decide the appeals by way of a common order
of arm’s length price adjustment. As such it is considered appropriate to
orders for 2007-08 and 2008-09 assessment years, there is a common issue
in both these appeals filed by the assessee against the assessment

PERR DIVYA SINGH, J.M.

ORDER

Respondent by: Sh. Premveer Jain, C.T.R.
Appeal by: Sh. Ved Jain, P.C.A

(RESPONDENT) (APPELLANT)

PGN-AVICSS8883

New Delhi
C.R. Building
Circle-9(1)

7th Floor, EROS Corporate Towers,
Safiz India(l)/) Ltd.,

(IN THE INCOME TAX APPELLATE TRIBUNAL)

INSTITUTE NO. 5186/DEL/2011 & 5433/DEL/2012

SHRI B. C. MEENA, ACCOUNTANT MEMBER

AND

BEFORE SHRI DIVYA SINGH, JUDICIAL MEMBER

DELHI BENCH: "B" NEW DELHI
Section 92D of the Act and Rule 10D of the Income Transfer Pricing Regulations do not apply in the case of the Appellant.

The learned AO/TPo/DRP has erred in disregarding the provisions of law.

The order of the learned Additional Director of Income Tax, New Delhi (I), New Delhi, dated 14.07.2009 and 14.08.2009 is without any material and is vitiated by error.

Conclusions in this respect have been reached without any due process of law and are vitiated by error.

The findings and conclusions reached in assessment of Rs. 3,97,00,88/- on account of alleged underestimation of Rs. 3,97,00,88/- of the Assocham Enterprises have erred both in law and in fact in making an addition.

The assessment years dealt with under:

In ITA No. 5186/DEL/2011

The grounds raised by the assessee in 2007-08 & 2008-09.
amount and not to the gross amount of sales.

The applicant, the risk is limited to the commission
with the purchasers/customers of the customers of
follow up on behalf of the customers and not deal
inherent base transactions. The function is merely
inflation of rate of exchange. In fact, in the
credit risk and foreign exchange risk on account of
interest and proper transactions. In particular, in
appreciate the difference in risk profile of the
The learned AO/TPo/DRP has failed to
down in sub-rule (2) and (3) of Rule 7(b).
compatible with any regard to products linked
commission and trading transactions as
the learned TPo has erred in treating the
commission was earned
enterprise segment on the value of goods on which
trading transactions in the non-associated
applying the gross profit margin earned from
the commission/trading transactions of the
that the learned TPo has erred in re-characterizing
Section 92C(1).

That the learned AO/TPo/DRP's method of
according to the methods specified in
computing the arm's length price is not in
under Section 92C(3) of the Act:
mandatory requirement for making adjustment
conditions provided in Section 92C(3) which is a
demonstrating the existence of any one of the four
the applicant's international transactions without
adopting his own method to determine the arm of
whatever
been discarded without any justification
with OP/TC as the profit level indicator ("PI") has
That the learned AO/TPO/DRP has overlooked that in respect of indent based transaction, service tax is applicable and in respect of principal transaction, sales tax is applicable. Thus, the two transactions are different classes of transactions. Apparently, the learned AO/TPO/DRP has erred in holding that the Appellant has created human and supply chain intangibles for which it is not being adequately compensated by the AE.

That on facts and circumstances of the case, the learned DRP has erred in not examining the validity of initiation of penalty proceedings u/s 137(1)(c).

On the facts and circumstances of the case, the order passed by the learned Assessing Officer (AO) under Section 143(3) read with Section 144C of the Act is bad, both in the eyes of law and on the facts of the case.

1. On the facts and circumstances of the case, the order passed by the learned Assessing Officer (AO) under Section 143(3) read with Section 144C of the Act is bad.

2. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in assessing the income of Rs.3,137,613.13 declared by the Appellant.

