IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1', NEW DELHI

BEFORE SHRI S.V.MEHROTRA, ACCOUNTANT MEMBER
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.813/Del/2014
(Assessment Year : 2009-10)

Mitsui & Co. India Pvt. Ltd., Plot No. D-1, 4th Floor, Salcon Ras Vilas, District Centre Saket, New Delhi	Vs.	DCIT, Circle 6 (1), New Delhi.

(PAN :AADCM4488J)

ITA No. 1795/Del/2015
(Assessment Year 2010-11)

Mitsui & Co. India Pvt. Ltd., Plot No. D-1, 4th Floor, Salcon Ras Vilas, District Centre Saket, New Delhi.	Vs.	DCIT, Circle 16(2), New Delhi

(PAN :AADCM4488J)

(Appellant) (Respondent)

Assessee by : Shri Ved Jain, Advocate, Sh. Ashu Goel, CA and Shri Ashish, CA
Revenue by : Shri Amrendra Kumar, CIT, DR

Date of hearing : 27.01.2016
Date of Pronouncement : 25.04.2016

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common question to be determined by the Tribunal has been raised in the aforesaid appeals, the same are being disposed of by way of consolidated order to avoid repetition of discussion.

2. Appellant, M/s. Mitsui & Co. India Pvt. Ltd. (hereinafter referred to as 'the assessee'), by filing the present appeal sought to set aside the impugned orders dated 03.01.2014 and 27.02.2015 passed by the Deputy Commissioner of Income-tax, Circle 6 (1), New Delhi qua the assessment year 2009-10 and Deputy Commissioner of Income-tax, Circle 16 (2), New Delhi qua the assessment year 2010-11 respectively on the grounds inter alia that :-

> **"Grounds of appeal qua ITA No.813/Del/2014 – AY 2009-10 :**
>
> 1. That on facts and in law the TPO/AO/DRP erred in making/upholding an addition to total income of '106,86,60,627 under Chapter- X of the Income Tax Act, 1961[hereinafter referred as "the Act"] in the order of assessment.
>
> 1.1 That on facts and in law, the AO/TPO/DRP jurisdictionally erred in virtually rewriting the accounts of the appellant, including therein transactions which did not belong to it and in changing its functional profile.
>
> 1.2 That on facts and in law the DPR/AO/TPO without any cogent, acceptable material on record erred in:
>
> i. Completely misunderstanding the business model, functional and risk profile of the tested party.

ii. Re-characterizing the service and commission segment as equivalent to its trading segment.

iii. Rejecting the use of "Berry Ratio" and using OP/TC (including cost to others) as a Profit Level Indicator (PLI) in order to Benchmark appellant's international transactions.

iv. Using the data not existing at the time of preparation of Rule 100 documentation by the assessee.

v. Using single year data as against multiple year data used by the assessee in order to compute the arm's length price of its international transaction.

vi. Inflating the Total Cost (TC) of assessee by Rs.4,541 crores (Approx) ignoring the fact that the said value was recorded as sales/purchase by the Associated Enterprise (AE) and as such it was not a cost to the assessee.

vii. Rejecting the comparable set selected by the assessee which were engaged in the business of providing services and adopting a comparable set of general trading companies.

viii. Assuming that the assessee has developed various unique intangibles.

ix. Assuming that the said intangibles have benefitted the AE without any corresponding markup to the assessee.

x. Assuming that the compensation model of the assessee does not include profit attributable to it on account of location savings/so called intangibles.

2. That on the facts and circumstances of the case and in law, the TPO/AO/DRP erred in comparing the profit margin earned by the assessee with Arm's Length margin/profit without appreciating that as per section 92C of the Act Arm's Length Price is to be compared with the reported value of international transaction and not the margins earned therefrom.

3. That without prejudice on facts and in law the AO/DRP erred in not granting the benefit for adjustment of the Arm's Length Price ("ALP") by ± 5% as per the proviso to section 92C(2).

4. That on facts an in law, AO/TPO has erred in assuming jurisdiction to determine Arm's Length Price in absence of requisite preconditions in law.

5. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.18,73,472/- by invoking the provision of Section 14A of the Act.

6. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.1,111,510/- on account of prior period expenditure.

7. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.229,831/- by invoking the provision of Section 438 of the Act.

8. That on the facts and circumstances of the case and in law, the AO/DRP erred in charging interest u/s 234B and 234C of the Act.

9. That on facts and in law the orders passed by the Assessing Officer [herein above referred as the "AO"] / Dispute Resolution Panel [herein above referred as the "DRP"] / Transfer Pricing Officer [hereinabove referred as the "TPO"] are bad in law and void ab-initio.

That the appellant prays for leave to add, alter, amend and/or vary the ground(s) of appeal at or before the time of hearing."

"Grounds of appeal qua ITA No.1795/Del/2015 – AY 2010-11:

1. That on facts and in law the TPO/AO/DRP erred in making/upholding an addition to total income of Rs.98,70,26,791/-under Chapter- X of the Income Tax Act, 1961 [hereinafter referred as "the Act"] in the order of assessment.

1.1 That on facts and in law, the AO/TPO/DRP jurisdictionally erred in virtually rewriting the accounts of the appellant, including therein transactions which did not belong to it and in changing its functional profile.

1.2 That on facts and in law the DPR/AO/TPO without any cogent, acceptable material on record erred in:

i. Completely misunderstanding the business model, functional and risk profile of the tested party.

ii. Re-characterizing the service and commission segment as equivalent to its trading segment.

iii. Rejecting the use of "Berry Ratio" and using OP/TC (including cost to others) as a Profit Level Indicator (PLI) in order to Benchmark appellant's international transactions.

iv. Using the data not existing at the time of preparation of Rule 100 documentation by the assessee.

v. Using single year data as against multiple year data used by the assessee in order to compute the arm's length price of its international transaction.

vi. Inflating the Total Cost (TC) of assessee by Rs.5924.87 crores (Approx) ignoring the fact that the said value was recorded as sales/purchase by the Associated Enterprise (AE) and as such it was not a cost to the assessee.

vii. Rejecting the comparable set selected by the assessee which were engaged in the business of providing services and adopting a comparable set of general trading companies.

viii. Assuming that the assessee has developed various unique intangibles.

ix. Assuming that the said intangibles have benefitted the AE without any corresponding markup to the assessee.

x. Assuming that the compensation model of the assessee does not include profit attributable to it on account of location savings/so called intangibles.

2. That on the facts and circumstances of the case and in law, the TPO/AO/DRP erred in comparing the profit margin earned by the assessee with Arm's Length margin/profit without appreciating that as per section 92C of the Act Arm's Length Price is to be compared with the reported value of international transaction and not the margins earned therefrom.

3. That without prejudice on facts and in law the AO/DRP erred in not granting the benefit for adjustment of the Arm's Length Price ("ALP") by ± 5% as per the proviso to section 92C(2).

4. That on facts an in law, AO/TPO has erred in assuming jurisdiction to determine Arm's Length Price in absence of requisite preconditions in law.

5. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.23,17,869/- by invoking the provision of Section 14A of the Act.

6. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.40,78,906/- on account of service fee paid to M/s. Wet Japan Logistics, Division of Mitsui & Co. Ltd., Japan and M/s. Mitsui & Co. (Asia) Pte Ltd., Singapore.

7. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.1,10,01,931/- on account of expenditure on logistics and warehousing support services.

8. That on the facts and circumstances of the case, the learned AO/DRP has erred, both on facts and in law in making/upholding a disallowance of an amount of Rs.5,93,513/- on account of non-deduction of withholding tax on purchases from Mitsui & Co. Ltd., Japan under section 40(1)(i) of the Income Tax Act.

9. That on the facts and circumstances of the case and in law, the AO/DRP erred in charging interest u/s 234A, 234B and 234C of the Act.

10. That on facts and in law the orders passed by the Assessing Officer [herein above referred as the "AO"] / Dispute Resolution Panel [herein above referred as the "DRP"] / Transfer Pricing Officer [hereinabove referred as the "TPO"] are bad in law and void ab-initio.

That the appellant prays for leave to add, alter, amend and/or vary the ground(s) of appeal at or before the time of hearing."

ITA NO.813/Del/2014 (AY 2009-10) :

3. Briefly stated facts of this case are : the assessee company is a wholly owned subsidiary of Mitsui & Company Pvt. Ltd., Japan, engaged in providing sales support Services and liasoning services to its

associated enterprises ("AEs") with regard to the exports and imports of the commodities from its AE to / from India. Services include :

- Providing information to AEs in respect of prospective supplier and / or customer
- Providing information with respect to the economic, business or market conditions for commodities in India
- Acts as communication channel for the supplier/buyer in India and MCJ.

4. During assessment year under consideration assessee company entered into numerous international transaction with its AEs. In pursuance to the Transfer Pricing order passed u/s 92(CA)(3) of the Income Tax Act (for short the Act) adjustment of Rs. 1,068,660,627/- on account of difference in Arm's Length price as determined by the TPO, has been made as addition. Assessee company claimed exemptions on account of investment and shares, finding the reply filed by the assessee company not satisfactory TPO/ DRP/ AO made disallowance of Rs. 1,873,472/- u/s 14A read with Rule 8D of the Act.

5. Assessee also claimed deduction on account of expenditure which have been disallowed by the TPO and upheld by the DRP on account of

expenditure pertaining to the prior period and AO thereby made disallowance of Rs.11,11,510/-.

6. Assessee also claimed deduction to the tune of Rs.1,20,000/- on account of donation to SOS u/s 35AC of the Act which has been disallowed as the assessee company has failed to furnish evidence with regard to the payment of donation.

7. Assessee also claimed deduction on account of expenditure on account of unpaid amount of Rs.2,29,831/- which has been disallowed by the TPO/DRP/AO. Consequently AO assessed an income of Rs.1,10,88,86,290/- qua the assessment year 2009-10.

ITA No.1795/Del/2015 (AY 2010-11)

8. Briefly stated the facts of this case are : during the scrutiny of return of income filed by the assessee declaring total income of Rs.1,79,43,030/- qua assessment year 2010-11, the case was referred to Transfer Pricing Officer (TPO) u/s 92CA (1) of the Income-tax Act, 1961 (hereinafter 'the Act'). In pursuance to the transfer pricing order and DRP dated 20.01.2014 passed u/s 92CA (3), assessment order has been passed making adjustment of Rs.98,70,26,791/- on account of difference in arms

length price (ALP) for the combined Associated Enterprises (AEs) segment determined by the TPO.

9. During the assessment proceedings, it has come on the record that assessee has paid service fee of Rs.40,78,906/- to its related parties, namely, M/s. West Japan Logistics Division of Mitsui & Co. Ltd., Japan amounting to Rs.6,40,000/- and M/s. Mitsui & Co. (Asia) Pte Ltd., Singapore amounting to Rs.34,38,906/-. Finding the explanation filed by the assessee not tenable, TPO/DRP disallowed the same u/s 37 (1) being the expenditure not incurred wholly and exclusively for the purpose of business and considered the same as related party transaction. The AO thereby made an addition of Rs.40,78,906/- to the total income of the assessee.

10. The AO in pursuance to the order passed by the TPO/DRP made addition of Rs.5,93,513/- on account of making purchases of Rs.7,19,40,901/- from M/s. Mitsui & Co. Ltd., Japan during FY 2009-10 on account of non-deduction of TDS on the business profit on the aforesaid payment on the ground that M/s. Mitsui & Co. Ltd., Japan has a PE in India and is regularly filing its return of income before Indian

Income-tax Authorities. Consequently, the amount of Rs.5,93,513/- has been added to the total income of the assessee.

11. The ld. AR for the assessee challenging the impugned order contended inter alia that TPO / AO / DRP have erred in making / upholding an addition to the total income of Rs. 10,686,60,627/- by completely misunderstanding the business model, functional and risk profile of the comparable companies; that DRP/AO/TPO have illegally rejected the use of Berry ratio and using OP/TC as a profit level indicator (PLIT) in benchmarking the international transaction; that TPO / AO / DRP has further erred in using the Data not in existence at the time of preparation of Rule 10D documentation and by using single year's data as against multiple years data used by the assessee to compute the arm's length price of its international transaction; that TPO / AO / DRP have inflated the total cost (TC) of assessee by Rs.4541 crore approximately by ignoring the fact that the said value was recorded as sales/purchase by the associated enterprises and was never a cost to the assessee; that TPO/DRP/AO has erred in not granting the benefit for adjustment of ALP by plus minus 5% as per proviso to Section 92C (2); that TPO/DRP/AO has erred in disallowing an amount of Rs. 18,73,472/- u/s 14A of the Act and disallowing an amount of Rs. 1,111,510/- on account of prior period

expenditure; that TPO/DRP/AO has also erred in disallowing an amount of Rs. 2,29,831/- by invoking the provision of section 43 (B) of the Act; that grounds no.1 to 4 of appeal no.813/Del/2014 for AY 2009-10 and grounds no.1 to 4 of appeal no.1795/Del/2-15 qua assessment year 2010-11 are covered by the order of ITAT in assessee's own case for the assessment year 2007-08 and 2008-09 in ITA no.6463 and 5082/Del/2011 dated 28.08.2015. However, on the other hand, the ld. DR has relied upon order passed by TPO/DRP/AO.

12. Undisputedly, assessee company entered into international transactions with its AE during assessment year under consideration as under :-

S. No.	Nature of international transaction	Value (in INR)
1.	Provision of services	884,041,575/-
2.	Purchase of goods	169,451,775/-
3.	Sales of goods	42,263,081/-
4.	Purchase of Assets	375,869,000/-
5.	Reimbursement of expenses received/receivable	43,194,499/-
6.	Reimbursement of expenses paid/payable	143,461,810/-

13. Assessee company is wholly owned subsidiary of MCJ, the general trading company playing an important role in linking buyers and sellers

for products in a variety of industrial segments. Assessee company is considered to be a low risk activity and the primary source of activity is in the nature of commission earned on the traded goods.

14. The assessee company has used TNMM as the most appropriate method for bench marking its international transaction and PLI selected as GP/OC i.e. Berry ratio. Assessee company chosen 29 comparables and by using 3 years data adjusted average Berry ratio at 1.08 and assessee company has claimed its 3 years average Berry ratio at 1.17.

