds/2014

18. The Tribunal held that assessee and a Singapore company having a common director were not associated enterprises as the parameters laid down under section 92A(1) and (2) were not satisfied. It held that for enterprises to be associated as per Section 92A, at least one of the 13 conditions prescribed in sub section (2) as per clause (a) to (m) had to be satisfied and that where the common director did not exercise any control over the AE, the mere fact that the assessee and its AE had one common director alone did not establish the AE relationship.

Obulapuram Mining Co Pvt Ltd [TS-847-ITAT-2016(Bang)-TP] (IT (TP) A No.182 (Bang) 2014)

CHAPTER - 2

MOST APPROPRIATE METHOD

2.1 Comparable Uncontrolled Price Method :

19. The Tribunal, relying on the decisions in the cases of Sumitomo Corporation India Pvt Ltd and Marubeni India P Ltd held that the internal CUP method was the most appropriate method to benchmark the assessee's commission for provision of indenting services as opposed to the Profit Split Method sought to be applied by the TPO and that where there was no data to support the CUP method, the TNMM method was to be applied. Considering the decisions of the Tribunal in the case of Sumitomo and Bayer Material Science wherein the ALP rate of indenting commission was taken at 2.26 percent and 5 percent, respectively, the Tribunal held that 3.36 percent (the average of the two) was to be considered as ALP.

Johnson Controls (India) Pvt Ltd v DCIT-TS-662-ITAT-2015 (Mum)-TP

20. The Tribunal held that where the TPO accepted the application of CUP method on the basis of the mean of the prices of pulses obtained from a website called agriwatch.com to benchmark the arm's length price of the transactions undertaken by the assesse viz. import of agricultural produce, but at the same time noted that the method used by the assessee suggested a range of values on a particular date and felt that the website was a good indicator but not a perfect CUP, he was incorrect in adopting the arithmetic mean of prices on a day to day basis as the final comparable value and comparing it with the import prices on each day and consequently making a

transfer pricing adjustment. It held that where the TPO had himself accepted that generally the price charged by the AEs from the assessee was equal to or less than the ALP, then his act of making an ALP adjustment on the basis of daily arithmetic mean of the transaction values was not permissible under the scheme of the Act.

UE Trade Corporation India Pvt Ltd v ITO - TS-10-ITAT-2016 (Del) - TP

21. The Tribunal held that the TPO was not justified in determining the ALP of the purchase of trademark by the assessee from its AE at Nil on the ground that there was no need for the assessee to purchase such trademark. It held that the TPO had no role in examining the commercial rationale of decision to purchase a trademark and determine the ALP at Nil without conducting any analysis under the CUP method.

DCIT v FabIndia Overseas Pvt Ltd - TS-333-ITAT-2016 (Del) - TP

22. The Tribunal deleted the TP adjustment in respect of export of chemicals to AEs on the basis of the CUP method, observing that the assessee was bound to sell the chemicals to its AE at lower prices to recover its manufacturing costs since it was obsolete stock and there was no room for determination of prices based on free interplay of demand and supply.

N L C Nalco India Ltd. vs. DCI - TS-36-ITAT-2016(Kol)-TP

23. The Tribunal held that where assessee company having imported gold bars from its AE, converted the same into jewellery and sold the same back to AE, since assessee was a simple job worker, CUP was to be regarded as most appropriate method for determining ALP.

Kailash Jewels (P) Ltd vs ITO - [2016] 68 taxmann.com 303 (Delhi-Trib)

24. The Tribunal deleted interest adjustment on external commercial borrowings (ECBs) taken by assessee from overseas AE at 5% as the effective rate of interest paid by assessee on loans taken in India was 6.62% and held that when internal CUP with unrelated parties is available it should be given precedence over external CUP (which was adopted by TPO).

Intergarden (India)(P)Ltd. vs ACIT - TS-114-ITAT-2016(Bang)-TP

25. The Tribunal held that where TPO proposed adjustment for royalty paid

by assessee to its AE even where assessee justified (a) how technical know-how supplied by AE was crucial to running of assessee's business (b) the same to be at ALP as per TNMM, the addition made by the TPO by applying CUP was not justified since in the instant case, no comparable transaction had been brought on record by the revenue.

Frigoglas India (P)Ltd. vs DCIT-[2016] 68 taxmann.com 370 (Delhi-Trib)

26. The Tribunal upheld TPO's application of CUP to benchmark assessee's import transaction following Serdia Pharmaceuticals ruling and also allowed 10% quality adjustment as the quality of asseessee's products (being manufactured in a German plant where quality control requirements are much more stringent than in India) were demonstrably superior to locally manufactured products in India. The Tribunal rejected Revenue's contention that weighted average rather than simple arithmetic mean should be used to compute ALP of import prices, and held that only domestic prices of the product should have been taken into account and not the export price while benchmarking the import transaction.

Merck Ltd. vs DCIT - TS-143-ITAT-2016(Mum)-TP

27. The Tribunal held that so far as CUP comparability was concerned, differences in the size, geographical location etc. could not be reason enough to discard the comparables, unless it was shown that such factors influenced conditions in the market in which respective parties to the transactions operated.

Further, it held that IBB was a generic chemical product and so far as prices of generic products were concerned, CUP on the basis of database built on inputs like customs data was reasonably acceptable.

SI Group India Ltd v DCIT -TS-150-ITAT-2016(Mum)-TP

28. The Tribunal held that the CUP method was the most appropriate method for determining the ALP of purchase and sale of goods and services since it seeks to compare the exact price charged or paid rather than the profit rate and held that TNMM sought to be applied by the assessee was affected by several factors which would significantly impact the determination of ALP. It further held that the TPO was incorrect in considering the transaction between the AE and a third

party in Italy as an internal CUP due to the geographical differences prevalent. It held that the CIT(A) had deleted the addition made by the TPO based on the submission of the assessee without considering the conflicting stand adopted by the TPO and therefore remanded the matter to the file of the TPO.

DCIT v Rayban Sun Optics India Ltd - TS-170-ITAT-2016 (Del) - TP

29. The Tribunal held that the CUP method was the most appropriate method for benchmarking the international transactions of the assessee viz. export and import of agro commodities and upheld the use of third party quotations as an external CUP since the quotations furnished by the assessee were authentic and reliable.Accordingly, it dismissed the contention of the TPO, rejecting CUP on the ground that the data provided by the assessee did not provide support for functional comparability. Reference was also made to the BEPS Action Plans 8-10 in respect to use of Quoted Prices and their authenticity for comparability analysis under the CUP Method.

DCIT v Noble Resources & Trading India Pvt Ltd - TS-269-ITAT-2016 (Del) - TP

30. The Tribunal held that where the assessee had selected the CUP method as the most appropriate method for benchmarking the payment of consultancy fees to its AE, by using the service agreement between the AE and an independent Hungary company as comparable, the AO was not justified in rejecting the CUP method and the comparable without any reasoning and making an ad hoc disallowance of 25 percent of the said consultancy fee on the ground that no evidence had been submitted by the assessee.

ITO v Intertoll ICS India Pvt Ltd - (2016) 47 CCH 0132 (Mum-Trib)

31. The Tribunal held that the CUP method was the most appropriate method for determining the ALP of the assessee's international transactions viz. provision of man power / human resources to its AEs and rejected the assesee's application of TNMM. It noted that the assessee had charged both its AEs and Non-AEs for the man power supply on an hourly rate for the same functions and therefore held that the CUP method was most appropriate. However, it rejected the application of an average or weighted average rate as directed by the DRP. Accordingly, it remitted the matter to the file of the TPO.

Taksheel Solutions Ltd v ACIT - TS-352-ITAT-2016 (Hyd) - TP

32. The Tribunal upheld the use of the CUP method over TNMM for the purpose of benchmarking the assessee's international transaction viz. purchase of DAP fertilizers on consignment basis. It held that where the assessee submitted adequate and reliable information and comparable uncontrolled prices, such as the price list of 'Fertecon Price Service' which is a weekly trade journal widely used in the fertilizer industry, for the purposes of benchmarking the international transaction under CUP, the TPO's approach of adopting TNMM was erroneous. It further held that TNMM was not the most appropriate method since the sale price was regulated by the government as a result of which the net profit margin was not under the control of the assessee and that 40 to 45 percent of the receipts of the assessee were by way of subsidy and not from the sale of products.

Mosaic India Pvt Ltd v ACIT - TS-312-ITAT-2016 (Del) - TP

33. Where the Assessee paid interest to its AEs @ 12% coupon rate on the CCDs and applied CUP method for benchmarking the same, but the TPO / DRP treated the CCDs as External Commercial Borrowing ("ECB") and made TP adjustment using 6 months LIBOR + 300 bps as base and the Assessee contended that as per FIPB, RBI and FEMA guidelines CCDs are considered as FDI and not ECB, and also submitted analysis (as part of additional evidence) based on the BSE database which indicated that average coupon rate of comparable instruments issued during the year was 14.50% for Real Estate Industry and 12.39% for all instruments,the Tribunal remitted the issue to the AO/TPO to consider the additional evidence since the same went to the root of the matter and was very much relevant to resolve the issue as to whether or not the borrowing was an External Commercial Borrowing.

Brahma Center Development Pvt Ltd vs ITO [TS-522-ITAT-2016(DEL)-TP] ITA No. 373/Del/2016

34. The Tribunal deleted TP adjustment in respect of export of Printed Circuit Boards (PCBs) by assessee to its AE in Austria for further sale in Europe as distributor for AY 2011-12 on the ground that internal CUP should be preferred over external TNMM & the prices at which the assesse sold goods to its AE were equal to the prices at which they were sold by the AE to independent customers in Europe. Though the Tribunal rejected assessee's

selection of foreign AE as tested party as its accounts were based on Austria GAAP and also rejected Revenue's adoption of entity level TNMM for benchmarking profit margin earned by the assesse it deleted the addition by adopting internal CUP.

AT & S India Pvt Ltd v DCIT [TS-539-ITAT-2016(Kol)-TP] ITA No. 179/Kol/2016

35. The Tribunal held that where the assessee had acquired shares of a JV from its AE and immediately sold the shares to Jindal Group, the said income arising out of the transfer was to be treated as business income and not capital gains and held that the TPO was justified in applying the CUP method to benchmark the purchase of the said equity shares by adopting the per share purchase price paid by independent third parties and comparing the same with the price paid by the assessee. Since the price paid per share by the assessee was higher than the price paid per share by independent third parties, the TPO was justified in taking the lower price as the arm's length price and making consequent TP adjustments by treating the investment made by the assessee as excessive.

GDF Suc TSA Energy India Pvt Ltd v ACIT - TS-537-ITAT-2016 (Bang) - TP ITA.984 & 1030/Bang/2010

36. The Court held that the Tribunal was correct in remanding the issue of determination of ALP of the 12 international transactions undertaken by the assessee during the relevant year since, the assessee had adopted both the CUP method as well as TNMM to justify the ALP of the transactions but the TPO had discarded CUP for all the transactions without providing any cogent reasons and where one method for determination of ALP was being preferred over another, the selection of that method was to be justified with proper reasoning.

Honda Motorcyle& Scooters India Pvt Ltd v ACIT - TS-660-HC-2016 (P&H) - TP I. T. A. No. 345 of 2015

37. The Tribunal held that where the assessee purchased equipment from its AE, the ALP of which was supported under the CUP method by certificates issued by the AE stating that the equipment was supplied at cost along with Customs Valuation Reports proving that the value was truthfully declared, no addition could be made to the said transaction and since the equipment was

purchased for pure non-commercial use, the market price could not be ascertained. Accordingly, the addition made by the TPO was set aside.

DCIT v C-Dot Alcatel Lucent Research Centre Pvt Ltd - (2016) 66 taxmann. Com 281 (Del)

2.2 Cost- Plus Method :

38. The Tribunal held that the assessee, engaged in the business of manufacture and sale of plastic ophthalmic lenses to its foreign AEs as well as other independent Indian companies, could not be considered as a contract manufacture of its AE since it was carrying out its own independent business activity as well and therefore, the plea of the assessee, relying on GE Medical Systems India Pvt Ltd v DCIT, that the Cost Plus method was the most appropriate method for contract manufacturers, was inapplicable. Accordingly, the TNMM method was used as the most appropriate method.

Further, the Tribunal held that where the cost components of the assessee were in variation with that of comparable companies, the Cost Plus method could not be regarded as the Most Appropriate Method.

Essilor Manufacturing India(P)Ltd. vs. DCIT - [2016] 67 taxmann.com 377 (Bangalore-Trib)

39. The Tribunal rejected TPO/DRP's application of cost plus method for benchmarking assessee's export transactions and held that products exported by assessee and also sold in the domestic market cannot be functionally compared in view of the variations in the specifications, difference in climatic conditions, marketing efforts involved by assessee. It observed that sale in the export market must be compared with the exports by similarly placed companies in an uncontrolled transaction.

Orbinox India Pvt Ltd - TS-732-ITAT-2016(CHNY)-TP-ITA No.454/Mds/2015

2.3 Profit Split Method :

40. The Tribunal held that where in respect of revenue derived by assessee company from distribution of television channels and sale of advertisement time, Profit Split Method (PSM) was adopted on basis of detailed analysis and

allocation of profits based on the role and functions of the entities vis-a-vis AEs and Non-AEs and the combined net profit had been arrived at by taking into account all transactions of the AE as well as the non-AE and factoring all costs and revenue, the DRP was not justified in concluding that profits from non AE would not be covered under PSM and same had to be determined separately at a higher rate.

Satellite Television Asian Region Ltd v DDIT - [2016] 66 taxmann.com 247 (Mumbai-Trib)

41. The Tribunal held that where RPM was suggested as most appropriate method of ALP computation by the assessee, it is imperative that the products sold by the tested Indian entity were subjected to a close comparison with those products sold by the comparable companies and that before rejecting RPM, the TPO should have made an analysis to determine whether the required data regarding the set of comparable companies dealing in similar products could be obtained from public data basis. Accordingly, the matter was remanded to the file of the AO / TPO.

Kohler India Corp (P)Ltd. vs. DCIT - [2016] 67 taxmann.com 200 (Bangalore-Trib)

2.4 Resale Price Method :

42. The Tribunal held that the Resale Price Method was the Most Appropriate method for determining ALP with respect to the assessee's trading and distribution segment, i.e. goods imported from its AE for onward sale, and not TNMM as proposed by the assessee. It further held that for the certain transactions wherein there was a value addition made to the imported spares by the assessee or where procurement of spares was done through job workers, the determination of Most Appropriate Method would require fresh adjudication and therefore, in respect of such cases, remanded the matter to the TPO.

It was further held that internal comparables were to be preferred as against external comparables.

Honda Motor India Pvt Ltd v ACIT - (2016) 66 taxmann.com 9 (Del)

43. The Tribunal held that where TPO rejected RPM as MAM for calculating

ALP in respect of trading segment, however Commissioner (Appeals) dealt with issue and reproduced relevant data of subsequent year wherein TPO himself had accepted RPM to be MAM for determining ALP for trading segment, findings of Commissioner (Appeals) had to be upheld.

DCIT v Delta Power Solution India (P)Ltd - [2016] 68 taxmann.com 247 (Delhi-Trib)

44. The Tribunal held that the TPO was incorrect in adopting the gross profit margin of the assessee's Group Company as the ALP for the international transactions entered into by the assessee viz. the import and distribution of Marlboro brand of cigarettes in India as well as export of tobacco leaves, since the Group as a whole (engaged in manufacturing, conducting R&D activities and owning trade marks) was functionally dissimilar to the assessee who was merely engaged in the distribution of these products. Accordingly, it held that the assessee, being a reseller / distributor had rightly benchmarked its transactions using the Resale Price Method.

DCIT v Phillip Morris Services India (SA) India Branch Office - TS-151-ITAT-2016 (Del) - TP

2.5 Transactional Net Margin Method :

45. The Tribunal held that the TNMM method was the most appropriate method for benchmarking the international transactions of the assessee as opposed to the Cost Plus method applied by the assessee. In the given case, the TPO considered both TNMM and Cost Plus method, but for benchmarking under the Cost Plus Method he used an arbitrary margin of 35 percent and applied it on direct costs. The Tribunal held that there was inadequate discussions as to how the 35 percent markup was arrived at and also noted that the markup was applied on direct costs, whereas it was to be applied on both direct and indirect costs. Noting that the TPO had accepted 11 comparable companies under TNMM method as well and the international transaction of the assessee was at arms length price considering these comparable companies, it held that the TNMM method was the most appropriate method.

ITO v Styx Back Office Services Pvt Ltd - (2016) 68 taxmann.com 62 (Del - Trib)

46. The Tribunal held that the selection of the most appropriate method was not an unfettered discretion of the assessee and is subject to adjudication at both the assessment as well as the appellate stage and that determination of the most appropriate method was based on the availability, coverage and reliability of data necessary for the application of the method and therefore where the assessee provided only one comparable under the internal TNMM whereas there was sufficient, relevant, reliable data for comparables under the external TNMM, the method chosen by the assessee viz. Internal TNMM was not the most appropriate method. Further it noted that the one comparable selected by the assessee under internal TNMM was an erstwhile AE of the assessee, which was now of independent status in legal terms as a result of group restructuring and therefore it did not satisfy the reliability test either.

Fortune Infotech Ltd v ACIT - (2016) 66 taxmann.com 92 (Ahd - Trib)

47. The Tribunal held that where the assessee company, engaged in the business of manufacture, assembly and sale of air-conditioning commercial refrigeration equipment, entered into various international transactions with its AE, and adopted an internal comparable of commercial refrigeration segment for justifying the PLI of transport refrigeration segment, TPO without carrying out detailed functional comparability of two segments, could not reject the said internal comparable and, make addition to assessee's ALP on basis of profit margin earned by an external comparable.

Carrier Air conditioning & Refrigeration Ltd v Addl.CIT - [2016] 67 taxmann.com 72 (Delhi-Trib)

48. The Tribunal held that where assessee was unable to furnish reliable data either to adopt Cost Plus Method or to analyse data on basis of CUP method, TNMM would be most appropriate method to analyse assessee's transactions in order to arrive at ALP

Mercedes Benz Research & Development India (P)Ltd. vs. ACIT - [2016] 68 taxmann.com 230 (Bangalore-Trib)

49. The Tribunal held that in an indirect method like TNMM, a reasonable number of comparables are to be selected to ensure that results are truly representative of segment to which tested party belongs.

GE Healthcare Bio-Sciences Ltd v DDIT [2016] 68 taxmann.com 369 (Chennai-Trib)

50. The Tribunal held that TNMM and not internal CUP was the MAM to benchmark the assessee's international transactions of providing portfolio management services, mutual fund services and investment advisory services, since the volume of non-AE transactions sought to be used as internal CUP by the Department was so minimal that the fee in percentage terms vis-à-vis Non-AE transactions would not be comparable to the fee in percentage terms for the AE transactions. It held that since the assets under management for AE transactions were around USD 135 million and that with the Non-AE fund was USD 2.55 million, mere comparison on the basis of fees in percentage terms was not appropriate.

ICICI Prudential Asset Management Co Ltd v ACIT - TS-148-ITAT-2016 (Mum) - TP

51. The Tribunal rejected TPO's selection of CUP as MAM for benchmarking assessee's export of Floxidin 10% (50ml) product over TNMM, which had been applied by assessee. It noted that TPO accepted TNMM as MAM in respect of 4 out of 5 products exported by assessee but applied CUP as MAM for export of Floxidin 10% (50ml) on the ground that the price charged by the assessee from its AEs was far less than the price charged from the third parties. It observed that that the volume of sale of the impugned product to AE in Thailand was almost 10 times to that of third party in Vietnam and though both countries were members of the Association of South East Asian Nations ('ASEAN') , it did not mean that the market conditions in both countries were similar. It opined that where substantial part (more than 80 percent) of the exports made to AEs were accepted by the TPO under TNMM and the assessee had provided due reasoning for the price difference in respect of one product, the TPO was wrong in adopting CUP method as the most appropriate method for benchmarking the remaining transactions.

Intervet India (P) Ltd vs DCIT - [TS-251-ITAT-2016(PUN)-TP]

52. The Tribunal noted that even though there was a loss incurred by the assessee on export of one product (PCMX) to its AE, as evident from Cost

Accountant's Report, the assessee had not taken the same into consideration while working out its PLI (Operating Profit / Total Cost) of 7.96% and therefore the reliability of the segmental financials taken by the assessee to work out the OP/TC of its export with AEs was doubted. Accordingly, the Tribunal held that the OP/TC of the relevant transactions worked out by the assessee, could not be taken as basis for benchmarking the relevant transactions by adopting TNMM and it would be more appropriate to take the OP/TC at the entity level by taking into consideration the entire set of transactions of the assessee. Thus, the Tribunal remitted the matter back to AO / TPO for fresh ALP-determination under TNMM. It held that by considering the entity level PLI, even the import transactions would be benchmarked and therefore no separate benchmarking would be required for the import transactions.

Reckitt Benckiser (India) Ltd v JCIT - TS-269-ITAT-2016 (Kol) - TP

53. The Tribunal held TNMM to be the MAM for the following reasons, viz (i) the assessee was only a custodian of the goods imported till they were delivered to the client or customer of its parent company on its directions and therefore since the assessee could not be held to be a trader or distributor of the goods the resale price method was not applicable. (ii) The other methods i.e. cost plus method which is applicable to the transactions relating to manufacture and sale of goods and Profit Split Method which is applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so inter-related were also inapplicable to the facts of the given case.

DCIT vs. CISCO Systems (India) Pvt. Ltd - (2016) 47 CCH 0464 (Bang Trib) - IT.(T.P) A No. 1447/Bang/2013

54. The Tribunal held that the TPO was correct in adopting TNMM over the Resale Price Method as the Most appropriate method, since the assessee had incurred huge expenditure on account of selling, distribution and promotion in respect of the trading of the goods imported from the AE as the assessee had closed its manufacturing operations during the subject AY and therefore the business model of the assessee was not comparable with that of the comparable companies who did not incur such expenditure. It held that the RPM could be considered as MAM in case the distribution of goods was without

any value addition but since the assessee had incurred substantial expenses on selling and promotion, TNMM was to be considered. It also held that appropriate adjustment was to be allowed while determining ALP under TNMM if abnormal expenditure was incurred on advertisement, marketing and promotion on account of the commencement of a new distribution activity.

Abott Medical Optics Pvt Ltd v DCIT - TS-443-ITAT-2016 (Bang) - TP - I.T.(T.P) A. No.1116/Bang/2011

55. The Court dismissed Revenue's appeal due to delay in filing of appeal wherein the Tribunal had held that TPO was not justified in rejecting internal TNMM based on non- AE transactions merely because segmental results were not audited.

Lummus Technology Heat Transfer BV - ITA 441 / 2016 (Del) [For the Tribunal order see - TS-48-ITAT-2014 (Del) - TP (I.T.A. No.: 6227/ Del/2012)]

56. The Tribunal held that the issue of comparability should be decided on the basis of facts on record and not on the basis of precedents as there cannot be an exact identical comparable and that, it was for this very purpose that TNMM was often resorted to as the minor differences, if any, were typically addressed by comparing net profitability of the comparables.

Virage Logic International India TS-480-ITAT-2016(DEL)-TP - I.T.A. No.-6918/Del/2014

57. Where the TPO rejected the assessee's TNMM (based on cost plus 55% mark-up) to adopt the CUP method based on price agreed in supply agreement with another AE, pursuant to which he made an adjustment which was later deleted by the CIT(A), the Tribunal confirmed the deletion made by the CIT(A) on the ground that the price quoted in the assessee's supply agreement with overseas AE could not be adopted as 'comparable un-controlled transaction under CUP method.

ACIT v Bilag Industries Pvt Ltd - TS-603-ITAT-2016 (Ahd) - TP ITA Nos 1441 & 1670 /Ahd/2006 & 343/Ahd/2012

58. The Court while dismissing the Revenue's appeal held that where the assessee received a host of intra-group services from its AE via a consolidated

agreement which were all intrinsically linked to the manufacturing activity of the assessee, the TPO was not justified in splitting up the agreement to determine the ALP of certain services separately on the ground that the services did not result in any benefit, while accepting the price of the other services.

Pr CIT v Avery Dennison (India) Pvt Ltd - TS-527-HC-2016 (Del) - TP ITA 386/2016 With ITA 392/2016

2.6 Others :

59. The Tribunal deleted the addition made by the TPO in respect of sharing of regional office expenses and for services received by the assessee from its AE since the TPO had neither disputed assessee's claim that TNMM was MAM nor disputed comparables chosen by assessee and made an ad-hoc addition of 20 percent of the cost sharing and the services received which was not based on a method recognized under the scheme of transfer pricing envisaged by the statute.

Det Norske Veritas v ADIT - (2016) 46 CCH 0542 - Mum Trib

60. The Tribunal deleted TP addition for assessee providing ship management services to parent company (AE) by holding that AO erred not only in resorting to an unscientific and unrecognized method for determining ALP(of computing revenue on the basis of minimum rate per crew member) but also in rejecting bonafide quotations as a valid input for ascertaining ALP; on the basis that no actual transactions had taken place. It held that the quotations could be a valid input under the residuary method set out in Rule 10AB read with Rule 10B(1),(particularly considering the limited scale of operations of assessee and smallness of amount involved); and that not only the actual price of transactions under comparable uncontrolled conditions but also hypothetical price which would have been charged under comparable uncontrolled conditions could be taken into account for computing the arm's length price.

Gulf Energy Maritime Services (P) Ltd - [TS-74-ITAT-2016(Mum)-TP

61. The Tribunal held where there was insufficient reliable data for the application of CUP, Resale Price Method and Profit Split Method for the purpose ascertaining direct and indirect cost of production of services, the TPO was

justified in adopting the TNMM as the most appropriate method.

iSoft Health Services (I) P Ltd [TS-819-ITAT-2016 (Bang)-TP]

62. The Court held that where transfer pricing officer accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions including payment of royalty, but however disputed the application of TNMM as the most appropriate method for the payment of technical assistance fee and applied CUP on the said transaction, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different method.

Magneti Marelli Powertrain India Pvt. Ltd. vs. DCIT (2016) 97 CCH 0037 (Del HC) (ITA 350/2014)

63. The Tribunal set aside the CIT(A)'s order deleting transfer pricing adjustment on commission income of 10 percent on sales earned by the assessee, made by the TPO by rejecting the Profit Split Method adopted by assessee for benchmarking commission income from its associated enterprise. It disagreed with the CIT(A)'s finding that the TPO had not mentioned conditions prescribed under section 92C(3) triggering transfer pricing provisions and noted that the TPO had stated that comparison of commission under PSM was not proper where the assessee had incurred considerable loss in the commission business (which was ascertained based on the segmental results). It further held that the action of the TPO adopting TNMM and selecting 7 comparable companies without conducting FAR analysis was flawed and therefore remitted the matter to the file of the TPO to re-determine arm's length price after providing assessee opportunity of being heard.

Bio Rad Laboratories (India) Pvt Ltd. [TS-829-ITAT-2016 (Del)-TP] (ITA No.3284/Del/2010)

CHAPTER - 3

COMPARABILITY - INTER AND INTRA INDUSTRY

3.1 Investment Advisory Services / Consultancy Services :

64. The Tribunal held that the assessee, rendering non-binding investment advisory services to its AE co**2**uld not be compared to a company engaged in providing merchant banking and investment banking services.

TA Associates Advisory Pvt Ltd v DCIT - (2016) 66 taxmann.com 130 (Mum)

65. The Tribunal rejected the separate benchmarking of portfolio management services and held that the same were part and parcel of the non-binding investment advisory services provided by the assessee to its AEs and therefore deleted the addition made on account of performance fee received by the assessee. Further, it held that even if the portfolio management services were to be benchmarked separately, the benchmarking could only be done by carrying out comparability analysis with uncontrolled transactions which was not done in the present case as the TPO had merely taken an ad hoc rate of 0.25 percent as the ALP. Further, the Tribunal noted that the assessee had entered into an APA with the CBDT for future years, where a margin of cost plus 21 percent had been accepted to be at ALP and since the margin of the assessee was cost plus 20 percent for the current year, it was to be accepted as it was at the same range as accepted in the APA.

3i India Private Limited [TS-799-ITAT-2016 (Mum)-TP] (ITA No. 581/Mum/2015

66. The Tribunal held that a company which is functionally comparable to the assessee, could not be excluded as comparable merely for the reason of low turnover, especially where no turnover filter was applied. Further it held that the assessee, engaged in providing non-binding investment advisory services could not be compared to companies engaged in merchant banking activities.
Tamasek Holdings Advisors India Pvt Ltd v DCIT - (2016) 46 CCH 0175 (Mum - Trib)

67. The Tribunal held that companies engaged in handling of IPOs, underwriting of issues, and carrying on the activity of directly or indirectly managing investments, mutual funds, venture capital funds, pension funds, provident funds etc could not be compared to the assessee who was engaged in providing investment advisory and support services to its AE.
Avenue Asia Advisors Pvt Ltd v DCIT - (2016) 66 taxmann.com 267 (Del)

68. The Court held that an investment advisor could not be compared to a merchant banker
CIT v General Atlantic (P)Ltd - [2016] 68 taxmann.com 88 (Bombay)

69. The Tribunal in case of assessee engaged in providing consultancy services, forensic crisis and security related services held that the TPO had flawed in characterising assessee as engaged in providing investment and other financial advisory when the officer himself had addressed assessee's profile as consulting business intelligence services. It observed that ignoring the assessee's employee profile, the officer proceeded on a general discussion so as to justify his conclusion drawn regarding characterization and that by no stretch of imagination the assessee could be compared with companies who were trading in shares and investments.
Control Risks India Pvt Ltd - TS-769-ITAT-2016(DEL)-TP-I.T.A .No.-979/Del/2015

3.2 ITES Sector :

70. The Tribunal, highlighting the importance of quantitative filters in the selection of comparables in the ITES sector, adopted a minimum turnover filter

of Rs. 100 crore, observing that selection of comparables had to be done on the basis of both quantitative and qualitative criteria and that size of companies and relative economies of scale under which they operate have a huge bearing while carrying out comparability analysis.

Further, it included a comparable originally rejected by the TPO on the non-satisfaction of the export to sales filter of 25 percent since the financials clearly demonstrated an export earning filter of 89 percent. It further excluded Wipro and Infosys as comparable companies on qualitative filters such as presence of huge brand value, intangible R&D activities and the said companies being full-fledged risk bearing entities could not be compared to a captive service provider like the assessee and held that a qualitative analysis assumes greater significance for selecting comparable companies as opposed to a high turnover filter.

Capgemini India Pvt Ltd v ITO - TS-640-ITAT-2015 (Mum) - TP

71. The Tribunal held that the assessee's software development services segment was not comparable to giant companies such as Infosys Technologies Ltd and Wipro Ltd in terms of risk profile, scale, nature of services, revenue, ownership of branded products and provision of both onsite and offshore services and companies having revenue from software products and training as well.

Further, with respect to the ITES Segment of the assessee, it held that companies engaged in providing high end KPO services and companies having related party to sales in excess of 15 percent could not be compared to the assessee engaged in providing low end services.

The Tribunal further held that the assessee's marketing support segment could not be compared to companies imparting technical consultancy services and companies not having a separate marketing support segment.

Avaya India Pvt Ltd v DCIT - TS-377-ITAT-2016 (Del) - TP

72. The Tribunal held that the assessee, engaged in providing its AE with IT and IT Enabled services could not be compared to a company like Wipro Technology Ltd due to the existence of an extra-ordinary factor of acquisition

of Citi Technologies Services Ltd as well as the fact that the said company was engaged in undertaking software development services for developing software application. It also held that the assessee could not be compared to Infosys Technologies Ltd due to its brand value, R&D expenses, offshore revenue etc. Further, companies engaged in software development as well as software products and marketing and not having segmental results for its software development work, could not be compared with the assessee.

FIL India Business Services Pvt Ltd v DCIT - TS-248-ITAT-2016 (Del) - TP

Pr CIT v Cash Edge India Pvt Ltd - TS-262-HC-2016 (Del) - TP

73. The Tribunal held that a company which owned significant intangible and had huge revenues from software products was not functionally comparable to a software development service provider. Further, it held that a company operating in different business strategy of acquiring companies for inorganic growth was incomparable to assessee rendering ITE services to its AE.

Logica (P) Ltd v DCIT - [2016] 68 taxmann.com 197 (Bangalore-Trib)

74. The Tribunal held that Satyam Computer Services Ltd. was rightly excluded by Commissioner (Appeals) on basis of non-reliability of financial data. Further, the Tribunal held that the Commissioner (Appeals) had rightly excluded Infosys and Exensys, on the basis of functional dissimilarity and having extraordinary event during the year. Exensys was having extraordinary profits by way of amalgamation of companies during the year. Infosys was excluded having different functionality of products, having high turnover and brand name.

The Tribunal held that though a company was included by TPO and not objected to by assessee, CIT(A) had wrongly rejected the same on the reason of low profit margin. It further held that only continuous loss making companies were to be excluded.

It also held that a product based company was not strictly comparable to a service company like the assessee.

ACIT v McAfee Software (India)(P)Ltd - [2016] 68 taxmann.com 293 (Bangalore-Trib)

75. The Tribunal held that a specialised Embedded Software Development Service Provider cannot be compared with any other software development company. Further, it held that Infosys Ltd. cannot be considered as comparable to the assessee company which is a captive unit of its parent company in US and which assumed only limited risk, since Infosys Ltd. is a giant in the area of software development which assumed all risks leading to higher profit.

It also held that L&T Infotech could not be rejected as objected by the assessee company on the ground of high turnover and related party transaction, since the turnover filter was not a relevant criteria in the service industry.

Further, it held that the event of merger itself cannot be a fact for exclusion of a company from the list of comparables where it is not the case of the assessee-company that the amalgamating company is functionally dissimilar.