3. On the facts and circumstances of the case, the learned AO has
assesses as per Section 92D of the Act.

receiving the detailed transfer pricing study done by the
TPO has erred, both on facts and in law, in arbitrarily
On the facts and circumstances of the case, the learned

appellate tribunal, a rational profit on cost would increase to an
the total income of the Appellant is accepted the
appreciate the fact that even if the addition proposed to
Without prejudice to above, the learned TPO has failed to
appellant.

the nature of the business transaction undertaken by the
which is has not been adequately commented ignoring
Appellant’s observations regarding the
compare margin with the comparable margin
Appellant’s observations on the basis that the assessee has entered

On the facts and circumstances of the case, the learned

income has been earned by the Appellant
commission enterprises on the value of goods on which non-associated
receipt of the margin comes from related transactions with non-associated
applying the gross profit margin of the business transactons, and by applying the
commission transaction of the Appellant as a
model of the Appellant by re-characterizing the

On the facts and circumstances of the case, the TPO has

which commission has been earned,

non-associated enterprises on the value of goods on

gross profit margin earned from related transactions with

applying the addition on account of arm’s length price by applying

DRP has erred, both on facts and in law in making

On the facts and circumstances of the case, the Hon’ble

determined by Transfer Pricing Officer (TPO) and the
Rs.133,007.42/- as difference in arm’s length price

erred, both on facts and in law in making an addition of

TPO NO 294/3/2012 & TIPA NO 3/186/DDEL-2011

4(i)
The grounds of appeal

The applicant has not been given in view of provisions to

3-8 which are raised alleging the addition of Rs.143,63 cores, vide
os-710 & 71 are general in nature as such stand covered in ground nos-71.
Out of these, Ground assessment year reproduced in the earlier part of this order, it would be

Similarly, on a perusal of the grounds alleged in 2008-09 present proceedings the same is dismissed.

We find that ground nos-6, 14 and 29 are general in nature and are specifically

addressed vide ground nos-25 & 14, the affidavit of Rs.3,977 cores odd.

From a perusal of the grounds in 2007-08 assessment year, it

The grounds of appeal

The applicant has not been given in view of provisions to

length range of 7% to be given in view of provision to

convention of the assessee that the benefit of arts

DRP has erred both on facts and in law, in reflecting the

On the facts and circumstances of the case, the Honble

Associate Enquiries/Associated Enquiries based on conjecture and unimpress.

the arm's length price of commission earned from

On the facts and circumstances of the case, the learned

TTP has erred, both on facts and in law in determining

Page No.

9
worldwide and operates with a network of 740 consolidated
sales and service offices. Sofico Group has operations in around 50
countries and sales in Japanese terms. Dealing in a wide range of
products.

Sofico Corporation is a general trading company (also popularly known as SGC)
Sofico Corporation Japan (SCJ) is a wholly headquarter in Tokyo.

Sofico Corporation on April 1, 2004.
Nissho Iwai Corporation were merged to form a new single entity,
principle operating arm of the Group, Nihonmatsu Corporation and

2003. By the incorporation of a joint holding company. The
incorporation took place in Dec 2003 and was followed on April
integration took shape in Dec 2003 and was followed on April

The Sofico was formed through the business integration between

2. Business Profile:

here under:-
therewith referred to as the PO)
structure of the assets as discussed by the Transfer, Police, and
of Rs 1,88,72,807/- by way of filling a return. The business profile/ownership

6. In 2007-08 Assessment Year, the assessee declared an income

Facts pertaining to 2007-08 Assessment Year:

each of the years separately.

5.

Retrieved to as the AO)
allowed at 60% as against 15% allowed by the Assessing Officer (hereinafter
no-9, it is alleged that the depreciation on computer printer should be
100% subsidiary of Sojitz, AE (Associate Enterprises) also which was itself a
The P.O. considering the fact that the assesse company was 6.1.