15. However, TPO after analysis of the assessee's transfer pricing approach and after issuing show cause notice selected 31 comparables and taken average at 4.66 %. Assessee raised objection to the comparables chosen by the TPO inter alia that in the absence of computation of correct margin certain parties are having related party transaction more than 25% and that the financial of some comparable are indicating manufacturing activity.

16. TPO disposed of the objections raised by the assessee and on the basis of final comparables chosen for TP studies recorded the findings to arrive at the difference of 1,068,660,627/- as adjustment to the value of international transaction for FY 2008-09, 987,026,791/- as adjustment to

the value of international transactions for the FY 2009-10. Operative part of the findings returned by TPO qua the assessment year 2009-10 are as under :

> "The assessee as part of this network and the synergy created by the same should be deriving income commensurate to the intangibles involved. The network of which the assessee is a part consists of wholesaler, manufacturer, chemical dealers, paper traders etc. It is doing procurement and as well as sourcing for manufacturers and also of wholesaler. On this basis, the assessee can compared with all the comparables confronted to him, wherein the receipts are from the trading of the commodities irrespective of the type of commodity or the way in which it is produced. Thus, other than the related party objections of the assessee to the comparables confronted by the show-cause dated 29.11.2012 is not acceptable. The margins are correct as per the working done by the assessee and the margin of the comparables is given in the table below:

SI No.	Name of the Comparables	Unadjusted Margin	Corrected Margin as per Assessee
1.	Arti Industries Ltd.	14.43	14.24
2.	Asian Tea & Exports Ltd.	2.58	2.03
3.	Aspinwall & Co. Ltd	7.16	6.1
4.	Bang Overseas Ltd.	2.95	-1.3
5.	Cottage Industries Exposition Ltd.	-0.6	-0.63
6.	Dolphin International Ltd.	2.19	1.4
7.	Emmsons International Ltd.	3.15	2.98
8.	Essel Shyam Technologies Ltd	4.13	3.03
9.	Euro Vistaa (India) Ltd	-1.18	-1.87
10.	FE (India) Ltd	2.55	2.53
11.	Frost International Ltd	2.64	1.29
12.	Gimpex Ltd	4.29	4.29
13.	Golkunde Diamonds & Ltd.	8.93	-2.98
14.	Indo Bonito Multinational Ltd.	12.41	11.59
15.	Indo Unique Trading Pvt. Ltd.	6.29	2.92
16.	Jaguar Overseas Ltd.	9.32	6.63
17.	Jainex Ltd.	2.18	1.59
18.	KP Sanghvi Intl. Ltd.	13.18	7.13
19.	Kothari Products Ltd.	13.57	2.78

20.	Lahoti Overseas Ltd.	0.92	0.76
21.	MD Overseas Ltd.	0.52	-7.49
22.	Phulchand Export Pvt. Ltd.	3.58	-2.89
23.	Riddi-Siddhi Bullion Ltd.	0.19	0
24.	Sakuma Exports Ltd.	1.03	0.63
25.	Shri Lal Mahal Ltd.	3.16	2.69
26.	Shri Sai Jewels Pvt. Ltd.	4.02	3.51
27.	Varun Industries Ltd.	5.47	5.16
28.	Vigneshwara Exports Ltd.	8.58	8.58
29.	Welspun trading ltd.	0.04	0.04
		4.75	2.58

8. Calculation of arm's length price

Based on above, it is concluded that the assessee has not been able to substantiate its arguments with valid documentary evidences. Following the discussion in the preceding paras, the FOB value of goods sourced from India, being Rs. 4591 Crores shall be taken as part of the cost base to calculate the remuneration of the assessee. Computation of arm's length profit for the combined AE segment (computation of profit of AE segment is attached as **Annexure 1)** is given below:-

Cost base of AE segment (AE-service segment)		
FOB Value		50,570,000,000
Operating cost of AE segment (Commission + Service segment) (805,292,495+63,512,277)		868804,772
Total	(A)	51,438,804,772
Mean of OP/TC of comparables (Arm's length OP/TC)	(B)	2.16%
Operating profit reported before including value of goods on which commission is earned (114,982,857 + 9,068,535)	(C)	124,051,392
Arm's length profit	(D)= (A) x (B)	1,111,078,183
Deficit	D-C	987,026,791

The difference of Rs.106,86,60,627 is adjustment to the value of international transactions for the FY2008-09."

17. Assessee carried the matter before the DRP which has upheld the order passed by the TPO and consequently AO passed the assessment order.

GROUNDS NO.8 & 9 OF ITA NO.813/DEL/2014 – AY 2009-10 AND GROUNDS NO.9 & 10 OF ITA NO.1795/DEL/2015 – AY 2010-11

18. Since the aforesaid grounds are consequential and general in nature, no findings are required to be returned.

GROUNDS NO.1 TO 4 OF ITA NO.813/DEL/2014 – AY 2009-10 AND GROUNDS NO.1 TO 4 OF ITA NO.1795/DEL/2015 – AY 2010-11

19. The ld. AR for the assessee by relying upon the order passed by ITAT, Delhi Bench in assessee's own case for AYs 2007-08 and 2008-09 in ITA Nos.6463 & 5082/Del/2011 dated 20.08.2015 contended that this issue is squarely covered and also brought on record the copies of grounds of appeal of the preceding years.

20. A perusal of the grounds of appeal qua the AY 2008-09 as well as 2009-10 in assessee's own case apparently go to prove that the issue raised in the present year is identical as has been determined by the coordinate Bench in the order (supra). The ld. AR reiterated his

arguments challenging the impugned orders as has been addressed before the TPO as well as DRP. The ld. AR further contended that the TPO/DRP have erred in applying the trading margins by ignoring the facts of the instant case that the assessee is a service provider and as such, the trading margin cannot be applied in its case and further contended that the TPO/DRP further erred in including the cost of sale in OP/TC ignoring the fact that the value of the sale under no circumstances affects the activities of the assessee company which is a service provider and in case of support services, the correct method adopted by the assessee is TNMM on the basis of which OP/TC has been computed.

21. Now, the first question arises for determination is, **"as to whether the assessee company has performed trading activity for its AE i.e. Mitsui & Company Pvt. Ltd., Japan or it has worked as a service provider"?**

22. This issue has been squarely dealt with by the coordinate Bench in the order (supra) and relevant portion thereof is reproduced for ready reference as under :-

> "The Learned AR submitted that the trading activities are undertaken by Mitsui Japan not by Mitsui India. If it is import of goods for buyers in India, the Mitsui Japan has a contract with the Japanese suppliers and Mitsui Japan also enters into contract with the buyers in India. Similarly for exports from India, Mitsui Japan enters into a contract with Indian supplier directly for the purchase and sales transactions. Thus the role of

Mitsui India, the assessee company is a mere facilitator, a mere service provider. Mitsui India does not take title or possession of the merchandise at any moment and bears no price risk. Mitsui India does not take inventory risk, it does not take warranty risk, it does not take credit risk. It does not employ its capital. In purchase and sale, inventory, advances, debtors, Mitsui India's main function is to maintain contact with the suppliers to ensure timely delivery of merchandise to the customers in the quality and grade desired, communicating with Mitsui India or its affiliates, gathering information on demand and supply conditions of the commodities. The above functions are entirely different than the trading business. In trading activities, one ventures himself. Buys and sells goods in it's account. It takes price risk, inventory risk, it deploys capital in inventory, debtors. It takes risk in warranty, credit, etc. Thus the functions performed, assets deployed and risk assumed in trading are entirely different than that of business support services. The TPO has gone wrong in holding that margins earned in trading are in identical circumstances as while providing support services.