NTT Data Global Delivery Services Ltd v ACIT - [2016] 69 taxmann.com 7 (Bangalore-Trib)

76. The Tribunal held that the assessee, a captive service unit, engaged in providing research and development services relating to contract software development maintenance could not be compared with companies such as Infosys, having huge turnover, IP rights and brand value. Further, the Tribunal excluded TCS as a comparable on the ground that it was engaged in providing IT and Consultancy services as well as sale of equipment and software licenses without a segmental break-up along with the fact that it made an acquisition of another company during the year.

Sony Mobile Communications International AB v DDIT - (2016) 46 CCH 0550 (Del - Trib)

77. The Tribunal held that a company could not be considered as comparable due to its huge brand value and substantial ownership of intangibles, with a company having ITES segment with much lesser revenue.

Momentive Performance Materials (India) Pvt Ltd v ACIT - (2016) 67 taxmann.com 327 (Bangalore -Trib)

78. The Tribunal held that the assessee was incorrect in seeking exclusion of a company on the ground that it was engaged in the business of software products because the company did not have any inventory of software products and the said company was engaged in providing software development services akin to the services provided by the assessee. With regard to the exclusion of Infosys and Wipro on the grounds of brand value possessed by the two companies, the Tribunal remitted the matter to the TPO to determine the impact of the brand on the profitability of the companies. Additionally, it held that the assessee was incorrect in seeking to exclude companies on the basis of them having revenues from software products, where 96 percent of their operating revenues were derived from software development services.

Further, it held that where the TPO used the segmental data of companies obtained under section 133(6) of the Act to determine comparability of the companies with the assessee, he was obligated to afford the assessee an opportunity to cross examine the data.

Agnity India Technologies Pvt Ltd v DCIT - (2016) 47 CCH 0475 Del Trib - I.T.A .No.-6485/Del/2012

79. The Court upheld the order of the Tribunal wherein it was held that the assessee, engaged in providing software development and maintenance services to its AE could not be compared to companies engaged in software development programmes, huge companies such as Infosys, companies failing the Related Party to sales filter, companies having undergone business restructuring directly affecting the profitability.

Pr CIT v Fiserv India Pvt Ltd - TS-437-HC-2016 (Del) - TP - ITA 17/2016

80. The Court dismissed revenue's appeal against Tribunal's order directing exclusion of certain comparables following different financial period and held that it was clear and self evident from the provisions of Rule 10B(4) that the data to be used for comparability analysis should be contemporaneous with the time when international transactions are entered into. Further, it upheld the Tribunal's exclusion of a comparable on ground of functional dissimilarity coupled with the fact that its related party transactions exceeded 25% filter.

Further, it held that companies engaged in Engineering and Technical Services could not be compared to the assessee who was engaged in providing routine customer support services.

PTC Software (I) Pvt Ltd [TS-835-HC-2016 (Bom)-TP] (INCOME TAX APPEAL NO.337 OF 2014)

81. The Tribunal in case of assessee engaged in software development and support services, rejected assessee's contention of use of contemporarious data and multiple year data on the ground that in a number of cases by Cordinate Benches it is held that only the data pertaining to relevant financial year has to be considered and stated that a company cannot be selected as comparable in absence of availability of segmental information if the comparables are engaged in providing diversified services and income from software development cannot be equated with income from services as software development may include sale of products. Relying on the decision of Co-ordinate bench in case of Sony India Pvt Ltd. directed assessing officer to treat the provisions for bad and doubtful debts of the comparable companies as part of their operating expenses.

Sum Total Systems India Private Limited vs. DCIT (2016) 48 CCH 0082 (Hyd Trib)-ITA No.255/Hyd/2015

82. The Court dismissed the Revenue's appeal and upheld the Tribunal's order of excluding comparable which was following different financial period from that of assessee on the ground that no such liberty is granted in terms of Rule 10B(4). It further upheld Tribunal's determination of related party transaction percentage by restricting the denominator to only total sales and not total sales plus total expenses on the ground that related party transactions have to be considered in the context of total transactions and not by a conversion formula. It further confirmed Tribunal's rejection of comparable providing knowledge process outsourcing service on the ground that it requires superior level of man power and human resources as compared to the assessee engaged in BPO service.

PTC Software (I) Pvt Ltd [TS-788-HC-2016 (Bom)-TP]

83. The Tribunal held that the assessee, engaged in providing software development services could not be compared to a company engaged in both IT

and IT Enabled services in the absence of a segmental break-up of income. It further directed exclusion of companies having undergone extra-ordinary events during the year and companies engaged in providing software consultancy services as they were not functionally similar to the assessee.

Labvantage Solution Pvt Ltd [TS-836-ITAT-2016 (Kol)-TP] (I.T.A No. 1051/Kol/2015)

84. The Tribunal reversed CIT(A)'s order directing combined benchmarking of off-shore software development and on-site software consultancy services provided by assessee to its AEs and held that even in a case where one company itself provides both the said services, the same have to be considered separately while benchmarking the international transactions and fact that the assessee was reimbursed at cost plus 7.5% for off-site services and 15.04% for on-site services itself established that the two services were different from functional and risk perspective. Accordingly, it remitted the issue to the AO with the direction to benchmark the international transactions of provision of software development services i.e. off-site services independent of on-site services.

SAS Research & Development (India) Pvt Ltd [TS-859-ITAT-2016(PUN)-TP] (ITA No.810/PN/2013)

85. The Tribunal held that a super profit making company into diversified product development would not be functionally comparable with assessee, a software development service provider.

Hewlett-Packard India Software Operation (P) Ltd v ACIT - [2016] 67 taxmann.com 371 (Bangalore-Trib)

86. The Tribunal held that in case of assessee company rendering software development services to its AE, company developing its own software products, company rendering KPO services and company owning significant intangibles and earning huge revenue from software products could not be accepted as valid comparables while determining ALP.

Teleogic India (P) Ltd vs DCIT - [2016] 67 taxmann.com 159 (Bangalore-Trib)

87. The Tribunal held that a company operating in a different business strategy of acquiring companies for inorganic growth cannot be selected as

valid comparable vis-à-vis a company providing ITES services

Amba Research (India) (P) Ltd v DCIT - [2016] 67 taxmann.com 342 (Bangalore-Trib)

88. The Tribunal held that in case of assessee company rendering IT enabled services (ITES) to its AE, a company in whose case extraordinary event of amalgamation took place, a company rendering KPO service, company with brand and ownership of intangibles cannot be considered as comparable to the assesseee company.

United Health Group Information Services-TS-731-ITAT-2016(DEL)-TP-ITA No. 1038/Del/2015

89. The Tribunal held that the assessee engaged in the business of rendering data conversion services was not comparable to companies providing consulting services, developing software products, companies who have undergone an extra-ordinary event such as merger / demerger. Further, it held that loss making companies could not be compared with profit making companies and directed for the exclusion of such companies.

Lason India Pvt Ltd v JCIT - (2016) 47 CCH 0147 (Chen Trib)

90. The Tribunal held that the assessee company rendering IT enabled services to its AE could not be compared to companies providing KPO services, engaged in research and development activities, owning intangibles and companies who have undergone extraordinary event of amalgamation during the relevant year. It further held that while determining ALP, turnover was a valid criteria that could be adopted for inclusion or exclusion of companies in comparability study of the assessee company.

DCIT v IGS Imaging Services (I) (P) Ltd. - [2016] 67 taxmann.com 148 (Bangalore-Trib)

91. The Tribunal held that the assessee company rendering IT enabled services to its AE, could not be compared to companies using highly skilled work force for carrying out research and development activities, companies rendering web designing and software testing services and companies in whose case extraordinary event of amalgamation took place during the relevant year.

ACIT v Tech Book Electronics Sercices (P) Ltd - [2016] 67 taxmann.com 169 (Delhi-Trib)

92. The Tribunal held that the assessee, dealing in global IT solutions, application development and maintenance, application re-engineering and retesting and outsourcing software development to its AE, was not comparable to companies engaged only in software services and companies engaged in the business of software products as well as end to end web solutions since they were functionally dissimilar.

Additionally, where a company had been rejected by the TPO on account of extraordinary events during the year, but the assessee submitted that the said company did not undergo a merger but the merger took place in one of the company's subsidiary companies, the company was to be included as comparable subject to verification of facts.

Kumaran Systems Pvt Ltd v DCIT - (2016) 66 taxmann.com 75 (Chennai - Trib)

93. The Tribunal held that the assessee, engaged in the business of providing ITES to its AEs could not be compared with a) companies outsourcing a substantial portion of its work thereby having low employee cost, b) companies who had undergone mergers during the year c) companies operating different business strategies and d) KPO companies.

Cognizant Technology Services Pvt Ltd v DCIT - (2016) 67 taxmann.com 99 (Hyd)

94. The Tribunal held that the assessee, providing IT Enabled services to its AEs was not comparable with companies having undergone substantial business restructuring resulting into extraordinary circumstances during the relevant financial year, companies engaged in providing KPO and LPO services, companies who have developed and own unique web based software by which it provides niche services to its customers, companies having huge brand value and intangibles and companies providing both BPO services and high end technology services not having segmental results.

Further, in relation to the software development services, the Tribunal held that

the assessee could not be compared with companies developing their own software products, companies having undergone business restructuring, engaged in both, the sale of services and products but not having segmental break-up and companies failing the related party transactions filter.

Equant Solutions India Pvt Ltd v DCIT - (2016) 66 taxmann.com 192 (Del)

95. The Tribunal held that in case of assessee company rendering IT enabled services (ITES) to its AE, a company in whose case extraordinary event of amalgamation took place or a company rendering KPO services or a company which outsourced major portion of its business activity could not be accepted as comparables while determining ALP

Cummins Turbo Technologies Ltd v DDIT - [2016] 68 taxmann.com 273 (Pune-Trib)

96. The Tribunal held that company having revenue from software licensing could not be compared to a company providing software development services.

Hewlett Packard (India) Software Operation (P)Ltd v DCIT - [2016] 67 taxmann.com 309 (Bangalore-Trib)

97. The Tribunal held that in case of assessee company rendering IT enabled services (ITES) to its AE, company outsourcing major portion of its work and a company having substantial intangibles could not be accepted as comparables while determining ALP.

Telelogic India (P) Ltd v ACIT - [2016] 68 taxmann.com 165 (Bangalore-Trib)

98. The Tribunal held that in case of assessee company rendering software development services to its AE, a company engaged in research and development activities, a company which was huge in terms of nature of services, number of employees, ownership of branded products, etc and a company which included its revenue even from hardware segment in 'software devlopment' segment, could not be accepted as valid comparables while determining ALP.

It further held that in case of assessee company rendering IT enabled services (ITES) to its AE, a company rendering technical services such as software testing, verification and validation of software item and a company rendering ITES services after outsourcing same to third parties, could not be considered as comparables while determining ALP.

Headstrong Services (India) (P) Ltd v DCIT - [2016] 68 taxmann.com 363 (Delhi-Trib)

99. The Tribunal held that company engaged in providing animation services for 2D and 3D animation cannot be compared with company providing software development and support service. Further, it held that where nine comparables remained after exclusions, comparable having RPT at 15 percent could also be excluded.

The Tribunal held that assessee can raise additional ground to seek exclusion of a comparable included in assessee's own TP study when he had not raised such ground before the lower authorities.

Noveli Software Development (India) (P) Ltd v DCIT - [2016] 68 taxmann.com 201 (Bangalore-Trib)

100. The Tribunal held that the assessee, a captive service provider, engaged in providing software development and allied services to its AEs could not be compared to large companies having huge turnover, companies engaged in the development of software product, companies engaged in the development of niche products and development services, companies engaged in both software development and product development with no segmental break-up, companies rendering KPO services and companies carrying out substantial R&D activities which resulted in the creation of IPRs.

United Online Software Development (India) Pvt Ltd v ITO - (2016) 46 CCH 0509 (Hyd Trib)

101. The Tribunal held that KPO company being quite different in business from the assessee company (which provided only IT enabled services to its AE which falls in the realm of BPO services) could not be considered as comparable. It restored the matter back to the TPO/AO for re-determining the ALP of the international transaction.

Genpact Services LLC (India Branch) v ADIT - [2016] 46 CCH 0458 (Del Trib)

102. With regard to the assessee's software development segment, the Tribunal excluded 14 comparables on grounds of functional dissimilarity following co-ordinate bench rulings in Broadcom India, NXP Semiconductors India and Capgemini India; However, it refused to apply upper turnover filter of Rs 200cr to eliminate companies noting that assessee's turnover was Rs 50.20cr, therefore, excluded only Flextronics Software Solutions (having turnover Rs 848 cr) and iGate Global Solutions (having turnover Rs 747cr) and retained Mindtree (having turnover Rs 590cr) and Sasken Technologies (having turnover Rs 343cr).

AOL Online India (P) Ltd v DCIT -TS-156-ITAT-2016(Bang)-TP

103. The Tribunal held that companies engaged in software development and related support services could not be compared with companies having revenue from both software development and software products and companies engaged in providing 2D and 3D animation services. It further held that huge size of brand value and reputation of a company disqualifies it from being treated as comparable to the assessee, a small captive service provider. The Tribunal further held that where the assessee had not raised an objection to the lower turnover filter, companies could not be eliminated on the basis of an upper turnover filter and that companies could not be rejected merely on the basis of turnover.

JDA Software India Pvt Ltd v ITO - (2016) 66 taxmann.com 327 (Hyd)
Parexel International (India) Pvt Ltd v ACIT - (2016) 66 taxmann.com 150 (Hyd)

104. The Tribunal upheld CIT(A)'s exclusion of Rolta India Ltd and KLG Systel Ltd as comparables on account of distinct nature of business, size and diversified products. It also noted that turnover of Rolta India was Rs. 599 crore or at best Rs. 347crore (as contended by Revenue) and turnover of KLG Systel was Rs 112.53cr, which was much higher than assessee's turnover of Rs. 13.31crore, and excludes these 2 companies applying turnover filter as well relying on Bombay HC ruling in Pentair Water India and Delhi HC ruling in Agnity India rulings.

ACIT vs. Dana India Technical Centre (P) Ltd - TS -140-ITAT-2016 (PUN)-TP

105. The Tribunal held that the assessee, engaged in providing software development services to its AE having a turnover of Rs. 22.71 crores could not be compared to companies having huge turnovers ranging from Rs. 250 crores to Rs.13,000 crores as they were beyond the reasonable realm of comparability. Further, it held that for determining the employee cost filter of comparable companies, the TPO was to consider contribution to PF & ESI, Gratuity and Ex gratia payments and where companies satisfied the impugned filter after considering the aforesaid items, it was to be considered as comparable.

DCIT v Sunquest Information Systems (India) Pvt Ltd - (2016) 47 CCH 0138 (Bang Trib)

106. The Tribunal held that the assessee, providing IT enabled analysis services to its AE was not comparable with companies who had undergone amalgamation during the relevant year. It further held that where the segmental results of a comparable were available, it was incorrect to exclude a company only for a reason that it was into high end services.

Further, the Tribunal, relying on the decision of the Bombay High Court in the case of CIT v Pentair held that companies having huge turnover were to be excluded as comparable companies and accordingly excluded companies having a turnover in excess of Rs. 200 crore.

Zyme Solutions Pvt Ltd v ITO - TS-65-ITAT-2016 (Bang) - TP

107. The Tribunal, following the principle that where two views were available on the issue, the view favourable to the assessee was to be adopted, followed the decision of the Bombay High Court in the case of CIT v Pentair Water India Pvt Ltd and excluded companies based on the turnover filter. Further, it held that the assessee engaged in providing software development services was not functionally comparable with companies engaged in development of niche products. Additionally, companies not satisfying the related party transaction filter of 15 percent were excluded as comparable.

FCG Software Services (India) Pvt Ltd v ITO - TS-18-ITAT-2016 (Bang) - TP

108. The Tribunal held that the assesssee, engaged in development of delivery of domain specific software to its AE could not be compared to companies engaged in development of both, software products and software.

Further, considering both conflicting views on the elimination of comparable companies based on turnover, the Tribunal, following favourable view in CIT v Pentair Water India Pvt Ltd, Bombay High Court, held that turnover is a relevant criteria for choosing comparable companies in determination of ALP and excluded companies on the basis of turnover and size.

Obopay Mobile Technology India Pvt Ltd v DCIT - (2016) 66 taxmann.com 119 (Bang)

109. The Tribunal held that the assessee, rendering software development services to its AE, having a turnover below Rs.10 crore, could not be compared to the following:

❖ Companies having turnover in excess of Rs.200 crore, as per the decision of the Court in the case of CIT v Pentair Water India Pvt Ltd.

❖ Companies having erratic margins and growth over the years and having a growth in revenue which was not supported by a corresponding growth in expenses.

❖ Companies engaged in the business of development of Software Products & Services and training.

❖ Companies having a related party transactions to sales percentage in excess of 15 percent.

Sysarris Software Pvt Ltd v DCIT - (2016) 67 taxmann.com 243 (Bang)

110. The Tribunal held that the assessee, providing software development services could not be compared with companies a) engaged in sale and development of software b) having huge turnover in comparison to that of the assessee c) engaged in product development d) having minimal employee cost e) engaged in development of a niche product f) engaged in providing animation services or g) incurring selling and R&D expenses for sale / development of its products.

NTT Data India Enterprises Application Services Pvt Ltd v ACIT - (2016) 67 taxmann.com 88 (Hyd)

111. The Tribunal held that companies having a turnover in excess of Rs. 200 crore, companies having a software products and hybrid service business model and therefore functionally dissimilar, companies engaged in bi-informatics software products / services and development of bio-technology products, companies actively involved in R&D activities were not comparable to the assessee, engaged in software development services which included network management, technical documentation etc, having a turnover between Rs. 1 crore and Rs. 200 crore.

Further, it held that when TNMM is adopted as the most appropriate method, only net margin of the tested party was to be considered without looking into individual elements of cost since all elements of costs are aggregated irrespective of their classification and composition.

The Tribunal included a comparable wrongly excluded due to erroneous computation of export revenue.

ITO v Infinera India Ltd - (2016) 67 taxmann.com 8 (Bang)

112. The Tribunal held that the assessee, engaged in providing software development and support services to its AE could not be compared to E Infochips Bangalore Ltd since the said company was engaged in providing both Software development services as well as ITES services and did not have segmental results, and therefore functionally different. Further, it held that Kals Information Systems Ltd, being engaged in development of software products as well as providing training facilities could not be considered as a comparable owing to the difference in functionality. Tata ElxsiLtd, engaged in complex activities such as product design services, innovation design engineering and visual computing was also excluded as comparable.

Oaktown Global Technology Services Centre (India) Pvt Ltd v ACIT - (2016) 47 CCH 0575 (HydTrib) ITA No. 434/Hyd/2015

113. The Tribunal held that the assessee, providing ITES to its AE in the field of insurance could not be compared to a) companies earning substantial

amounts from high end medical transcription services without segmental results b) companies providing high end engineering design services and c) companies having turnover of less than 1 crore since it failed to satisfy the turnover filter applied by the TPO himself.

Swiss Re Shared Services (India) P Ltd v ACIT - TS-598-ITAT-2016 (Bang) - TP - IT(TP)A.380/Bang/2016

114. The Court held that a comparable could not be excluded merely because it had a 0.55 percent deviation from the 75 percent export earnings filter applied by the TPO and held that there was nothing sacrosanct about the figure of 75 percent and noted that a deviation that did not affect the result was acceptable. Further, it held that companies having a different financial year ending could not be rejected as comparable if the data relating to the financial year in which the international transaction was entered into was directly available from the annual accounts of the comparable. Further, it held that where the assessee an ITES provider had a turnover of 59 crores, a company whose relevant segment had a turnover of 27.76 lacs could not be considered as comparable and it also excluded companies outsourcing a large portion of its activities.

Mercer Consulting (India) Pvt Ltd - TS-664-HC- 2016 (P&H) - TP Income Tax Appeal No. 101 of 2015

115. The Court declined to interfere with the Tribunal ruling on comparability analysis and held that Infosys BPO and Eclerx Services Ltd. (ESL) were not comparable with assessee company engaged in KPO services. The Court relying on its ruling in Rampgreen Solutions PvtLtd held that while the assessee was catering to the capital and financial services markets, ESL worked in the area of sales, marketing and supporting financial services and that the financial profile of the two KPOs could not be said to be similar from the point of view of the type of businesses they were catering to.

PCIT vs Actis Global Services Pvt Ltd [TS-535-HC-2016(DEL)-TP] ITA 417/2016

116. The Tribunal held that where the TPO had applied a lower turnover filter, eliminating companies having turnover less than Rs.1 crore, logically he

should have fixed an upper turnover filter for rejecting companies having very high turnover as well. Relying on the decision of the Bombay High Court in Pentair Water India, it held that companies having more than 20 times the turnover of the assessee from software development services, could not be treated as comparable.

UCB India Pvt Ltd v ACIT - TS-605-ITAT-2016 (Mum) - TP - I.T.A./ 1218/Mum/2014

117. The Tribunal held that companies engaged in development of products & sale of products, companies deriving revenue from software services as well as software products without having segmental data could not be considered as comparable to the assessee who was engaged in providing information technology and software support services to its AE.

UCB India Pvt Ltd v ACIT - TS-605-ITAT-2016 (Mum) - TP- I.T.A./ 1218/Mum/2014

118. The Tribunal dismissed the assessee's miscellaneous application seeking exclusion of Avani Cincom Technologies Ltd on the ground of functionality (as it was also dealing in software products) against its previous order wherein Avani Cincom Technologies Ltd was held to be comparable to the assessee, engaged in software development, as there was nothing on record to show that this company earned revenue from software products. The Tribunal further noted that the assessee merely placed reliance on the commentary reported in the annual report and not on the actual information and financial details reported in the annual report.

Ariba Technologies India Pvt Ltd v ITO - TS-714-ITAT-2016 (Bang) - TP - I.T. (T.P) A. Nos.441 & 442/Bang/2012

119. The Tribunal held that the assessee, engaged in providing back office support services to its AE without any direct involvement in the conduct of its business, could not be compared with companies having undergone business restructuring / extraordinary financial events and companies providing both BPO services as well as Technical services having no segregation of revenues attributable to the two.

Further, the Tribunal, relying on the decision of the Delhi High Court in Chrys

Capital Investment Advisors (India) Pvt Ltd, held that mere high / low turnover or low / high profitability could be no reason to eliminate an otherwise comparable company.

Ameriprise India Pvt Ltd v DCIT - (2016) 66 taxmann.com 246 (Del)

120. The Tribunal held that only those loss making companies incurring losses for three consecutive years and not those companies merely incurring losses only in the relevant year, were to be excluded as comparable while determining the ALP of the international transactions undertaken by the assessee, engaged in providing software development services.

Sungard Solutions (India) Pvt Ltd v ADIT - (2016) 68 taxmann.com 89 (Pune)

121. The Tribunal held that the assessee, a wholly owned subsidiary of its USA based AE, engaged in providing IT and IT enabled services to its group could not be compared to a) companies not satisfying the service income filter of 75 percent, b) companies engaged in development of product and consultancy, c) companies having a huge brand value and reputation, d) companies specializing in embedded software development and e) companies having a huge turnover.

ADP Pvt Ltd v DCIT - TS-633-ITAT-2015 (Hyd) - TP
Avineon India P Ltd v DCIT - (2016) 46 CCH 0512 (Hyd)

122. The Tribunal held that 100 percent Government owned undertakings, rendering services primarily to the Central / State governments could not be considered as comparable to the assessee, since it received preferential treatment in obtaining contracts from the Government, impacting profits and not indicative of a free market economy in which the assessee operated. Further it held that in the absence of segmental results, companies carrying on pre-project activities, procurement assistance, project management / planning, commissioning, inspection, construction and supervision were not comparable to the assessee, a captive service provider, engaged in providing engineering design and related services. It also held that companies undertaking substantial R&D activities (5.41 percent of turnover) were not comparable with the assessee who did not perform the said function.

Bechtel India Pvt Ltd v DCIT - TS-638-ITAT-2015 (Del) - TP

123. The Tribunal held that the assessee, a software development service provider could not be compared with a software product company. Further, it held that companies operating in the segment of software development services comprising of embedded product design services, industrial design and engineering services, visual computing labs and system integration services, having no break up of sub-services based on which the margin of only the software services activity could be computed, could not be considered as a comparable. Also, companies owning significant intangibles and huge revenues from software products could not be considered as comparable. It observed that though TNMM obviates necessity for complete product identity or services identity between tested party and comparables and broad functional similarities would suffice, but where functional profile shows that dissimilarity, even within very same segment, is so significant so as to erode comparability, then there is a good case for exclusion.

Citrix R & D India (P)Ltd. vs DCIT - [2016] 68 taxmann.com 42 (Bangalore-Trib)

124. The Tribunal held that the assessee, engaged in the business of design and development of customized software applications could not be compared to companies having revenue from software development, hardware maintenance, information technology, consultancy in the absence of segmental information and companies engaged in software development services along with sale of software products without a break-up between the two.

Further, it held that where a comparable company earned income from a customer pursuant to an agreement entered into between such customer and the comparable company's parent company, which in the instant case was the AE of the assessee as well, the said transaction of receipt of income would be considered as a deemed international transaction under section 92B and the company could not be considered as comparable since it would no longer be an uncontrolled transaction.

Saxo India Pvt Ltd v ACIT - (2016) 67 taxmann.com 155 (Del - Trib)

125. The Tribunal held that the assessee-company engaged in rendering software development services to its AE, could not be compared to companies developing their own software products and company owning significant

intellectual property rights in form of patents which were used in rendering software development services.

Headstrong Services India Pvt Ltd v DCIT - (2016) 66 taxmann.com 185 (Delhi - Trib)

126. In respect of assessee's financial and accounting support services segment which was a high-end KPO segment, the Tribunal rejected reliance on jurisdictional HC ruling in Rampgreen Solutions to contend exclusion of 2 comparables since in the said precedent the assessee's profile was taken as low end ITeS and not a high end KPO as in the case at hand.

Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] - I.T.A .No.-6779/Del/2015

127. The Tribunal held that the assessee, a pure software development service provider, could not be compared to companies engaged in the business of software products, companies engaged in R&D activities resulting in creation of IPRs, companies engaged in embedded product development, companies developing software products as well as software development but having no segmental results, companies engaged in software design and development product services and companies engaged in 2D and 3D animation.

Further, it held that the acceptable RPT filter range was 5 percent to 25 percent and where there were a sufficient number of comparable companies, to obtain better comparison a filter of 15 percent as opposed to 25 percent was to be used.

LSI Technologies India Pvt Ltd v ITO - (2016) 47 CHH 0016 (Bang Trib)

128. The Tribunal held that the software segment of the assessee, engaged in providing support services to major Telecom and IT service providers, could not be compared to companies failing the employee cost to total cost filter of 25 percent, companies deriving revenue from both product and software services without segmental results, giant companies in terms of risk profile, scale and owning branded / proprietary products, companies developing software products in-house, companies developing hardware and software for embedded products and programs.

Nokia Siemens Networks India Pvt Ltd v ACIT - (2016) 47 CCH 0081 (Del- Trib)

129. The Tribunal remitted the benchmarking of the assessee's international transaction to the file of the TPO since the financials of the companies selected by the assessee were not available in the public domain at the time of the TP study but were now available. Accordingly, it directed the TPO to decide the matter afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee. The Tribunal further held that where the TPO had selected a comparable based on information received under section 133(6) of the Act without giving the assessee an opportunity of being heard, the issue was to be set aside to the file of the TPO for fresh adjudication after providing the assessee with such opportunity.

Microsoft India (R&D) Pvt Ltd v DCIT - (2016) 47 CCH 0316 (Del - Trib)

3.3 Support Services :

130. The Tribunal held that the assessee, engaged in providing IT Infrastructure support services and Financial and Accounting Support services in the capacity of a captive service provider could not be compared to a) companies in possession of intellectual property rights and having a huge brand, b) companies engaged in development of software products and also engaged in KPO, c) legal process outsourcing, d) data process outsourcing and e) high end software services and having undergone business restructuring during the year, f) companies engaged in health care outsourcing and software development services not having segmental information.

Bechtel India Pvt Ltd v DCIT - TS-638-ITAT-2015 (Del) - TP

131. The Tribunal held that the assessee, engaged in providing business support services in the nature of pre-sale / purchase and post-sale / purchase to its AEs, could not be compared to companies engaged in providing Project management consulting services, feasibility studies, micro enterprise development etc, companies providing advice on procurement and also carrying out procurement audits, Advisory-cum-consultants and companies engaged in project monitoring and quality assurance. It also rejected the

contention of the assessee that companies engaged in information vending and companies having a different financial year ending were to be accepted as comparable.

Marubeni Itochu Steel India Pvt Ltd v DCIT - (2016) 67 taxmann.com 52 (Del - Trib)

132. The Tribunal held that where the assessee was primarily engaged in providing sales support and post-sales support services, and the TPO found that assessee's employees were highly qualified and technically competent while the employees of the comparable companies were low level skilled employees and accordingly excluded the said companies as comparable, the CIT(A) was incorrect in disregarding the comparability analysis of the TPO on the general broad sweeping reasoning that a certain leeway was to be given in choosing comparable companies. Accordingly, the matter was remanded to the file of the AO / TPO.

CIT v Comverse Network Systems India (P)Ltd - [2016] 67 taxmann.com 290 (Delhi-Trib)

133. The Tribunal held that the assesee engaged in providing marketing support services such as liaison of potential new customers, hosting conferences and sales events to promote the LinkedIn product in the local market, could not be compared to a) non-profit companies mainly earning subscription fees from its members, b)companies engaged in the process of building its own brand and therefore expending huge advertising expenses, c) companies owning valuable online portals through which it earned service fees from third party customers. It further held that the assessee was incorrect in contending that companies engaged in a wide range of services including advertising, interior decoration and event management were to be included as comparable.

LinkedIn Technology Information Pvt Ltd v ACIT - TS-435-ITAT-2016 (Del) - TP - I.T.A. No.706/Del/2016

134. The Tribunal rejected TPO's selection of high-end technical service providers as comparables for benchmarking marketing support services rendered by assessee. It also held that a company which was engaged in online

portal activities and its major revenue was advertisement and subscriptions could not be compared to assessee engaged in marketing support services.

Further, it rejected the assessee's ground for exclusion of comparable being a 100% EOU, stating that registration as a 100% EOU only gives benefit with respect to direct and indirect taxation, and does not change the functional profile. It further held that even if it had impacted the prices charged by the comparable it was required to be shown as to what was its impact on the PLI of the comparable.

Rolls-Royce India (P) Ltd v DCIT - TS-180-ITAT-2016(DEL)-TP

135. The Tribunal held that companies engaged in engineering activities, testing services; micro enterprise development, skill development and project related services, tourism research studies, environment management, foreign exchange related service, travel agency services; business of container freight station could not be taken as comparable for the assessee engaged in providing marketing and other support services to its AE.

Roche Products (India)(P)Ltd v ACIT - TS-154-ITAT-2016(Mum)-TP

136. The Court dismissed Revenue's appeal, and upheld Tribunal's exclusion of ICRA Online Ltd for assessee providing marketing support services to AE for AY 2007-08; Even though assessee had initially included ICRA Online Ltd as a comparable in its TP-study and subsequently contended its exclusion during assessment proceedings on the basis of Director's Report which was not available when TP-study was carried out, the Court rejected the Revenue's contention that as per Rule 10D(4), information / document for TP-study should as far as possible be contemporaneous and should exist on the date specified in Sec 92 (f)(iv) and that fresh TP-study on the basis of the Director's Report of ICRA Online Ltd could not be the basis of its exclusion by observing that the date specified in Sec 92(f)(iv) was the due date specified in Explanation 2 to Sec 139 of the Act i.e. November 30th of the AY and assessee's contention to exclude ICRA Online Ltd was based on Director's Report dated May 12, 2007 (before due-date), However, the Court admitted Revenue's appeal on the question whether ITAT was justified in directing inclusion of Machine Tools India Ltd. as a comparable.

CIT v/s Haworth (India) Pvt Ltd. [TS-534-HC-2016(BOM)-TP] INCOME TAX APPEAL NO.233 OF 2014

137. The Tribunal held that the asessee-company rendering marketing support services to its AE in respect of sale of software products was not comparable to companies involved in providing engineering and consultancy services relating to hydroelectric projects and companies conducting clinical trials on food and drugs.

Microsoft Corporation India (P) Ltd v DCIT - [2016] 67 taxmann.com 94 (Delhi-Trib)

138. The Tribunal held that assessee, a BPO, could not be compared with a company that was into KPO services.

C3I Support Services (P)Ltd. v DCIT - [2016] 46 CCH 0423 (Hyd Trib)

139. The Tribunal held that the assessee engaged in providing support services / BPO Services including customer care and technical support services could not be compared to companies rendering KPO services involving specialized knowledge and domain expertise and companies providing high end services.

Daksh Business Process Services Pvt Ltd v DCIT - TS-455-ITAT-2016 (Del) - TP - ITA No.-2666/Del/2014

140. With regard to the assessee's call center service segment, the Tribunal excluded 12 comparables on grounds of functional dissimilarity following co-ordinate bench rulings in Stream International Services, Capital IQ Information, Avineon India and Zavata India; Also excluded 2 more comparables which failed TPO's employee cost filter; However, refused to accept assessee's contention to exclude Allsec Technologies Ltd, Apollo Healthstreet Ltd and I-Services India Pvt. Ltd as assessee had not made out a case for their exclusion.

Considering that the assessee was involved in Telecom and BPO services and its employee cost was very less compared to similar business, the Tribunal concluded that a company which failed the employee cost filter was to be rejected.

AOL Online India (P)Ltd v DCIT - TS-156-ITAT-2016(Bang)-TP

141. As regards to the assessee's infrastructure support service segment the Tribunal held that Infosys Ltd could not be taken as a comparable due to its owenership of brands and proprietary products which results in its bargaining power for higher profits.

Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] - I.T.A. No.-6779/Del/2015

142. The Court held that where the Tribunal in the prior years for AY 2004-05 accepted the plea of the assessee that it was not into core R & D activities but actually into the provision of marketing support services which was also accepted by the AO in his remand report for the relevant year i.e. AY 2005-06 as well the DRP for AY 2007-08, the Tribunal was incorrect in concluding that the assessee was engaged in providing core R&D activities for the year under review. Accordingly, it held that ITDC (a comparable selected by the assessee and affirmed by the DRP for AY 2007-08) was wrong excluded by the Tribunal on the ground of functional dissimilarity since the said company was also providing market support services akin to the assessee.

Honda (R&D) India Pvt Ltd v ACIT - TS-525-HC-2016 (Del) TP ITA 616/2015

3.4 Other Industries :

143. The Tribunal held that government related, protected/affiliated/ favoured companies rendering "Certification/Inspection" services etc. and companies trading in products and goods or providing vocational training cannot be said to be functionally similar to assessee's engineering design segment.

Bechtel India Pvt Ltd. vs DCIT [TS-499-ITAT-2016(DEL)-TP] - I.T.A . No.-6779/Del/2015

144. The Tribunal held that a company catering to needs of defence and armed forces and other organizations in field of space applications, night vision equipment, etc would not be functionally comparable to assessee engaged in the manufacturing of optical plastic lenses of human care.

Essilor Manufacturing India(P)Ltd. vs. DCIT - [2016] 67 taxmann.com 377 (Bangalore-Trib)

145. The Court held that where a substantial part of revenue of a comparable company in execution of turnkey projects arose out of executing projects of public sector undertakings, it could not be considered to be comparable to assessee-company providing turnkey services to its AE as contracts between Public Sector undertakings were not driven by profit motive alone but other considerations also weigh such as discharge of social obligations etc.

CIT v Thyssen Krupp Industries India (P)Ltd -[2016] 68 taxmann.com 248 (Bombay)

146. The Tribunal held that the assessee, engaged in distribution of channels was to be compared to companies engaged in the business of distribution and that the TPO was incorrect in choosing service companies as comparable. It further held that where data of distributors of channels was not available in the public domain, distributors of broadly comparable products and services should have been selected.

ACIT v Turner International India Pvt Ltd-TS-336-ITAT-2016 (Del)- TP

147. The Tribunal held that Hikal Ltd, having a crop protection segment was comparable to the Crop Protection Segment of the assessee and that the financial data of Hikal's crop protection segment was to be considered for comparison purposes as opposed to the entity level results taken by the TPO.

Further, in relation to the assessee's organic chemical segment, the Tribunal held that the TPO was incorrect in rejecting Sunshield Chemicals as a comparable on the ground that it was a persistent loss making company and sick company, since the impugned company ceased to be a potentially sick company and the annual reports for the two years prior to the relevant year reflected profits. Further, it held that companies not satisfying the R&D filter of 3 percent, applied by the TPO himself were to be excluded as comparable.

EI DuPont India Pvt Ltd v DCIT - TS-338-ITAT-2016 (Del) - TP

148. The Tribunal held that the CIT (A) was incorrect in considering NDTV and Cinevistaas as comparable to the assessee as they were pure content developers as compared to the assessee who was merely engaged in trading of content purchased / procured. It noted that the assessee was a mere trader and not a developer of content as supported by its P&L account which did not reflect any production or post production expenses as contained in the P&L accounts of NDTV and Cinevistaas. Accordingly, it deleted the addition made by the TPO arrived at by incorrectly considering the average margin of the two companies.
Star India Pvt Ltd v ACIT - TS-406-ITAT-2016 (Mum - TP)

3.5 Qualitative Filters :

149. The Tribunal held that where a company was correctly chosen as comparable based on its FAR analysis, it was necessary for the revenue to bring some cogent reason, argument or fact to justify that the comparable was to be excluded, other than the fact that the company was loss making.
DCIT v Nortel Networks India Pvt Ltd - (2016) 66 taxmann.com 177 (Del)

150. The Tribunal, relying on the earlier year's Tribunal orders in the case of the assessee, accepted the use of foreign comparable companies for carrying out FAR analysis and to benchmark the assessee's international transactions of providing automobile design services and engineering services to its Indian holding company, since the assessee was a Permanent establishment of a company incorporated in the UK.
Tata Motors European Technical Centre Plc v DCIT - TS-647-ITAT-2015 (Mum) - TP

151. The Tribunal citing Rule 10D which stresses the relevance of the FAR analysis, held that only those companies which were into the manufacture of bulk drugs i.e the same business of the assessee could be taken as comparable.
Astrix Laboratories Ltd v ACIT - (2016) 67 taxmann.com 28 (Hyd)

152. The Tribunal held that when assessee had both related party transaction and non-related party transaction, in absence of similarly placed companies having similar functions, similar assets employed and similar risk

undertaken, transaction of assessee with non-related party could be considered as best method to determine arm's length price by applying TNMM.
Igarashi Motors India Ltd v DCIT - [2016] 68 taxmann.com 333 (Chennai-Trib)

153. The Tribunal rejected assessee's contention of exclusion of company where the comparable company had super normal profit and brand value on the ground that merely because company has higher profits it cannot be excluded as comparable and it was not demonstrated that whether such brand value has any impact on the pricing or profitability of the company.
United Health Group Information Services--TS-731-ITAT-2016(DEL)-TP-ITA No. 1038/Del/2015

154. The Tribunal held that companies in whose case extraordinary event of amalgamation took place, companies having segmental revenue lower than the filter applied by the TPO, companies with huge turnover and brand value cannot be considered as comparable. Also, where a comparable has been excluded in the earlier assessment year and if there are no change in activities, the comparable should be excluded.
Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

155. The Tribunal held that where a particular company has been held to be not comparable in the case of another company, then such former company shall not cease to be the comparable to the assessee company since comparability of each company needs to be ascertained only after matching the functional profile and other relevant reasons.
Delphi Automotive Systems Pvt Ltd-TS-755-ITAT-2016(DEL)-TP I.T.A No. 1559/Del/2016

156. The Tribunal held that merely because the assessee had accepted the filters while preparing the TP Study, it could not be denied right to insist upon the exclusion of a comparable which has remained in the list of comparables accepted if subsequent information/data available in the public domain shows that the said comparable has become incomparable as its very profitability is impacted by its peculiar mix of its functionality or asset base or risk analysis.

Neither the acceptance nor the retention or for that matter lack of objection at the first instance makes an incomparable a comparable. The Tribunal further held that a comparable could not be foisted upon an assessee merely because it was proposed by the assessee, or was not objected to by the assessee in the earlier years or at the initial stages in the year under consideration.

Virage Logic International India [TS-480-ITAT-2016(DEL)-TP] - I.T.A. No.-6918/Del/2014

157. The Court held that where the Revenue failed to urge before the CIT(A) or the Tribunal the plea that Himachal Futuristic Communication Ltd ('HFCL') was not comparable to the assessee since the FAR analysis of the said comparable had not been conducted, the same could not be considered as a substantial question of law. Accordingly, it upheld the decision of the Tribunal wherein the Tribunal had included the said company as comparable dismissing the contention of the Revenue that the said company was loss making on the ground that the Revenue had not controverted the CIT(A)'s finding that HFCL was functionally comparable.

Nortel Network India Pvt Ltd - TS-770-HC-2016(DEL)-TP-ITA 548/2016

158. Where the assessee sought to include / exclude certain comparable companies, mere reliance on decisions of the Tribunal without bringing out the similarity in facts / functional profile based on which the decisions were rendered vis-à-vis the said comparable companies would not suffice. The Tribunal remanded back the case to the file of assessing officer so that proper analysis on FAR basis could be presented by assessee.

ECI Telecom India Private Limited vs. ACIT (2016) 48 CCH 0050 (Mumbai Trib)-ITA No. 7552/Mum/2012

159. The Tribunal upheld the directions of the DRP deleting the TP addition since the TPO selected two comparable companies but rejected 4 others which were also functionally comparable with the assessee. Further, it noted that during the DRP proceedings, the assessee submitted 6 comparable companies pursuant to which the DRP remanded the matter to the TPO for consideration of these new comparables and that the TPO failed to examine the said comparables on the ground that the assessee could not submit new

comparables at the appellate stage. It held that where the TPOs order itself revealed that all 6 companies were in the same segment, the act of the TPO in picking up only two comparable companies was highly objectionable. With regard to the admission of additional evidence / new evidence, the Tribunal held that the DRP being an appellate authority had all the powers of the CIT(A) and therefore was empowered to admit such evidence.

DCIT v M/s Rolls Royce Marine India Pvt Ltd - TS-284-ITAT-2016 (Mum) - TP

160. The Tribunal held that the TPO was to be consistent in matters relating to selection of comparables and therefore if a comparable had been included or rejected in an earlier year, he was not entitled to take a different view in a later year if there was no change in circumstances.

Hyundai Rotem Company v ACIT - IT(TP) No 1772 / Del / 2015

161. The Tribunal held that consistent abnormal profits earned by a Company intended to be taken as a comparable and several irregularities in financial statements of same, shall rightly disqualify such company as a comparable.

ACIT v Transcent MT Services (P)Ltd. & Anr - [2016] 46 CCH 0295 (Del Trib)

162. The Tribunal set aside the order of the AO with the direction that the TPO was to carry out a detailed FAR analysis in respect of the assessee's international transaction of providing ITES to its AE before embarking on the selection of comparable companies. It noted that the assessee's arguments for inclusion / exclusion of comparable companies arose solely on account of the fact that the foundational exercise of a proper FAR analysis of the assessee had not been done and also observed that while TNMM was robust enough to tolerate minor variation in the FAR analysis of comparables, the TPO was to conduct a FAR analysis on the basis of functions performed, assets available and risk assumed.

Copal Research India Pvt Ltd v DCIT - TS-624-ITAT-2016 (Del) - TP I.T.A .No.-7079/Del/2014 with I.T.A .No.-1113/Del/2016

163. The Court held that even though the Tribunal had rejected three

comparables on merits, the Court restored the issue to the file of the TPO as the same were never examined by him. However, the Court approved the Tribunal's order to the extent it held that merely because a comparable had been used in the subsequent AY for determining the ALP, it would not ispo facto apply to determine the ALP in the relevant AY as well.

Advance Power Display Systems Ltd v CIT - TS-670-HC-2015(BOM)-TP

164. The Tribunal held that though the principle of res judicata does not apply to income-tax proceedings, the rule of consistency was still applicable and therefore the TPO should not have rejected comparables which were valid comparables in the previous year without assigning a valid reason for rejecting the earlier year's stand or without bringing on record the salient features of the year under consideration as compared to the facts of the earlier years.

Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) - TP

165. The Court quashed the Tribunal's order and held that the Tribunal had no jurisdiction to render decision relating to adoption of international database for identifying comparables in international market while restoring TP adjustment for fresh adjudication by TPO as this was not subject matter of appeal. The Court directed the Tribunal to decide the appeal afresh and clarified that all contentions of both parties were left open.

Pentair Water India Private Limited -TS-762-HC-2016(BOM)-TP-TAX APPEAL NO. 65 OF 2016

166. The Tribunal held that merely because a comparable incurred loss during the year in normal course of business it could not be excluded as a comparable where it satisfied the functional comparability analysis.

Syngenta India Ltd v ACIT - TS-366-ITAT-2016 (Mum) - TP

167. The Court held that where the Revenue failed to urge the plea that a company was not functionally comparable to the assessee before the CIT(A) or the Tribunal, the same could not be urged before the Hon'ble High Court at a later stage.

PCIT v Nortel Network India Pvt Ltd - TS-770-HC-2016 (Del) - TP

3.6 Quantitative Filters :

3.6.1 Data for the Relevant Year :

168. The Court rejected Revenue's contention that companies could not be selected as comparable since they had a different financial year ending as compared to the assessee, by holding that if a comparable was functionally similar to the assessee and the results of the remaining part of the financial year could be reasonably extrapolated from the available data, then companies could not be eliminated on the ground of having a different financial year. Further, it dismissed the Revenue's plea for exclusion of companies having turnover less than Rs 1 crore and held that if the said filter was to be applied, then companies with higher turnover also should have been rejected.

It also held that the Revenue had erroneously excluded a company on the ground that it was in a negative phase of growth since the annual reports of the company exhibited a considerable rise in income over the past year.

CIT v McKinsey Knowledge Centre India Pvt Ltd - TS-672-HC-2015 (Del) - TP - ITA 217/2014

169. The Tribunal held that comparables which became available in public domain even after conduction of studies by assessee could be taken as comparables and considered for benchmarking.

Syngenta Biosciences (P)Ltd. v DCIT- [2016] 46 CCH 0507 (Mum Trib)

170. The Tribunal held that comparability was to be tested using the current years data of comparable companies and only when such data does not provide a true picture of uncontrolled comparable price, can multiple years data be considered. Further, it held that the tolerance range of + / - 5 percent as per proviso to section 92C(2) was a consequential benefit and would be available only if the difference between mean margin and assessee's margin on international transactions price was within such range.

Essilor Manufacturing India(P)Ltd. vs. DCIT - [2016] 67 taxmann.com 377 (Bangalore-Trib)

171. The Tribunal held that where the current year data was not available for a company it could not be considered as comparable. Further, it held that where a company was functionally comparable it could not be excluded merely because it had negative net worth.

ACIT v Gillete Diversified Operations (P)Ltd - TS-218-ITAT-2016(DEL)-TP

172. The Tribunal held that merely because a company follows different accounting year, it cannot be excluded. However, onus would be on the party which presses for its inclusion to provide reconciliation of the profitability in an authentic and reliable manner.

United Health Group Information Services--TS-731-ITAT-2016(DEL)-TP-ITA No. 1038/Del/2015

3.6.2 Related Party Transactions :

173. The Tribunal held that where Assessing Officer had excluded a company from comparable list on basis of information obtained under section 133(6) of the Act but did not make available said information to assessee, comparability was to be considered afresh. The Tribunal held that where assessee had requested for inclusion of two companies as comparables, excluded by TPO in his TP analysis on ground that they had failed RPT filter, in view of fact that actual working of TPO was not verifiable, matter required re-adjudication.

Mercedes Benz Research & Development India (P) Ltd. v ACIT - [2016] 68 taxmann.com 230 (Bangalore-Trib)

174. The Tribunal rejected CIT(A)'s adoption of assessee's AE as tested party and selection of Indian company as comparable for foreign tested party, by holding that the entire exercise of determining the ALP by the CIT (Appeals) was contrary to the provisions of transfer pricing. It restored the issue to the file of AO / TPO for deciding the matter afresh by considering segment-wise data of the assessee & then comparing it with comparable companies in light of various judicial precedents; and further directed adoption of 15% RPT filter as against 25% adopted by TPO.

Kshema Technologies Ltd v ACIT - TS-182-ITAT-2016(Bang)-TP

175. The Tribunal held that a company having related party transactions to sales in excess of 25 percent (37.88 percent) could not be considered as comparable as it would constitute a controlled transaction.

ITO v NTT Data Global Delivery Services Ltd - (2016) 47 CCH 0071 (Del- Trib)

176. The Tribunal held that 0% related party filter was not practically possible and noted that in light of the view taken by Tribunals, in the normal course 15% was the tolerance range of related party transaction which could be relaxed to a maximum of 25%. Noting that neither the assessee nor the transfer pricing officer had applied related party filter, it remitted the matter to the TPO directing him to verify the RPT of comparable companies by applying a suitable RPT filter not exceeding 25 percent.

United Engineers (Malasia) Berhad Quorum [TS-827-ITAT-2016 (Bang- TP]

3.6.3 Turnover Filter :

177. The Tribunal held that companies having turnover 20 times more than the assessee could not be accepted as a comparable.

DCIT v United State Pharmacopeia India (P)Ltd - [2016] 46 CCH 0447 (Hyd Trib)

178. The Tribunal held that the related party to sales filter of 15 percent was appropriate. Further, it held that the application of a turnover filter was important however applying a turnover filter of say Rs. 1 to 200 crores would give unrealistic results as an entity having a turnover of Rs. 1 crore could be compared to a company having a turnover of Rs. 200 crore but at the same time, as per the filter, a company having a turnover of Rs. 200 crore could not be compared to a company having a turnover of Rs. 201 crore as it fell outside the filter. Therefore, it suggested the application of an appropriate multiple (for example, 10 times) for determining comparability based on turnover. Additionally, it held that companies having high profit margin or high loss could be rejected as comparable only if such high profit or high loss was a result of some abnormal event or circumstance and the mere fact of high profit or high loss was not sufficient to exclude companies as comparable.

ITO v Maxim India Integrated Circuit Design Pvt Ltd - TS-265-ITAT-2016 (Bang) - TP

179. The Tribunal held that for the benchmarking of purchase of raw material and exports to AE, a comparable having a turnover of Rs.1745 crore could not be compared to the assessee having a turnover of Rs. 86 crore and held that the turnover filter was to be applied at 5 times the turnover of the assesse.

Luwa India Pvt Ltd v ACIT - TS-687-ITAT-2016 (Bang) - TP - I.T.(T.P) A. No.568/Bang/2012 & C.O. No.31/Bang/2015

180. The Tribunal held that turnover filter could not be applied after applying the qualitative filter, as a tool for cherry picking at later stage of assessment, but was to be applied at the time of the search process.

Star Limited [TS-773-ITAT-2016 (Mum)-TP] (ITA No.7680/Mum/2012)

181. The Court dismissed appeal of revenue against Tribunal's exclusion of comparables for lack of segmental data and held that mere availability of proportion of the turnover allocable for software product sales per se could not lead to an assumption that segmental data was available to determine the profitability of the concerned comparable.

Saxo India Pvt Ltd [TS-790-HC-2016 (Del)-TP] (ITA 682/2016)

CHAPTER - 4

ADJUSTMENTS / COMPUTATION / CALCULATIONS

4.1 Adjustments restricted to AE Transactions / Segments :

182. The Tribunal held that it is not permissible to make transfer pricing adjustment by applying average operating profit margin of comparables on assessee's universal transactions entered into with both AEs and non AEs.

Headstrong Services (India)(P)Ltd v DCIT - [2016] 68 taxmann.com 363 (Delhi-Trib)

183. The Court held that the TPO was unjustified in applying the base of capital employed under the TNMM method without segregating the capital employed in respect of AE and Non-AE transactions. Further, it held that where the assessee entered into both international as well as domestic transactions, the Tribunal was justified in restricting the adjustment only to international transactions.

CIT v Goldstar Jewellery Design Pvt Ltd - (2016) 67 taxmann.com 86 (Bom)

184. The Tribunal held that the segmental results of the business of the assessee, segregating transactions undertaken by it with its AEs and Non-AEs was to be admitted as additional evidence so as to determine the transfer pricing adjustment vis-à-vis AE related transactions and not on all transactions undertaken by the assessee. Since the segmental results were not analysed, the Tribunal admitted the same as additional evidence and remanded the matter to the file of the TPO.

RMSI (P) Ltd v ACIT - [2016] 46 CCH 0276 (Del Trib)

185. The Tribunal held that the entire exercise under Chapter X was confined to computing the total income of the assessee from international transactions with its AEs having regard to the arms' length price and therefore, the TPO was incorrect in making an adjustment at an entity level including transactions with unrelated entities.

Federal Mogul Automotive Products (India) Ltd v DCIT - TS-235-ITAT-2016 (Del) - TP

186. The Tribunal held that for the purposes of making necessary adjustments as envisaged under Rule 10D, the relevant segments of the comparable companies were to be considered and only the segmental revenue and segmental costs were to be considered with allocation of common expenditure amongst the segments on a proportionate and reasonable basis.

Astrix Laboratories Ltd v ACIT - (2016) 67 taxmann.com 28 (Hyd)

187. The Tribunal approved the assessee's stand of not allocating business development expenses to the AE segment of international transactions pertaining to technical support services based on the contention of the assessee that substantial business development expenditure and expenses incurred for securing independent contracts were incurred as an entrepreneur in the Non-AE segment. Further, it noted that the TPO had accepted the segmental break-up for the prior years and therefore applying the rule of consistency the same was to be accepted in the relevant year as well.

Stanley Consultants Pvt Ltd v DCIT - TS-610-ITAT-2016 (Del) - TP I.T.A. No.3336/Del/12

188. The Tribunal held that for the purpose of determining ALP, only transactions / turnover of assessee arising out of transactions with its AEs was to be considered and not the transactions undertaken by the assessee on an entity level. Accordingly, it set aside the matter to the file of the AO.

Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

189. The Tribunal held that where assessee engaged in business of system

integration and business process outsourcing, allocated actual expenses to each segment to which they were directly related and indirect cost on the basis of head count (except cost of space, which was allocated on basis of number of desk and vacant seats were allocated to IT segment), the method of allocation was appropriate as neither the CIT(A) nor assessing officer commented over the rationality of the allocation keys and this method was appropriate for the reason that BPO segment was in start-up stage. It further observed that even if business support cost was allocated based on revenue, then also, profit level indicator would have been higher as compared to comparables.

Xansa India Ltd-TS-774-ITAT-2016(DEL)-TP-ITA No.2283/ Del/ 2011

4.2 Adjustment for Credit Period :

190. The Tribunal held that where the assessee enjoyed a longer credit period than the period printed in the invoice on its import transactions from its AE as a result of which the AE charged a higher price, it was appropriate to consider the extra credit period enjoyed by the assessee so as to determine ALP while benchmarking the interest paid by the assessee to its AE.

Salcomp Manufacturing India Pvt Ltd - TS-716-ITAT-2016(CHNY)-TP-I.T.A.No.2201/Mds./2012

4.3 Capacity Adjustment :

191. The Tribunal held that an adjustment could be given to a tested party for under-utilization of manufacturing capacities only if it was possible for the assessee to establish that the comparable companies had a utilization capacity above its own.

Further, it held that an adjustment on account of variation of cost of raw materials could only be made if the variation was substantial enough to establish extraordinary circumstances and that for claiming such adjustment, the assessee was to show how the comparable companies were affected by similar variations, if any and that the products of the comparable companies were of inferior quality.

Momentive Performance Materials (India) Pvt Ltd v ACIT - (2016) 67 taxmann.com 327 (Bangalore -Trib)

192. After noting that there were serious issues with respect to assessee's products and a fall in production by over 64% evidenced that there was substantial underutilization of capacity, the Tribunal upheld assessee's claim for capacity underutilization adjustment, in principle, but remitted the issue back to AO for fresh quantification of adjustment by making necessary changes in the figures of comparables and not the tested party.

Frigoglass India Pvt Ltd [TS-500-ITAT-2016(DEL)-TP] - I.T.A. No. 784/Del/16

193. The Tribunal remitted the issue of capacity utilization adjustment for manufacturer and exporter of jewellery for AY 2008-09 to the file of the TPO by holding that an assessee who starts business in a particular year cannot be compared with those who are doing business for many a years.

Radhashir Jewellery Co Pvt Ltd [TS-459-ITAT-2016(Mum)-TP] - I.T.A./7066/Mum/2013

194. The Tribunal held that where adjustments on account of under-utilization of capacity and difference in depreciation are factors which are likely to materially affect price or cost charged or paid, or profit arising from, such transactions in open market, Assessing Officer / TPO should allow adjustments on account of under-utilization of capacity and also difference in depreciation method adopted by assessee and comparable companies. Consequently, it further held that the issue of apportionment of unallocated expenses also needed to be allowed.

Srini Pharmaceuticals Ltd v ACIT - [2016] 68 taxmann.com 50 (Hyderabad-Trib)

195. The Tribunal held that where the assessee, being newly incorporated was incurring losses as it was yet to break even, though TNMM was the most appropriate method, comparability with other companies under TNMM could only be done once the significant differences of operating cost between the comparables and assessee were adjusted since break-even of cost could only be reached after a sufficient period of operations by which time sufficient income could be generated to contribute towards fixed cost. Accordingly, it remitted the ALP determination to the file of the TPO.

MGE UPS System India Pvt Ltd v DCIT - TS-281-ITAT-2016 (Del) - TP

4.4 Depreciation Adjustment :

196. The Tribunal held that where the assessee computed depreciation under the straight line method as opposed to the comparable companies who used the written down value method, the assessee was eligible for an adjustment on account of the difference in the methods as depreciation charged by the assessee (29 percent) was substantially higher than the depreciation charged by comparable companies (15 percent).

AMD Far East Ltd v JDIT - TS-299-ITAT-2016 (Bang) - TP

197. The Tribunal held that where there was a difference in the depreciation of the assessee and the comparable companies due to the age of machinery, rate at which it was claimed and the method of claiming depreciation and details of capacity utilization and rate of depreciation of the comparable companies could not be ascertained, adopting Gross Profit / Sales as the PLI would eliminate such differences.

Kirloskar Toyota Textile Machinery Pvt Ltd v DCIT - TS-363-ITAT-2016 (Bang) - TP

4.5 Working Capital Adjustment :

198. The Tribunal held that where a company carries high trade receivables it would mean that it allows its customers a relatively longer period to pay its amount resulting in higher interest cost and lower profit and similarly companies carrying high payables enjoy the benefit of a relatively longer period for payment which reduces its costs and increases it profits. Accordingly, working capital adjustment ought to be granted to bring the case of the assessee at par with other functionally comparable companies.

Marubeni Itochu Steel India Pvt Ltd v DCIT - (2016) 67 taxmann.com 52 (Del - Trib)

199. The Tribunal remitted the issues of working capital and risk adjustment to the file of the TPO with the direction that if it all any working capital adjustments or risk adjustments in the comparables proposed by the TPO was warranted the taxpayer would have to support its claim by way of justifying the extent of adjustments requested as the law contemplates and support it

further by way of placing necessary justification in support of its prayer.

Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] I.T.A. No.-6779/Del/2015

4.6 Profit Level Indicator :

200. The Court held that for the purpose of computing the PLI of the assessee's transactions with its AEs viz. providing buying services to its AE, the total cost incurred by the assessee was to be taken as the denominator and not the FOB value of the goods sourced through the assessee as the FOB value would enhance the assessee's cost base by the cost of manufacture and export of goods by the third party vendor.

Pr CIT v Li & Fung India Pvt Ltd - TS-686-HC-2016 (Del) - TP -ITA 674/2016

201. The Tribunal upheld the order of TPO/DRP and stated that depreciation is one of the elements of operating cost which needs to be considered in it and it cannot be excluded from the operating margin ratio as it had a material impact on the profitability of the assessee.

India Japan Lighting Limited-TS-741-ITAT-2016(CHNY)-TP-ITA No.245/Mds/2013

202. The Tribunal held that foreign exchange losses incurred by the assessee was to be considered as operating in nature relying on the decision of the Coordinate Bench wherein it was held that foreign exchange losses formed part of operating margins since AS 11 stipulates that foreign exchange loss / gains of any nature relating to any item whatsoever was required to be charged to the P&L.

Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

203. The Court upheld the order of the Tribunal wherein it was held that foreign exchange gains / losses were to be considered as operating in nature. It held that the Safe Harbor Rules introduced in 2013 which stipulate exclusion of foreign exchange gains / losses from operating income / expenses were applicable only with prospective effect and therefore would not apply to the

relevant AY i.e. AY 2009-10.

Pr CIT v Fiserv India Pvt Ltd - TS-437-HC-2016 (Del) - TP ITA 17/2016

204. The Tribunal held that gain on account of foreign exchange fluctuation was to be considered as operating revenue for the purpose of working the profit margins of comparable companies.

Obopay Mobile Technology India Pvt Ltd v DCIT - (2016) 66 taxmann.com 119 (Bang)

205. The Tribunal held that loss arising out of foreign exchange fluctuations in relation to trading items was to be considered as an operating cost.

Ameriprise India Pvt Ltd v DCIT - (2016) 66 taxmann.com 246 (Del)

206. The Tribunal held that when rental income of the assessee was excluded from the total income for the calculation of PLI, corresponding rental expenditure was also required to be excluded.

Zyme Solutions Pvt Ltd v ITO - TS-65-ITAT-2016 (Bang) - TP

207. The Tribunal held that while working out operating margin, amount of foreign exchange gain /loss is required to be considered as an item of operating revenue/cost, both in case of assessee as well as comparables.

Mercedes Benz Research & Development India (P) Ltd. v ACIT - [2016] 68 taxmann.com 230 (Bangalore-Trib)

208. The Tribunal held that where assessee company had not claimed provision of derivative losses in final computation of its income, same could not form part of operating expenses while computing its PLI. Also, where assessee was engaged in both domestic and export sales in ready to serve food (RTS) segment, transfer pricing adjustment had to be made with respect to international transaction only and not on entire sales of RTS segment. Further, where assessee claimed that interest on finance cost being non-operating expense was to be excluded while calculating PLI of assessee company, in absence of information as to nature of interest paid on finance cost, claim of assessee was to be dismissed.

Further, it held that where TPO made addition to assessee's ALP in respect of ready to serve food sold to its AE without giving adjustment on account of

difference in capacity utilization between assessee and its comparatble, impugned addition deserved to be set aside.

Tasty Bite Eatables Ltd. v ACIT - [2016] 68 taxmann.com 272 (Pune-Trib)

209. The Court held that though Rule 10B(1)(e)(i) of the Rules do not prohibit the use of Berry Ratio as PLI for applying TNMM, it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. It further held that it would not be an appropriate PLI in cases where an Assessee uses intangibles as a part of its business or in cases of Assessees who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio which can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. Thus Berry ratio can effectively be applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them.

Sumitomo Corporation India (P) Ltd. v. CIT - (2016) 71 taxmann.com 290 (Del) - IT APPEAL NOS. 381,382 OF 2013 & 702 OF 2014 AND 738 OF 2015

210. The Tribunal held that as per the Rules, the net profit margin of controlled transactions had to be compared with the net profit margin of the uncontrolled transactions and not the respective gross profit margins as done by the TPO.

DCIT v Cummins India Ltd - (2016) 67 taxmann.com 341 (Pune)

211. The Tribunal held that the net operating margin realized by the assessee from international transactions was to be compared to the net operating profit margin realized by the comparable companies using the same base i.e. the numerator and denominator used for computation should be common for the assessee as well as the comparable companies and therefore the operating profit to operating cost of the comparable companies could not be compared to the operating profit to value added expenses of the assessee.

DCIT v Agilent Technologies India Pvt Ltd - (2016) 67 taxmann.com 95 (Del - Trib)

212. The Tribunal held that where losses on account foreign exchange arose during the normal course of business activities, the AO / TPO ought to have included the same as an operating item while computing the PLI of the assessee as well as the comparable companies.

Swiss Re Shared Services (India) P Ltd v ACIT - TS-598-ITAT-2016 (Bang) - TP - IT(TP)A.380/Bang/2016

213. The Tribunal held that cost to cost receipt of reimbursement of expenses was to be evaluated independently and not added to the cost base and revenue in determining the ALP.

FCG Software Services (India) Pvt Ltd v ITO-TS-18-ITAT-2016 (Bang)-TP

214. The Tribunal held that where the assessee, who was entitled to charge its AE a mark-up of 5 percent on the actual costs incurred by it in providing research services, inadvertently failed to exclude the cost of bought out services and service tax from the cost on which mark-up was charged in accordance with the agreement, the TPO ought to have excluded the same. It noted that if the above figures were considered, there would be no scope for making adjustment under section 92 of the Act since the price would be at ALP and accordingly deleted the addition.

Unilever Industries Pvt ltd v JCIT - TS-2-ITAT-2016 (Mum) - TP

215. The Tribunal held that where assessee was remunerated with costs incurred with mark up at 8 percent for services rendered to its AE, TPO was not justified in changing base from 'costs' incurred to 'FOB' value of exports' and applying 6 percent mark-up.

Li & Fung (India) (P)Ltd v DCIT - [2016] 68 taxmann.com 58 (Delhi-Trib)

216. The Tribunal held that foreign exchange gain pertaining to marketing commission segment should be considered as operating income while computing margin of comparable companies.

GE Healthcare Bio-Sciences Ltd. vs DDIT - [2016] 68 taxmann.com 369 (Chennai-Trib)

217. Reimbursement costs have to be excluded for profitability purposes while working out operating costs (as same do not involve any functions to be performed).

International Merchandising Corporation v DCIT-[2016] 68 taxmann.com 360 (Delhi-Trib)

218. The Tribunal held that once there was additional compensation that had been taken as item of operating revenue, then costs incurred in bearing such risks have to be naturally considered as operating cost.The Tribunal held that as operating profit was computed by considering items of operating costs alone, value of two items viz. purchase of capital asset and FTS which were capital in nature and capitalized in balance sheet, could not be included in base amount for applying operating profit margin rate of comparables for computing amount of transfer pricing adjustment.

Asahi Glass Ltd v DCIT - [2016] 46 CCH 0421 DelTrib

219. The Tribunal held that an adjustment should be allowed to the assessee of the difference in the risk borne by the assessee as well as the comparables. Noting that assessee had submitted a working for risk adjustment, without commenting on the correctness of the computation, the Tribunal set aside this ground to the file of TPO for fresh consideration in accordance with law after granting proper opportunity to the assessee for supporting its claim.

Rolls-Royce India (P) Ltd. vs DCIT - TS-180-ITAT-2016(DEL)-TP

220. The Tribunal held that forex loss on account of late receipt of export proceeds of earlier AY were not relatable to export sales of the year under consideration and thus excluded the same while computing assessee's PLI. However, it clarified that forex loss relating to sales of current AY would need to be adopted for computing assessee's PLI, and accordingly directed the AO to re-compute assessee's PLI.

ACIT v Dana India Technical Centre (P)Ltd -TS-140-ITAT-2016 (PUN)-TP

221. The Court upheld Tribunal's order considering foreign exchange gain/loss arising out of revenue transactions (i.e. ITES services) as an item of operating revenue/cost.

Pr CIT v Ameriprise India (P)Ltd -TS-174-HC-2016(DEL)-TP

222. The Tribunal held that where the assessee had outsourced some of its work to its subsidiaries and other independent units in relation to services to be provided by it to its other AEs, and these entities raised bills on the assessee for which the assessee made payments to them on its own account, the entire transaction could not be treated as a pass through cost as it was not a mere payment from the AE of the assessee to its subsidiaries, and therefore, the assessee was not correct in seeking its exclusion from income and expenditure while computing PLI.