Sojitz India Pvt Ltd (Assesse)

India

Singapore

99.99%

Sojitz Asia Pte Ltd (AE)

which in turn holds 100% share capital of Sojitz India.
Sojitz Corporation Japan has the ownership control of Sojitz Asia

Ownership Structure:

- Identifying potential customers or suppliers.
- Networking with customers.
- Support Services for facilitating trading activities of AE.
- IT solutions.
- Lifestyle related business and new business development including
  plastics, real estate development and forest products, consumer
  products, energy and mineral resources, chemical and
  machinery.
- Sojitz business activities are wide ranging, covering machinery
  subsidiaries and affiliated companies in Japan and overseas.
The TPO had noted that the assessee had benchmarked its international transaction relating to providing business support Services using the transactional net margin method (hereinafter referred to as TMM method) as the most appropriate method (hereinafter referred to as MAM) with operating cost (total cost as profit level indicator) as OTC as PLI. The assessee computed itself as

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Type of transaction</th>
<th>Method selected</th>
<th>Total value of transaction (Rs.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Imports</td>
<td>TNMM</td>
<td>837,321</td>
</tr>
<tr>
<td>2.</td>
<td>Provision of business information and sales support services</td>
<td>TNMM</td>
<td>173,018,363</td>
</tr>
<tr>
<td>3.</td>
<td>Reimbursement of Expenses by associated enterprises</td>
<td>TNMM</td>
<td>77,663,108</td>
</tr>
</tbody>
</table>
that theassessee should have earned on the total FOB value of the goods, explain why margin of 1.81% should not be adopted to compute the margin respectively was 1.81% and 1.48%. Accordingly he required the assessee to services as a service provider segment and observed that the margin earned on trading sales made in non-AE segment with the assessee's of the TPO's order. Apart from that the TPO also compared the commission cause noticed issued to the assessee is reproduced in internal pages 34 & 5 issued a show cause notice and required to explain the same. The show according for the above mentioned reasons, the assessee was

6.4

transactions with the AE's,


The FOB value of goods transacted through the assessee were


similarly the margin in the case of comparable


The calculation of margin in the case of comparables


In the PL calculation, the denominator did not contain the

-6.3

The method adopted by the assessee was not approved by the


under the proviso to section 92C(2), the assessee claimed its international comparables taken was computed at 9.15%. Exceeding the 5% option the least party showing a margin of 5.47% and the margin of the 13
6.5. It may be pertinent at this point to extract the relevant portion from the show cause notice reproduced in the TPO's order.

6.6. The same reads as under-

8. On comparison of commission earned on trading, sales made in non AE segment and AE segment, the following position emerges:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Non-Es</th>
<th>AE</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>FOB Value of goods traded</td>
<td>9,59,808,865</td>
<td>12,151,252,480</td>
<td>197,620,270</td>
</tr>
<tr>
<td>Commission earned</td>
<td>17,393,089</td>
<td>180,227,181</td>
<td></td>
</tr>
<tr>
<td>Segmental Gross Profit margin (as calculated)</td>
<td></td>
<td>1.81%</td>
<td>1.48%</td>
</tr>
</tbody>
</table>

From an analysis of the above computation, it is seen that in your trading transaction with your AE, you have earned a gross profit margin of 1.48%. In the segment relating to trading with non AE's, you have earned a gross profit margin of 1.81%. On the basis of detailed examination of FNF analysis in your TP report, it is noticed that there is no significant difference between the functions performed, assets utilized and risks assumed by you in your trading transaction in your non AE segment and also the transaction performed by you wherein you have purportedly earned only commission income or a fixed fee. While analyzing the functions performed by you, it is also noticed that you are creating human intangibles and supply chain intangibles, for which apparently you are not being adequately compensated in your transactions with your AE.
The support service is a trading activity and as such would run foul of rule 10(2)(e)(i) in a non-AE
er. It was also argued that there was a significant difference in the nature of the business of the two companies. The
assistance provided in one case was in the nature of a routine auxiliary service, whereas it was also argued that there was a
routine auxiliary service in the other case.