19. The learned AR further contended that the finding given by the TPO that appellant company has over a period of time developed a supply chain intangibles, which is all about having the right product in the right place, at the right price, at the right time and in the right condition, is wrong and against the facts. In this regard reference made by the TPO in its order about the assessee company having developed knowledge of products and design, knowledge of acquisition, knowledge of quality control, knowledge of storage is wrong and against the facts. These are none of the activities of the assessee company as is evident from the description of business support service provided by it. Assessee company simply provides facilitation services to entities in supply chain without being a part of the supply chain. The assessee company has created human intangibles. In this regard the AR submitted that TPO has just made a literary reference in his order about human intangibles and held that assessee has created human capital intangible ignoring the facts and the detailed reply submitted by the assessee. The facts are that the activities performed by the assessee are routine, preparatory and auxiliary in nature which does not create any intangibles. Organizations providing support services employ human resources for the same and that does not lead to creation of any intangibles. Assessee's role is limited to that of a routine coordination and support service provider. It is Mitsui Japan which has the expertise, a strong relation with a vast network of manufacturers, distributors and buyers."

23. So, we have no hesitation in following the order passed by the coordinate Bench in determining the issue in favour of the assessee that

the assessee company has performed routine, preparatory and ancillary activities in nature and have not created any intangibles as its role was limited to that of a routine coordination and support service provider. So, the ld. TPO/DRP have erred in recharacterizing the service end commission activities of the assessee company as equivalent to its trading segment.

24. Now, the question arises for determination is, **"as to whether TPO/DRP has inflated the total cost (TC) of assessee by Rs.4541 crores qua AY 2009-10 and Rs.5924.87 crores qua AY 2010-11 respectively by ignoring the fact that the said value was recorded sale/purchase by the AEs and was never a cost to the assessee"?**

25. This issue has again been dealt with by the coordinate Bench in the judgment (supra), operative part thereof is reproduced for ready reference as under :-

> "28. We have considered the arguments advanced by the parties and gone through the orders of the authorities below as well as the judgments relied upon. On going through the order of TPO in the case of the assessee and the order passed by the ITAT in the case of Mitsubishi Corporation India (P) Ltd., we note that the facts of the two cases are almost similar. In this regard we note that the ITAT in Para 7 of its order has recorded the FAR analysis carried out by the TPO. It may be relevant to quote para 7 of the order passed by the ITAT in the case of Mitsubishi Corporation India (P) Ltd. (supra) as under:-
>
> > *"7. As the Transfer Pricing Officer rightly noted, the main issue in this case is adjudication on the question "whether …(the assessee).. is being adequately compensated" for the functions*

performed by the assessee. The TPO then proceeded to analyze functions of the assets, risks assumed by the assessee and assets employed by the assessee. He noted that, as set out in paragraph 3.4 of the transfer pricing study, the assessee has provided the services for (a) facilitating communication between buyer and seller; (b) arranging freight, insurance and custom clearance through third parties; (c) collecting market information; (d) identifying potential customers (in import transactions only) or suppliers (in export transactions only); and (e) advising an associated enterprise or third party in regulatory or financial matters. It was also noted that, as stated in the transfer pricing study, "the presence of assessee in India provides AEs a medium of communication through which they can compete with their competitors eyeing similar business in India". The TPO was of the view that "the assessee has performed all the critical functions, assumed significant risks and used both tangible and unique intangibles developed by it over a period of time". He then summarized the FAR analysis as follows:

Functions performed by the assessee:

-Purchasing activities: Mitsubishi India places orders with related party vendors after receiving orders or projections from its customers

-Distribution activities: In some of the principal transactions, Mitsubishi India warehouses Inventory at public bonded warehouses and maintains sufficient Inventory as per agreement with customers. It performs Inventory control and ships goods to customers. Mitsubishi India's customers sometimes arrange for their own shipping and handling.

-Sales marketing and after sales activities: In principal transactions, the Group Companies coordinates in negotiating prices with Mitsubishi India's customers. Mitsubishi India's sales personnel requirements are Identified by Mitsubishi India and also remuneration of sales personnel is determined by Mitsubishi India. Mitsubishi India is responsible for billing and collection. Mitsubishi India provides market research relating to local market and develops marketing strategy.
-Identifying potential customers and suppliers.
-Information gathering.
-Facilitating communication
-Arrangement of logistics.
-Accounting and administration.
-Developing long term strategic policies.

-Dealing with finance, accounting, IT and legal issues.
-Human Resource Management:
(b) risks assumed by the assessee:
-bears volume risk
-bears foreign exchange risk
-bears manpower risk
(c) assets used by the assessee:
-Fixed asset"

29. In the order passed by the learned TPO in the case of the assessee before us, the FAR analysis stated by the TPO in para 5.2.1 is exactly the same as stated hereinabove in the case of Mitsubishi Corporation India (P) Ltd.. The conclusion drawn by the TPO and quoted in the judgment of the Mitsubishi Corporation India (P) Ltd. in para 9 of the order are also exactly the same as in para 5.3 of the TPO's order in the case of the assessee company. Thus we are of the view that the facts of the present case are similar to the facts of the Mitsubishi Corporation India (P) Ltd. In the Mitsubishi Corporation India (P) Ltd.(supra), the ITAT has held that it is impermissible to make notional addition in the cost base and then take into account the cost which are not borne by the assessee. The ITAT while giving the above finding has relied upon the judgment of the Hon'ble jurisdictional Delhi High Court in the case of Li & Fung (Supra) whereby the Hon'ble Court has held as under:-

"……..This Court is of opinion that to apply the TNMM, the assessee's net profit margin realized from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Textually, and within the bounds of the text must the AO/TPO operate, Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) recognizes that "the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise ..." (emphasis supplied). It thus contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The textual mandate, thus, is unambiguously clear.

40. The TPO's reasoning to enhance the assessee's cost base by considering the cost of manufacture and export of finished goods, i.e., ready-made garments by the third party venders (which cost is certainly not the cost incurred by the assessee), is nowhere

supported by the TNMM under Rule 10B(1)(e) of the Rules. Having determined that (TNMM) to be the most appropriate method, the only rules and norms prescribed in that regard could have been applied to determine whether the exercise indicated by the assessee yielded an ALP."

30. In view of the above judgment of Hon'ble jurisdictional High Court, we hold that it was not correct on the part of the TPO to include the cost of sales incurred by the AEs in respect of which the assessee company has rendered services and then to work out the profit for determination of the arm's length prices. Our view is also supported by the judgment of the Delhi Tribunal in the case of Sojitz India (P) Ltd. vs DCIT (Supra) where a similar issue has come up. In that case also the learned TPO has included the cost of sale of all the AEs while determining the arm's length price and has also considered the transactions entered into by the assessee company as transaction that of trading activity. The ITAT has examined this issue and has held as under:-

"12.18 In the aforementioned background we are of the view that in order to *adjudicate upon the issues it would be appropriate for us to formulate the questions as under:-*

(a) Whether the TPO on facts was justified to treat the indenting activity at par with the trading activity ;

(b) If the answer to the query posed in (a) is "yes" then were the margins earned in the trading activity by the assessee with non AEs correctly applied to the indenting activity with AEs ;

(c) If the answer to the query posed in (b) is "yes" then would the 'costs' referred to in Rule 10B (1) (e) (i) be the FOB value of goods on the facts of the present case or would it be the operating cost of the assessee;

(d) If the answer posed to the query in (a) is "no" then is there any justification on facts in applying the margins earned in the trading activity to the profits of indenting activity for working out the Arms Length Price.