Lason India Pvt Ltd v JCIT - (2016) 47 CCH 0147 (Chd Trib)

223. The Tribunal rejected the assessee's plea for considering payment of commission of Rs. 2 crore to Voltas Ltd. (third party) as a pass through cost as the said costs were directed towards rendering of marketing support services to its AE and were thus a value added cost and were part of assessee's operating cost for computing margin. It observed that the assessee received Rs. 4.24 cr as commission from AE as consideration for rendering marketing support services, of which a sum of Rs. 2cr was paid to Voltas Ltd under a sub-contract service agreement and therefore the entire amount of Rs. 2 crore represented costs incurred by assessee in its role as principal for carrying out the market and support services and not as an agent of its foreign AE. Therefore, it held that this was not a sum recoverable per se from AE. It further held that if commission paid to Voltas Ltd. (which was exclusively for rendering marketing support services to AE) was treated as a pass through cost, then the payment to assessee's own employees and other expenses, which were also incurred in rendering services to AE, should also be treated as pass through cost, which was an 'absurd' proposition.

Kobelco Cranes India (P) Ltd. vs ITO - [TS-242-ITAT-2016(DEL)-TP]

224. The Tribunal accepted the assessee's plea for treatment of royalty income received from franchisee / JVs in India and reimbursed to its AE, for marketing and operational rights, as a pass-through cost, noting that there was

no value-addition to the collection of royalty amount and reimbursement to AE and further that assessee had not commercially exploited the royalty / franchise fees as it was required to remit such funds within 5 days of end of each month.

Mc.Donald's India (P) Ltd vs DCIT - TS-236-ITAT-2016(DEL)-TP

225. The Tribunal held that interest income earned from Fixed Deposit Receipts was includible as operating income since the said interest arose out of advances received against exports which were immediately placed in FDRs with the bank for the purpose of taking letters of credit in favour of overseas sellers and therefore was an integral part of the assessee's business activity.

Further, it held that TP adjustments were to be restricted to the international transactions undertaken by the assessee with its AEs and therefore the TPO was incorrect in making an adjustment to the entire manufacturing segment of the assessee.

DCIT v Bunge India Pvt Ltd - TS-264-ITAT-2016 (Mum) - TP

226. The Tribunal held that where foreign exchange fluctuation was considered as operating in nature while computing the PLI of the assessee, it was to be considered on a similar footing while computing the PLI of comparable companies.

DCIT v Sunquest Information Systems (India) Pvt Ltd - (2016) 47 CCH 0138 (Bang Trib)

227. The Tribunal held that 'other sales income' and 'corporate support service income' was to be included while computing the PLI of the assessee. Further, it held that foreign exchange gains arising out of the sale of goods was to be included in the operating income of the assessee.

ACIT v Gillete Diversified Operations (P)Ltd - TS-218-ITAT-2016(DEL)-TP

228. The Tribunal held that as per Accounting Standard 5, bad debts could not be considered as extra-ordinary in nature and were to be considered as operating expenses while computing the PLI.

Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) - TP

4.7 Others :

229. The Tribunal held that where the assessee had a fixed selling price of goods manufactured by it vis-à-vis its AE and the price of raw materials used by it for the manufacture of such goods increased extraordinarily, the assessee was entitled to an adjustment for such extraordinary cost of raw materials since the sale price being fixed, the margin of the assessee was bound to suffer, as opposed to the comparable companies who were not restricted by a fixed sale price.

ACIT v Summit India Water Treatment & Services Ltd - TS-655-ITAT-2016 (Ahd) - TP ITA. No: 377/AHD/2012

230. The Tribunal held that as per the language used in section 92(1) and 92C(3)(a) of the Act, it is the actual income earned from an international transaction during the year that has to be taxed at ALP and therefore the actual income of the assessee from an international transaction could not be substituted with any hypothetical figure such as the projected profits for the subsequent years or by considering the profits of the earlier years.

Headstrong Services India Pvt Ltd v DCIT - (2016) 66 taxmann.com 185 (Delhi - Trib)

231. The Tribunal held that considering the complex structures involved in many intra AE transactions it could not be held that the ALP adjustments cannot result in a situation wherein the profits of the AE along with the ALP adjusments exceed the global profits of the group as a whole, since it would require interaction of a large number of tax jurisdictions with irreconcilable tax laws.

Fortune Infotech Ltd v ACIT - (2016) 66 taxmann.com 92 (Ahd - Trib)

232. The Tribunal rejected the TP adjustment of Rs. 1.30 crores to the amount of book profits under minimum alternate tax (MAT) provisions and held that there was no provision under the law that permitted the AO to make an adjustment on account of transfer pricing addition to the amount of profit shown by the assessee in its profit and loss account, for the purpose of computing book profit u/s 115JB. It noted that section 115JB is a self-contained code which prescribes certain adjustments permissible to book

profit, whereas TP adjustments are governed by altogether different sets of provisions contained in Chapter X and that such an approach was highly unfair and would result in undue and avoidable hardship to the tax payers.

Owens Corning (India) Pvt Ltd. v DCIT - TS-245-ITAT-2016(Mum)-TP
Owens Corning (India) Pvt Ltd v DCIT - TS-269-ITAT-2016 (Mum)

233. The Tribunal held that where only one price had been determined under the most appropriate method, the question of providing the 5 percent (relevant for the year under consideration - AY 2004-05) benefit under the second proviso to Section 92C did not arise.

Philips Electronics v ACIT - TS-316-ITAT-2016 (Kol) - TP

234. The Tribunal held that where the sale price of the assessee's key product, constituting 35 percent of the gross margin was substantially reduced by the assessee in the relevant year due to availability of similar cheap generic products, so as to defend its market share, a reasonable and suitable adjustment was to be made to the profit margin. Accordingly, it remitted the file to the AO to determine the impact of reduction of price of the assessee's key product.

Syngenta India Ltd v ACIT - TS-366-ITAT-2016 (Mum) - TP

CHAPTER - 5

SPECIFIC TRANSACTIONS

5.1 Advertisement, Marketing and Promotion :

235. The Tribunal, noting that the decision of the Delhi High Court in the case of Sony Ericsson was not available to the TPO at the time of the relevant proceedings, remanded the matter back to the file of the TPO to re-compute the AMP addition in line with the ratio laid down in the aforesaid judgment. Further, it held that the AO / TPO were to adopt the bundled approach in benchmarking AMP transactions and that where the comparable companies were adopted as a bundled transaction, it would be unfair to segregate AMP expenses since the comparable companies are accepted after comparing various functions performed by the tested party and the AMP expenses are duly accounted for in such comparability analysis.

India Medtronic Pvt Ltd v DCIT - TS-633-ITAT-2015 (Mum) - TP

236. The Court held that the TPO was incorrect in presuming the existence of an international transaction between the assessee and its AEs, on the basis that the assessee allegedly made a contribution towards AMP expenditure to its wholly owned Indian subsidiary on behalf of its AEs coupled with the fact that the assessee had incurred a loss in the relevant segment and therefore concluding that it was not adequately compensated by the AEs for the creation of marketing intangibles. The Court held that there would be a need for a detailed examination of the operating agreement between the assessee, its Indian subsidiary and the AEs to ascertain if any part of the AMP expenses was

for the purpose of creating marketing intangibles for the AE of the assessee and only after an international transaction between the assessee and its AE in relation to AMP expenses was shown to exist, could the question of determining ALP of such international transactions arise.

Yum Restaurants (India) Pvt Ltd v ITO - TS-12-HC-2016 (Del) - TP

237. The Tribunal remitted the issue of determination of ALP to the lower authorities to first determine the existence of an international transaction prior to making an adjustment on account of AMP expenses. It also directed the TPO to exclude from the ambit of AMP expenses, selling expenses directly incurred in connection with sales not leading to sale promotion.

LG Life Sciences India P Ltd v ACIT - (2016) 47 CCH 0551 (Del Trib) ITA No. 1818/Del/2015

238. The Court set aside the Tribunal order by holding that the Tribunal should decide the question regarding existence of international transaction involving advertisement, marketing and promotion ("AMP") expenses between assessee and its AE,instead of remanding the issue to any other authority for decision, where all the necessary material relevant to decide this issue is already on record. It further held that in case the question regarding existence of international transaction was answered by the Tribunal in the positive, the Tribunal should decide the further issues that arise in the appeal in accordance with law. It further directed that in the eventuality that the first question is answered in the positive, it would be open to assessee to file further appeal before the High Court and raise relevant questions of law including relating to the jurisdiction and power of TPO to determine the existence of an international transaction even though it was not reported by assessee and also regarding the retrospective application of Sec 92CA(2B)

Daikin Airconditioning India Pvt Ltd v/s ACIT [TS-533-HC-2016 (DEL)-TP] ITA 269/2016

239. The Tribunal held that the TPO was incorrect in adopting the Bright Line Test for the purpose of determining the ALP of the AMP transactions as specifically held by the Delhi High Court in the decision of Sony Ericsson and accordingly remanded this limited issue to the file of the TPO.

Johnson & Johnson Limited v Add CIT- TS-19-ITAT-2016 (Mum) - TP

240. The Tribunal held that where the assessee, a market leader in the chocolate confectionary segment, had incurred marketing expenses for increasing awareness of its products in India leading to higher sales, the same could not be presumed to have an indirect benefit to the assessee's AE. Additionally, in the absence of an agreement between the assessee and the AE and where the TPO failed to prove that the assessee incurred marketing expenses on behalf of the AE, the provisions of Chapter X could not be applied to the AMP expenditure of the assessee. It held that a perceived / notional indirect benefit to the AE due to incurring of certain expenditure by an assessee in India was not covered under the TP provisions.

Mondelez India Foods Pvt ltd v Add CIT - (2016) 47 CCH 0098 (Mum-Trib)

241. The Tribunal deleted TP adjustment on account of AMP expenses in the case of assessee engaged in manufacture and sale of toy products in India for AY 2008-09 by holding that a perceived / notional indirect benefit to the AE , due to incurring of certain expenditure by assessee in India was not covered by the TP provisions. Further, noting that the lower authorities tried to incorporate ingredients of Section 37 while dealing with TP adjustment on account of higher expenditure in respect of AMP, the Tribunal held that the lower authorities had adopted a totally incorrect approach without appreciating that there was a fundamental and basic distinction between the provisions of Section 37 and Section 92 of the Act as the first is expense oriented and the second is pricing oriented.

DCIT v Mattel Toys (India) Pvt Ltd - TS-466- ITAT-2016 (Mum) - TP - ITA/4350/Mum/2014 ITA/4415/Mum/2014 ITA/84/Mum/2015

242. The Apex Court granted leave to the Departments SLP against High Court's ruling that mere existence of an agreement whereby a license has been granted to assessee to use brand name would not ipso facto imply any further understanding or arrangement between assessee and its foreign AE regarding AMP expense for promoting brand of foreign AE to infer an international transaction.

DCIT v. Honda Siel Power Products Ltd - (2016) 71 taxmann.com 181 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10667 OF 2016

243. the Tribunal had set aside the order of the lower authorities making AMP adjustments by adopting the bright line test in light of the decision of the Jurisdictional Court in the case of Sony Ericsson Mobile which held that the bright line test was inapplicable.

Pr CIT v Toshiba India Pvt Ltd - TS-700-HC-2016 (Del) - TP-ITA 418/2016, CM APPL.25577/2016

Pr CIT v Bose Corporation India Pvt Ltd - TS-702-HC-2016 (Del) -TP-ITA 462/2016, C.M. APPL.26603/2016

244. The Tribunal held that where the identical issues (AMP expenses and Intra-group services) were already adjudicated by Jurisdictional High Court in assessee's own case which were in favour of assessee, re-characterisation of intra-group services on the basis of it not being for commercial expediency when it is fully disclosed in the TP study report is clearly beyond powers of transfer pricing officer. Also, revenue had not been able to prove existence of international transaction involving AMP expenses.

Bausch & Lomb India Pvt.Ltd vs. DCIT (2016) 48 CCH 0069 (Del Trib)-ITA No. 6778/Del/2015

5.2 Commission :

245. The Tribunal held that the ALP of the commission expenses paid by the assessee, a joint venture between Venture, USA and Satyam India, to its promoter company could not be taken as Nil by the TPO by disallowing the payment under section 37(1) of the Act and that he ought to have determined the ALP of the transaction using one of the prescribed methods. Further, the Tribunal held that the TPO could not apply the CUP method without identifying any uncontrolled comparable transaction.

Satyam Venture Engineering Services Private Limited [TS-466-ITAT-2016(HYD)] 2004-05-1590/Hyd/2010; 2005-06-197/Hyd/2011; 2006-07- 354/Hyd/2011; 2007-08-1905/Hyd/2011; 2008-09-1138/Hyd/2013.

246. The Tribunal held that where the assessee had paid commission to its US AE at 10 percent and justified the same under the CUP method on the basis of similar commission paid (@ 8 percent) by the AE to unconnected parties who

acted as selling agents, no addition could be sustained since the commission paid by the assessee to its AE was for services rendered in respect of sales in the US and the scope of services rendered by the AE was much wider than the scope of services rendered by the uncontrolled companies to whom the AE was making commission payments at the rate of 8 percent.

Paxar India Pvt Ltd v DCIT - TS-582-ITAT-2016 (Bang) - TP ITA No. 1788/B/2013

5.3 Loans / Interest on Receivables / Corporate Guarantee :

5.3.1 Loans :

247. The Tribunal held that commercial expediency of a loan to a subsidiary company was not relevant in the ascertaining the arm's length interest on such a loan and that there was no bar on anyone advancing an interest free loan to anyone but when such transactions are covered by the international transactions between associated enterprises, Section 92 of the Act mandates that the income from such transactions is to be computed on the basis of arm's length price. It rejected the contention of the assessee that when no income was reported from a particular transaction, then computing ALP on the same was not warranted. Further the Tribunal distinguished the decision of the Court in Vodafone India Services Pvt Ltd v UOI - (2014) 50 taxmann.com 300 and held that the said decision dealt with international transactions which were inherently incapable of producing income chargeable to tax since it was in the capital field. Therefore, it was held that even if no income was reported in respect of an item in the nature of income, such as interest, but the substitution of transaction price by arm's length price results in an income, it can very well be brought to tax under Section 92.

Instrumentarium Corporation Ltd v ADIT(IT) - TS-467-ITAT-2016 (Kol) - TP - IT APPEAL NOS. 1548 & 1549 (KOL.) OF 2009

248. The Tribunal deleted the notional interest adjustment made by the TPO by re-characterizing the advance paid by the assessee to its AE on account of purchase of machinery from its AE. It held that the TPO did not bring any material on record to suggest that the transaction was sham or bogus or that it

was a loan and therefore he was incorrect in treating it as a loan and imputing notional interest on the same.

Essar Steel Orissa Ltd v ACIT - TS-442-ITAT-2016 (Mum) - TP- I.TA No. 2289/Mum/2014

249. The Tribunal held that for the purpose of benchmarking the interest on loan given by the assessee to its US based AE, LIBOR was the safest tool since the loan was denominated in foreign currency and rejected the approach of the CIT(A) in adopting the rate of interest stipulated in the RBI Master Circular No 7 / 2006-07 dealing with External Commercial Borrowings.

Marico Ltd v ACIT - TS-411-ITAT-2016 (Mum) - TP - I.T.A./8858/ Mum/2011 I.T.A./8713/Mum/2011

250. The Tribunal held that where the assessee advanced a loan to its AE at LIBOR plus 247 basis points and Indian banks were charging LIBOR plus 250 basis points on similar loans, the addition made by the TPO / DRP was to be set aside, more so since the loans granted by the assessee were to subsidiaries under the same management and control which substantially reduced the risk factor.

UFO Movies India Ltd v ACIT - (2016) 66 taxmann.com 120 (Del)

251. The Tribunal held that where assessee had advanced loan to its 100 percent subsidiary of Poland in Polish Zloty, interest rate should be computed by adopting WIBOR + 1 percent.

KPIT Cummins Infosystems Ltd v ITO - [2016] 68 taxmann.com 294 (Pune-Trib)

252. The Tribunal set aside TPO/DRPs order charging notional interest on interest free loan advanced to UK subsidiary (AE) by holding that if assessee had surplus interest free funds after meeting all statutory obligations, including payment of income tax on the income, then assessee was open to invest the same in any manner as it liked. As details of loan borrowed and available surplus were not available in the present case, the Tribunal remitted the matter and directed verification of i) whether assessee had sufficient surplus funds for advancing the corporate loan to UK AE and ii) whether there was any nexus

between borrowed funds and advance made by assessee to UK AE.

Sundaram Fasteners Ltd. vs DCIT - TS-121-ITAT-2016(CHNY)-TP

253. The Tribunal held that where the assessee received interest on advances given to its AE, the interest rates of the loanee country were to be considered for the purpose of benchmarking the interest and not the Bond rate of BB rated bonds in India.

Subex Ltd v DCIT - (2016) 68 taxmann.com 233 (Bangalore - Trib)

254. The Tribunal rejected (a) TPO/DRP's treatment of AE as the 'tested party' and adoption of USD Corporate Bond Rates for determining ALP of INR dominated CCD's borrowed by assessee from AE (b)TPO/DRP's 'blanket approach' in applying USD Corporate Bond Rates for interest benchmarking, on the ground that once the tested transaction is in INR denominated debt, then interest rate must necessarily be based on economic and market factors affecting Indian currency and data available for debt issuances in India or INR denominated rather than foreign currency rate or external data by relying on Delhi HC ruling in Cotton Naturals. The Tribunal accepted assessee's alternative approach of undertaking search for comparable debt issuances in BSE data as assessee had used data for the subsequent year and made minor tenor adjustment to factor the time period to arrive at mean margin and held that although a high degree of comparability was required under CUP, but in absence of such a comparable data, a minor adjustment could be made to eliminate the material effect of time difference for arriving at a CUP. The Tribunal deleted the addition by noting that the assessee had filed 2 comparables for the earlier year wherein for credit rating of AA Enterprises, the coupon rate of interest per annum was between 11% to 12% for a tenor of 60 months, and concluded that if for a credit rating company AA or AA(+) the interest rate is ranging between 11% to 12%, then in the case of the assessee which was admittedly BBB(-) credit rating company, 11.30% interest paid by the assessee to its AE was much within the arm's length rate.

India Debt Management (P)Ltd v DCIT -TS-141-ITAT-2016(MUM)TP

255. The Tribunal held that where assessee company had advanced interest free loans to subsidiaries, the ALP needs to be determined applying the

international market condition since the money was lent and utilized outside India and relying on the ruling of PMP Auto Components (P) Ltd, it directed transfer pricing officer to determine ALP by applying LIBOR + 200 points.

Transport Corporation of India Ltd. - TS-764-ITAT-2016 (HYD)-TP-ITA No. 117/Hyd/2016

256. The Tribunal held that where the assessee had provided its AE with a loan in foreign currency, the interest charged to its AE was to be benchmarked with respect to the LIBOR and not the implicit interest rate on India's External Debt applied by the AO and since assessee charged interest of LIBOR + 2%, no further adjustment was required.

Salcomp Manufacturing India Pvt Ltd - TS-716-ITAT-2016(CHNY)-TP-I.T.A.No.2201/Mds./2012

257. The Tribunal held that where the assessee granted loan to its AE at an interest rate amounting to LIBOR, out of the proceeds of FCCBs issued outside India and claimed that the said loan was given to its AE since money raised through FCCBs were not permitted to be brought into India unless actually deployed for capital expansions, the TPO was not justified in questioning the commercial rationale of such transaction and making a TP addition by taking the ALP interest rate at LIBOR + 200 basis points. Further, relying on the decision in the case of the Tribunal in Cadila Healthcare Ltd, wherein notional interest adjustment was deleted on optionally convertible loans on the ground that no interest was chargeable unless the option of conversion vested in such loans was not exercised, the Tribunal deleted the addition made by the TPO.

Sun Pharmaceuticals Ind Ltd v ACIT - TS-247-ITAT-2016 (Ahd) -TP

258. Where the assessee had provided its AEs an interest free loan and worked out an interest rate of LIBOR + 100 basis points as ALP pursuant to which it suo motu offered interest income to tax, the Tribunal held that the TPO was not justified in downgrading the credit ratings of the AEs relying on S&P's corporate ratings and arriving at an ALP of LIBOR + 300 basis points as the TPO relied on only 4 out of the 7 ratios relevant to determining the credit rating of the company and that the method adopted by him was unscientific. In light of the evidences submitted by the assessee providing for a different credit

rating of its AEs based on a scientific approach, the Tribunal remitted the matter to the file of the TPO to determine the correct ALP of the loan.

Tega Industries Ltd [TS-780-ITAT-2016 (Kol)-TP] (ITA No.1912/ Kol/2012)

259. The Tribunal held that where the assessee borrowed funds in India on which it paid interest of Rs. 10.05 crores and advanced the same as interest free loans to its foreign AEs, it was an obvious means of shifting profits outside India and reducing tax liability in India by claiming the interest paid as a deduction and not earning any interest on the advances given. Accordingly, the tribunal held that the TPO had rightly determined the ALP on a notional basis by adopting LIBOR as the rate of interest.

Further, it held that where the assessee had given a corporate guarantee and letter of comfort without charging any fee, the same having no bearing on profits, income, loss or assets of the assessee was therefore outside the scope of international transaction.

TVS Logistics Services Ltd v DCIT - TS-324-ITAT-2016 (Chny) - TP

260. The Tribunal held that where the assessee had advanced interest free loans to its AE without charging any interest, the same was liable for benchmarking under the Act irrespective of the fact that the advances were paid out of EEFC accounts which did not earn any interest in any case. It rejected the argument of the assessee that the advances did not require any benchmarking since they were in the nature of quasi capital and were granted with the main purpose of promoting exports of the AEs outside India. As regards the interest rate applicable the Tribunal held that the since the advances were made in foreign currency, the interest rate on loans and advances in respect of foreign currency and not the PLR of the State Bank of India, was to be considered as the ALP rate of interest.

Baba Global Ltd v DCIT - TS-346-ITAT-2016 (Del) -TP

261. The Tribunal held that the interest paid on External Commercial Borrowing taken by the assessee from its UK AE was to be benchmarked using the domestic PLR and not the GBP LIBOR as taken by the TPO since the ECBs were denominated in Indian currency. It noted that since the interest paid by

the assessee was less than the PLR rate, the same was to be considered to be at ALP and therefore the addition made by the TPO was deleted.

BT (India) Pvt Ltd v DCIT - TS-353-ITAT-2016 (Del) - TP

5.3.2 Interest on Receivables :

262. The Tribunal held that the TPOs treatment of delay in realization of sales (beyond 30 days) to AE as a loan and charging interest thereon on the basis that the assessee had used borrowed funds to pass on the facility to its AE, was not justified since the assessee was a debt free company and there was nothing on record to show that the assessee was making interest payments to any lenders.

Bechtel India Pvt Ltd v DCIT - TS-638-ITAT-2015 (Del) - TP

263. The Tribunal deleted adjustment on account of interest on delayed realization of debts from AEs by holding that Sec 92B amendment to the extent it pertains to delayed realization of debtors was prospective. It further held that since assessee had not charged interest on delay in realization of debts to non-AEs, no interest could be added / charged from the non AEs. Further, the Tribunal rejected re-characterization of transaction as unsecured loan by relying on Delhi HC decision in EKL Appliances, as form and substance of transaction had remained unchanged, and the assessee had behaved in a commercially rational manner by setting same terms for realization of export proceeds for AEs and non-AEs.

Hiraco Jewellry (India (P) Ltd v DCIT -TS-191-ITAT-2016(Mum)-TP
ACIT vs. Gitanjali Exports Corporation Ltd -TS-192-ITAT-2016(Mum)-TP

264. The Tribunal held that where the assessee had not charged interest on outstanding receivables from both its AEs and its Non-AEs, the TPO was not justified in making an adjustment by leving notional interest on the AE outstanding receivables.

Excellence Data Research Pvt.Ltd. & ANR. Vs. ACIT & ANR. (2016) 48 CCH 0051 (Hyd Trib)-ITA No.310/Hyd/2015

265. The Tribunal deleted the addition of interest @ 4.06 percent made by

the TPO on receivables outstanding beyond a period of 2 months and held that putting a limit of two months of credit period was arbitrary considering that the RBI permitted realization of foreign receivables within a period of one year. It further noted that it was in the interest of the assessee to receive foreign exchange promptly, irrespective of whether the debtors were AEs or Non-AEs, so as to enable it to claim deduction under section 10A of the Act. The Tribunal observed that the assessee's invoices were outstanding for a period of 3 months which was a reasonable period and therefore held that no interest was to be charged on such receivables and also noted the assessee did not charge interest on outstanding receivables neither from its AEs nor its Non-AEs.

GSS Infotech Ltd v ACIT - TS-298-ITAT-2016 (Hyd) - TP

266. The Tribunal held that the credit period on AE receivables was not an independent international transaction but part of the main international transaction of providing software development services and therefore no separate adjustment was warranted on account of the same. It held that for the purpose of determining the ALP of such international transactions, adjustments in the shape of working capital adjustments were to be considered. Accordingly, the Tribunal remitted the matter back to the file of the TPO to provide for adequate working capital adjustments in respect to the software development services.

Dell International Services India Pvt Ltd v JCIT - TS-358-ITAT-2016 (Bang) - TP

267. The Tribunal held that the transaction of extending credit period to AEs was closely linked with the transaction of providing services to the AE and was not a separate transaction and therefore both transactions were to be aggregated for determination of ALP. It rejected the argument of the assessee that transaction of extending credit period to AEs could not be regarded as "international transaction" in the absence of any income arising therefrom was not acceptable and further held that the observations in Vodafone vs. UOI 368 ITR 1 (Bom) were in a different context.

Tally Solutions Pvt Ltd v ACIT - IT (TP) A No 1364 / Bang / 2011

268. The Tribunal held as per Rule 10A(d), which provides that that all

closely linked transactions with AEs have to be aggregated and clubbed together for transfer pricing, where extended period of credit granted to the AE for realization of sales proceeds was directly related to and arising out of the sale transaction benchmarked under TNMM and the extended period of credit could not be considered as an independent transaction.

Yash Jewellery Pvt Ltd v DCIT - (2016) 66 taxmann.com 216 (Mum)

5.3.3 Corporate Guarantee :

269. The Tribunal held that where the assessee intended to provide guarantee to its AE by pledging shares held by it, for a loan taken by the AE from ICICI Bank, Singapore but the shares were not finally pledged due to refusal of permission by the RBI, the assessee had not furnished the impugned corporate guarantee and therefore no international transaction under section 92C of the Act took place and that the TPO was incorrect in making the addition on the misconception that the refusal of permission by the RBI was in relation to another loan and not the loan taken by the AE.

Adani Enterprises v ACIT - TS-1-ITAT-2016 (Ahd) - TP

270. The Court held that the TPO was incorrect in making a TP adjustment on account of corporate guarantee where in fact, the assessee did not furnish any corporate guarantee in favour of its AE. It noted that the assessee intended to provide guarantee to its AE by pledging shares for arranging a term loan from ICICI bank but could not proceed with doing so due to refusal of permission by the RBI. Accordingly, it held that there was no international transaction under section 92B.

Pr CIT v Adani Enterprises Ltd - TS-621-HC-2016 (Guj) - TP TAX APPEAL NO. 574 of 2016

271. The Tribunal held that amendment made by Finance Act, 2012 in section 92B, atleast to the extent it dealt with question of issuance of corporate guarantees, is effective from 1.4.2012 and cannot have retrospective effect from 1.4.2002.

Rushabh Diamonds vs. ACIT - [2016] 68 taxmann.com 141 (Mumbai-Trib)

272. With respect to corporate guarantee granted by the assessee on behalf of its AEs, the Tribunal relying on its decision in Siro Clinpharm, held that the amendment to Section 92B introducing corporate guarantees as international transactions could not be given retrospective effect and therefore the corporate guarantee given by the assessee could not be considered as an international transaction. Consequently, it deleted the TP addition.

Marico Ltd v ACIT - TS-411-ITAT-2016 (Mum) - TP - I.T.A./8858/Mum/2011 I.T.A./8713/Mum/2011

273. The Tribunal, relying on the order of the coordinate bench in the assessee's own case of the previous AY, held that the rate of 0.5 percent was to be taken as arms' length rate of guarantee commission fee on corporate guarantee provided by the assessee to its AE (for banking facilities availed by the AE from HSBC, Mauritius) as opposed to the rate of 3 percent arrived at by the TPO.

Thomas Cook (India) Ltd v DCIT - TS-307-ITAT-2016 (Mum) - TP

274. The Tribunal rejected the TPO's ALP-determination of interest rate on ECB from AE, based on effective all in cost interest rate as per 'India's External Debt - Status Report - 2008'. It accepted the assessee's contention that the aforesaid rates were unadjusted industry averages which could not be treated as ALP. It also noted that the assessee's loan was based on EURIBOR, while the 3 comparables furnished by assessee had LIBOR based interest rates and since the assessee had not furnished all relevant data such as downloaded financials of the comparables, actual interest rates computed with reference to the interest burden and the loan outstanding for various periods, it remitted the matter back to TPO for fresh determination of ALP after assessee produces necessary evidence for finalization of comparables.

Winergy Drive Systems India Private Limited [TS-586-ITAT-2016(CHNY)-TP] I.T.A.No.1720/Mds/2014

275. The Tribunal held that provision of a guarantee by a parent to its subsidiary constituted a shareholder function and hence charging a guarantee fee was not warranted and further held that where the issuance of a corporate guarantee was without consideration there would be no impact on profits, incomes, losses and assets of an entity and therefore it would not constitute an

international transactions liable to benchmarking under TP provisions. Accordingly, it deleted the TP adjustment of notional charges @ 6 percent on corporate guarantee issued by the assessee.

Further, it held that LIBOR + 200 basis points was to be used for the purpose of benchmarking loans granted by the assessee to its US based subsidiary and not the average yield on unrated bonds as used by the TPO.

Manugraph India Ltd. vs DCIT - TS-190-ITAT-2016(Mum)-TP

276. The Tribunal upheld the guarantee fee charged by the assessee at 1 percent to be at ALP in respect of the corporate guarantee given by the assessee to its AE. It held that the TPO was incorrect in benchmarking corporate guarantee fee on the basis of difference between credit rating of assessee and associated enterprise and held that the considerations for raising of bonds in Indian market were distinct and incomparable with providing a corporate guarantee to a bank abroad in respect of loan taken by an AE and therefore the credit rating used for benchmarking the corporate guarantee was without any basis.

Grindwell Norton ltd [TS-793-ITAT-2016 (Mum) - TP] (ITA NO. 523/MUM/2014)

277. The Tribunal held that corporate guarantee furnished by assessee to bank for extending loan to subsidiary company is shareholder function not warranting any transfer pricing adjustment on the ground that assessee's expectation from provision of loan and guarantee was not that of a lender or guarantor to earn a market rate of interest or guarantee fee but that of shareholder to protect its investment interest and that transaction of internal loan funding and corporate guarantee were international transactions under section 92B requiring determination of arm's length price.

Tega Industries Ltd [TS-780-ITAT-2016 (Kol)-TP] (ITA No.1912/ Kol/2012)

5.4 Royalty / Management Fees / Intra Group Services :

5.4.1 Royalty :

278. The Tribunal held that where the agreement dated July 1, 2008

provided for technical know-how payment on sale of traded finished goods, the disallowance of such royalty by the TPO on the ground that the assessee should not have borne the same, could be restricted only to payments up to June 30, 2008. Further, in respect of technical know-how royalty on manufactured goods, it held that the TPO was not authorized to disallow such expenditure taking the royalty at 1 percent of net sales, where the agreement provided for such payment, merely on the basis of information on the website of the SIA. It further held that service tax on brand usage royalty and technical know-how royalty could not be disallowed since the taxes were the liability of the assessee based on terms of the agreements and the fact that assessee was the receiver of services and therefore no disallowance could be made of such amounts.

Johnson & Johnson Limited v Add CIT- TS-19-ITAT-2016 (Mum) - TP

279. The Tribunal held that the RBI / FIPB approvals issued vis-à-vis royalty / technical know-how fee were not determinative of ALP and could not be considered as a valid CUP for benchmarking royalty payments to AEs for use of know-how, formulae and trademarks for the manufacture, packing, sale and distribution of 'Brylcreme'. It held that royalty was a separate international transaction and the onus to determine the ALP was on the assessee. It held that the automatic route under which the FIPB / RBI approvals were granted were devised for ease of doing business and therefore could not be equated with the arm's length principle. Noting that the Revenue authorities had determined the ALP of the royalty paid at 1 percent (as opposed to the 5 percent made by the assessee), without properly appreciating the trademark agreement submitted by the assessee, it remitted the issue to the file of the AO and directed the assessee to benchmark royalty transactions with independent comparables.

Sara Lee TTK Ltd vs DCIT [TS-663-ITAT-2016(Mum)-TP] /ITA No. 376/Mum/2012

280. The Court upheld the finding of the Tribunal that where no method under section 92C was applied to determine the ALP in respect of technical consultancy fee paid by the assessee to its AE and where no exercise was undertaken to benchmark the value of services received by the assessee no addition could be made on the basis that the assessee did not receive adequate benefit for the fee paid. Merely because the agreement entered into between

the assessee and the AE provided for 12 categories of services out of which the assessee availed 3 services, the TPO was not correct in making an ad-hoc addition without carrying out any benchmarking exercise. It also upheld the finding of the Tribunal that the fee of Rs.1.57 crore was in respect of the assessee's right to avail and the AE's obligation to provide technical assistance in any of the 12 services enlisted in the agreement.

CIT v Merck Ltd - TS-608-HC-2016 (Bom) - TP INCOME TAX APPEAL NO. 272 OF 2014

281. The Tribunal held that the RBI approval of royalty rates paid by the assessee to its AE implied that the payment were at ALP.