It was also argued that the expenditure submitted for the purpose of the relevant transaction was an expenditure related to "support services", i.e., not used in the transfer pricing method.
the customers. Many customers in India are global customers for the AEs.

The assessment of a service provider’s ability to create and manage an asset would be capable of being transferred or licensed for consideration. However, it was not considered that a service provider would necessarily mean to be an asset which is auxiliary in nature and cannot be said to create any intangibles. An activity performed, it was stated that, if carried out, preparatory and necessary to the creation of human intangibles or supply chain intangibles are created.

Set as such no human intangibles or supply chain intangibles are created. An activity performed, it was submitted, does not require any specific skills and other intangibles. The law is low, and service provider who bears a minuscule risk. The law is that the detailed FAR analysis in the TP Report had characterized the creation of human intangibles and supply chain intangibles. It was submitted that the observations of the TP, in para. 4.7 in regard to the operating expenses.

The functions performed by the assessee are made in support of business functions. The functions performed by the assessee in the case at hand are not the position in the case at hand.

6.9 If was further elaborated that CQS did not address the

6.10 Refering to the definition of the TMM in Rule 1(3)(e) it was submitted that the cost referred therein did not include CQS.
affected or assets employed or to be employed and they did not prescribe profit margin should be computed in relation to cost incurred or sales further on considering Rule 10(b)(1)(E)(II), he was of the view that the net transacted through it hence it was held that it is not an appropriate Pl.

held that the PU used by the assessee did not capture the cost of the goods However not convinced with the explanation offered, the TPA.

6.13 C...
6.14. Acting on the recommendation of the TPO, the AO made an adjustment of Rs.39,710.48/- in the arm's length price.

Determination of arm's length margin to inter-arm transaction = 22.03%-

\[
\text{Difference} = \text{Rs.39,710.48/-} - \text{Rs.219,937.669/}
\]

Arm's length commission income @ 1.81% on

\[
\text{Rs.212,151.253.480/-} - \text{Rs.180,227,181/-}
\]

Commission income earned from AES @ 1.48% on

\[
\text{Rs.3,941,488/-}
\]

was made as under:

Transaction with arm's length trader, accordingly in arm's length adjustment of

should be applied and not the margin of 1.48% earned in its trading

Gross profit margin of 1.81% earned by the assessee on its trading segment

Accordingly he was of the view that while computing arm's length price, the

that human intangible and supply chain intangible had also been created.

should be expressed as a percentage of FOB price of goods. He also held

net profit margins. Thus he was of the view that the compensation module

for value added expenditure to be considered as base for computing the
advanced on behalf of the assessee, the DRP confirmed the action of the TPO.

7.2. Accordingly the AO passed the impugned order in conformity with the directions of the DRP. Aggrieved by which the assessee is in appeal before the Tribunal.

**Facts pertaining to 2008-09 assessment year :-**

8. The assessee in the year under consideration declared an income of Rs.313,76,134/- herein also the assessee bench-marked its international transaction relating to business support service using TNMM as the most appropriate method with OP/TC as PLI.

8.1. The TPO in the year under consideration also did not accept the characterization of the assessee which according to the assessee’s FAR analysis was as under :

“The functional analysis serves as a foundation to characterize entities for purposes of inter-company transfer pricing. Based on the facts as presented in the above analysis of functions performed, assets employed and risks borne, it is possible to characterize Sojitz India as a routine service provider that assumes normal business risks.”

[Signature]
8.3 Accordingly consistent with the view taken in the earlier year, the TPO has considered the following points:

- The FOB value of goods transacted through the assesse has been computed using OP/OC as the P1L.
- The commission income received on the intermediating international transactions by aggregating all the international transactions has been considered the margin of the tested party the assesse has chosen external INM to benchmark.
- The assesse has two kinds of international transactions.