12.19. On a consideration of the business profile of the assessee as available on record and the nature of services rendered and the risk profile of the assessee, we are of the view, that the TPO erred in considering that the activity of a service provider is similar to the activity of a trader. The decisive factors as to why the question framed in (a) has been answered in the negative, are being elaborated in the following paras based on the Business Profile,

FAR analysis etc. which we have deliberated on in the earlier paras.

12.20. The unrebutted facts available on record is that the assessee is a service provider to the extent of 88.67% of its total earnings. As per the contracted terms and the unrebutted stand of the assessee it is merely providing indenting services. At no point of time the title in goods or possession of the merchandise is in assessee's hands. The contract is entered into by SCJ and Indian customers directly whether for export or import. The negotiations are directly done by SCJ and the Indian customers and the assessee merely functions as a facilitator. Looking at the nature of services rendered and the arguments advanced which also remain unrebutted and as such are taken to be correct the assessee does not need to incur cost either for maintaining or storing the inventory or for the transportation as the title in goods is never held by the assessee for its indenting activity as a service provider. Consequently the assessee is not exposed to any credit risk in maintaining the inventory nor is the assessee exposed to price risk or the risk linked with offering credit sales. From the nature of the risk profile of the assessee and on considering the functions performed and the assets deployed it can be safely concluded to be that of a low risk business, which has also been the claim of the assessee. It is a matter of record that in these years the assessee has also shown profits on its own trading with non AEs. In the facts available on record, nothing has been brought on record by the TPO to either justify that the assessee has made a wrong claim on facts while claiming to be engaged in indenting activities or was infact performing all or some of the functions of a trader, in which eventuality the TPO would have been well within his rights to re-characterize the assessee's indenting activities as a trading activity. It is an accepted economic principle that the trader acting as an entrepreneur is exposed to price risk, cost risk, credit risk, warranty risk etc, which would necessitate the contract being entered into and negotiated by assessee. In its indenting activity these facts are not evident. Accordingly the question posed in (a) is answered in the negative.

12.21 Considering the next question posed, even if the answer in (a) is in the negative, we see that there is no reasoning and justification for applying the margins earned in trading activity to indenting activity as the two are distinct and separate. Merely because the assessee was also having a small level of trading activity in its own name, there is no reason available on record either justifying the action of re-characterizing the nature of assessee's activity from a service provider to that of a trader. As

observed, neither the TPO has lead any discussion nor has the DRP cared to throw any light on the aspect for upholding the action of the TPO. Where all the critical functions were being performed by the AE, the services provided, as a facilitator, by the assessee cannot be treated as a trading activity. The performance of the critical functions, like decisions to enter into contract, to negotiate the terms of the contract, to decide the level and extent of exposure for price risk, credit risk, warranty risk etc are some of the risks to which a trader is exposed. The record shows that at no point of time the assessee was ever exposed to any of those risks as such, the two activities could not be treated at par and thus invited a similar treatment.

12.22. The Ld. CIT DR has relied upon various decisions in support of the TPO's order and the order of the DRP which we propose to discuss subsequently. However it can never be over emphasized that each decision operates on its own peculiar facts and circumstances. This holds equally good for orders and judgments rendered in the context of transfer pricing as each change or nuanced change in facts and circumstances would call for a detailed appreciation of facts and circumstances of both sets of cases. Transfer pricing litigation as we have seen is very fact drive. Consequently for appreciating the principles laid down in the judgements and orders, a detailed factual study of the business model FAR analysis and even economic conditions, if need be, have to be closely examined. Only then the applicability or relevance of the principle laid down be considered. The issues being purely factual necessarily warrant a detailed discussion.

12.23. In the facts of the present case it is seen that the assessee is using the network of SCJ for rendering its services. Reference may also be made to page 248 of the paper book which contains the TP study of the assessee the same is reproduced for ready reference.

"Patents, License Rights, and other Intellectual Property Rights

The various intangibles required to carry out the operations of the Assessee namely trademark, patents, licence, are owned by Sojitz Japan.

Sojitz Japan possesses entrepreneurial knowledge with respect to the operation of the global trading network. Sojitz India has not developed and does not use any intangible assets in its business operations in India."

12.24. As such it is seen that no intangible assets are held by the assessee in terms of supply chain intangibles etc. It is further seen that the AE is trading in a diverse range of goods right from aero space, chemicals, plastics, high technology machinery, automobiles, tele-communications industry or reality etc. and no effort has been made to show that the limited trading activity belongs to which of those segments were anyway the FAR analysis shows that there is no comparison in the two activities

12.25. Accordingly on account of these facts, we are unable to agree with the TPO who chose to re-characterize the activities of the service provider and treated them at par with the activities of a trader since the nature of the activities of a trader and service provider are materially distinct and different.

12.26. As we have held on facts that the two sets of activities are distinct and different, consequently we are of the view that there is no justification for applying the margins earned in trading activity to those earned in the indenting services. As such, we find ourselves unable to agree with the reasoning and the decision of the TPO which has been upheld by the DRP. At the cost of repetition the consistent and unrebutted material available on record shows that in the trading activity, the assessee has entered into contracts with the parties in India in its own name. The title in goods has been held for these contracts in assessee own name as such the assessee as any other trader has exposed itself to the price risk, the credit risk and other related risks of inventory risk etc. The negotiations for the same has directly been done by the assessee and not by the SCJ. As such not only the efforts required but even the risk borne is completely different. The risks being of a higher level the rewards if the venture succeeds can also move upwards in regard to the trading activity. This fact is demonstrated from assessee's own record of the two years under consideration whereas in the first year it is 1.81%, in the other it is 13.29%.

12.27. While holding that the margins of one activity cannot be applied to other activity we consider it necessary to address another aspect of the issue as Ld. CIT DR has specifically relied upon orders of the ITAT for the proposition that the TPO can re-characterize the transaction under the Act. We hold that no doubt that the TPO under the Income Tax Act and the rules there under has the powers to re-characterize the transaction if so warranted on facts, in the facts of the present case, this power has been erroneously exercised. On a detailed consideration of the functions performed by the assessee in the two separate class of activities and, considering the assets utilized by the assessee in the two

ventures and on a consideration of the risks to which the assessee is exposed to in the two activities as discussed above we are of the considered that on facts re-characterization was not called for and further the margin earned in one cannot be blindly applied to the other activity in the facts of the present case.

12.28. Thus in view of the above the answer posed in (b) which was to be answered only if (a) was in the affirmative, has still been decided as parties had addressed and the facts were available on record, is also necessarily answered in the negative.