DCIT v AVT MC Cormick Ingredients Ltd - (2016) 67 taxmann.com 322 (Chennai - Trib)

282. The Tribunal held that ALP of international transaction of 'Payment of royalty' should be done separately on transaction by transaction approach by applying CUP method and restored the matter to the file of the AO/TPO.

JCB India Ltd v DCIT - [2016] 46 CCH 0366 (Del Trib)

283. The Tribunal held that where the assessee functioned in a competitive industry where technology was required to survive and grow and where continuous innovation was a pre-requisite and where the Revenue had accepted the payment of royalty to be necessary and at ALP in previous years, no TP adjustment could be made. However, the Tribunal also noted that payment of royalty, even if justified and considered at ALP, could be a relevant factor for determining compensation for carrying out distribution and marketing functions on behalf of its AE.

DCIT v Reebok India Co - (2016) 46 CCH 0484 (Del Trib)

284. The Tribunal held that where the assessee made a payment of royalty / technical collaboration fee to its AE @ 1.5 percent of domestic and export sales in lieu of which the AE provided the assessee with a host of services such as engineering services, purchasing services, brand development services, product development, footwear design and construction services, administration and accounting services, financial services etc, and the assessee had proved the receipt of services and the economic and commercial benefits

derived therefrom and the actual application / use of such services by the assessee, the TPO was unjustified in determining the ALP at Nil. Further, it dismissed the contention of the Revenue that some of these activities were shareholders activities to monitor the assessee.

DCIT v Bata India Ltd - TS-149-ITAT-2016 (Kol) - TP

285. The Tribunal allowed assessee's miscellaneous petition against its previous decision wherein TP adjustment with respect to royalty payment was originally confirmed as the assessee had not justified its claim that the royalty payment made by it was below the industry average rate of royalty. It accepted the copy of industrial average rate available in Wikipedia as per which the average rate of royalty for automotive industry was 4.7 percent which was higher than the 3.6 percent paid by the assessee and directed transfer pricing officer to verify assessee's claim.

Hyundai Motor India Ltd-TS-717-ITAT-2016 (CHNY)-TP-I.T.A.No.2353/Mds/2012

286. The Tribunal rejected the TPO's determination of the ALP for royalty payment to AE at Nil by applying the benefit test and held that the TPO was not justified to adopt such approach in determining the ALP of royalty payment when the assessee had produced the agreement between the assessee and AE under which license was granted to the assessee. It held that the TPO's jurisdiction was to determine the ALP by testing the same with uncontrolled comparable prices and not to examine the allowability of the claim by applying the benefit test or conditions provided under section 37(1) of the Act.

Luwa India Pvt Ltd v ACIT - TS-687-ITAT-2016 (Bang) - TP - I.T.(T.P) A. No.568/Bang/2012 & C.O. No.31/Bang/2015

287. The Tribunal deleted-adjustment in respect of assessee's payment for technical know-how to AE which was at ALP as per TNMM adopted by the assessee. It held that merely because these services were too general, in the perception of the authorities below, or just because the assessee did not need these services from the outside agencies, could be reason enough to hold that the services were not rendered at all. It further held that benefit test does not have much relevance in ALP ascertainment.

Merck Ltd v DCIT - TS-143-ITAT-2016(Mum)-TP

288. The Tribunal accepted royalty payment @2 percent of net sales price of goods manufactured relying on a series of judicial precedents from the co-ordinate benches including Owens Corning Industries (India)Pvt Ltd ruling wherein it was held that even Reserve Bank of India's approval of royalty could be a reasonable CUP input for determining arm's length.

SI Group India Ltd v DCIT - TS-150-ITAT-2016(Mum)-TP

289. The Tribunal, relying on the order passed by the coordinate bench for the previous years, held that where the assessee had made royalty payment for usage of trademark 'Cadbury' at a rate lower than the rate paid by other group companies for the same trademark, the TPO was unjustified in making an adjustment to the royalty paid.

Mondelez India Foods Pvt ltd v Add CIT - (2016) 47 CCH 0098 (Mum-Trib)

290. The Tribunal held that where the royalty paid by the assessee for the use of the trademark 'Goodyear' was directly linked to the revenue derived from the manufacture of tyres undertaken by the assessee and formed a part of its cost of sales, it was incorrect to segregate the royalty transaction for benchmarking purposes. Further, it held that the fact that no such payment was made by another AE was not relevant considering the business dynamics and commercial realties in both the companies.

Goodyear India Ltd v DCIT - TS-226-ITAT-2016 (Del) - TP

291. The Tribunal, following the decision of the Court in the case of SGS India, accepted the 3% royalty payment made by assessee to its associated enterprise on grant of license and right to use trademarks at 3 percent of turnover, considering that the assessee had received Government approval for royalty rate at 8 percent on exports and 5 percent on domestic sales.

A W Faber Castell (India) Pvt Ltd [TS-798-ITAT-2016 (Mum)-TP] (IT(TP)A No.1018/M/2016)

292. The Tribunal held that where the assessee had paid its AE royalty of 40 percent on its local sales pursuant to which the AE had granted the assessee with a license which was used by the assessee to derive substantial revenues from third parties, it held that the TPO was incorrect in determining the ALP of

such payment at Nil as the assessee had not only established the benefit arising out of payment of such royalty but had also duly benchmarked the transaction vis-à-vis uncontrolled parties wherein royalty was paid at 43.75 percent of turnover.

Labvantage Solution Pvt Ltd [TS-836-ITAT-2016 (Kol)-TP] (I.T.A No. 1051/Kol/2015)

293. The Tribunal upheld the TPO's segregation of the payment of royalty and fees for technical services made by the assessee to its AE since such transactions were not closely linked to assessee's other international transactions. With regard to the assessee's contention that the TPO had not segregated payment of royalty and FTS for earlier AYs, it held that the fact that the TPO proceeded on a wrong premise in the preceding year without considering the international transactions of royalty and fees for technical services as separate from the others, could not give a license to the assessee to claim that the same wrong approach be repeated in the subsequent years as well. Further, it refused to accept payment of royalty and FTS at ALP simply on the ground that it was paid at maximum rate stipulated by RBI, and held that the rate of royalty approved by the RBI has a persuasive value in the process of determination of ALP of Royalty for a particular case and could not be considered as conclusive

Gruner India (P) Ltd v DCIT - TS-202-ITAT-2016(DEL)-TP

294. The Tribunal held that in the absence of any comparison of the international transaction undertaken by the tested party with a transaction carried out in a uncontrolled market, the TPO could not independently conclude that the volume and quality of management services availed by the assessee from its AE was disproportionate to the payment made by the assessee and therefore rejected the TPO's approach of estimating arm's length price of management service fee paid to AE at 25% of the amount actually paid, since estimation of the services rendered and costs for such services was outside the scope of transfer pricing adjustment. Since the TPO made the TP adjustment without identifying any uncontrolled transaction, the Tribunal upheld the order of the DRP upholding assessee's transfer pricing study and accordingly dismissed the Revenue's appeal.

DCIT v Flakt (India) Ltd - TS-319-ITAT-2016 (Chny) - TP

295. The Tribunal held that where the assessee could not prove that its AE, to whom it paid service charges for management and administrative services, had rendered the said services to the assessee the ALP of the services charges were rightly determined at Nil. Further, considering the functions performed by the AE, a shareholder of the Indian assessee, it held that the shareholders did not require any compensation for such services even as per the OECD guidelines.

Technical Stampings Automotive Ltd - TS-332-ITAT-2016 (Chny) - TP

296. The Tribunal deleted the TP addition made by the TPO / CIT(A) on royalty charged by the assessee from its AE viz. MBL by benchmarking it with the higher rate of royalty charged by the assesse from its other AE viz MME. It held that the TPO was incorrect in considering another controlled transaction for the purpose of comparability and also further highlighted that there was a geographical difference and difference in respect of the brands and products used.

Marico Ltd v ACIT - TS-411-ITAT-2016 (Mum) - TP I.T.A./8858/Mum/2011 I.T.A./8713/Mum/2011

297. The Tribunal held the AO was not empowered to disallow the royalty expense incurred by the assessee on the basis that the benefit test was not satisfied. It held that where the expenditure or payment by the assessee was demonstrated to have been incurred for the purposes of business, the AO / TPO was not empowered to disallow the same on extraneous reasoning / on the basis of commercial rationale. It observed that the assessee was neither obligated to show that a legitimate expenditure was incurred out of necessity, nor to prove that a certain expenditure has actually resulted in income or profit in the same year or in subsequent years.

It further held that where TNMM was applied to the assessee's transactions as a whole, it covered within its ambit, the royalty transactions as well and therefore the Department was incorrect in seeking to use the CUP method to benchmark the royalty paid on a standalone basis.

Daksh Business Process Services Pvt Ltd v DCIT - TS-455-ITAT-2016 (Del) - TP- ITA No.-2666/Del/2014

298. Where the assessee merely changed the basis of computation of royalty payment to its AE (which was initially paid on the basis of Indian Published Price (IPP) / list price and subsequently on the basis of actual sales) which led to an increase in the rate in terms of the percentage, restriction of royalty payment to the prior year's rate was unwarranted since the rate of royalty in prior years was computed on a different basis, especially since when computed on the same basis the rate in earlier years was in fact more than the rate in the relevant year.

CIT v Oracle India Pvt Ltd - TS-472-HC-2016 (Del) - TP - ITA 334/2016

5.4.2 Management Fee :

299. The Tribunal restored the matter to the file of the TPO by holding that where TPO proposed adjustment for management fee paid by assessee to its AE without determining if Head Office of assessee had correctly allocated hours of service/cost of service rendered, action of TPO was not justified, more so since the same was claimed to be at ALP by the assessee as per the TNMM.

Frigoglas India (P)Ltd. vs DCIT - [2016] 68 taxmann.com 370 (Delhi-Trib)

300. The Tribunal held that where the assessee had filed details of services availed from its AE i.e. information technology, finance, communication, human resources, client services etc, as well as the allocation of costs pertaining to these services (based on revenue), the TPO / DRP were not justified in determining the ALP of the payment made by the assessee to its AE at Nil on the ground that no documentary evidence was submitted by the assessee. It rejected the contenton of the Revenue that since these expenses were incurred for the benefit of the entire group, no charge of such expenditure was required. Further, it held that the TPO and DRP had exceeded their powers and proceeded to determine the allowability of the expense instead of deteterming the ALP of the expenses.

Nielsen (India) Pvt Ltd v ACIT - TS-347-ITAT-2016 (Mum) - TP

301. The Tribunal deleted TP-adjustment in respect of management fees and royalty payment by following co-ordinate bench ruling in assessee's own case for AY 2010-11; wherein it was held that CUP can be chosen over TNMM only when a comparable product or service is available, and when no such comparable is available, as in the given case, there cannot be any occasion to resort to CUP, and, as such, in such a situation, CUP cannot be accepted as MAM over the TNMM.

Frigoglass India Pvt Ltd [TS-500-ITAT-2016(DEL)-TP] - I.T.A. No.784/Del/16

302. The Tribunal held that without giving a finding that the assessee has also incurred expenditure in respect of the same services over and above the management fees paid to the AE it cannot be said that the assessee has not received the alleged management services. The Tribunal further held that even though APA was not applicable for the subject year, making a separate adjustment by TPO by determining ALP of management fees at Nil was contrary to the stand of the department itself while agreeing to APA. However, as TPO had not examined the matter by considering management fees as part of operating cost for the purpose of testing assessee's ITES transactions separately as per Sec 92, the Tribunal set aside the matter back to AO/TPO for reconsideration.

AXA Technologies Shared Services Pvt Ltd [TS-503-ITAT-2016(Bang)-TP] - I.T.(T.P)A. No.659/Bang/2012

303. Where the Assessee was engaged in rendering IT Enabled services ("ITeS") to its AE during AY 2011-12 at cost plus 20% markup, and also availed management support services from its AE, which formed part of cost base for calculating markup; and the DRP deleted TP adjustment on ITeS but upheld the adjustment on management support services by holding the ALP of the same to be Nil, the Tribunal deleted the addition by holding that since management support services availed by the assessee were forming part of cost base for calculating 20 percent markup on ITES services rendered by the assessee to its AE, consideration of ALP of the same at Nil would lead to reduction of cost base by Rs.8.41 crore with corresponding reduction in markup @20 percent of 8.41 crore. It further held that the ALP adjustment of Rs. 8.41 crore by the revenue authorities on account of management support fees would be required to be

coupled with a corresponding revenue reduction of Rs. 10.09 crores leading to erosion of tax base, rather than augmenting it. Therefore the Tribunal concluded that the TP provisions could not be invoked in view of specific prohibition under section 92(3) as for every rupee of ALP adjustment in intragroup service (management support service), assessee's revenue would stand reduced by one and one fifth times of the ALP adjustment.

Mercer Consulting India Pvt Ltd. vs. DCIT [TS-495-ITAT-2016(DEL)-TP] - I.T.A. No.1085/Del/2016

304. The Tribunal held that the double addition made by the AO as well as TPO on account of management consultancy and business auxiliary service fee paid by the assessee to its AE on the ground that the assessee did not produce any submissions in support of the claim could not be sustained since in the MAP proceedings, initiated by the assessee pursuant to the order of the AO, the Competent Authorities deleted the TP addition and accepted the assessee's methodology, allocation key and 5 percent mark-up on cost and allowed the amount paid to the extent of the 5 percent mark-up. Based on the outcome of the MAP proceedings, the Tribunal held that the addition made by the AO was to be deleted as well, and held that MAP proceedings were albeit restricted to transfer pricing adjustments but in the instant case it threw light on the actual availing of services along with proper allocation.

GKN Driveline (India) Ltd v ACIT - TS-439-ITAT-2016 (Del) - TP - ITA No.5923/Del/2012

5.4.3 Intra Group Services :

305. The Tribunal held that the TPO / CIT(A) was incorrect in determining the ALP of the intra-group service charge paid by the assessee to its AE at Nil on the ground that there was no evidence of benefit received by the assessee. It held that there was nothing in the order of the TPO indicative of the existence of any of the circumstances prescribed in clauses (a) to (d) of Section 92C(3) of the Act which necessitated the intervention of the AO / TPO for determination of ALP and that the TPO had no role to play in determining the reasonableness / benefit of a business expenditure. Accordingly, it deleted the addition made by the TPO.

N L C Nalco India Ltd. vs. DCI - TS-36-ITAT-2016(Kol)-TP

306. The Tribunal held that where the assessee's AE had only charged salary and related costs of its employees toward the professional and management consultancy services provided to the assessee without any mark-up, the transfer pricing provisions would not apply to the payment made by the assessee since the expenses incurred by the assessee were paid to the third party employees of the AE and not to the AE itself. Further, noting that the assessee had achieved an increase in export turnover as well as gross margin, it concluded that the assessee benefited from the services rendered by the AE and therefore the TPO was incorrect in determining the ALP of the said transaction at Nil.

Knorr Bremse India Pvt Ltd - TS-661-ITAT-2016 (Del) - TP IT(TP)A No. 5886/Del/2012

307. The Tribunal held that the TPO was incorrect in determining the ALP of the intra-group consulting and administrative services availed by the assessee from its AE at Nil since the assessee had satisfied the 'need' test, 'evidence' or 'rendition' test and 'benefit' test envisaged in section 92(2) of the Act. It noted that the assessee had provided overwhelming evidence to prove that the services were actually rendered by the AE and that the assessee, running a vast business required the impugned consultancy and administrative services for its functioning. Further, it noted that there was no evidence brought on record by the Revenue to show that the same services availed from the AE were also availed from independent parties and therefore it held that the services were not duplicative services. The Tribunal also held that where the services received by the assessee satisfied the need test, rendition test and benefit test, the services could not be said to be shareholder activities.

GE Money Financial Services Pvt Ltd v ACIT - TS -216-ITAT-2016 (Del)- TP

308. The Tribunal held that where the assessee submitted adequate evidence to prove that it had actually received intra-group services from its AE, the TPO was incorrect in disregarding the receipt of services by simply stating that they were not needed or that they were duplicative in nature or that the assessee did not benefit from the same. It therefore held that the TPO was unjustified in determining the ALP of the intra-group services at Nil.

GE Money Financial Services Pvt Ltd - TS-457-ITAT-2016 (Del) - TP - ITA No.440/Del/2014

309. The Tribunal held that the TPO was incorrect in determining the ALP of administrative and business support services availed by the assessee from its AE at Nil under the CUP method with regard to the assessee's Inter Group Services Segment. It held that where the proportionate amount of the said expenses were accepted to be at ALP for the other Segments of the assessee, the TPO was not justified in rejecting the said expenses under the IGS Segment without adequate reasoning. It held that it was not the prerogative of tax authorities to ascertain the benefit received by the assessee from the availment of services and that the benefit received from a particular service was to be perceived from the point of view of a businessman and not from that of the tax authorities. It remitted the matter to the file of the TPO to determine whether the services received by the assessee were duplicative of the functions performed in-house as well as to determine whether the services received by the assessee were shareholder services.

EI DuPont India Pvt Ltd v DCIT - TS-338-ITAT-2016 (Del) - TP

310. The Tribunal deleted transfer pricing adjustment in respect of reimbursement of salary & travelling expenses of an employee seconded in the capacity of Managing Director by the associated enterprise to the assessee noting that the assessee was the economic employer of the MD and that there was adequate proof of the work performed by the MD and quantum of salary paid viz. sample emails, minutes of meeting and nature of services provided, and therefore it could not be held that no activities had been carried out by MD for the assessee in India. It rejected transfer pricing officer's determination of arm's length price at Nil and held that if a person to whom salary has been paid was not an equity shareholder in either of the associate entities, he did not qualify to be a related party and therefore the payment of salary to an independent person could not be subject matter of benchmarking. It further noted that the Revenue had accepted that the reimbursement was a pure cost to cost transaction without any markup and that the only contention of the Revenue was the legitimacy of the expenditure which was a commercial decision of the assessee and not within the powers of the TPO.

Royal Canin India Private Limited [TS-801-ITAT-2016 (Mum)-TP] (IT(TP)A No 784/Mum/2016)

311. The Tribunal held that though the ALP of support services rendered by an AE could not be determined at 'Nil' by questioning the necessity or benefits of expenditure incurred, such expenditure could only be allowed after conclusively proving that there was actual rendition of services by the AE. Therefore, where the assessee had filed certain additional evidences in support of rendition of services before the Tribunal for the first time and the CIT(A) had allowed such expenses without being able to examine such evidence, the matter was to be remanded back to the file of the AO / TPO. It dismissed the argument of the assessee that the services were accepted to be at ALP in the previous years and held that the concept of res judicata was inapplicable to assessment proceedings.

3M India Ltd v ACIT - TS-293-ITAT-2016 (Bang) - TP

312. Where the assessee had provided various evidences to corroborate the receipt of intra-group services such as financial, administrative, technical and commercial services from its AE along with the allocation of the costs, the Tribunal held that the TPO was incorrect in determining the ALP at Nil as the assessee had provided adequate documentation. It held that the Revenue was incorrect in disregarding the actual transaction between the parties as the economic substance did not differ from its form.

SKF India Limited [TS-810-ITAT-2016 (Mum)-TP] (ITA No. : 1420/Mum/2016)

313. The Tribunal held that if the intra-group services were inextricably linked with the manufacturing segment, the aggregated margin earned on the overall assets as well as the manufacturing operations would take care of the payment made for intragroup services but also noted that the onus would be on the assessee to demonstrate whether the associate enterprises treated the international transactions as a single transaction or the same was aggregated. Accordingly, it remitted the matter to the file of the TPO to determine whether the intra-group services were inextricably linked with the manufacturing and overall business carried out by the assessee and that if it was found that all the transactions were to be aggregated, then no separate benchmarking would be required.

SKF India Limited [TS-810-ITAT-2016 (Mum)-TP]

5.5 Share Application Money / Investment in Share Capital / Sale of Shares :

5.5.1 Share Application Money / Investment in Share Capital :

314. The Tribunal deleted the notional interest adjustment made by the TPO on advance share application money given the assessee to its AE by treating the aforesaid investment as a loan. Following the case of the Tribunal in the case Bharti Airtel, it held that the TPO had not brought on record anything to show that any unrelated share applicant was to be paid interest for the period between making the payment towards share application money and the allotment of shares and therefore the very foundation of the adjustment was devoid of legal merits.

Pan India Network Infravest Pvt Ltd v Add CIT - TS-653-ITAT-2015 (Mum) - TP

315. The Tribunal sustained transfer pricing adjustment in respect of amount refunded by wholly owned subsidiary to assessee towards share application money to the extent of shares not allotted by adopting interest rate of 6 months LIBOR plus 150 basis points and deleted adjustment made on the amount to the extent shares allotted. It observed that the advancing of amount by the assessee company and refund of the amount by its wholly owned subsidiary after enjoying the said amounts, has the colour and character of loan transaction. It rejected assessee's challenge that section 144C being a substantive provision will apply prospectively from assessment year 2010-11 by observing that said provisions are applicable to cases where assessing officer on or after 1.10.2009 proposes variation to assessee's income in consequence of TPO's order and as regards time limits for framing of assessment where provisions of section 144C applies, it concluded that section 153C shall not put any fetters to the framing of any such assessment and time limit as provided in section 144C will apply.

Taurian Iron & Steel Co Pvt Ltd - TS-768-ITAT-2016(Mum)-TP-ITA No.5920/Mum/2012

316. The Tribunal deleted the transfer pricing addition of notional interest made on account of alleged excess consideration paid on investment in share

capital of wholly owned subsidiary re-characterized as loan on the ground that the transfer pricing provisions in Chapter X of the Act do not apply to international transactions on capital account, not resulting in any income. Further, it held that the re-characterization of equity share capital into loan was on the ground that the investment was made at a value in excess of the value of shares as per the Wealth Tax Valuation Rules was unwarranted since shares were not even covered under the definition of assets under the Wealth Tax Act. It also held that even if the re-characterization was permissible, the TPO was incorrect in making an addition of the equity share capital invested.

Addressing the contention of the Revenue that there was a possibility of potential income from the said transaction and therefore benchmarking was required, it held that potential income, to qualify as income subject to transfer pricing under the Act, should arise from the impugned international transaction which is before the TPO for consideration and not out of a hypothetical transaction that may or may not take place in the future and since no income arose from the said transaction, no benchmarking was required.

Topsgrup Electronic Systems Ltd v ITO - [2016] 67 taxmann.com 310 (Mumbai -Trib)

317. The Tribunal deleted adjustment on account of notional interest on share application money paid to wholly owned subsidiary which was re-characterized by TPO as interest bearing loan and there being delay in allotment of shares. It held that, a delay in allotment of shares by the subsidiary company, as long as the subsidiary is a wholly owned subsidiary, did not prejudice the interests of the assessee. It further held that none of the conditions for re-characterization of transactions specified in Delhi HC's EKL Appliances ruling were satisfied.

The Tribunal affirmed DRP's deletion of notional interest adjustment on outstanding recoverable from subsidiary on account of pre-incorporation expenses incurred by assessee on behalf of subsidiary by holding that expenses were incurred for performing 'shareholder services', and thus no interest could accrue on the same.

Sterling Oil Resources (P)Ltd. vs ITO - TS-72-ITAT-2016 (Mum)-TP

318. The Tribunal held that where the assessee had advanced an interest free loan to its AE which was converted into share application money, such amount could not be considered as a loan and subjected to benchmarking as the TPO was not permitted to re-characterize the transaction.

Baba Global Ltd v DCIT - TS-346-ITAT-2016 (Del) -TP

319. The Tribunal deleted the TP addition made on account notional interest on interest free loan granted by the assessee to its AE in Cyprus, converted into equity within 3 months as the Revenue had neither brought anything on record to justify the re-characterization of quasi equity into a loan nor demonstrated that the transaction was bogus or sham. It held that the mere disclosure of interest free loan in Form 3CEB would neither act as an estoppel nor forclose the assessee from claiming the same as not being an international transaction. Further, it held that where the assessee advanced the funds as a shareholder activity, it was not within the domain of the tax authorities to insist that the aim of enhancing the global reach of the portfolio should be attained through a pure loan and not by way of shareholding activity.

DLF Hotel Holdings Ltd v DCIT - TS-418-ITAT-2016 (Del) - TP - I.T.A . No.-6336/Del/2012

5.5.2 Sale of Shares :

320. The Tribunal held that where the assessee sold 9 percent of the shares held in an Indian company to its Mauritius subsidiary during AY 2013-14, at Rs.10.32 per which was based on the valuation arrived at during AY 2007-08, the valuation adopted for AY 2007-08 could not be relied on to justify the price at which the share was sold in the previous year relevant to AY 2013-14 and that the TPO was justified in computing the value per share as per the Discounted Cash Flow Method as on AY 2013-14, accounting for the time gap, fluctuation in the market rate and the value of capital assets of the company. Accordingly, it upheld the addition made by the TPO by adopting the value per share at Rs. 36.31 as against the value relied on by the assessee i.e. Rs.10.32.

Visteon Asia Holdings Inc v DCIT - TS-669-ITAT-2016 (Chny) - TP - ITA No. 723/Mds/2016

5.5.3 Others :

321. The Tribunal held that where the assessee, who made a payment of commission to its AE had provided adequate justification towards the ALP of the said payment and the rate of commission paid to unrelated parties was in excess of the rate of commission paid by the assessee, the TPO was not warranted in making a TP adjustment on the ground that no services were rendered. It observed that the TPO is not empowered to test the genuineness of a transaction under Chapter X of the Act.

Pharmaceutical Industries Ltd v DCIT - (2016) 46 CCH 0169 (Ahd Trib)

322. The Tribunal deleted the TP adjustment on the sale of intellectual property rights by the assessee to its AE. It noted that the assessee had arrived at the sale consideration on the basis of independent valuation reports prepared by two valuers which was prepared on the basis of projected cash flows at the time of sale and the TPO had subsequently replaced the projected cash flows with the actual cash flows, at the time of assessment, to arrive at the TP adjustment. It held that the value at the time of making the business decision was important, and that when the values were replaced subsequently, it was not a valuation but an evaluation. Observing that the Revenue was doubting the valuation only because the actual AE revenues were more favorable that the projected revenues it held that for valuation of an intangible asset, only the future projections alone can be adopted and such valuation cannot be reviewed with actuals after 3 or 4 years down the line.

DQ Entertainment (International) Ltd v ACIT - TS-367-ITAT-2016 (Hyd) - TP

323. The Tribunal held that the TPO was incorrect in taking the WDV of the machine as a comparable for determining the ALP of the second hand machine purchased by the assessee. It held that the WDV may be one of the factors to be taken into consideration while determining the value of second hand machinery and that the buyer would naturally look for the efficiency and life of machinery after purchase, but in view of the specific provisions of Rule 10B(1)(a) of the Rules, WDV could not be considered to be the ALP and that it

was obligatory for the TPO to identify a comparable uncontrolled transaction to determine the ALP. Accordingly, it upheld the order of the DRP deleting the TP addition.

ACIT v Interpump Hydraulics India Pvt Ltd - TS-350-ITAT-2016 (Chny) - TP

324. The Tribunal deleted the ad hoc section 40A(2) disallowance made by the TPO in respect of payments made by the assessee to its AE towards data processing and database charges since neither did the TPO / CIT(A) dispute the fact of the rendition of services nor did they use any comparative data or carry out any exercise to arrive at fair market value. It held that even if the payments were excessive or unreasonable, such arbitrary and baseless disallowances could not be upheld. Further, since both the assessee as well as the AE were assessed at maximum marginal rate of tax it held that the transaction was tax neutral and the payment could not be considered to be made with the intention of tax evasion.

AMserve Consultants Ltd - TS-436-ITAT-2016 (Del) - TP - ITA No. 6059/Del/2013

325. Where the assessee, a full-fledged risk bearing entrepreneur, had purchased, at cost, certain promotional items from its AE, which were provided to its customers in India and had been procured mainly for boosting its sales in India and developing the market for Pet Products, the risks and rewards of which were exclusively borne by the assessee, the Tribunal held that the Revenue was incorrect in contending that the assessee had purchased the same for the brand promotion of its AE. It noted that the assessee had purchased items worth Rs.1.12 crores on a sale of Rs.44 crore which was a cost to cost reimbursement and which was reasonable and could not be considered as excessive and therefore it held that no adjustment was to be made.

Royal Canin India Private Limited [TS-801-ITAT-2016 (Mum)-TP] (IT(TP)A No. : 784/Mum/2016)

CHAPTER - 6

MISCELLANEOUS

6.1 APA / MAP / Safe Harbour Rules :

326. The Tribunal permitted assessee to withdraw appeal for AY 2010-11 in view of resolution of the TP-issue under Advance Pricing Agreement (APA) since a) the assessee had submitted an APA application on March 30, 2013 for determination of ALP for its proposed international transactions covering AYs 2014-15 to 2018-19. b) thereafter also filed an application to include rollback for AYs 2010-11 to 2013-14; c)the APA was concluded on March 31, 2016, d) assessee was obligated to file the modified return of income under section 92CD of the I.T. Act for the above-mentioned assessment years which included the year under appeal. e) Consequently, the assessee had to withdraw the appeal pending before the tribunal.

Broadridge Financial Solutions India P. Ltd vs DCIT [TS-528-ITAT-2016(HYD)-TP - ITA.No.228/Hyd/2015

327. The Tribunal held that provisions for comparability analysis in Advance Pricing Agreement (APA) have immense persuasive value and can be "rolled back" i.e. retrospectively applied for past years also even though in the APA signed by the assessee there were no "rollback provisions" -provided the international transactions in both the years (i.e. the year of APA and the past year) are the same and availability of data for the past year is also on similar lines as suggested in the APA.

Ranbaxy Laboratories Ltd v ACIT - [2016] 68 taxmann.com 322 (Delhi-Trib)

328. The Tribunal admitted additional evidence filed by assessee in the form of Advance Pricing Agreement wherein it was accepted that the assessee was a contract manufacturer only post financial year 2010-11 and remitted the matter to the file of the TPO who had treated the assessee as a contract manufacturer for years prior to FY 2010-11. It noted that the nature of business would have considerable bearing on determination of arm's length price and since the same could not have been furnished before lower authorities, the additional evidence was to be admitted.

Lotus Footwear Enterprises Ltd [TS-804-ITAT-2016 (Chny)- TP] (I.T.A.Nos.779/Mds/2014, 801/Mds/2015 & 810/Mds/2016)

329. The Tribunal dismissed the appeals filed by the assessee as well as the Revenue since the TP issues arising out of the said appeals were resolved through India-USA Mutual Agreement Procedure and therefore the grounds contained therein were now infructuous.

Yahoo Software Development India Pvt Ltd v DCIT-TS-531-ITAT-2016 (Bang)-TP-IT(TP)A.1046/B/2011, IT(TP) A.1651 & 1685/B/ 2013

330. The Tribunal remitted the issue pertaining to whether price fixed under MAP concluded with USA in respect of call centre and share services transactions with US-AEs could be adopted in case of transactions with Non-US AEs in the absence of any attempt from the assessee to bring out similarities of the factors that influenced the price between the US and Non-US transaction. The Tribunal directed the TPO to undertake FAR analysis of non-US transactions with a view to find out whether there was any distinction in factors influencing price between the US and Non-US transactions.

Dell International Services India Pvt Ltd v DCIT - TS-498-ITAT-2016 (Bang) - TP - IT(TP)A No.1302/Bang/2010

331. The Tribunal noted that for subsequent years, where the assessee had exercised the option to be covered under the Safe Harbour Rules, pursuant to which the TPO passed an order under Rule 10TE(6) considering the assessee to be a low-end / BPO service provider in respect of the same agreement prevalent for the relevant assessment year and held that the same agreement could not give rise to two different types of services (BPO and KPO services) merely on the basis of providing the services at different times and accordingly

remitted the issue of characterization of the assessee as BPO or KPO service provider to the AO for fresh adjudication. It further held that the revenue could not take inconsistent stands, classifying the assessee as both a BPO and KPO in respect of services provided under the same agreement.

SNL Financial (India) Pvt Ltd v DCIT - TS-320-ITAT-2016 (Ahd) - TP

6.2 Appeal :

332. The Court dismissed the writ petition filed by the petitioner against the DRP directions and the draft assessment order on the ground that the assessee had an efficacious alternate statutory remedy available.

Cairn India Ltd v DCIT - TS-58-HC-2016 (P&H) - TP

333. The Tribunal denied condonation of Revenue's 419 days delay in filing appeal against DRP order for AY 2009-10 noting that assessee's appeal against the same DRP order was already disposed of by Tribunal and Revenue had not even initiated process of filing appeal till the time hearings in assessee's appeal were concluded.

DCIT vs Aegis Ltd - TS-79-ITAT-2016(Mum)-TP

334. The Court held that it is imperative for the Income-tax Department to have a system in place to keep record of questions of law admitted and dismissed by the High Courts to avoid multiplicity / duplication of appeals on identical matters already disposed of, as in the instant case, the question raised by the Department, viz.whether transfer pricing adjustment consequent to arriving at Arms' Length Price(ALP) was required to be made only in respect of the international transactions or in respect of all the business transactions of the assessee i.e. at the entity level, had already been disposed of by the Court in favour of the assessee. It directed the Pr CIT to file an affidavit, indicating steps being taken to ensure that the Department was taking consistent views.

CIT v TCL India Holding Pvt Ltd - (2016) 96 CCH 0010 (Bom)

335. Where the assessee had merged with another entity w.e.f from April 1, 2012 and the AO / DRP had passed orders dated December 24, 2014 against the non-existent entity, pursuant to which the assessee filed appeals in the name of the non-existent entity, which was later substituted, the Tribunal

dismissed the appeal filed by the assessee and held that when an appeal was filed in the name of a non-existent company, there could not be any substitution during the pendency of the proceedings. It held that the appellate proceedings initiated by a non-existent company before the Tribunal could not survive at all and therefore there was no question of substitution of any existent company in the place of a non-existent company. It further held that the impugned order passed by the AO could not stand in the eye of the law.