Following paragraphs:

5.5. On the basis of above details furnished by the assesse:

- The TPO following the view taken in the earlier year was of the view.
Similarly, the finding that the assessee had created human and supply chain
applications as then impossible high operating profit and cost would be incurred.
Appraised results would arise if the conclusion of proposed addition was
that the goods was also reassessed; the action was further assailed on the ground that
the action of holding that the commission is earned on the FOB values of
was not permissible under law; the method applied by the TPO was assailed,
was not permissible under law; the method applied by the TPO was assailed,
year 1997-98 the issues on the ground that after-characterization on the facts
before the DRAFT the assessee raised various grounds as in the earlier
assessment order based on the TPO’s order before the DRAFT. Accordingly
assessment order based on the TPO’s order before the DRAFT. Accordingly
In this year also the assessee reiterated the addition made in the draft

<table>
<thead>
<tr>
<th>Difference for which adjustment is required to be made</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less Gross Margin shown by the assessee</td>
<td>13.697499</td>
</tr>
<tr>
<td>Gross amount’s length margin</td>
<td>1,612,004.981</td>
</tr>
<tr>
<td>Trading segment</td>
<td>13.29%</td>
</tr>
<tr>
<td>Gross Margin as earned by the assessee in the Non 1996</td>
<td>12,929,455.163</td>
</tr>
<tr>
<td>FOB Value of Goods</td>
<td>Amount</td>
</tr>
</tbody>
</table>

Rs. 1,439,367.142/- in the following manner of
considering the explanation the proposed in adjustment of
8.4 Accordingly after issuing a show cause notice to the assessee and

ITV No. 5433/2012 & ITA No. 5186/DEL-2011
the acts in facilitating their trading activities. The functions assessees provided useful information and support services to
and submissions of the assessees. As mentioned above, the
5.2. This panel has carefully considered the facts of the case
existed of the four conditions mentioned in section 22(3) of the Act
was also argued that the TPo has not demonstrated so much
had not followed any of the methods prescribed in the Act. It
was not only not demonstrated, it was also considered that the TPo
stated that the assessees were a single service provider and did
not carry out any warehousing activity and did not assume the
risks which a normal trader undertakes. In support of the claim
and put as the taxpayer never took possession of the goods, did
was no instruction in including the value of goods in the GST.
TPo's role as a supplier of goods and not a full
the assessees was a single service provider and not a full
profit margin earned on non-AE trading segment. It was argued
not justified in re-characterising the commission/interest
before the TPo were notified. It was argued that the TPo was
"5.2. During the hearing before the Panel, submissions made

Heretofore:

discussed in para 5.2 & 5.2 of the said order. The same is reproduced
9.2. The specific reasoning and finding of the DPER on the issue is found
the passing of the impugned order under challenge by the assessees.
behalf of the assessees and upheld the action of the TPo which resulted in
3.1. However, the DPER did not agree with the contention advanced on

IIA NO. 343/2012 & II A NO. 315/2011
61
assesse is additionally a service provider only. The services it was stated
provided by the assesse to its Group entities of SCJ, is concerned that the
was contended that it is an accepted position as far as the nature of services
inherently did not arise. Referring to the material available on record, it
service provider, the occasion of creating human chain and supply chain
and in fact this is the first year in which the company is fully functional as a
has been in existence as a service provider only for the last couple of years
into existence only in March 2005. In the backdrop where the assesse
business even prior to the existence of the assesse company who has come
spread over more than 17 odd countries and has been carrying on this
International presence and a global recognition amongst its customers
decades. It was submitted that for more than 50 years, SCJ has an
alone with its affiliates has been in this line of business, for almost six
provider to the various Group entities of Softly Corporation, Japan (SCJ)
available on record. It was contended that the assesse is only a service
nature of activities undertaken by the assesse and referring to the material
reading from the orders of the TPO, ld. An addressed the bench on the

10.1. Inviting attention to the material available on record and

10. Alleged by this, the assesse is in appeal before the Tribunal in both

control, logistics and vendor development.
the buyers, helps in collections of accounts receivable, quality
played a major role in identifying the suppliers, networking with
TPO. It has been rightly observed by him that the assesse
performed by it have been discussed in detail in the order of the