12.29. The query posed in (c) calls upon us to decide whether as per Rule 10B(1)(e)(i), the TPO, in the facts of the present case, was justified in holding that net profits margins should be computed in relation to FOB value of goods/ or the operating cost to the assessee. The said query was also to be addressed only if the answer posed to us in the said question was in the affirmative. Herein also it is seen that although the answer is in the negative but, since the parties have addressed and the facts are available on record we propose to deal with the said question also.

12.30. Rule 10 B (1) (c) (i) reads as under:-
Determination of arm's length price under section 92C.

10B. (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :
*(a) ** ** **
(b) ** ** **
(c) ** ** **
(d) ** ** **
(e) Transactional net margin method, by which-
(i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
** ** **
12.31. In the facts of the present case which have been discussed at length while considering the action of the TPO in re-characterizing the transactions, we are of the view that on the basis of the detailed FAR analysis of the assesses, the "costs" referred to in Rule 10 B (1)(e)(i) does not suggest that in the facts of a case like the present case the 'costs' would mean the FOB value of goods. The assessee demonstrably is a low risk entity as a*

service provider functioning as a facilitator who is not exposed to price risk, warranty risk, inventory risk, etc., whose funds are not locked in the cost of goods, title in goods never vests with the assessee contracts are entered in the name of SCJ and its affiliates at one end and the customers in India also in their own names. In these unrebutted facts on record, the TPO was not correct in holding that the 'costs' as per the Rule were FOB value of goods. As such (c) is also decided accordingly.

12.32. Arguments on the creation of and contributing to the human intangibles and supply chain intangibles have been addressed as such we propose to addresses these also at this stage. Since we are of the view that issues in transfer pricing are very fact specific and conclusion necessarily are fact driven as such it may be pertinent to add that while deliberating on facts we have also taken into consideration the orders relied upon by the parties, specifically the department, while deciding the issue in assessee's favour. However in order to maintain coherence and lucidity in our findings which are fact driven, we propose to discuss the judgements subsequently. For the present purposes on consideration of the functions performed by the assessee, the assets deployed using the intangibles of SCJ networks, the risks to which the assessee is consequently exposed we are unable to concur with the conclusion of the TPO that the assessee has created human assets and supply chain intangibles. The unrebutted fact on record is that the assessee has been able to render services utilizing the network of the AE and all intangibles and patents etc. utilized internally belong to the AE and the level and degree of the qualification required of the personnel of the assessee is low and skill requirement is so low that no specific skills are required by the personnel who replace the existing personnel who may choose to move on for better options. The assessee does not need to and cannot restrain the leaving personnel from utilizing any skills which they may have acquired during employment as no specific skills for indenting are required for indenting and acting as a facilitator. It is not the case of the department that the assessee is performing critical functions which admittedly are performed by the AE or that the assessee is contributing by way of analysis, reports and opinions, being provided as such value added services are being performed wherein the analysis/opinions may turn out to the correct or grossly wrong as such due to the high risks of both eventualities occurring the personnel are necessarily highly qualified sought after experts, commanding high salaries. The simple performance of a low risk activity of facilitator does not lead to the conclusion that a human intangible is being created. It is seen that there is no material on record as to how supply chain

intangibles are being created as the assessee is using the network and intangibles of its AE.

12.33 Coming to the final question (d), which we have posed to ourselves since the answer to question (a) is in the negative the question regarding justification on facts in applying margins earned in trading activity to the profits of indenting activity for working out the Arms Length Price requires to be considered. For the said purpose we are of the view that elaborate discussions are not necessary as it would necessitate re-iterating the distinctions in the two separate sets of activities and the conclusions on the detailed FAR analysis already done in the earlier paras especially while considering queries (a) and (b). Accordingly relying on the same we hold that there is no justification to apply the margins of trading activity to indenting activity in the facts of the present case.

12.34. We further support the view taken, by referring to 2006-07 assessment year wherein the Revenue has accepted the method applied and only on comparables there have been a dispute. Similarly in 2008-09 assessment year, that is the immediately subsequent assessment after the two years under consideration, same method has been followed by the assessee. According to the Ld. CIT DR the method has not been accepted though adjustments have not been made as the margins in the trading activity vis-à-vis the indenting activity, declined. The Ld. CIT D.R has been at pains to emphasize that no doubt no adjustment was made in the TP proceedings for 2009-10 assessment year but no deviation has been made from the stand taken by the department in the TP proceedings.

12.35. Accordingly on facts for the detailed reasoning given hereinabove on the issues addressed before us we are of the view that the TPO's action upheld by the DRP cannot be upheld by us."

The issue is also covered by the judgment of the Mitsubishi Corporation India (P) Ltd. vs. DCIT (Supra) where the coordinate bench has held as under:-

"35. In the cases in which no economic risk for inventories is assumed, in which these inventories do not even find their way to the current assets, and in which no functions are performed in respect of these inventories, except to facilitate trading in respect of the same, the very raison d'être for the cost of inventories being included in the cost base ceases to exist. The FAR analysis set out in the TPO's order, which is summarized in paragraph 7 earlier in

this order, does not support the inclusion of inventory costs in the cost base either.

57. In our considered view, to sum up, in a situation in which a business entity does not assume any significant inventory risk or perform any functions on the goods traded or add any value to the same, by use of unique intangibles or otherwise, the right profit level indicator should be operating profit to operating expenses i.e. berry ratio. In such a situation, no other costs are relevant since (a) the cost of goods sold, in effect, is loses its practical significance, (ii) there is no value addition, and, accordingly, there are processing costs involved, and (iii) there is no unique intangible for which the business entity is to be compensated.

65. As for the objection that use of berry ratio is not permitted under rule 10B(1)(e)(i) as it does not deal with costs incurred, sales effected or assets employed or to be employed, it proceeds on the fallacy that the basis of computation, as set out in rule 10B(1)(e)(i), is exhaustive whereas it is only illustrative and it ends with the expression "or having regard to any other relevant base". Just because a cost base is not of costs incurred, sales effected or assets employed, such a base does not cease to permissible under rule 10B(1)(e)(i) unless such a base can be held to be irrelevant. In view of the elaborate discussions earlier, justifying exclusion of inventory costs, the cost of base of the operating expenses is relevant. When cost of inventory is excluded from the cost base, for all practical purposes, cost bases consists only of the operational costs. In our considered in a situation in which trading is on back to back basis without anything actually going to the current assets and flash title of goods is held only momentarily, it could indeed actually be a relevant base as to what are the operating costs or value added expenses - particularly when, as we have noted above, no resources are used in the inventories.

80. Coming to the service fee/commission segment, we have noted that as regards the service fee/commission segment, the TPO has re-characterized the same as trading activities as he was of the view that the right course of action will be to treat the same as equivalent to trading segment, because what the assessee has disclosed as service/commission income is infact trading income. Accordingly, the cost of goods sold by the AEs, which was ₹ 2927,92,05,406, was also to be included in cost base of the service/commission segment and then ALP was recomputed. So far as this aspect of the matter is concerned, the issue is now covered in favour of the assessee by Hon'ble jurisdictional High Court's

decision in the case of Li & Fung wherein Their Lordships have, inter alia, observed as follows:

……..This Court is of opinion that to apply the TNMM, the assessee's net profit margin realized from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Textually, and within the bounds of the text must the AO/TPO operate, Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) recognizes that "the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise ..." (emphasis supplied). It thus contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The textual mandate, thus, is unambiguously clear.