Zenta Knowledge Services (P) Limited [TS-787-ITAT-2016 (Chny)-TP] (ITA No.882/Mds/2015)

336. The Tribunal, following the Special bench decision in the case of Aztec Software & Technology Services, dismissed the appeal filed by the assessee and held that the TP provisions would be applicable irrespective of the fact that the assessee is a unit eligible to benefit under section 10A of the Act. It held that the lower judicial forums had to accept and follow the views expressed by the higher judicial forums.

Transcend MT Services Pvt Ltd v ACIT - TS-405-ITAT-2016 (Del) - TP

337. The Court dismissed Revenue's appeal by upholding exclusion of 3 out of 9 comparables chosen by TPO which was confirmed by DRP for AY 2010-11. It rejected Revenue's contention that if 3 out of 9 comparables were to be excluded, then ITAT ought to have suo motu required the TP-adjustment exercise to be undertaken afresh by TPO since the TP-adjustment based on remaining 6 comparables (that were to some extent functionally dissimilar to the assessee) could not have reflected the correct ALP. It held that the statutory scheme during the relevant AY 2010-11 did not envisage permitting Revenue to appeal against the inclusion or exclusion of a comparable by the TPO which was affirmed by DRP and only assessee had a remedy of filing an objection before the ITAT. It also noted that though such a provision permitting the filing of cross objection by Revenue was introduced by Finance Act, 2012 but the same was removed by Finance Act, 2016.

Pr. CIT v/s Trend Micro India Pvt Ltd [TS-515-HC-2016(DEL)-TP ITA 447/2016

338. The Tribunal held that where the issue regarding selection of a non-resident entity as a tested party was pending before the High Court for final

adjudication in the case of the assessee itself there was no need to constitute a Special Bench for the same issue. Accordingly, it rejected the Revenue's contention for constitution of Special Bench.

General Motors India Pvt Ltd v ACIT - TS-640-ITAT-2016 (Ahd) - TP - I.T.A. Nos.: 1293/Ahd/2015 and1294/Ahd/2015

339. The Apex Court heard special leave petition filed by revenue against Delhi High Court decision in Cargill Foods India Limited wherein the High Court had accepted commodity exchange quotations as valid CUP for benchmarking assessee's international transaction of import of Soyabean and sunflower oils and directed the Revenue to get instructions as to whether CUP Method had been accepted by TPO in subsequent assessment years by accepting quotation for benchmarking international transaction, posting the SLP admission hearing after 4 weeks.

Cargill Foods India Ltd [TS-866-SC-2016-TP] (CC No(s). 19007/2016)

6.3 Assessment :

340. The Tribunal held that the TPO was incorrect in rejecting revised form 3CEB filed by the assessee after one year from the end of assessment year on the ground that the time limit for filing Form 3CEB was one year from the end of assessment year or before completion of assessment, whichever was earlier. It held that section 92CA(3) did not provide for a specific time limit for filing revised forms and the Form 3CEB, being a report of a Chartered Accountant on the international transactions and the benchmarking of the said transactions could not be ruled out and therefore in the interest of justice, remanded the matter to the AO to consider the revised form 3CEB.

Ashok Leyland Ltd v DCIT - (2016) 67 taxmann.com 48 (Chen - Trib)

341. The Tribunal held that where revenue had not brought any evidence to show that price variation in export was on higher side and would impact Arm's Length Price, adjustment on account of price variation in export sales was to be deleted.

DCIT v AVT MC Cormick Ingredients Ltd - [2016] 67 taxmann.com 322 (Chennai-Trib)

342. The Court quashed the final assessment order passed under section 143(3) of the Act without passing a draft assessment order as mandated by Section 144C(1) of the Act which applied to the assessee. It observed that the DRP did not entertain the assessee's objections absent the draft assessment order and therefore the rights made available to the assessee under section 144C of the Act were rendered futile by directly passing final order under section 143(3) of the Act.

International Air Transport Association - TS-62-HC-2016 (Bom) - TP

343. The Tribunal held that the issuance of a draft assessment order is a sine qua non before the AO can pass a regular assessment order under section 143(3) of the Act and since the AO passed the final assessment order without passing the draft assessment order, the same was liable to be quashed.

Jazzy Creations Pvt Ltd v ITO - TS-38-ITAT-2016 (Mum) - TP

344. The Court held that where the Petitioner was not a foreign company and the TPO did not propose any variation to income returned by petitioner, neither of two conditions of section 144C of the Act were satisfied and therefore the petitioner was not an 'eligible assessee'. Consequently, the Assessing Officer was not competent to pass draft assessment order under section 144C(1) of the Act and therefore the said draft assessment order was quashed.

Honda Cars India Ltd v DCIT - [2016] 67 taxmann.com 29 (Delhi)

345. The Tribunal held that where Commissioner (Appeals) at time of working out adjustment on arm's length price did not give any opportunity to assessee while rejecting CUP method and taking TNMM as most appropriate method and also did not provide any reason for rejecting comparables selected by assessee, matter required readjudication.

RS Components & Controls Ltd v DCIT - [2016] 68 taxmann.com 28(Delhi-Trib)

346. The Tribunal held that where asessee had to establish receipt of benefits on account of services rendered by its AEs and it submitted that it had evidence to show that there were considerable correspondences between AEs and itself, it was not open to TPO to hold that there was no benefit whatsoever

received by assessee without verifying documentation submitted by assessee. It restored the matter to the file of the AO/TPO.

SKF Technologies (India)(P)Ltd v DCIT- [2016] 68 taxmann.com 318 (Bangalore-Trib)

347. The Court quashed the draft as well as final assessment orders passed by AO confirming TP adjustment for AY 2010-11 in respect of two ESPN entities (partnership firms established in Mauritius), not being 'eligible assessees' as defined u/s 144C by holding that this was an instance of blatant disregard by AO of the DRP's order holding that neither of them were 'eligible assessees' u/s 144(15)(b)(ii), as neither was a 'foreign company', and no variation or TP adjustment arose as a consequence of TPO's order. It observed that, even if no direction was issued by the DRP under Section 144C(5) of the Act, the fact that the DRP held that both the Petitioners were not 'eligible assessees' could not have been ignored by the AO since DRP is superior authority in relation to the AO.

ESPN Star Sports Mauritius S.N.C. ET Compagnie vs The Union of India - TS-130-HC-2016(DEL)-TP

348. The Court held that where the assessee had imported pigments from its associated enterprise at a price lower than its fair value (in view of predatory pricing policy to capture the market), the contention of the Revenue that imports of pigments were to be benchmarked was misplaced since it would result in transfer pricing adjustment of allowing higher purchase price to the assessee which would reduce income taxable in India which was contrary to the provisions of Section 92(3) of the Act.

CIT v Merck Ltd - TS-608-HC-2016 (Bom) - TP INCOME TAX APPEAL NO. 272 OF 2014

349. The Tribunal quashed CIT's order u/s 263 for AY 2008-09 wherein CIT invoked revisionary powers u/s 263 for the reason that AO had not referred ALP determination of international transactions to TPO as required under CBDT Instruction No. 3/2003, by relying on Bombay HC decision in Vodafone India & concluding that CIT's reliance on Delhi HC decision in Sony India and ITAT Special Bench decision in Aztec was misplaced as these judgments were

rendered in the context of Sec 92CA(4) as existing prior to the amendment in 2007.

Obulapuram Mining Company Pvt. Ltd vs DCIT [TS-512-ITAT-2016(Bang)-TP ITA No.545(Bang) 2012

350. The Court, prima facie, held that the notice issued by AO making reference to TPO and TPO's consequent notice to assessee for AY 2013-14 to be without jurisdiction. The notices proceeded on the basis that amount paid by assessee to cane growers was an expenditure which would be a specified domestic transaction u/s 92BA. However, the Court held that the expenditure incurred by a sugar co-operative society would not be a 'specified domestic transaction' as it was not one of the entities referred to in Sec 40A(2)(b).

Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd vs DCIT [TS-517-HC-2016(BOM)-TP] WRIT PETITION NO. 6158 OF 2016

351. The Tribunal dismissed the miscellaneous petition by the assessee against the prior order of the Tribunal filed on the ground that the impugned order which related to transfer pricing issues was passed without arguments made by either party and held that the Tribunal, in the said order specifically mentioned that the 'rival submissions were considered' and the assessee had not even filed an affidavit of its officers / directors or authorized representatives who appeared before the Tribunal during appellate proceedings to contradict the finding of the Tribunal and therefore the contentions being unsupported were rejected.

M Modal Global Services Pvt Ltd v CIT - TS-606-ITAT-2016 (Bang) - TP (In IT(TP)A Nos.176 & 196(B.)/2012)

352. The Tribunal deleted the TP-adjustment holding that the order passed by the TPO was barred by limitation as per the provisions of Sec 92CA(3A) and therefore liable to be quashed. It arrived at an extended time limit as per Explanation 1 of Sec 153 and worked out a time limit for passing order by TPO as 60 days prior to the extended time limit i.e. on or before 29.11.2014, and since order was passed on 31.12.2014, it concluded that the order was barred by limitation by 31 days.

Asian Honda Motor Co Ltd [TS-569-ITAT-2016(DEL)-TP] ITA No.6143/Del/2015

353. The Tribunal partially rejected the miscellaneous application filed by the assessee, urging the Tribunal to rectify its order directing the assessee to furnish further comparables for adoption of CUP for benchmarking the cost to cost expenses reimbursement made by the assessee by holding that the said directions did not stand in the way of the assessee making a claim before the AO that one comparable would be sufficient to determine ALP of its International transactions. b) the direction passed in the aforesaid order, directing the use of multiple year data and adopting weighted average data of comparables was contrary to the statutory provisions and therefore amounted to a mistake apparent from record and was to be deleted.

Lee Hours Pomeroy Architects v DCIT - TS-644-ITAT-2016 (Kol) - TP I.T.A No. 382/Kol/2015

354. The Tribunal held that where the TPO refused to consider the comparability of fresh comparable companies, the inclusion of one company sought by the assessee without considering other prospective comparable companies selected by the TPO would distort the overall comparability and therefore remitted the comparability of all the companies to the file of the TPO.

Federal Mogul Automotive Products (India) Ltd v DCIT - TS-235-ITAT-2016 (Del) - TP

355. The Court dismissed Revenue's appeal, upheld Tribunal's rectification order deleting its alternate direction to use subsequent year data for determining ALP after discounting for inflation. It stated that Rule 10B(4) implicitly prohibits the data, of a subsequent year, being taking into consideration as the basis of comparison and further contended that the Tribunal had rightly corrected its order.

Trinity Advanced Software Labs Pvt Ltd [TS-651-HC-2016(AP)-TP] I.T.T.A.NO.421 OF 2015

356. The Tribunal held that where the AO passed the final assessment order without providing the assessee with the draft assessment order and therefore did not provide the assessee with an opportunity to file objections before the DRP, the provisions of section 144C of the Act were not complied with and therefore the final assessment order was bad in law and liable to be quashed.

ACIT v Getrag Hi Tech Gears Pvt Ltd - (2016) 46 CCH 0588 (Chd Trib)

357. The Tribunal held as per Section 92CA of the Act, there is no requirement for the AO to furnish to the assessee, his reasons for rejecting the assessee's computation of ALP and the assessee could not contend that the order of the AO / TPO was bad in law merely on the aforesaid ground considering that the assessee was afforded adequate opportunity of being heard before the adjustment was made.

Philips Electronics v ACIT - TS-316-ITAT-2016 (Kol) - TP

358. The Tribunal admitted additional evidence submitted by the assessee in the form of a sworn affidavit of the director of its AE corroborating the fact that the AE rendered intermediary services for sale of the assessees products to unrelated customers in Switzerland for which the assessee paid it a commission. It rejected Revenue's argument that the affidavit was to be sworn before the Indian Consular and held that the affidavit satisfied the requirements of the 12th Hague convention (arrived at between signatory states for abolishing the requirement of legalization for foreign public documents). Considering the fact that the said affidavit was not available with the assessee during assessment proceedings it admitted the same as additional evidence and remitted the matter to the file of the TPO who had determined the ALP of the commission paid at Nil on the ground that the assessee failed to substantiate rendering of services by its AE.

Kamla Dials and Devices Ltd v ACIT - TS-286-ITAT-2016 (Del) - TP

359. The Court held that the where the DRP had passed its directions ignoring the request of the assessee to adjourn the matter since the assessee was unable to retrieve records relevant to the hearing on account of a flood in its factory, the said directions were in violation of the principles of natural justice. It held that in the instant case, the availability of an alternate remedy was not a bar to approach the Court and that since no adequate, effective and reasonable opportunity of being heard was granted to the assessee, the directions of the DRP were to be set aside.

Gamea Renewable Pvt Ltd v ACIT - (2016) 96 CCH 0086 (Chen) - W.P.Nos.5499 and 9629 of 2016 and W.M.P.Nos. 4840, 11713, 8658 and 11712 of 2016

360. The Tribunal upheld the TPO's jurisdiction in determining the ALP of the alleged international transaction relating to AMP expenses not reported by the assessee in Form 3CEB and rejected the assessee's contention that as per Instruction No 3 / 2016 the AO ought to have first provided an opportunity of being heard to the assessee before recording a satisfaction in respect of AMP transaction. It noted that as per the Instruction, though the original jurisdiction of the TPO was confined to the international transactions referred to him by the AO, such jurisdiction was extendable to other international transactions which come to his notice during the course of proceedings before him. Further, it rejected the contention of the assessee that the Instruction, being curative in nature should have retrospective application since it would render several earlier assessment orders containing transfer pricing additions null and void.

Nikon India Pvt Ltd v DCIT - TS-469-ITAT-2016 (Del) - TP - ITA No.6314/Del/2015

361. The Court noted that though the assessee had not challenged before the lower authorities the re-opening on the ground that the notice violated the provisions 92CA(2C) of the Act, (which provides that the AO is not empowered to assess / reassess under section 147 or pass an order enhancing the liability of the assessee under section 154 of the Act, for proceedings which have been completed before July 1, 2012) since the objection went to the root of the matter, it directed the AO to consider the Petitioner's objections in respect to Section 92CA(2C) of the Act and dispose of the same within a period of 4 weeks from the date of filing. Additionally, the Court stayed the impugned notice for a further period of ten weeks from the date of the order (a) so as to enable the petitioner to challenge the order disposing of the objections in respect of Section 92CA of the Act (b) taking into account the decision of the Jurisdictional Court in the case of Asian Paints 296 ITR 90 (Bom) which directs the AO not to commence reassessment proceedings for a period of 4 weeks from the disposal of objections.

Amore Jewels Pvt Ltd v Pr CIT - TS-470-HC-2016 (Bom) - TP - WRIT PETITION NO.800 OF 2016

362. The Court set aside references made by AO to TPO for AYs 2011-12 to 2013-14 without giving assessee an opportunity of being heard as required by

law despite assessee's objection that the impugned transaction were not associated enterprises as contemplated in Sec 92A. It further held that satisfaction to be arrived at by the AO regarding the existence of the international transaction or specified domestic transaction, even prima facie, is a sine qua non for making the reference to the TPO.

Indorama Synthetics India Ltd [TS-501-HC-2016(DEL)-TP] - W.P.(C) 6422/2013 W.P.(C) 4558/2014

363. The Court held that for the purpose of determining the period of 9 months from the date on which the draft assessment order was forwarded to the assessee, under section 144C(12) of the Act (which provides the time limit within which the DRP was to pass its directions), the term "forward" contained therein had to be understood to mean actual service and therefore where the draft assessment order was passed on March 26, 2014 but served on the assessee 5 months later due to the change in jurisdiction, the DRP could not refuse to pass directions stating that the time limit of 9 months under section 144C(12) expired on December 31, 2014 whereas objections were filed in January 2015.

Rain Cements Ltd v DCIT-TS-483-HC-2016 (AP)-ITA No. 723/Mds/ 2016

364. The Tribunal held that where the assessee himself has computed ALP and has disclosed the income, it is not case of enhancement of income, deduction under section 10A would be allowed on voluntary TP adjustment by assessee.

Sum Total Systems India Private Limited vs. DCIT (2016) 48 CCH 0082 (Hyd Trib)-ITA No.255/Hyd/2015

365. The Tribunal quashed reassessment proceedings and deleted TP addition on the ground that the reference to transfer pricing officer was made prior to initiation of reassessment proceedings when no assessment proceedings were pending and held that such reference was illegal and could not be construed as information having a live link to the formation of belief that income had escaped assessment under section 147.

Labvantage Solution Pvt Ltd [TS-836-ITAT-2016 (Kol)-TP] (I.T.A No. 1051/Kol/2015)

366. Where the quantum of international transactions undertaken by the assessee during the year under review was Rs. 7.78 crore, the Tribunal held that reference made by assessing officer to transfer pricing officer was invalid as it was contrary to CBDT Circular which provided that no reference could be made to the transfer pricing officer for determining arm's length price if quantum of international transactions was less than Rs. 15 crores. It further held that CBDT being administrative body to administer the direct tax laws, instruction issued by it is binding on all the lower authorities.

Sensiple Software Solution Pvt Ltd [TS-824-ITAT-2016 (CHNY)-TP] (ITA No.556/Mds/2015)

367. The Tribunal rejected assessee's contention that draft assessment order was passed without regard to the internal instruction issued by the Department that no transfer pricing adjustment is to be made in a routine manner when the quantum of international transactions with associated enterprises is less than Rs. 15 crores and held that where international transactions were referred to transfer pricing officer with prior permission of CIT, then nothing in section 92A prohibited making of such reference and the instruction was only an internal matter of guidance to officers and there was no statutory prohibition to the making of such reference or the passing of a transfer pricing order based on such reference.

iSoft Health Services (I) P Ltd [TS-819-ITAT-2016 (Bang)-TP] (IT(TP)A.1256IBangI20 12)

368. The Court dismissed the assessee's petition challenging the reference made by the AO to TPO on the ground that it was in contravention of the CBDT Instruction No 3/2016 and noted that as per law it was necessary for the AO to decide the objections, if any, to the applicability of Chapter X before referring the transactions to the TPO as also before determining the ALP of international transactions himself and that in the instant case, the AOs satisfaction recorded contained sufficient reasons and that the AO had clearly indicated the relationship between the Petitioner and the other parties and made a comparative chart pursuant to which he alleged that the sales were under invoiced. It held that the course of action adopted by the AO was sufficient to refer the matter to the TPO and therefore the Petitioner was incorrect in

challenging the reference. As regards the service of order, the Court held that the contention of the assessee that the reference was void ab initio on account of non-service of the satisfaction note prior to making reference to TPO was misplaced as the failure to supply the satisfaction note prior to reference was a mere irregularity and did not prejudice the Petitioner in any manner whatsoever.
Shri Vishnu Eatables (India) Limited [TS-795-HC-2016 (P&H)-TP] (Civil Writ Petition No. 13613 of 2016 (O&M))

6.4 Penalty :

369. The Tribunal held where the revenue had not controverted that assessee had provided similar services in both the relevant and previous assessment year, the AO was incorrect in levying penalty under section 271AA of the Act on the basis that the assessee did not maintain records relating to international transactions as required under Rule 10D of the Rules and merely updated the margins of the comparable companies selected in the previous year, since comparable companies selected in the preceding year were relevant to transaction made during relevant assessment year and their updated margins would suffice for the purpose of comparability.
ACIT v Integrated Decisions & Systems(India)(P)Ltd - [2016] 68 taxmann.com 185 (Jaipur-Trib)

370. The Tribunal held that penalty under section 271AA need not be imposed upon assessee when assessee had explained that delay in filing details of international transactions under section 92D occurred on account of the fact that its auditor was busy in marriage of his son considering that there was no modification in the ALP adopted by the assessee.
Augustan Knitwear (P) Ltd. vs. ACIT - (2016) 67 taxmann.com 139 (Chen- Trib)

371. The Tribunal deleted penalty imposed under section 271(1)(c) of the Act in relation to the TP addition proposed on payment for availing of certain services from AEs as the assessee had satisfied the conditions of good faith and due diligence as stipulated in Explanation 7 to section 271(1)(c) of the Act. Further, it held that the mere fact that the assessee did not file an appeal against the adjustment did not make penalty an automatic implication as

penalty proceedings and assessment proceedings were two separate set of proceedings recognized under the Act.

Mitsui Prime Advanced Composites India Pvt Ltd v DCIT - TS-193-ITAT-2016 (Del) - TP

372. The Court deleted the penalty imposed by the AO in respect of the transfer pricing addition made noting that some of the comparable companies selected by the assessee were rejected by the TPO during the year under review whereas the same had been accepted in the prior year and therefore the assessee could not have visualized that out of the 12 comparables selected by it, 9 would have been rejected resulting in a radical change in margin computation. It further held that in the absence of any overt act which disclosed conscious and material suppression, invocation of Explanation 7 to Section 271(1)(c) in a blanket manner would be injurious to the assessee and contrary to the intent of the statute.

Pr CIT v Verizon India Pvt Ltd - TS-698-HC-2016 (Del) -TP - ITA 460/2016, C.M. APPL.26591/2016

373. The Tribunal held that where the assessee as well as the TPO had adopted the CUP method to benchmark the export transaction and a TP addition was made observing that the assessee sold cold flu tablets to its AE at 1.807 dollars per unit whereas the same was sold to non-related parties at 1.95 dollars per unit, levy of penalty under Explanation 7 to section 271(1)(c) was justified since the assessee being full aware of the factual discrepancy in the rates charged to AEs vis-à-vis Non-AEs chose not to revise its income and challenged the same in assessment proceedings, but did not prefer any quantum appeal due to the smallness of the amount. It held that Explanation 7 to Section 271(1)(c) of the Act (which provides that where an assessee has entered an international transaction as defined under section 92B of the Act, if any amount had been added or disallowed in computing the total income under section 92C(4), such addition or disallowance would be deemed to represent income in respect of which particulars were concealed or inaccurate particulars had been furnished) would be applicable in the instant case since the assessee failed to compute the ALP in the manner prescribed.

Clestra Life Sciences P Ltd v ITO - TS-676-ITAT-2016 (Mum) - TP - ITA No. 6962/Mum/2014

374. The Tribunal confirmed imposition of penalty under section 271(1)(c) since the assessee failed to demonstrate due diligence and good faith while benchmarking its international transaction by adopting the Cost Plus method on an aggregate basis whereas it was well aware of the availability of a direct CUP for at least two transactions.

Genom Biotech Pvt Ltd v ITO - TS-66-ITAT-2016 (Mum) - TP

375. The Tribunal held that where due diligence had been exercised in good faith by assessee in selecting comparables and by applying TNMM or RPM assessee was fully within arm's length range, this was not a case of concealment or of filing of inaccurate particulars and hence penalty could not have been imposed simply because the assessee accepted transfer pricing addition arising out of the TPO rejecting / introducing some comparable and applying TNMM as the MAM.

ACIT v Boston Scientific India (P)Ltd - [2016] 67 taxmann.com 288 (Delhi-Trib)

376. The Tribunal deleted penalty imposed under section 271(1)(c) of the Act with respect to the TP adjustment confirmed by the Tribunal on procurement support services provided to AE and held that penalty could not be imposed merely because the addition was accepted by the assessee with a view to buy peace and avoid protracted litigation and also noted that the assessee did not conduct its affairs with malafide intent

Gap International Sourcing India Pvt Ltd v DCIT - TS-611-ITAT-2016 (Del) - TP I.T.A .No.-6742 /Del/2013

377. The Tribunal upheld the CIT(A)'s deletion of concealment penalty u/s 271(1)(c) in relation to TP-adjustment on assessee's payment towards travel and salary costs of specialized technical personnel providing technical support during AY 2006-07 noting that in the quantum proceedings ITAT had confirmed TP-adjustment observing that assessee could not furnish any material or evidence with regard to rendering of services whereas the assessee had filed a debit note evidencing the services received. The Tribunal also accepted the assessee's contention that in quantum proceedings, ITAT had proceeded on an erroneous footing that the disallowance may have been made u/s 40(a)(i) or u/s 37, noting that the assessee had deducted TDS on entire payment @

15.75% and filed a legible copy of the debit note. Further, it noted that the TPO / DRP erred in determining ALP at Nil without giving any analysis as to why such an adjustment was required to be made when TNMM had been applied and when overall profit margin and method had not been disturbed. Observing that no penalty was levied for non-furnishing of the information and documents as required u/s 92D(3), for which separate penal provision u/s 271G has been prescribed, the Tribunal concluded that no case can be made for the levy of penalty u/s 271(1)(c). It also deleted the penalty in respect of TP adjustment on imports since the entire matter had been set aside and remanded back for fresh adjudication and thus the penalty levied on the basis of impugned assessment order could not be sustained.

DCIT v Kodak Graphic Communication I Pvt Ltd - TS-649-ITAT-2016 (Mum) - TP ITA No. : 6762/Mum/2012

378. The Tribunal deleted penalty u/s 271(1)(c) levied in respect of TP addition on interest free loan provided by assessee to its wholly owned subsidiaries by holding that since the jurisdictional HC had admitted a substantial question of law in respect of the TP adjustment, it indicated that the issue was debatable and thus the assessee's contention that it acted on a bonafide belief could not be shot down simply because assessment/TP adjustment made by the TPO had been upheld by the Tribunal.

Perot Systems TSI (India)(P)Ltd v ACIT - TS-97-ITAT-2016(DEL)-TP

379. While TPO accepted TNMM for computing ALP, he calculated mark-up of 6% on total cost as against assessee's method of applying the mark-up on standard cost and consequently levied penalty u/s 271(1)(c) read with Exp-7 which was deleted by the Tribunal by holding that the addition determined by lower authorities was not on account of any inaccuracy, discrepancy or concealment found in the information and documents furnished by the assessee but due to the difference in pricing methodology adopted for determining expected profits from AE. It further, held that no penalty was levied in earlier AYs and that, it was not open for the Assessing Officer to hold an assessee guilty under section 271(1)(c) of the Act in one year and not in other preceding two years under identical circumstances.

Cherokee India (P) Ltd. vs DCIT - TS-107-ITAT-2016(Mum)-TP

380. The Tribunal deleted penalty levied u/s 271G for non-furnishing of "TP study report" in time on the ground that TPO's order specifically mentioned that TP documentation containing fundamental & economic analysis prescribed under Rule 10D was submitted by assessee. It observed that based on such documentation TPO had accepted assessee's transactions at arm's length. Considering Revenue's failure to point out specifically which information had not been provided by assessee, and the fact that penalty had been levied for non-furnishing of 'TP Study Report' (which was not a specified document under Rule 10D) in time, though the information had been made available before passing of TPO's order, the Tribunal deleted the penalty.

Worlds Window Impex (India) (P) Ltd. v ACIT-TS-175-ITAT-2016 (DEL) -TP

6.5 Stay of Demand :

381. The Tribunal held that where Vodafone Group Plc's indirect stakeholding in Indian company VIL was increased as a consequence of two transactions and those transactions had been interpreted by Assessing Officer to mean that assessee-company had exercised right of call options available with it and addition was made considering such transaction as an 'international transaction', in view of fact that assessee-company was not even a party to impugned two transactions and there was no such assignment or transfer of call options by assessee, stay on demand raised by Assessing Officer was to be granted. It further held that where TPO made addition to assessee's ALP in respect of rendering IT enabled services to its AEs, in view of fact that TPO had included/excluded certain concerns in final set of comparables which were contrary to ratio of certain decisions of Co-ordinate Benches of Tribunal, stay on recovery of outstanding demand was to be granted.

Vodafone India Services (P)Ltd v DCIT - [2016] 68 taxmann.com 130 (Mumbai-Trib)

382. The Tribunal, relying on its earlier orders, rejected assessee's petitions seeking stay against demand on the ground that demand arose due to transfer pricing adjustment which is factual matter and therefore the same could not be a fit case for granting stay. Further, with regard to the contention of the assessee that it was facing coercive action for recovery of amount and there

had been a delay in hearing due to non-functioning of the bench, it held that since the assessee did not bring on record any material to show that any imminent coercive action was taken by the Revenue, there was no change in facts vis-à-vis facts prevalent at the time of rejection of stay vide earlier orders of the Tribunal and accordingly dismissed the petition.

Kaypee Electroncis & Associates Pvt Ltd [TS-828-ITAT- 2016 (Bang)-TP] (IT (TP) A Nos. 132 & 159/Bang/2016)

383. The Court rejected the assessee's petition seeking extension of stay of outstanding demand noting that no one had appeared on behalf of the assessee when the matter was called out for hearing in the previous month. It dismissed the stay application on the ground that the assessee was not interested in the stay application.

IBM India Pvt Ltd v ACIT - TS-690-ITAT-2016 (Bang) - TP - IT(TP)A No.773(BNG.)/2016

384. The Court held that where in respect of marketing and administrative services provided to third party customers, the assessee adopted a revenue sharing model whereby it kept 75 percent of the revenue and paid 25 percent to its subsidiaries who provided support services for transactions where the customers directly contracted with either the assessee or its subsidiaries, the TPO was incorrect in determining the remuneration to subsidiaries at 15 percent, where the customers directly contracted with the assessee, since there was no difference in the functions performed by either the assessee or its subsidiaries as compared to cases where customers directly contracted with the subsidiaries.

CIT v ITC Infotech India Ltd - (2016) 66 taxmann.com 106 (Cal)

6.6 Others :

385. The Tribunal held that where a number of individual transactions could not be considered as closely linked, they could not be aggregated and had to be benchmarked on a transaction to transaction basis.

ACIT v Tamil Nadu Petroproducts Ltd - (2016) 46 CCH 0068 (Chen)

386. The Tribunal held that where the assessee was assigned a contract for

execution of works contract with respect to the designing, engineering, construction, operation and maintenance of a highway in Andhra Pradesh, for which the assessee entered into an agreement with its AE engaging it as a Project Advisor, the TPO was incorrect in determining the ALP of the payment made to the AE as Nil on the ground that the assessee had subcontracted a certain portion of the work to another contractor thereby contending that the payment made to the AE was a sham transaction, since the assessee was responsible for the design and suitability of the project and therefore required the said services of its AE. The Tribunal noted that the entire work had not been assigned by the assessee to the sub-contractor and the most important work of design and engineering work had been retained by the assessee and that as per the agreement between the assessee and its AE, the assessee had employed the services of its AE in relation to the designing and engineering of the project. It further noted that since the employees of the AE had visited India and rendered services required, the allegation of the AO that the transaction was a sham transaction was baseless.

IWM Constructions P Ltd v ACIT - TS-494-ITAT-2016 (Hyd) - TP - ITA Nos.457/Hyd/2007 & 1658/Hyd/2008

387. The Tribunal rejected the adoption of a foreign AE as a tested party for the purpose of benchmarking the intra group services received by the assessee from its AE. It held that under the TNMM, the profit margin realized by the Indian assessee from the transaction with its foreign AE was to be compared with the margin earned by the comparable companies and that there was no question of substituting the profit realized by the Indian enterprise with the profit realized by the foreign AE and that the assessee's methodology of adopting the foreign AE as the tested party was a patently unacceptable position having no sanction under the TP laws of India. Further, on examination of the search process adopted by the assessee it held that the foreign comparable companies selected by the assessee were completely lacking comparability and therefore held that apart from contending that the foreign AE should have been considered as a tested party, there was no material to substantiate the same since the data chosen by the assessee was neither relevant nor reliable.

GE Money Financial Services Pvt Ltd - TS-457-ITAT-2016 (Del) - TP - ITA No.440/Del/2014

388. The Court allowed the assessee's appeal challenging the order of the Tribunal wherein the Tribunal held that a foreign AE could not be considered as a tested party as it lacked statutory sanction since there was nothing in section 92B of the Act prohibiting such consideration. Accordingly, since the Tribunal had remitted the issue of consideration of most appropriate method and appropriate comparables, the Court held that it would be appropriate for the TPO to consider the question of adopting a foreign AE as a tested party as well.

GE Money Financial Services Pvt Ltd v Pr CIT - TS-697-HC-2016 (Del) - TP - ITA 662/2016, CM Nos. 31740-31741/2016

389. The Tribunal held that in case where assessee had suo moto disallowed franchise fees paid to associated enterprise on account of non-deduction of TDS under section 40(a)(i), the TPO was incorrect in making a TP addition on the same as it would amount to a double addition. Further noting that the TPO proceeded to decide the issue on merits and contended that the assessee should be precluded from claiming such expenditure in future, it held that such an approach by the TPO was incorrect as he could not pass an advance ruling for subsequent years.

Royal Canin India Private Limited [TS-801-ITAT-2016 (Mum)-TP] (IT(TP)A No. : 784/Mum/2016)

International Tax

CHAPTER - 7

PERMANENT ESTABLISHMENT

7.1 Agency PE :

390. The Court held that where the assessee, a UAE based company availed marking information services from a company in India, since the said company was not authorized to conclude contracts on behalf of the assessee, no dependent agent PE was constituted. Additionally, the Court held that where the assessee company, in order to carry out its contract with ONGC for the fabrication and installation of petroleum products, opened a project office in Mumbai, the said project office would not constitute a fixed place PE since it was merely acting as a communication channel and therefore fell within the exclusionary clause (e) of Article 5 viz. auxiliary activities. Further, it held that even if a fixed place of business falls squarely under Paragraph 1 of Article 5 and is specifically listed in Paragraph 2 (i.e. Project office**)**, it would not constitute a PE if it fell under any exclusionary clause of Article 5(3) of the DTAA. (i.e. preparatory or auxiliary activity)

National Petroleum Construction Company v DIT - (2016) 66 taxmann.com 16 (Del) [India - UAE DTAA]

391. The Tribunal held that where the assessee received services from UK and UAE based entities in running a duty free retail outlet at international terminals under an Exclusive Procurement Agreement, it was not liable to deduct tax at source on payments made to such entities as alleged by the AO on the ground that the UK / UAE companies had a business connection in India,

since the agreement did not envisage exercise of absolute control over the business of duty free shops by the UK / UAE entities and that they did not have the right to determine retails prices at the ships. The Tribunal also noted that the title and risk to the merchandise was transferred outside India and the fact that the commission paid was directly linked to sales was not a relevant factor.