TTA No. 5983/2012 & TTA No. 5686/DEL-2011
is main function and intent the only function is to maintain contracts with the
which are some of the risks to which a normal trader would be exposed as
purchases, sale of inventory or making purchases on credit or sales on credit
credit risk, etc. as at no point of time its capital is employed either in
normal trade is exposed namely' price risk, inventory risk, warranty risk,
of time as such at no point of time does it bear any of the risks to which a
point of time nor does it hold possession of the merchandise at any point
wheresoever as neither the title in goods rests in assesse's name at any

10.2.

It was emphasised that the assessee does not bear any risk

India is that of a mere facilitator and a mere service provider.
contract with Indian supplier directly. The role of the assessee is to soft
Indian; similarly for exports from India, it was urged that SCI enters into a
Japanese suppliers and SCI itself enters into a contract with the buyers in
when SCI wants to import goods for buyers in India, SCI contracts its
have been importing with SCI over the years. It was elaborated that as and
existence in 2005. The SCI, Japan it was stated, has its own customers who
the record shows that SCI negatizes contracts with its customers directly
the record shows that SCI negatizes orders by the assessee for SCI as
department that the orders have been procured by the assessee for SCI as
accepted by the department. It was elaborated that it is not the case of the
well as in the earlier year. Thus the activities as a service provider are
enumerated in para 5.6 of the DRP's order in 2008-09 assessment year as
a mere service provider. The service rendered it was stated have even been
year as well as the DRP's orders, which clearly address the fact that it was
have been enumerated in both the years in the TPO's orders for both the
Trader could plausibly argue to the support service provider that the margins earned by the activity and the activity of a support service provider also are part of the DDP. Uplisting the order of the TPo had already occurred in training. The DDP in such the action of the TPo in training the two separate sets of activities at high, if was urged if the venture succeeds the rewards can also be high. As business support service provider could be exposed to other risks being activity and can no where to be stated to be identical to what risks a situation in training activity are materially distinct and peculiar to the said accordingly the functions performed for the, assets deployed and the risk called upon to take risks on warranty and on credit extended etc. inventory risk as capital deployment in inventory depots etc. and is trader the assesee in the said activity has necessarily taken a price risk in he exposes himself to all the risks of buying and selling activities as such as a consequence of his own initiative and these are not the customer of SCP. It was ventured into it was urged that the customers have been identified by the assesee at time of the in which the assesee has

10.3. in the limited trading activities in which the assesee basis model has-a trading business.

completely distinct and separate and operate in entirely different business and supply of the commodities. The said functions. It was contended are communicated with SCP or its affiliates and gathers information on demand quantity/grade and quantity desired and for the said purpose it suppliers to ensure a timely delivery of merchandise to the customers in the
10.4. Similarly, the findings of the TPO in the two years under consideration which have been upheld by the DRP in regard to human intangibles and supply chain intangibles were also assailed. It was reiterated that it seems to have been lost sight of the basic fact that the assessee cannot be credited for developing the business of SCI Group of entities. The business of SCI affiliates with its customers either for export or for import in India and the rest of the world has been developed and created and has been in existence much prior to the creation of the assessee as such to conclude that the supply chain intangible and human intangible are being created by the assessee. It was urged that a complete misunderstanding of facts and ignoring the material available on record. It was submitted that the activities performed are routine preparatory and auxiliary in nature and as such do not create any intangibles. Assees’s role was urged is limited to providing support service as a facilitator. It was urged that no record was kept by the assessee which has resulted in the ongoing business as the facts on record are that SCI, Japan has relied upon its own vast network of manufacturers, distributors, and buyers for business whereas the assessee only provides routine services for which no separate skills are required. It was urged that in the eventuality an employee leaves, he does not carry any specific skills or knowledge for which the assessee can restrain him from using elsewhere in the business world and similarly the
to apply commission rate based on the value of goods sold because it is an
10.7.
appropriate to take costs of sales for computing margin.