40. The TPO's reasoning to enhance the assessee's cost base by considering the cost of manufacture and export of finished goods, i.e., ready-made garments by the third party venders (which cost is certainly not the cost incurred by the assessee), is nowhere supported by the TNMM under Rule 10B(1)(e) of the Rules. Having determined that (TNMM) to be the most appropriate method, the only rules and norms prescribed in that regard could have been applied to determine whether the exercise indicated by the assessee yielded an ALP.

81. Clearly, therefore, it is impermissible to make notional additions in the cost base and thus take into account the costs which are not borne by the assessee. It is so opined by Hon'ble jurisdictional High Court on a careful analysis of rule 10B(1)(e)(i). It is, therefore, no longer open to the revenue authorities to reconstruct the financial statements of the assessee by including the cost of products incurred by the AEs, in respect of which services are rendered, in its reconstructed financial statements, and then putting the hypothetical trading profits, so arrived at in these reconstructed financial statements, to the tests for determining arms' length price. Respectfully following the esteemed views of Their Lordships, we hold that the adjustments carried out in the cost base of ALP computation, in respect of service fee/commission segment, are indeed devoid of legally

sustainable merits. We direct the Assessing Officer to delete these adjustments."

31. Respectfully following the above judgment of the coordinate benches we are of the view that the adjustment made to arm's length price as upheld by the DRP cannot be sustained.

32. We are of the further view that the adjustment as confirmed by the DRP is otherwise untenable in view of the proviso to section 92C of the Act. The TPO has included the cost of sales of the AEs while making adjustment to the arm's length price. The cost base as determined by the learned TPO in the assessment year 2007-08 is Rs.4558,90,44,859. The adjustment proposed after order from the DRP is Rs.116,70,79,548. This amount is within 5% of the cost base of Rs. 5589044859/- determined by the learned TPO himself. The cost base as determined by the TPO in the assessment year 2008-09 is Rs.4071,95,89,546. The adjustment proposed after order from the DRP is Rs.114,82,92,425. This amount is also within 5% of the cost base determined by the TPO himself. Accordingly, no adjustment could have been made in view of the proviso to section 92C of the Act. The TPO is not right in including the cost of sales while determining arm's length price and not considering the same while applying proviso to section 92C of the Act. The language of the proviso to Section 92C as it was applicable for the assessment year under consideration is very clear and unambiguous. According to provision of section 92C first arm's length price has to be determined. Thereafter the same has to be compared with the price charged by the assessee and if the difference between the price determined by TPO and the price charged by the assessee is within ±5% then no adjustment is required to be made.

33. Further the contention of the learned CIT(DR) that the proviso to section 92C is applicable only when two different methods are adopted is also not correct. The language of the proviso in this regard is quite clear. First the most appropriate method has to be determined. Based on that arm's length price is to be found out by using various comparables. When more than one comparable is applied then arithmetical mean is to be worked out and no adjustment is to be made when arm's length price is determined on the basis of such arithmetical mean is within 5% of the cost paid or charged by the assessee.

34. In the present case the most appropriate method applied by the learned TPO is TNMM. The arm's length price has been determined using more than one comparable as is evident from the TPO's order for both the assessment years. This arithmetical mean has been taken into consideration for determination of the arm's length price by the TPO as is evident from the TPO order and accordingly the proviso to section 92C

> will be applicable to the present case. Since in the present case such difference is less than 5% and hence no adjustment can be made.
>
> 35. Accordingly under the facts and the reason discussed hereinabove and respectfully following the order of the co-ordinate bench on an identical issue under almost similar facts, we are of the view that adjustment made by the Assessing Officer in the assessment order cannot be sustained and the same are directed to be deleted. Accordingly, Ground no.1 to 4 of both the assessment years i.e. 2007-08 and 2008-09 are allowed."

26. In view of what has been discussed above and by following the order passed by the coordinate Bench in assessee's own case on identical facts qua the AYs 2007-08 and 2008-09, we are of the considered view that the adjustment made by the AO in compliance to the order passed by TPO/DRP for benchmarking the international transaction qua AYs 2009-10 and 2010-11 is not sustainable in the eyes of law for the following reasons :-

(i) that the TPO/DRP have illegally and arbitrarily included the cost of sales incurred by the assessee company's AE, for which the assessee company has rendered support services to work out the profit for determination of the ALP;

(ii) that identical and similar issue has been decided by the Tribunal in case of Mitsubishi Corporation India (P_ Ltd. vs. DCIT – ITA No.5042/Del/2011 dated 21.10.2014 by following the judgment rendered by Hon'ble jurisdictional

High Court in case of Li and Fung India Pvt. Ltd. vs. CIT – 361 ITR 85 (Del.) and held that the TPO was not justified in re-characterizing the transaction as trading transaction and it has also been held that cost of sales incurred by the AE cannot be included to work out the profit for determination of the ALP;

(iii) that the nature of services rendered by the assessee company to its AE since 2003 are the same and it has been consistently benchmarking its international transaction relating to the business support services using TNMM as the most appropriate method as OP/TC as PLI, as has been used in the instant case;

(iv) that as has been discussed in the preceding paras and as has been held by the coordinate Bench of the Tribunal in assessee's own case qua the AYs 2007-08 and 2008-09 that when the FOB value of the goods on which commission/ service income is earned amounting to Rs.4005.37 crores for AY 2009-10 and Rs.5057 crores for AY 2010-11 is not to be added to the cost base of the assessee's international transaction, the assessee's international transactions

computed by using TNMM as the most appropriate method and PLI selected is GP/OC i.e. berry ratio, the international transaction in question are at arm's length;

(v) that the comparables chosen by the TPO to determine the arm's length price of the international transaction entered into by the assessee company are not correct one because all the comparables are of trading company and not of support services provider as in the case of assessee company.

Consequently, grounds no.1 to 4 in both the appeals qua AYs 2009-10 and 2010-11 are hereby determined in favour of the assessee.

GROUND NO.5 OF ITA NO.813/DEL/2014 – AY 2009-10 AND GROUNDS NO.5 OF ITA NO.1795/DEL/2015 – AY 2010-11

27. The DRP has confirmed the addition of Rs.18,73,472/- for AY 2009-10 and Rs.23,17,869/- qua AY 2010-11 by applying the decision of Special Bench rendered in case of **Cheminvest vs. ITO – 317 ITR 86** on the ground that disallowance would be made irrespective of the fact that during the year, there is any exempt income or not.

28. Undisputedly, the aforesaid decision of **Cheminvest** (supra) rendered by Special Bench of ITAT has been overruled by the Hon'ble

jurisdictional High Court in ITA No.749/2014 vide judgment dated 02.09.2015.