Cochin International Aiport Ltd v ITO - TS-73-ITAT-2016 (Cochin) [India - UK DTAA , India - UAE DTAA]]

392. The Apex court granted leave to the departments SLP against High Court's ruling that where assessee, a Mauritius based telecaster of TV channels, carried out entire activities from Mauritius, its affiliates/agents in India who were remunerated on arm's length basis for carrying out only routine functions in India, did not constitute assessee's PE in India.

DIT v. B4U International Holdings Ltd - (2016) 71 taxmann.com 182 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10482 OF 2016

393. The Tribunal held that the company engaged in manufacturing products developed by the assessee as well as marketing the products manufactured by the assessee, in which the assessee held 50 percent share capital, did not constitute a PE of the assessee under Article 5 of the India-USA DTAA, since (i) the said company did not have the right to conclude contracts on behalf of the assessee, (ii) the assessee did not have access to the premises of the said company and (iii) the final decision of pricing of the product along with the term / conditions therein were taken by the assessee.

DDIT (IT) v Lubrizol Corporation USA - (2016) 47 CCH 0435 (Mum - Trib) - ITA No. 1247/Mum/2014 [India - US DTAA]

394. The Tribunal held that distribution revenue accruing to the assessee, a Mauritian company, by virtue of an agreement with Taj India was not taxable in India, absent a PE in India. It noted that Taj India, appointed as an exclusive distributor, was acting independently qua its distribution rights and that the agreement was ostensibly on principal to principal basis and therefore Taj India did not constitute a Dependent Agent PE under Article 5(4) of the India-Mauritius DTAA.

ADIT (IT) v Taj TV Ltd-TS-428-ITAT-2016 (Mum) - ITA No. : 4678/ Mum/2007, : 412/Mum/2008, 4176/Mum/2009 [India - Mauritius DTAA]

395. The Tribunal held that that revenue earned by assessee (an Israel company) from contract with HPCL (an Indian petroleum company) for implementing automated systems was taxable in India, since the assessee's project office ('PO') incorporated in India to oversee implementation of project constituted assessee's dependent agent PE in India. It rejected the assessee's stand that contract can be split into supply of equipment which took place outside India and installation of systems at HPCL sites which was sub-contracted to another Indian company since the assessee supplied equipment to subcontractor, which in turn installed the same at the HPCL petrol pumps and that the assessee received the entire contract revenues from HPCL and compensated sub-contractor for the works carried out by it. Therefore it held that the contract was composite. It also rejected the contentions of the assessee viz (i) that PO did not constitute assessee's PE in India as it was merely coordinating the activities carried by sub-contractor (ii) the subcontractor did not constitute PE as it was an agent of independent status.

Orpak Systems Ltd. vs. ADIT - TS-94-ITAT-2016 (Mum)

7.2 Installation PE :

396. The Tribunal held that though service of installation is covered by the FTS clause as well as Installation PE clause of the India China treaty and though the installation contract (including period of after sales service) exceeded 183 days, the income from installation activity was neither taxable as FTS nor as business income since the specific installation PE clause in India China Treaty would override General FTS clause and the aforesaid threshold limit of 183 days would have to be applied to the actual period of installation (which was less than 183 days) and not the contractual period.

Gujarat Pipavav Port Ltd v ITO - (2016) 67 taxmann.com 370 (Mumbai - Tribunal)

397. The AAR held that the entire contract revenue arising to the Applicant, a Singaporean company from L&T towards supply of goods and rendition of services was taxable in India as it was attributable to its PE in India and rejected the contention of the Applicant that the contract was bifurcated into two parts viz. (i) offshore supply of goods and (ii) provision of services since there was no division on the basis of supply and services and the payment was

not separately linked with services and supply but was made on the basis of stages of completion of the contract irrespective of goods and materials brought in the premise and that the intention of the applicant was that the property in the goods will pass only when the installation and erection of entire works was completed.

MERO Asia Pacific Pte Ltd - TS-489-AAR-2016 - A.A.R. No 981 of 2010 [India - Singapore DTAA]

398. The Tribunal held that for the purpose of computing number of days stay for examining the threshold limit of 9 months under section 5(2)(i) of the India- Mauritius DTAA, each building site, construction, assembly project or supervisory activities was to be viewed independently on stand-alone basis and no aggregation was to be done. Accordingly, since the duration of the project did not exceed 9 months, the Tribunal held that there was no PE in India. Further, with regard to the assessee's Liaison office premises, it held that the office maintained by the assessee was in the form of an auxiliary unit to provide back up support and other auxiliary services for the purpose of maintaining coordination and aid to the functioning of the project and therefore did not constitute a PE as the activities were preparatory or auxiliary in nature.

J Ray Mc Dermott Eastern Hemisphere Ltd - TS-250-ITAT-2016 (Mum)

399. The Tribunal held that the contract revenue arising to the assessee, a US based company engaged in the manufacture and sale of equipment used in the seismic industry from offshore supplies pursuant to a contract entered into with ONGC was not taxable in India since the title in the goods passed offshore and therefore no part of the consideration could be attributed to supplies in India. It rejected the finding of the AO that the contract entered into by the assessee, which included supply of offshore supplies, equipment etc as well as installation and commissioning services, was a composite contract and held that the contract was divisible into different components, the consideration for which was separately contemplated. Further, since the Revenue failed to substantiate the presence of assessee's employees in India for more than 120 days (for providing training to ONGC), it held that the assessee did not have a installation PE in terms of Article 5(2)(j) / (k) of the India -US DTAA.

Ion Geophysical Corporation - TS-455-ITAT-2016 (Del) - ITA no. 1607/Del/2015

7.3 Fixed Place PE :

400. The Tribunal held that where the assessee, a Japanese company engaged in business of manufacturing consumer products, opened a liaison office in India, since power of attorney did not authorize employee of LO to do core business activity or to sign and execute contracts etc., on behalf of assessee, it could not be regarded as assessee's PE in India.

Kawasaki Heavy Industries Ltd. vs. ACIT - [2016] 67 taxmann.com 47 (Delhi-Trib)

7.4 Service PE :

401. The Tribunal held that in order to determine as to whether assessee, a German company, rendering services in field of exploration, mining and extraction to Indian companies, had PE in India, it was continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period.

Rheinbraun Engineering Und Wasser GmbH v DDIT - (2016) 68 taxmann.com 34 (Mumbai- Trib.) [India - Germany DTAA]

402. The Tribunal held that where all the conditions of Article 5(2)(k) of the DTAA were satisfied i.e. (i) there was furnishing of services including managerial services (ii) such services were other than those taxable under Article 13, (iii) such services were rendered out of India (iv) such services were rendered by 'other personnel' and (v) such activities continued for a period of more than 90 days within 12 months, the assessee was said to have a Service PE in India.

JC Bamford Investments Ltd v DCIT(IT) - (2016) 46 CCH 0435 (Del Trib) [India - US DTAA]

7.5 Multiple PEs :

403. The Tribunal held that where assessee secured order on behalf of its Indian entity and outsourced work thereto, such entity constituted assessee's

business connection in India. Also, where assessee received BPO services from its Indian entity, it did not constitute fixed place PE in India. Further, where Assessing Officer alleged that expatriate employees of assessee were providing services in India but could not render any evidence in this regard, it was held that there was no service PE in India.

DCIT v Vertex Customer Management Ltd - [2016] 67 taxmann.com 105 (Delhi-Tribunal) [India - UK DTAA]

404. The Court held that the assesee's liaison office and subsidiary company in India could not be considered as a Fixed Place PE since neither were their premises at the disposal of the assessee, nor did they act on behalf of the assessee in negotiating and concluding agreements. Further, the Court held that the Indian subsidiary company could not be treated as a Dependent Agent PE since it did not have the authority to conclude contracts on behalf of the assessee. Additionally, the Court held that the Indian subsidiary could not be considered as an Installation PE or a Service PE since the subsidiary carried out the tasks of installation and testing on its own accord and not on behalf of the assessee and that there was no material to hold that it performed services on behalf of the assessee. Therefore, the Court held that the supply of equipment to a third party overseas was not taxable in the hands of the assessee.

Nortel Networks India International Inc v DIT - (2016) 96 CCH 0001 - (Delhi) [India - US DTAA]

405. The Court held that where the subsidiary company of the assessee was compensated at ALP for international transactions with the assessee (its AE), assuming that the subsidiary company was the PE of the assessee, no further profits could be attributed to the assessee's operations in India.

Without prejudice to the above, the Court held that the assessee's subsidiary in India did not constitute a fixed place PE since there was no evidence that the assessee had the right to use its premises or any fixed place at its disposal. The Court held that held that in the absence of any evidence that any of the assessee's employees provided services in India, there could be no Service PE and merely because the assessee had the right to audit the Indian subsidiary, it could not be concluded that the employees of the assessee provided services in

India. Further,it held that there was no allegation that the Indian subsidiary was authorized to conclude contracts on behalf of the Petitioner and therefore could not be considered as a Dependent Agent PE.

Adobe Systems Incorporated v ADIT - (2016) 96 CCH 0012 (Del) [India - US DTAA]

7.6 Attribution of Profits :

406. The Tribunal applied the indirect method of attribution of profits as per Rule 10 of the Rules to attribute the profits of the assessee (a Chinese company) to its PE in India in respect of supply of telecom equipment and mobile handsets, since the assessee did not maintain any books of accounts relating to the PE in India. It held that for the purpose of attribution of profits to a PE, the most important aspect to be kept in mind is the level of the PE's participation in the economic life of the source country and the nexus between the source country and the PE's activities. Referring to the activities performed by the Indian PE, the Tribunal held that the level of operatins carried by the PE were considerable enough to conclude that almost the entire sales and after sales function were carried out by the PE in India and accordingly attributed 35 percent of the net global profits to the impugned PE. Further, it rejected the assessee's contention that no further attribution of profits could be made to the PE as the transactions were accepted to be at ALP by the TPO, since the post-sale activities carried out by the Indian entity surfaced only during survey carried out by the Department and were not subject matter of TP proceedings.

ZTE Corporation v ADIT - (2016) 70 taxmann.com 1 (Del - Trib) [India - China DTAA]

7.7 General :

407. The Tribunal held that as interest payment by Permanent establishment (Branch office) to its head office (a foreign company) was a payment by a foreign company's Indian PE to foreign company itself; it could not give rise to any income, in hands of foreign company.

BNP Paribas SA v. ADIT - [2016] 69 taxmann.com 6 (Mumbai - Tribunal) [India - France DTAA]

408. The Tribunal held that where UK-based non-resident company received non-compete fee, a business receipt, the same could not be taxed in India in the absence of a PE.

Trans Global PLC vs DIT (IT) - [2016] 68 taxmann.com 146. (Kolkata - Tribunal) [India - UK DTAA]

409. The Tribunal held that amount received by assesseee, a Singaporean company engaged in business of making / accepting / executing and discounting of financial instruments, from its Indian associated enterprises by discounting their Promissory Notes was assessable as discounting charge and not as interest under section 2(28A) of the Act / Article 11 of India-Singapore DTAA. The same was business income of assessee which could not be taxed in India in absence of its PE in India. It further held that this was a case where assessee had merely discounted the sale consideration receivable on sale of goods and not a case where any money had been borrowed or debt had been incurred.

Cargill financial Services Asia Pte. Ltd, In Liquidation v ADIT - [2016] 67 taxmann.com 266 (Delhi-Tribunal)

CHAPTER - 8

ROYALTY / FEES FOR TECHNICAL SERVICES

8.1 Royalty :

410. The Court held that software purchase payments by the assessee, in the capacity of a Value Added Reseller did not amount to royalty as payments made for purchase of a software as a product could not be considered to be for the use or the right to use the software. It held that it was necessary to make a distinction between cases where consideration as paid to acquire the right to use a patent or copyright and cases where payment was made to acquire patented or copyrighted products / material and where the payment was for copyrighted products / materials, the consideration was to be treated as a purchase of product. Accordingly, the disallowances made under section 40(a)(i) and 40(a)(ia) of the Act were deleted.

Pr CIT v M Tech India Pvt Ltd - (2016) 67 taxmann.com 245 (Del)

411. The Tribunal held that consideration received by assessee for sale of software supplied as part of machine to end user was not royalty under article 12 of DTAA between India and Israel as there was no transfer of copyright or any rights therein nor was there any situation giving rise to any type of infringement of copyright by customers of assessee. It held that the amendment made in section 9(1)(vi) by way of insertion of an Explanation by Finance Act, 2012, for extending scope of term 'Royalty', could not be read into provisions of Article 12(3) of the Indo-Israel tax treaty as amendment made in provisions of Act cannot be automatically read into articles of treaty unless

corresponding amendment is made in treaty as well.

Galatea Ltld v DCIT - [2016] 67 taxmann.com 190 (Mumbai-Trib) [India - Israel DTAA]

412. The Court held that unless the DTAA was amended jointly by both parties to incorporate income from data transmission services as partaking of nature of royalty, Finance Act, 2012 which inserted Explanations 4,5 and 6 to section 9(1)(vi) by itself would not affect meaning of term 'royalties' as mentioned in article 12 of India - Thailand DTAA.

DIT v New Skies Satellite BV - [2016] 68 taxmann.com 8 (Delhi) [India - Thailand DTAA]

413. The Court held that where the assessee had entered into a contract with IOCL for offshore construction work involving mobilization / demobilization and installation services, the Revenue was incorrect in separating the mobilization / demobilization services from the installation services since the payment made to the assessee was for the execution of a composite contract.

It held that since the equipment used by the assessee while providing services to IOCL were in the exclusive control of the assessee and IOCL did not have any dominion or control over the same, the payment received by the assessee could not be taxed as equipment royalty under Article 12(3) of the India-Singapore DTAA. Further, it rejected the contention of the Revenue that the installation services were incidental to mobilization / demobilization services and therefore taxable under Article 12(4)(a) of the DTAA and held that since the demobilization / mobilization services were not taxable under Article 12(3), the installation services even if considered ancillary, would not be taxable. Further, it held that the said services were neither taxable under the DTAA since they didn't make available any technology nor under the Act since it fell under the exclusionary clause to Explanation 9(1)(vii).

Technip Singapore Pte Ltd v DIT - TS-301-HC-2016 (Del) [India - Singapore DTAA]

414. The Tribunal held that payments made by assessee to non-residents for downloading of photographs for exclusive one time use for publication in

assessee's magazine in India did not amount to Royalty under article 12 of DTAA between India and was not liable for tax deduction at source since admittedly a) photographs had been given to assessee for limited purpose of its one time use in magazine b) assessee could neither edit photograph nor could it make copies of photograph to be sold further or to be used elsewhere c) assessee was not permitted to make resale of these photographs to any other person for any other use.

DCIT v VJM Media (P.) Ltd - [2016] 68 taxmann.com 305 (Mumbai-Trib.) [India - UK DTAA]

415. The Tribunal held that the amount received by a UK Resident company from its Indian affiliate under a Management and Administration Services agreement for services such as business policy advice, market research, market analysis, evaluation of business opportunities etc constitutes royalty towards the supply of commercial information concerning commercial experience under the Act as well as the India-UK DTAA. It held that since some of the services under the said agreement were charged based on gross turnover, it indicated that the services were in relation to information, knowledge or expertise as well as experience already in existence and in possession of the assessee. In dealing with the contention of the assessee that the agreement was a composite agreement and some of the services were purely business / commercial practice, it held that since the assessee failed to provide a bifurcation of the same, then the other part of the services could also be given the tax treatment as given to one part of the services provided which constitutes the principle purpose of the contract.

TNT Express Worldwide UK Ltd v DDIT (IT)- TS-253-ITAT-2016 (Bang) [India - UK DTAA]

416. The Tribunal held that the definition of royalty under the DTAA and the Act was not paramateria since the Act defines royalty to include computer software which was not so in the relevant DTAAs. Further, it held that the difference between the term 'use of copyright in a software' and 'use of software' was to be appreciated and held that to constitute royalty under the DTAA the consideration paid should have been for the transfer of use of copyright in the work and not the use of the work itself. It held that the sale of

a CD ROM / diskette containing software was not a license but was a sale of product which was a copyrighted product. Further, it relied on the decision of the Apex Court in the case of Sedco Forex International Drill INC. & Others v. Commissioner of Income Tax & another wherein it was held that if an explanation added to a provision changed the law, then it could not to be presumed to be retrospective irrespective of the fact that the phrase used were 'it is declared' or 'for the removal of doubts', and held that payments made prior to Finance Act, 2012, to Hong-Kong entities for which there was no DTAA, would not be subject to deduction of tax, as Explanation 4 to Section 9(1)(vi) of the Act, though introduced as retrospective in nature with effect from 1.6.1976, had the effect of change in law and consequently was to be given prospective effect.

DDIT (IT) v Reliance Industries Ltd - (2016) 69 taxmann.com 311 (Mumbai - Trib) [DTAA between India and Australia / Canada / Singapore / Netherlands / Germany / US / UK / UAE

417. The Tribunal held that revenue earned from 'software sale' by assessee an India branch of a UK company to Indian customers was in nature of business receipts and not royalty as same was consideration for sale of a copyrighted product and not for use of any copyright . All Intellectual property rights to products remained with UK company and assessee could not use it or pass it over to anyone except by way of sale of software products Further, 'royalty' definition under India-UK DTAA did not include consideration for use of computer software. Furthermore, retrospective insertion of Explanation 4 to section 9(1)(vi) vide Finance Act, 2012 which included consideration for right to use a computer software within ambit of 'royalty' also could not be read into DTAA as a country which was party to a treaty could not unilaterally alter its provisions. Also the Tribunal further held that receipts from annual maintenance contract having same character as that of original software would be covered under business profits under article 7. Also, where training to employees of end users of software sold by assessee for which consideration had been received was ancillary and subsidiary to sale of software; it was to be treated as business receipts under article 7 of DTAA between India and UK.

Datamine International Ltd v ADIT - [2016] 68 taxmann.com 97 (Delhi-Tribunal)[India - UK DTAA]

418. The Tribunal held that payment of Inter-connect Usage Charges ('IUC') by Bharti Airtel ('assessee') to Foreign Telecom Operators ('FTO') in connection with its International Long Distance ('ILD') telecom service business was neither FTS nor royalty (including process royalty) u/s 9(1)(vi)/(vii) of the Act and therefore Section 195 of the Act was not applicable on the ground that for it to constitute technical services there should be an involvement/ presence of human element. It also observed that the 'inter connection facility' was a standard facility. Further, it rejected the Revenue's alternate stand that payment was in the nature of 'royalty' as it was made for 'use of process' since the assessee merely delivered the call that originates on its network to one of the inter connection locations of the FTO and FTO carries and terminates the call on its network and the assessee was nowhere concerned with the route, equipment, process or network elements used by the FTO. It clarified that the term "process" used under Explanation 2 to Sec 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available and not exclusively owned by grantor and that it implied an item of intellectual property and that the word "process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis, the expression 'similar property' used at the end of the list further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or trade mark' are to be understood as belonging to the same class of properties viz. "intellectual property. It also clarified that the retrospective insertion of Explanations 5 & 6 to Sec 9(1)(vi) did not alter this position and moreover retrospective amendment in domestic legislation cannot affect royalty definition under DTAA which is very 'restrictive'.

Bharti Airtel Limited v ITO - (2016) 46 CCH 0304 (Del Trib) [India - UK DTAA]

419. The Tribunal held that where assessee received reimbursement from its India entity for use of equipments situated outside India and it could not be established that same was on cost to cost basis, it was taxable in India as royalty.

DCIT v Vertex Customer Management Ltd - [2016] 67 taxmann.com 105 (Delhi-Tribunal) [India - UK DTAA]

420. The Tribunal held that where assessee was granted license by two foreign companies (licensors) based out of US and UK and licensors provided data relating to geophysical and geological information and they were not responsible for accuracy or usefulness of such data, since licensors had only made available data acquired by them but did not make available any technology available for use of such data by assessee, payments made by assessee to said licensors was not in nature of 'Royalty' as per respective DTAA.
GVK Oil & Gas Ltd v ADIT - [2016] 68 taxmann.com 134 (Hyderabad-Tribunal) [India - US DTAA, India - UK DTAA]]

421. The Tribunal held that the amount received by Baan Global BV, a Dutch company, for supply of 'off the shelf' software to its Indian distributor for onward supply to Indian customers was not taxable as royalty under the India-Netherlands DTAA since what was supplied was only copyrighted products and there was no transfer of right to use copyright in computer software since the agreement between the assessee and ultimate customers forbade customers from decompiling, modifying, reverse engineering or disassembling the software. It rejected the contention of the DRP that sharing of source code of software amounted to the use of 'process' and held that the customers were only permitted to use the source code for internal computing operations and was subject to riders and limitations. It also rejected the contention of the Revenue that the retrospective amendment to the Act was to be read into the DTAA and held that in the absence of a corresponding negotiation between the two sovereign nations to amend the specific provision of royalty in the DTAA, the amendment in the Act could not be read into the DTAA.
ADIT v Baan Global BV - TS-351-ITAT-2016 (Mum) - ITA No 7048/Mum/2010 [India - Netherlands DTAA]

422. The Court held that consideration received by assessee on sale of pre packaged software was not royalty. It further held that there is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke

the royalty definition. Viewed from this angle the Court held that a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of USA DTAA.

CIT & ANR vs. Halliburtion Export Inc. & ANR - (2016) 96 CCH 0060 (Del HC) - ITA 363/2016, 365/2016 [India - US DTAA]

423. The Tribunal held that payment made by the assessee to a US company for transponder charges and linking up charges could not be treated as consideration for use or right to use any copyright or the other various terms used in Article 12(3) of the India-US DTAA and was therefore not taxable as royalty. Further, as regards the contention of the revenue, that the amended definition of royalty under the Act was to be read into the DTAA, the Tribunal, relying on the decision of the Court in New Skies Satellite, held that the definition of royalty under domestic law would not have any impact on the DTAA.

ADIT (IT) v Taj TV Ltd - TS-428-ITAT-2016 (Mum) - ITA No. : 4678/Mum/2007, : 412/Mum/2008, 4176/Mum/2009 [India - US DTAA]

424. The Tribunal held that royalty income earned by the asssessee, an Italian company under technical collaboration and license agreement with an Indian company was taxable on gross basis @ 20 percent under Article 13 of the India-Italy DTAA and not as business income @ 41.82 percent by treating its Indian branch as its PE. It dismissed the contention of the Revenue that since the employees of the assessee's Indian branch were technically qualified, they assisted the assessee in providing such services and held that the Revenue did not show any material evidencing that services were provided by employees of the Indian branch. Further, it held that to connect royalty with a PE one has to evaluate the asset test which failed in the instant case.

Iveco Spa v ADIT - TS-450-ITAT-2016 (Del) - ITA No. 5447/Del/2010, ITA No. 5696/Del/2012 [India - Italy DTAA]

8.2 Fees for Technical Services :

425. The AAR held that fees received by the UK based applicant on account of supply management services such as ensuring market competitive pricing

from suppliers, maintaining contract supply agreement with suppliers after identifying products availability, competitive pricing, provided to its Indian Group company could not be treated as fees for included services as the same did not impart any technical knowledge and expertise to its Indian Group company such that the Indian company could make use of it in the future, failing the condition of making available the technology as contained in Article 13 of the India UK DTAA. Further since managerial services were excluded from the ambit of Fees for technical services, the payment was not subject to tax.

Cummins Ltd In re - [2016] 65 taxmann.com 247 (AAR - New Delhi) [India - UK DTAA]

426. The Court held that agency commission paid by the assessee to non-resident agents for procuring orders for the assessee outside India, would not be taxable as fees for technical services under section 9(1)(vii) of the Act and therefore section 195 of the Act would not be applicable, since obligation to deduct tax at source under section 195 only arises if the payment is chargeable to tax in the hands of the non-resident recipient.

CIT v Farida Leather Company - (2016) 66 taxmann.com 321 (Mad)

427. The Tribunal held that the payment made by the assessee to its overseas group company as reimbursement of expenses incurred by them for recruitment of employees on behalf of the assessee did not come within the purview of Article 12(4) of the India-USA DTAA as the payments were pure and simple reimbursement of recruitment expenses. Accordingly, the Tribunal deleted the disallowance made under section 40(a)(i) of the Act.

ACIT v Lehman Brothers & Advisors Pvt Ltd - (2016) 67 taxmann.com 225 (Mum- Trib) [India - US DTAA]

428. The Tribunal held that where the assessee, a foreign company provided consultancy services for highway projects in India, it would not amount to technical service as it was related to construction activity, which was specifically excluded from the scope of fees for technical services under the Act and thus it would not be subjected to presumptive taxation under section 44D of the Act but would be taxed as regular business profit.

DDIT v MSV International Inc - [2016] 67 taxmann.com 156 (Delhi-Trib).

429. The Tribunal held that where the assessee, engaged in engineering and construction works, availed services of review and tracking of execution plans of the assessee and also obtained procedures from a foreign company which also undertook project budget and client satisfaction, the foreign company had made available its technical knowledge, expertise and know-how in execution of the contract with the assessee in India and hence the assessee was liable to deduct tax under section 195 of the Act on the said payment.

Forster Wheeler France SA v DDIT (IT) - (2016) 67 taxmann.com 120 (Chennai- Trib)

430. The Tribunal held that the assessee was not liable to deduct tax under section 195 of the Act on payments made towards security surveillance services paid to a non-resident since the payment was towards maintenance of common security platform applicable to all Group companies which did not make available any technical knowledge, experience, skill and therefore did not fall under the definition of fees for included services under the India -China DTAA.

DCIT v Dominion Diamond (India) Pvt Ltd - TS-42-ITAT-2016 (Mum) [India - China DTAA]

431. The Tribunal held that export commission payments to foreign brokers for rendering services abroad was not a sum chargeable to tax in hands of foreign brokers as contemplated under section 195 and was not a fee for technical / managerial service as defined in Explanation 2 to section 9(1) (vii) to bring it to tax under fiction created by deeming provisions of section 9.

ACIT v Pahilarai Jaikishin - [2016] 66 taxmann.com 30 (Mumbai-Trib)

432. The Court held that where an arranger of bank engaged in mobilizing deposits in India for Deposits Scheme, appointed non-resident sub-arrangers for mobilizing fund outside India, services rendered by non-resident sub-arrangers would not fall within category of managerial, technical or consultancy services; and therefore payments made by the assessee to such non-residents would not be liable to TDS and accordingly, the disallowance under section 40(a)(i) of the Act was deleted.

DIT (IT) vs. Credit Lyonnais - [2016] 67 taxmann.com 199(Bombay)

433. The Apex Court dismissed the assessee's SLP against the judgement of

the Calcutta High Court wherein it was held that payment of consultancy fees paid to Singaporean company for forex derivative transaction services was taxable as 'Fees for technical services '('FTS') for AY 2008-09 considering the fact that the Singaporean company provided expert guidance and consultancy services.

CIT vs. Andaman Sea Food (P) Ltd - [TS-30-SC-2016] [India - Singapore DTAA]

434. The Tribunal held that fee for included services (FIS) would not include amounts which are inextricably and essentially linked to start up services and sale of property.

Raytheon Ebasco Overseas Ltd v DCIT - [2016] 68 taxmann.com 133 (Mumbai-Tribunal) [India - US DTAA]

435. Where the assessee company was developing and exporting gas circuit breaker and vaccum circuit breaker for which design tests were conducted as per IEC Standards, and the assessee company had paid testing charges without TDS to foreign companies, the Tribunal held that the said payment was FTS liable for TDS and that though the products were sent out of India, source of income was created once export orders were concluded in India. It further held that in order to fall within second exception provided in section 9(1)(vii)(b), source of income, and not receipt should be situated outside India.

DCI - Large Taxpayer Unit v Alstom T & D India Ltd - [2016] 68 taxmann.com 336 (Chennai-Tribunal.)

436. The Tribunal held that sum received by the assessee, a UK based Company, for allowing Indian telecom operators to use its Virtual Voice Network (VVN), i.e., a facility used to connect the call to the end operators could not be treated as royalty or FTSin terms of Article 13 of India-UK DTAA since the payment was made to the assessee for using its services and not for the use of any scientific equipment or technology. Also payment for service could not be brought to tax as 'FTS' under Article 13 of India-UK DTAA as no technology was made available to the service recipient, since it was not able to apply that technology without recourse to the service provider.

Interroute Communications Ltd v DDIT - [2016] 68 taxmann.com 160 (Mumbai -Tribunal) [India - UK DTAA]

437. The Tribunal held that review of design does not amount to transfer of design and hence fees for the same cannot be taxed as FTS / FIS under the India US treaty. It also held that where the service of installation was inextricably connected to sale of goods, the same could not be treated as FIS or FTS.

Gujarat Pipavav Port Ltd v ITO - (2016) 67 taxmann.com 370 (Mumbai - Tribunal) [India - US DTAA, India - China DTAA]

438. The Tribunal held that the payment of professional fees made by the assessee to non-residents in the UK, USA, France and China did not constitute fees for technical services since it did not make available to the assessee, any technology by virtue of which it would be able to apply such technology without recourse to the service provider. Further, in dealing with the alternate contention of the assessee that the payments, being made to individuals, would be governed by Article 15 viz. Independent Personal Services and not FTS, the Tribunal agreed with the same and held that since none of the individuals were present in India for a period of 90 days or more the same would not be taxable under Article 15 of the respective DTAAs. Further, it held that the retrospective amendment to Section 9(1)(vii) inserted vide Finance Act, 2010, doing away with the requirement of services being rendered in India, would not be applicable to the assessee, since at the time of deduction of tax, the same was not applicable and therefore it deleted the disallowance made under section 40(a)(i) of the Act.

KPMG v ACIT - (2016) 46 CCH 0339 (Mumbai - Trib) [DTAA between India and US / UK / France /China]

439. The Tribunal held that where assessee rendered composite service of managerial and technical nature to is Indian subsidiary and the CIT (A) taxed half of receipts therefrom without analyzing bills to segregate them, action of CIT(A) was not justified and restored the matter to the file of CIT (A).

ADIT v Lloyds Register UK - [2016] 68 taxmann.com 309 (Mumbai-Tribunal) [India - UK DTAA]

440. The Tribunal held that the payment made by the assessee to a Korean non-resident company for testing and certification services was taxable as fees for technical services and therefore liable to withholding tax, by relying on the

decision of the Court in the case of M/s Havells (India) Ltd wherein it was held that fees for testing and certification services was taxable in the hands of the non-resident company since the assessee (making the payment) in that case could not prove that the testing services availed were utilized in a business outside India as a result of which the source was to be considered to be in India.
Megawin Switchgear Pvt Ltd v ACIT - (2016) 47 CCH 0039 (Chen Trib)

441. The Tribunal held that payments made by the assessee for 3D Seismic Data Interpretation services were not FTS under Article 13 of India- UK DTAA as services did not "make available" technical expertise, skill or knowledge and hence not liable for withholding tax under section 195 of the Act. It observed that the assessee had provided the initial data and the non-resident was only required to provide the interpretation report of such data and therefore held that the AO erred in treating maps/designs given by the non-resident to the assessee as technical plan or design since the said maps/designs were nothing but a way to interpret the data and could not be equated to development and transfer of technical maps and designs as contemplated by the AO. Further, it held that the payment was made for providing analysis of data and the conclusion provided by the non-resident did not enable the assessee to apply such knowledge or undertake survey independently without any assistance.
Adani Welspun Exploration Ltd v ITO - TS-249-ITAT-2016 (Ahd) [India - UK DTAA]

442. The Tribunal held that where in course of business carried on by assessee-company as a stock broker, foreign subsidiaries rendered services which were in nature of simple marketing services of introducing foreign institutional investors to invest in capital markets in India, but no technical service was being made available, payments made to subsidiaries would not fall within definition of 'fees for technical services' taxable in India.
Batlivala & Karani Securities (India) (P) Ltd v. DCIT - (2016) 71 taxmann.com 142 (Kolkata - Trib) - IT APPEAL NOS. 1234 AND 1235 (KOL.) OF 2013 [India - UK DTAA]

443. The Tribunal held that payment made by the assessee to an Israel based company under an annual maintenance contract was not taxable in India and accordingly there was no liability to deduct tax under section 195 of the Act

since the payment towards AMC was in the nature of routine repairs and maintenance and not in the nature of fees for technical services absent managerial, technical or consultancy services provided to the assessee. Further, it rejected the contention of the Revenue that the services were rendered in India since as per the warranty agreement the equipment was sent outside India for repairs and re-imported in India and therefore it was incorrect to conclude that the entire services were rendered in India.

ACIT v HCL Comnet Ltd - TS-456-ITAT-2016 (Del) - ITA No 321/Del/2012, 5651/Del/2012, 6142/Del/2012 [India - Israel DTAA]

444. The Tribunal held that service tax did not have any element of income i.e. it was not in the nature of fee for technical services and therefore did not partake the character of income hence was not includible in the gross receipts offered for taxation.

DDIT v Egis Bceom Intl SA - (2016) 46 CCH 0098 (Del Trib) [India - France DTAA]

445. The Court reversed the decision of the AAR and held that the Most Favoured Nation clause contained in Article 7 of the Protocol between India and France was applicable to Fees for technical services under the India-France DTAA and therefore where the Protocol provided that where any convention / agreement / protocol was signed between India and a OECD member state which limits India's taxation at source on FTS to a lower rate or on the basis of a restricted meaning the benefit under the Protocol could not be denied. Accordingly, it held that the definition appearing in the India-UK DTAA was to be read as forming part of the India-France DTAA as well and therefore since the management fee paid by the assessee to a French company was not covered under the FTS clause of the India-UK DTAA, the same would not be taxable under the India-France DTAA.

Steria India Ltd - TS-416-HC-2016 (Del) - W.P.(C) 4793/2014 & CM APPL. 9551/2014 [India - France DTAA]

446. The AAR held that program fees received by the Applicant, Regents of the University of California from its Indian counterpart for holding management programs for training senior executives was not taxable under the India-US DTAA since the applicant's activity was in the nature of educational activities

and could not come within the ambit of fees for includes services or royalty under Article 12(5) of the India-US DTAA which excludes amount paid for teaching in or by educational institutions.