admittedly since no sales have been affected by the assessee, it would not
would mean the cost incurred by the enterprise which in the case of the
was submitted that the cost incurred herein
of the TPO for adding cost of goods sold while computing margin is not the
without ever being part of the supply chain.

without ever being part of the supply chain.

supply chain.

support service provided to the TPO in the both years. It was urged that the
facilitation. These facts will be evident from the description of the business
controlled or storage etc as the only service provided by the assessee is of a
developed any knowledge of product, design or knowledge of other
chain intangibles herein also it was urged the assessee company has not
Similarly, in regard to the allegations of the creation of supply
10.5.
function of a mere facilitation.

requisite of the role as a service provider as the assessee performs the
substrate does not require any specific training to adjust with the
ITAA 53, 533/DEL-3012 & ITAA 53, 518/DEL-3011
to the activity of support services and applied trading margin earned in a most arbitrary manner considered trading activity as one and comparable. A contention that the TPO without looking at any of these items deals has in an appropriate method. In the facts of the present case, it was his determination of total FOB value of all types of goods to be sold, most deliberately will not be determined the arms length price based on a single rate of commission of account of this fact, it was his contention that the compensation model to and items vary a lot and no such effort has been made by the TPO. On established some. In the facts of the present case, the nature of products of products in respect of which services have been rendered has to be of type of product in which trade the nature of consumer products are dictated by fads and trends in the market which may higher as compared to the industrial products as the sale and prices of the similar, the percentage of commission for consumer products is always luxury goods or commodities is higher as compared to the percentage of commission on brokerage for high value products like gold, bullion etc. in which trading has been ventured for the first time, it was emphasised that in which trading has been ventured for the first time, it was emphasised that there is no attempt even to look at the merchandise. There is no attempt to compare the commission charged for an equal service. It was his argument that when the nature of services have been rendered, it would be difficult to say which the same factors should be the nature and type of product in respect of which the accepted fact that the commission would be dictated apart from other.
Different nature of products and items for which support services have been rendered to the AEs.

10.8. It was urged that if we consider transfer pricing adjustment as proposed by the TPO and upheld by the DRP very absurd results will follow. For the said proposes attention was invited to synopsis dated 19.02.2013 in 2008-09 assessment year relevant portion from pages 13-14 is being extracted hereunder:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Audited Accounts</th>
<th>Reconstructed accounts by I.T. TPO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Income</td>
<td>30,40,69,090</td>
<td>30,40,69,090</td>
</tr>
<tr>
<td>Total Expenditure</td>
<td>27,66,12,688</td>
<td>27,66,12,688</td>
</tr>
<tr>
<td>Profit Before Tax</td>
<td>2,74,56,402</td>
<td>1,46,37,63,344</td>
</tr>
<tr>
<td>PBT/Sales/revenue</td>
<td>9.03%</td>
<td>481.39%</td>
</tr>
<tr>
<td>Capital</td>
<td>8,00,00,000</td>
<td>8,00,00,000</td>
</tr>
<tr>
<td>Reserves and surplus</td>
<td>1,98,15,112</td>
<td>1,98,15,112</td>
</tr>
<tr>
<td>Net worth</td>
<td>9,98,15,112</td>
<td>9,98,15,112</td>
</tr>
<tr>
<td>Return on capital</td>
<td>27.51%</td>
<td>1466.47%</td>
</tr>
</tbody>
</table>