29. Ld. DRP confirmed the addition of Rs.18,73,472/- for AY 2009-10 and Rs.23,17,869/- for AY 2010-11 by returning the following findings :-

> "16.1 The assessee submitted that the outstanding balance in investment (in shares) was at Rs.13,00,80,400 and Rs.13,00,80,400 as, on 31st March 2009 and 2010 respectively. There has been no investment in shares during the year, the assessee earned no dividend income on the above investments and accordingly claimed no exemption under Section 10(33} of the Income Tax Act. Consequently provisions of Section 14A of the Income Tax Act are not applicable. Therefore, the same has been wrongly invoked. Further, it is now judicially well settled that no disallowance u/s 14A can be made where the availability of interest free funds far exceeds the investments made as in the present case.
>
> 16.2 DRP has duly considered the issue. It is seen that in the case of Cheminvest Ltd. Vs ITO 317 ITR (AT) 86 (Delhi S. Bench), the ITAT has held that irrespective of the fact that whether during a year there is any exempt income or not, Sec. 14A disallowance would still be attracted. It is to be noted that once the A.O. is satisfied that the assessee had incurred expenses in earning exempt income, he has to follow the procedure laid down in Rule 8D. For purposes of disallowance u/s 14A, it is not necessary that there should be fresh 'investment during the year under consideration. Further, the assessee has not established with evidence that its share capital and reserves were actually invested in equity from where exempt dividend income is to be earned. Therefore, the objection is rejected."

30. Undisputedly, the assessee has not earned any exempt income during the years under consideration and no investment has been made by the assessee during the years under consideration and the outstanding balance in investment i.e. in shares as on 31.03.2008 & 31.03.2009 and 31.03.2009 & 31.03.2010 was Rs.13,00,80,400/- and Rs.12,68,83,373/- as on March 2010 respectively. Assessee also brought on record the fact

that its own funds/paid-up share capitals and reserves exceed the investment made and has not raised any long term borrowing. The assessee has only working capital from the bank which has been used for business purposes.

31. Hon'ble jurisdictional High Court in the judgment (supra) overruled the decision rendered by the Special Bench of the Tribunal by returning the following findings :-

> "23. In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression „does not form part of the total income" in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year."

32. By applying the law laid down by the Hon'ble jurisdictional High Court in judgment cited as Cheminvest vs. ITO (supra) in the similar facts and circumstances of the case, when assessee has not earned any exempt income during the years under consideration, as is evident from the documents lying at pages 7 & 14 of the paper book i.e. profit & loss account and audited balance-sheet, section 14A would not be applicable in the instant case. Hence, the disallowance confirmed by the DRP is not

sustainable in the eyes of law. So, ground no.5 in both the years are allowed in favour of the assessee.

GROUND NO.6 OF ITA NO.813/DEL/2014 – AY 2009-10

33. The AO after noticing the fact that from the auditor's report that expenditure amounting to Rs.11,11,510/- on account of leased rent, staff welfare and commission income adjustment relates to prior period and hence disallowed the same and added the same to the total income of the assessee company. Ld. AR contended that the assessee had in fact never claimed the said amount as deduction in the return of income. As in the computation of income, the assessee has taken the total figure of Rs.5,03,90,040/- as net profit which was in fact without taking into account the prior period expenses and referred to the computation of income and audited profit & loss account, lying at page 7 of the paper book. A perusal of the audited profit & loss account statement apparently shows that assessee has never claimed prior period expenses to the tune of Rs.11,11,510/- during the year under consideration in Income-tax return and as such, the question of disallowing the same does not arise. So, we hereby decide this ground in favour of the assessee.

GROUND NO.7 OF ITA NO.813/DEL/2014 – AY 2009-10

34. The AO has made disallowance of Rs.2,29,831/- on account of service tax payable and made the addition under section 43B of the Act. However, during the course of argument, the ld. AR for the assessee has fairly conceded that this ground goes against the assessee company and as such, he does not want to press it. Consequently, ground no.7 is determined against the assessee.

GROUND NO.6 OF ITA NO.1795/DEL/2015 – AY 2010-11

35. The AO made an addition of Rs.40,78,906/- by disallowing the same u/s 37 (1) claimed by the assessee company as expenditure on account of payment of service fee paid to M/s. West Japan Logistics Division of Mitsui & Co. Ltd., Japan and M/s. Mitsui & Co. (Asia) Pte Ltd., Singapore on the ground that the aforesaid expenditure has not been incurred wholly and exclusively for the purpose of business and on the ground that the assessee has merely submitted copies of the agreement of the assessee with the aforesaid companies and no evidence is available on the file. The AO has rejected the submissions made by the assessee

company to justify the aforesaid expenditure. Keeping in view the fact that in the succeeding year, AY 2011-12, the DRP vide order dated 14.12.2015 has decided this issue in favour of the assessee and deleted the entire addition of service fee paid to the same parties to whom this fee was paid. So in view of the matter, this issue is required to be restored to the AO to decide afresh in the light of the order dated 14.12.2015 passed by DRP qua AY 2011-12 in assessee's own case after providing an opportunity of being heard to the assessee. Consequently, this ground is determined in favour of the assessee.

GROUND NO.7 OF ITA NO.1795/DEL/2015 – AY 2010-11

36. The assessee claimed to have incurred expenditure to the tune of Rs.1,10,01,931/- on logistic and warehousing support service during the FY 2009-10 having been paid to M/s. Auto Cars and M/s. Hitachi Transport System India Pvt. Ltd., which has been disallowed by the AO u/s 37 (1) on the ground that the same has not been incurred wholly and exclusively for the purpose of business and the assessee has failed to offer any justification for making the aforesaid payment on account of commercial expediency nor the assessee has furnished copy of agreement with M/s. Panasonic India Pvt. Ltd. and nor placed on record detailed computation of losses. However, the ld. AR, on the other hand,

contended, that the amount in question has been incurred under terms of the outsourcing agreement with respective agencies, namely, M/s. Auto Cars and M/s. Hitachi Transport System India Pvt. Ltd. and placed on record the copy of agreement, lying at pages 7 onwards of the paper book. This fact has however been overlooked by the AO as well as DRP and as such, we are of the considered view that this issue is also required to be restored to the AO to decide afresh after providing an opportunity of being heard to the assessee to adduce evidence in this regard. So, this ground is also determined in favour of the assessee.

GROUND NO.8 OF ITA NO.1795/DEL/2015 – AY 2010-11

37. The AO noticed that the assessee had made purchase of Rs.7,19,40,901/- from M/s. Mitsui & Co. Ltd., Japan during FY 2009-10, which has a PE in India and it regularly files its income before the Income-tax authorities. The assessee company was required to deduct the tax at source on the business profit on the above said payment, which has not been deducted by the assessee company and consequently, AO made an addition of Rs.5,93,513/-. Undisputedly, this issue is covered by the order passed by the DRP in assessee's own case qua AY 2011-12 vide order dated 14.12.2015 wherein DRP has held that no TDS is applicable u/s 195 on offshore supplies. When the assessee company has no PE in

India it is not liable to deduct tax at source. So in the light of the facts and circumstances of the case and the fact that this issue has been decided by the ld. DRP qua the subsequent AY 2011-12 in favour of the assessee, this issue is also restored to the AO to determine afresh in view of the stand taken by the revenue in the subsequent year. So, consequently this ground is also determined in favour of the assessee.

38. In view of what has been discussed above, the aforesaid appeals so far as TP issues are concerned are allowed for statistical purposes and so far as corporate issues are concerned, these appeals are partly allowed and the file is ordered to be restored to the AO to decide afresh after providing an opportunity of being hearing to the assessee company.

Order pronounced in open court on this 25th day of April, 2016.

Sd/-	**sd/-**
(S.V.MEHROTRA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 25th day of April, 2016/TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.