The Regents of University of California - TS- 490-AAR-2016 - A.A.R. No 1656 of 2014 [India - US DTAA]

447. The AAR held that the service fee payable by the Applicant to its Russian subsidiary for providing product promotion services was not FTS under the Act or under Article 12 of the India-Russia DTAA since the services rendered could not be considered as consultancy services as they merely entailed preparation of reports by the Russian subsidiary which were statistical in nature. Further, it dismissed the alternate contention of the Revenue that the same could be taxed as managerial services since the job of the medical representatives of the Russian subsidiary was to merely meet doctors and pharmacies which could not said to be managing the affairs of the Applicant.

Dr Reddy's Laboratories Ltd - TS-487-AAR-2016 - A.A.R. No 1572 of 2014 [India - Russia DTAA]

448. The AAR held that administrative support services provided by a third party service provider to the Applicant in connection with the Applicant's contract with Indian Oil Corporation were not taxable as fees for technical services since it was in the nature of managerial services which did not make available any technical skill information or knowledge to the Applicant.

Foster Wheeler GB Ltd - TS-491-AAR-2016 - A.A.R. No 1003 of 2010 [India - UK DTAA]

449. The Tribunal held that payment of legal fees by the assessee to UK firm for educating its officials regarding various legal/regulatory requirements for setting up of a bank branch outside India falls within the exceptions under section 9(1)(vi)/(vii) as the payment was made to carry on business outside India and create a new source of income outside India and hence, not taxable as royalty/fees for technical service under the Act. It further held that under India-UK DTAA, as per Article 15 (Independent Professional Services) being more specific than Article 13 (Royalty/ Fees for Technical Service) the fees were not taxable, since no employee of the UK firm was present in India for more than 90 days.

Kotak Mahindra Bank Limited - TS-528-ITAT-2016 (Mumbai Trib)- ITA No. 3901/Mum/2013 [India - UK DTAA]

450. The Tribunal held that revenue earned by assessee, a resident of Finland from management support and other services rendered to its Indian group concern were not taxable as fees for technical services under the provisions of Article 13 of India-Finland DTAA on the ground that such services did not make available technology or technical knowhow to the recipient to function on its own without the dependence of the assessee.

Outotec Oyj [TS-569-ITAT-2016 (Kol)] (I.T.A Nos. 558/Kol/2014 & I.T.A Nos. 462/Kol/2015) [India - Finland DTAA]

451. The Tribunal held that amount received by assessee of Rs. 23.77 cr (out of total receipts of Rs. 33 crore), a UK based event management company pursuant to contract with BCCI for providing assistance in organizing Indian Premier League (IPL) cricket tournament was taxable as fees for technical services under Article 13 of India-UK DTAA on the ground that assessee had made available the procedures, agreements for organizing IPL by virtue of which BCCI would be able to carry on the IPL events subsequently.

International Management Group (UK) Ltd. [TS-545-ITAT-2016 (Del)] (ITA No.1613/Del/2015) [India - UK DTAA]

452. The Tribunal held that payment made by assessee to its Malaysian subsidiary for carrying out clinical trial and R&D pursuant to Product Development agreement with Cipla constituted fees for technical service under Article 13 of India-Malaysia DTAA and TDS was required to be deducted under section 195 since the services provided by the Malaysian subsidiary were of technical nature and the DTAA between India and Malaysia did not contain the make available clause.

Stempeutics Research Pvt. Ltd. [TS-560-ITAT-2016(Bang)] (I.T.(I.T) A. No.1450/Bang/2013 & 1196/Bang/2014) [India - Malaysia DTAA]

CHAPTER - 9

CAPITAL GAINS

453. The Tribunal held that where the assessee transferred shares under a scheme of arrangement approved by the High Court, the scheme would not fall under the category of re-organization under Article 13(5) of the India - Netherlands DTAA, since the object of the scheme was not financial re-structuring but to enable the assessee to transfer its shareholding and pursuant to the scheme there was only a reduction in the share capital but the security holders continued to enjoy the same rights and interests, thereby not satisfying the definition of reorganization. Accordingly, it held that the gain received by the assessee was taxable in India.

Accordis Beheer BV v DIT - TS-10-ITAT-2016 (Mum) [India - Netherlands DTAA]

454. The AAR held that settlement amount received for surrender of right to sue was not taxable since it was a capital receipt and could not be charged to capital gains as its cost of acquisition was not determinable. Further, the AAR held that the settlement amount was received as a result of surrender of claim against another company and its auditors and not in substitution of any business income and therefore the said amount could not be taxable in accordance with the principle of surrogatum, since it did not replace any business income.

Aberdeen Claims Administration Inc - (2016) 65 taxmann.com 246 (AAR- Del)

Lead Counsel of Qualified Settlement Fund - (2016) 65 taxmann.com 197 (AAR- Del)

455. The AAR held that where a Mauritius based company proposed to transfer shares held by it in an Indian company in favour of a company proposed to be incorporated in Singapore pursuant to a group reorganization initiated 20 years back, it could not be said to be a tax avoidance scheme merely because treaty benefits were available. It further observed that the Mauritius company had been operating for a period of 10 years and therefore could not be considered as a shell company. It held that the applicant was not liable to capital gains tax as per Article 13 of the DTAA, since Article 13(1) and 13(3) were not applicable and in the absence of a permanent establishment Article 13(2) of the DTAA was also not applicable.

In the absence of a PE in India, the MAT provisions did not apply to the applicant and neither did the transfer Pricing provisions apply as there was no income arising out of the said international transaction.

Dow Agro Sciences Agricultural Products Ltd In re - [2015] 65 taxmann.com 245 (AAR- New Delhi) [India -Mauritius DTAA]

456. The Tribunal held that gains from alienation of shares of capital stock of the company the property of which consists directly or indirectly principally of immovable property situated in a contracting state may be taxed in that State and therefore, the assessee a resident of India, transferring shares of a Sri-Lankan company would be taxable in Sri Lanka itself. It held that the contention of the CIT in invoking 263 of the Act on the basis that the AO failed to examine the issue adequately and that the AO failed to compute long term capital gains and short term capital gains separately, was not consequential since the capital gains would be taxable only in Sri Lanka in any case.

Jay Agriculture & Horticulture Pvt Ltd v Pr CIT - (2016) 46 CCH 0118 (Ahd Trib) [India - Sri Lanka DTAA]

457. The Tribunal held that advance given by assessee, a non-resident company, to its wholly owned subsidiary is a property in the sense that it is an interest which a person can hold and enjoy, and since it is a property and is not covered by exclusion clauses set out in section 2(14), it is required to be treated as a 'capital asset' and if any loss arises on sale of the said asset, it would be treated as short term capital loss in the facts of the given case.

Siemens Nixdorf Informationssysteme GmbH v DDIT - [2016] 68 taxmann.com 113 (Mumbai -Tribunal)

458. The Tribunal held that where the assessee was resident of both India and Sri Lanka, as per Article 13 of the India-Sri Lanka DTAA, capital gains arising from the transfer of immovable property situated in Sri Lanka would be taxable only in Sri Lanka. However, it held that the same was also income chargeable to tax in India under the provisions of the Act and therefore to avoid double taxation relief i.e. credit for tax paid in Sri Lanka would be granted to the asssessee in accordance with Notification No 91 of 2008 read with the DTAA.

Shalini Seekond v ITO - (2016) 47 CCH 0398 (Mum - Trib)- I.T.A. No. 3877/Mum/2012 [India - Sri Lanka DTAA]

459. The Court held that the situs of an intangible asset was the situs of the owner of such asset and that an intangible asset does not have any physical form at any particular location and therefore could not presumed to be situated in India when its owner was outside India. It held that the legislature could have, through a deeming fiction, provided for the location of an intangible capital asset but it had not done so insofar India in concerned. Citing the deeming fiction introduced for the situs of shares in an indirect transfer, it held that since there was no like provision for intangible assets, the well accepted principle of 'mobilia sequuntur personam', which provides that the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset, was to be followed. Accordingly, since the assessee / owner of the intangible asset was not in India at the time of transfer of intellectual property rights to another company viz. SAB Miller, no income accrued to the Petitioner in India.

CUB Pty Ltd v UOI - TS-401-HC-2016 (Del) - WP(C) 6902/2008

460. The AAR held that the capital gains arising to the Applicant, a Mauritian company and wholly owned subsidiary of a Japanese Bank, on transfer of shares of an Indian asset management and trustee companies was not taxable under Article 13 of the India-Mauritius DTAA. It noted that the Applicant held more than 75 percent of the paid up capital of the asset management and trustee companies and held a valid TRC and therefore the Revenue were incorrect in contending that the Applicant was merely a 'permitted transferee'

just to claim the benefit of the India-Mauritius DTAA and that the Japanese parent company was in effective control of the transaction. Noting that the Applicant had a valid TRC, the AAR held that the beneficial provisions of the DTAA could not be denied to the Applicant.

Shinsei Investment Ltd - TS-473-AAR-2016 - A.A.R. No 1017 of 2010 [India - Mauritius DTAA]

461. The AAR, invoking the non-discrimination clause under Article 25(1) of the India-Italy DTAA, held that capital gains arising on amalgamation of a non-resident company having an Indian branch with its group company(an Italian based bank) was not taxable in light of the exemption provided in Section 47(vi) which is otherwise available only to Indian companies. It dismissed the contention of the Revenue that the applicants case fell under the exception carved out under Article 25(3) and clarified that the said exception only applied to personal allowances etc and would be in context of individuals and not companies. It further held that even if the amalgamation was considered as a transfer, since the shareholders of the applicant and not the applicant received consideration by virtue of shares of the amalgamated company, there would be no capital gains tax in the hands of the applicant since it did not receive any consideration. Further, the AAR also held that that the consideration received by the shareholders of the applicant was not chargeable to tax as capital gains in view of Article 14(5) of the India-Italy DTAA which provided that capital gains shall be taxable only in Italy.

Banca Sella SPA - TS-468-AAR-2016 - AAR No 1130 of 2011 [India - Italy DTAA]

462. The AAR held that as per Article 13(4) of the India-Mauritius DTAA, the assessee, Mahindra-BT, Mauritius, was not liable to tax in India in respect of the transfer of shares in Tech Mahindra Ltd ('TML') to AT&T International USA ('AT&T'). It rejected the Revenue's contention that the applicant was incorporated without any economic substance and that its sole purpose was to hold shares to facilitate a tax neutral share transfer noting that there was a commercial option agreement between TML and AT&T, whereby AT&T was to be offered an opportunity to hold shares in TML only once AT&T had provided TNML was a certain level of business and that there was nothing wrong if the

Applicant held the shares in TML and transferred them to AT&T subsequent to the fulfillment of conditions prescribed in the Options Agreement. It further rejected the stand of the Revenue that the control and management of the Applicant was situated in India under section 6(3) of the Act since the condition of control and management being wholly situated in India was not satisfied as various important decisions on financial matters were taken by the Applicant's Board of Directors in Mauritius.

Mahindra-BT Investment - TS-479-AAR-2016 - A.A.R. No 991of2010 [India -Mauritius DTAA]

CHAPTER - 10

DIVIDEND INCOME

463. The Tribunal held that for AY 2004-05, dividend received by the assessee from a Malaysian Bank would be governed by the old DTAA between India and Malaysia and therefore would not be liable to tax in India. Post AY 2004-05, the dividend income would be taxable in both states and subject to tax credit under section 91 of the Act.

DCIT v UCO Bank - (2016) 46 CCH 0313 (Kol Trib) [India - Malaysia DTAA]

464. The Tribunal held that where the assessee, a resident of India, received dividend from a company incorporated in Brazil, then as per Article 10 read as well as Article 23 of the India-Brazil DTAA, the dividend could have been taxed at a rate not exceeding 15 percent in Brazil as per the DTAA. However, since the Brazilian law declared the dividend income to be exempt from income-tax, as the assessee was a resident of India within the meaning of paragraph 3 of Article 23 of the DTAA (which provides that where a company which is a resident of a Contracting state derivces dividends which, in accordance with the provisions of paragraph 2 of Article 10 may be taxed in the other Contracting state, the first mentioned State shall exempt such dividends from tax), such dividends were exempt from tax in India.

ITO v Besco Engineering & Services Pvt Ltd - (2016) 47 CCH 0028 (Kol) [India - Brazil DTAA]

465. The Tribunal held that where the assessee society received dividend income from an Omani company, which was offered to tax in India, it would be liable to credit of tax paid under the India - Oman DTAA, in spite of the fact that the Omani tax laws exempts tax on such income, as the term 'tax payable' in Article 25(4) of the DTAA includes tax which would have been payable but not paid due to certain tax incentives under laws of the contracting State.

Krishak Bharati Cooperative Ltd v ACIT - (2016) 67 taxmann.com 138 (Del - Trib) [India - Oman DTAA]

CHAPTER - 11

ARTICLE 8 / SECTION 44BB / SECTION 44D

466. The Tribunal quashed reassessment proceedings initiated by the Revenue seeking to tax technical and ground handling services rendered as fees for technical services under the Act as they were allegedly effectively connected with the assessee's PE in India, following the order of the Tribunal in the assessee's own case for previous assessment years wherein it was held that ground handling and technical services performed by the assessee should be considered as a part of operation of aircraft in international traffic under Article 8 of the India-Netherlands DTAA, and therefore could not be treated as fees for technical services under the Act.

DCIT v KLM Royal Dutch Airlines - TS-25-ITAT-2016 (Del) [India - Netherlands DTAA]

467. The Court held that the freight income earned by the assessee, a Singapore based company engaged in the shipping business, from the operation of ships was not taxable in India under Article 8 of the India-Singapore DTAA, despite the fact that the receipts were remitted to London and not Singapore, since the Inland Revenue Authority of Singapore issued a certificate stating that the entire freight income derived by the assessee would be assessable in Singapore on accrual basis without making any reference to the amount of income remitted or received in Singapore. The contention of the Revenue that the assessee was not entitled to the benefit of Article 8 by virtue of Article 24(1) (which provided that reliefs provided by the DTAA would only apply to income remitted to Singapore) was rejected by the Court on the

ground that the said clause did not provide that Article 8 would not apply to every case of non-remittance and moreover the income in the instant case was taxable in Singapore on the basis of accrual.

M.T. Maersk Mikage [TS-474-HC-2016(GUJ)] SPECIAL CIVIL APPLICATION NO. 9150 of 2014 [India - Singapore DTAA]

468. The Tribunal allowed the assessee's (resident of Indonesia) appeal challenging assessment under section 172 of the Act (which deals taxation of non-resident shipping companies) and held that income earned from slot chartering in certain vessels sailing from Port of Mundra was not taxable in India as per Article 8 of India-Indonesia DTAA. It held that the Revenue was incorrect in denying exemption under Article 8 of India-Indonesia DTAA on the ground that vessels in which the containers were transported were not owned/ chartered by the assessee, since as per Article 8(1) source jurisdiction (India in this case) had no right to tax income from operations of ships in international traffic or even any activity directly connected with such operations, whether carried on by the assessee on his own/ in collaboration with others and that there was no reference to ownership and charter of vessels in Article 8 of the DTAA. It relied on Bombay HC ruling in Balaji Shipping UK Ltd wherein it was held that "slot hire facility is an integral part of the contract of carriage of goods by sea" and thus is eligible for treaty protection against source taxation of such income.

K Cargo Global Agencies v ITO - TS-235-ITAT-2016(Ahd) [India - Indonesia DTAA]

469. The AAR held that consideration received for on-board fabrication and installation of Floating Production Storage and Offloading facility under Change order was taxable in India under section 44BB of the Act despite working performed outside India as the change order was a mere extension of the Original Contract and therefore warranted similar tax treatment. Entire consideration received was taxable under section 44BB without splitting the same on the basis of travel of FPSO outside or in India as section 44BB did not provide for such splitting up.

Aker Contracting FP ASA - TS-773-AAR-2015

470. The Tribunal held that where profits and gains of the business carried on by the assessee were to be computed at 10 percent of gross receipts as per section 44BB of the Act, deeming the gross receipts to be the income of the assessee, it could not claim a deduction of fuel cost incurred in respect of construction of offshore facilities, even though the same would be allowable under the normal provisions of the Act, since its taxability was governed by the provisions of Section 44BB which do not provide for deduction of expenses incurred.

Fugro Rovtech Ltd v ADIT(IT) - (2016) 66 taxmann.com 19 (Mum)

471. The Tribunal held that where the assessee and a Russian company entered into an agreement for the construction of Nuclear power plant in India, whereby the Russian company was to assist in setting up the Nuclear Power Station, the payment made to the Russian company was taxable under section 44BBB of the Act and not taxable as fees for technical services since the Russian company not only provided necessary assistance but also was actively involved in the process of setting up the Power Station by providing end to end services and deputing personnel for the purpose of carrying on construction.

DDIT(IT) v Nuclear Power Corporation of India Ltd - (2016) 46 CCH 0111 (Mum Trib)

472. The Tribunal held that income received by a non-resident under a time charter agreement accrues and arises in India even when the vessel and crew are outside the territorial waters of India since the payments were intricately linked to the services/works rendered by the assessee and arose due to the execution of contract in India. Further, it held that if a non-resident is engaged in the business of providing services or facilities in connection with the prospecting for extraction or production of mineral oil, then 10% of the aggregate of the amounts received/accrued will be deemed to be the profits and gains of such business chargeable to tax in terms of provisions of section 44BB of the Act even if it was in the nature of Royalty / FTS since specific services were contemplated only under section 44BB of the Act and, therefore that being special provision, the same will prevail over all other provisions dealing with royalty/FTS.

Siem Offshore Crewing v ADIT - (2016) 46 CCH 0277 (Del Trib)

473. The Court held that both section 44B and 172 of the Act open with a non-obstante clause and that section 44B provides for the computation and section 172 provides for the recovery and collection of taxes. The provisions of section 172 of the Act clearly provide the mechanism for levy, assessment and recovery and therefore there is no warrant in applying the provision of section 195 to the assessee and accordingly there is no obligation to deduct tax at source on the resident / Indian company making payments to non-resident covered under section 172 of the Act. Thus, no disallowance can be made under section 40(a)(i) of the Act in such a case.

CIT v VS Dempo & Co Pvt Ltd - (2016) 66 taxmann.com 93 (Bom)

474. The Court held that consideration received by foreign company for services rendered to Indian entities for activity of 2D/3D seismic survey carried on in connection with exploration of oil could not be construed as "fees for technical services" in terms of Explanation 2 to section 9(1)(vii) and the same was liable to tax in India under section 44BB only if non-resident had a PE in India in relevant assessment year.

PGS Exploration (Norway)AS v ADIT - [2016] 68 taxmann.com 143 (Delhi)

475. The AAR held that where the applicant provided coring service (which generally include the removal of sample formation material from a wellbore for further analysis of the said samples) sample analysis service to examine presence of petroleum in block for exploration, consideration received by applicant would be taxable under section 44BB and the provisions of sections 9(1) (vii), 44D and 44DA of the Act would not be applicable in view of the judgment of the Apex Court in Oil & Natural Gas Corpn. Ltd v CIT.

Corpro Systems Ltd., In re - [2016] 68 taxmann.com 330 (AAR-New DELHI).

476. The Tribunal held that the assessee, a Singapore Company and wholly owned subsidiary of an Indian company, engaged in the business of operating ships in international traffic across Asia and the Middle East could not be considered to have effective management and control in India merely because it had opened a bank account in India, having one of its directors in India or

holding of only one meeting during the year in India. Also, it held that the location of the parent company in India would not decide the residential status of the assessee. It dismissed the contention of the Revenue that the assessee was taxable under section 44B since the assessee did not own or charter or lease any vessel or ship for the year under consideration and therefore held that its income was to be taxed as business income and in the absence of PE in India no income was taxable in India.

Forbes Container Line Pte Ltd v ADIT - TS-126-ITAT-2016 (Mum)

CHAPTER - 12

INDEPENDENT PERSONAL SERVICES

477. The Tribunal held that the amount received by the assessee, a US individual, for rendering software development services to an Indian entity was not taxable in view of Article 15 of India-US DTAA and rejected the AO's contention that the impugned services not being covered under Article 15 were taxable under Article 12 of the DTAA. It held that once a receipt was of a nature covered under Article 15, it would stand excluded from Article 12 by applying sub-clause 5 of Article 12. It further observed that software development services essentially required intellectual skill and was dependent on individual characteristics as a result of which it fell within the ambit of 'professional services under Article 15(2) and also noted that while dealing with the scope of services covered under Article 15, there could be overlapping effect of the scope of services covered under other Articles but as long as the services were rendered by an individual or a group of individuals, the rendition of services was covered by Article 15.

ITO v SusantoPurnamo - TS-438-ITAT-2016 (Ahd) - I.T.A. No. 254/Ahd/2015 [India - US DTAA]

CHAPTER - 13

WITHHOLDING TAX

478. The Tribunal held that the assessee, a branch of a foreign bank was not liable to deduct tax at source on payment of interest to its head office since the payment was made by the non-resident to himself and accordingly deleted the disallowance made under section 40(a)(i) of the Act.

DBS Bank Ltd v DDIT (IT) - (2016) 66 taxmann.com 173 (Mum)

479. The Tribunal held that the assessee, an independent insurance broker was not required to deduct tax at source on payments made to non-resident re-insurers since it was an independent broker and not an agent and did not carry out any activity on behalf of anyone in India and did not have the authority to conclude contracts in India. It observed that neither did the non-resident reinsurers nor any independent insurance company have any control over the assessee and that section 9(1)(i) specifically excluded independent brokers from its ambit. Accordingly, it held that the assessee could not be treated as an assessee in default under section 201 / 201(1)(A) of the Act.

ADIT v AON Global Insurance Service Ltd - TS-756-ITAT-2015 (Mum)

480. The Tribunal held that the question of applying a rate of 20 percent and making consequent adjustment on payments made by the assessee to a non-resident, ignoring the provisions of the DTAA was a legal question which was beyond the scope of intimation under section 200A of the Act which provided for adjustments on account of arithmetical errors and therefore, the said intimation and adjustment was not justified.

Wipro Ltd v ITO - (2016) 46 CCH 0187 (Bang - Trib)

481. The Tribunal held that the second proviso to section 40(a)(ia) of the Act was retrospective in nature, being declaratory and curative in nature, seeking to eliminate unjust enrichment on part of the Government.

Dilip Kumar Roy v ITO - (2016) 68 taxmann.com 129 (Kolkata - Trib)

482. The Tribunal deleted Sec 40(a)(i) disallowance and held that the assessee was not liable to deduct TDS u/s 195 on payments made to non-resident during AY 2010-11 for training conducted outside India and dismissed the contention of the Revenue that the assessee was liable to deduct TDS applying explanation to Sec 9(1) inserted retrospectively by Finance Act 2010 which provides that even where the non-resident has not rendered services in India, FTS shall be deemed to accrue or arise in India. It held that an assessee who has to make the payment cannot visualize or apprehend that in future a retrospective amendment would be brought whereby it would require withholding of tax and that that law cannot compel a person to do something which is impossible to perform (i.e lex non cogit ad impossiblia).

Holcim Services South Asia Ltd v DCIT - TS-80-ITAT-2016(Mum)

483. The Tribunal held that assessing Officer's order under section 195(2) determining the amount of TDS to be deducted from payment to non-resident is not an appealable order u/s 246 / 246A and CIT(Appeals) cannot entertain appeals against it and any order passed by CIT(A) by entertaining such appeal will be unsustainable for want of jurisdiction - Consequently, the Tribunal also cannot entertain any appeal against CIT(A)'s order on the matter

Bangalore International Airport Ltd v ITO - [2016] 68 taxmann.com 228 (Bangalore - tribunal)

484. The Court held that for AY 2001-02, prior to the insertion of section 40(a)(ia) of the Act, disallowance of payments to non-residents on account of non-deduction of tax at source was discriminatory, since payments to residents were not subject to such disallowance arising out of non-deduction of tax at source and consequently assessees would be eligible to benefit of Article 26(3) of the India-US DTAA i.e. Non-discrimination, and therefore it held that the administrative fee paid by the assessee to its US based holding company was

allowable in spite of non-deduction of tax at source.

CIT v Herbalife International India Pvt Ltd - (2016) 96 CCH 0007 (Del) [India - US DTAA]

485. The Tribunal held that where the assessee made payments in consideration for services rendered by non-residents, in view of the fact that no finding had been brought on record by the Revenue that non-residents had business connection in India, it could be concluded that no services were rendered by non-residents in India. Further, since no finding was made vis-à-vis the nature of the payments and no evidence was brought on record to show that the payments were in the nature of fees for technical services, the provisions of section 40(a)(i) of the Act would not be applicable since the receipts were not in the nature of income deemed to accrue or arise in India in the hands of the non-residents.

IDS Infotech Ltd v DCIT - (2016) 69 taxmann.com 393 (Chandigarh)

486. The Tribunal deleted Sec 40(a)(i) disallowance for non-deduction of Sec 195 TDS on payment of technical know-how fees to AVL Austria, since under old DTAA provision of 1963 between India and Austria which existed till September, 2001, payment made by Indian entity to Austrian resident for rendering services in Austria was not taxable in India.

LML Ltd - TS 392 ITAT 2016 (MUM) ITA No. : 3668/Mum/2004 [India - Austria DTAA]

487. The Tribunal held that the amount remitted by the assessee to its 100 percent Mauritian holding company under a share buy-back scheme was not taxable in India during the relevant assessment year viz AY 2011-12 (prior to the insertion of section 115QA of the Act) since the shareholders were liable to capital gains tax under section 46A and there being no capital gains tax in Mauritius, no tax was payable. Accordingly it held that Section 195 was not applicable to the said transaction. It further dismissed the contention of the Revenue that the buyback scheme was a colourable device to avoid payment of DDT under section 115O and held that the buyback was legitimate and in accordance with section 77A of the Companies Act.

Korn Ferry International Pvt Ltd - TS-439-ITAT-2016 (Mum) I.T.A. No. 7367/Mum/2014, I.T.A. No. 7139/Mum/2014

488. The Tribunal held that the remittance of sales commission to non-resident agents was not taxable in India absent operations carried out in India and therefore it deleted the disallowance made under section 40(a)(i) of the Act. It held that even though Section 9(1)(i) of the Act was triggered in the instant case, it had no impact on the taxability in the hands of the commission agent because admittedly no business operations were carried out in India and by virtue of Explanation 1 to Section 9(1)(i) of the Act, the entire commission income was outside the ambit of income deemed to accrue or arise in India.

ITO v Excel Chemicals India Ltd - TS-417-ITAT-2016 (Ahd) - I.T.A. No.5/Ahd/16

489. The Tribunal held that the assessee was not liable to withhold tax under section 195 of the Act on payment towards ground rent, advertisement and exhibition expenses to non-resident entities not having PE in India, since the payments were in the nature of business receipts which would be taxable only if the payee had a PE in India.

ITO v Brahmos Aerospace Pvt Ltd - TS-524-ITAT-2016 (Del) - ITA No. 966/Del/2015

490. The Tribunal upheld CIT(A)'s order deleting disallowance made by the AO under section 40(a)(ia) of the Act on account of non-deduction of tax on selling expenses paid to non-residents since the payments made to the said non-resident parties were for the purpose of marketing and consultancy services rendered outside India and the said payments were not exigible to tax deduction at source u/s 195 of the Act as there was no income accruing or arising in India in the hands of the said non-resident parties in view of Section 9(1)(vii) of the Act read with Section 90(2) and the treaty provisions as per the India-USA DTAA..

ITO vs. Annik Technology Systems P. Ltd. (2016) 48 CCH 0132 (Delhi Trib.) (ITA No. 4763/DEL/2012) [India - US DTAA]

491. The Tribunal held that provisions of section 195 of the Act do not apply to transaction between one non-resident to another non-resident. Further, it held that if the non-resident assessee is not liable to pay advance tax then there is no question to levy interest under sections 234B and 234C of the Act.

Star Limited [TS-773-ITAT-2016 (Mum) - TP]

492. Where the assessee had duly deducted tax at source during the relevant year on the payments for which disallowance under section 40(a)(i) was made on account of non-deduction of tax in the prior year, the Tribunal allowed assessee's claim of reversal of disallowance made in light of proviso to Section 40(a)(i) of the Act.

Star Limited [TS-773-ITAT-2016 (Mum)- TP]

493. The Tribunal held that appeal filed by the assessee- deductee against a 195(2) order passed upon application made by the payer / deductor was not maintainable since as per section 246A an order under section 195(2) was not appealable before the CIT(A). It further held that the only remedy against a section 195(2) order was appeal under section 248 which was required to be filed by the deductor and not the deductee. It held that the order appealed against must be an order against an assessee determining its liability to be assessed under the Act and since, in the present case, the order under section 195(2) was against the deductor in whose case the assessment was concluded and not the assessee, the only course open to the assessee was to deny its liability to be assessed under the Act and claim a refund.

DCIT v Abu Dhabi Ship Building PJSC - TS-328-ITAT-2016 (Mum)

CHAPTER - 14

MISCELLANEOUS

14.1 Assessment :

494. The Court held that when there was no failure on part of the assessee to disclose all material facts relating to income in question at the time of assessment and the AO concluded that the amount received by the assessee from its subsidiary under the software duplication and distribution license agreement was taxable as royalty, he could not subsequently initiate reassessment proceedings merely on the basis of change of opinion that the amount in question was to be taxed as business income.

Oracle Systems Corpn v DIT(IT) - (2016) 66 taxmann.com 286 (Del)

14.2 AAR - Maintainability of Application :

495. The Court held that a notice issued under section 143(2) of the Act in a pre-printed format would not be a bar to the AAR application even if it was issued prior to the filing of the AAR application. Further, it held that the words 'already pending' in section 245R(2) of the Act covered situations wherein on the date of filing of the application before the AAR, the question raised therein was already subject matter of proceedings before the income tax authority and since the question before the AAR was not subject matter of the notice under section 143(2) of the Act, the AAR application could not be dismissed.

Hyosung Corporation v AAR - TS-77-HC-2016 (Del)

496. The Court held that the words 'already pending' in section 245R(2) of

the Act relates to the date of filing of application before the AAR and therefore notices issued under section 143(2) of the Act subsequent to filing the AAR application would not bar the AAR proceedings. It held that only if the question raised in the AAR application was already subject matter of proceedings before the income-tax authorities, could the AAR refuse to entertain the said application. Where the notice issued by the AO was in a standard format and not covering the specific issue which was subject matter of application before the AAR, there would be no bar on adjudicating such issues under section 245R of the Act.

LS Cable & System Ltd v CIT - (2016) 96 CCH 0011 (Del)
Hyosung Corporation v AAR - TS-274-HC-2016 (Del)

497. The Court allowed the Petitioner's writ and quashed the AAR order rejecting the Petitioner's application for advance ruling under Section 245R on the ground that since a notice under section 143(2) was issued in case of the Petitioner the matter was pending adjudication before AO thereby attracting bar on approaching the AAR, since the notice under section 143(2) was issued in general terms and it did not address itself to any specific question.

Sage Publications Ltd v DCIT - TS- 480-HC-2016 (Del) - W.P.(C) 5870/2016

14.3 Individuals :

498. The Tribunal held that since the assessee, an employee of a US based company, was a non-resident providing services in the US and subject to tax in the USA he was exempt from tax in India as per Article 16 of the India-USA DTAA and merely because he was paid salary by the US company's Indian counterpart, which was later reimbursed by the US company, tax could not be levied on him in India.

Neeraj Badaya v ADIT(IT) - (2016) 46 CCH 0541 (Jaipur)

499. The Tribunal held that the salary received by the assessee, a non-resident individual, working as a marine engineer in foreign waters, was taxable in India since it was received in the assessee's NRE account in India. It rejected the contention of the assessee that the income was not taxable in India since it was received in foreign currency and held that Section 5(2)(a) provides for taxability of any income received or deemed to be received in India

irrespective of the residential status of the recipient.
Tapas Kr Bandopadhyay - TS-310-ITAT-2016

14.4 Others :

500. The Court dismissed the petition filed by the petitioner challenging validity of section 94A(1) of the Act, (incorporating special measures in respect of transactions with persons located in notified jurisdictional areas) Notification No 86 and press release dated November 1, 2013. It held that Section 94A of the Act, empowering the Central Government to declare any country or territory outside India as a notified jurisdiction was constitutionally valid. It held that the Indian Constitution followed the dualistic doctrine with respect to international law and that international treaties do not automatically form part of the international law unless incorporated into the legal system by a legislation made by parliament. The Court held that the challenge to the constitutional validity of section 94A(1) of the Act was meritless and in dealing with the contention of the Petitioner that section 90(1)(c) of the Act could not be diluted by section 94A(1) of the Act, it held that in the case of lack of effective exchange of information, section 90(1)(c) of the Act gets diluted by the contracting parties and not by section 94A(1) of the Act. It observed that there was sufficient justification for the insertion of Section 94A of the Act which sought to take action against non-cooperative jurisdictions. With regards to the validity of Notification No 86, which declared Cyprus as a notified jurisdiction under section 94A of the Act, it held that the contention of the tax payer that countries with whom agreements were entered into under section 90(1) could not be considered as notified jurisdictional areas was incorrect as the language used in section 94A was 'any country or territory' and therefore the Central government could notify any country irrespective of the existence of a treaty with the said country. Further, the Court held that the impugned Press release, which speaks about the liability to withhold tax at 30 percent to payments made to non-residents in Cyprus using the words 'any sum', 'income' and 'amount', was not a legal document and therefore the language used therein could not be tested on the strength of law lexicons as they were meant for the benefit of the common man and therefore dismissed the contention of the petitioner pointing out the discrepancies in the terms used therein and those used in section 94A.
T Rajkumar v Union of India - (2016) 68 taxmann.com 182 (Mad)

TABLE OF CASES

C

I