Perhaps it is impossible to earn 1466.47% return on capital in any business. If we take the transfer pricing adjustment under above.
applied to absurd situations. Applying the trading margin in the two years namely 18.1% and 13.29% will demonstrate further from the fact that on more or less the same turnover, the method of the TP 95 followed is applied it was argued can be these two years, the method was not accepted, the absurd result to which inferred with and has been consistently shown by the assesses and only in emphasized that the basis for computation the OP/TC is not PL was not regard to the margin computed with reference to the comparable. It was with OP/TC as PL has been accepted and the addition was made only with business support services using TMM as the most appropriate method for benchmarking its international transaction relative to provision of it was emphasized that in 2006-07 assessment year the assesses method applied has been 13.29% in both the years the activity remained the same, support services and in the next assessment year 2008-09 the margin been seen that whereas in one for the TP applied the margin of 18.1% to the under consideration. Referring to the same, it was submitted that it can be to extremely impossible results. Exploring this argument further attention characterizing the business support service into trading activity can lead argument that this itself will demonstrate as to how and why re-addressing the past history in assessee's own case, it was his

10.3 -

...constitute accounts with indent sales trading as trading sales then

ITA No. 348335-2012 & ITA No. 3186 DEL-2011
It was urged that absurd conclusions can be drawn if the said action is
factual reliance was placed on the past history of the assessees on the issue
transaction of business support services as trading activity. Referring to the
same. As such there was no occasion for the TP to re-characterize the
the fact that the nature of services provided by the assessees have remained
emphasis was laid on the aspect that there is no dispute over
10.12
trading activity is not the correct approach either under law or facts.
the nature of services remain the same applying the margin earned in the
assessment years, no addition was made by the TP. Accordingly where the
consideration has been accepted and in the immediately subsequent
which in the immediately preceding assessment year to the years under
with OP/TCA as PL. As such it was his argument that this is a correct method
business support services using TMM as the most appropriate method
has been consistently bench-marking its international transaction relating to
March 2005 when the assessees company was incorporated and the assessees
services being provided by the assessees to its associated enterprises since
It was emphasized that there is no change in the nature of
10.11.
of 1.81%, 1.279% and 0.599% because the risks are high and thus varied.
the reasons also. The trading activity has shown in the three years a range
shows that the risks in the two activities very different, consequently
that margins in service provider sector were higher. This fact it was urged
determined by the assessees has been accepted as the department found
assessment year i.e. 2009-10, it was submitted that the arm’s length price
inviting attention to the TP’s order for the subsequent
10.10
business with just Rs. 8 crore trading of more than Rs. 1200/- crores and earn
admittedly was just to provide support services to the company whose main activity
company which was just Rs. 8 crores and the company whose main activity
show that the TP0 presumed that on the total capital of the assessed
was contested that a penalty of the balance sheet of the company would
was charged for the support service to A. Establishing this argument further it
would be much less than what it is supposed the assessed should have
profit of the AL for whom services have been rendered by the assessed
submission that the TP0 has completely ignored the fact that even the total
activity of the two years, the adjusted results are yielded. It was his
in volume of business simply applying the margin, arrived in the trading
difference in the nature of activity by the assessed and negligible variation
consideration are perceived. It would show that despite there being no
10.13
It was submitted that if the facts for the two years under
10.13
the nature of the activity remains the same,

the activity remains the same. It was submitted is demonstrated from the fact that
activity and volume is varying from Rs. 3 crore odd to Rs. 14.3 crore odd. The
addition proposed on the other hand for the very same
volume namely Rs. 2.125 crore odd and Rs. 12.225 crore odd. The
commission earned by the assessed it was negled is commensurate with the
is varying between Rs. 12.25 crore odd and Rs. 12.225 crore odd. The
would result where cost as adopted by the TP0 based on FOB value of goods
from the very same activities applying the margins of 1.81% and 1.39%
Rs. 14.3 crore odd proposed by the TP0 more or less from the same turnover
upheld. Attention was invited to the adjustment of Rs. 3 crore odd and
II

The ldl Dr. on the other hand relied upon the order of the
TPO's and the DRT which confirmed the TPO's order in both the years.

deserves to be deleted.

Accordingly it was the conclusion that the proposed adoptions upheld by the DRT previced by the AO
rendering advertising space on behalf of &
that mark up is to be applied to the cost incurred and not the cost of
recognition method and the Tribunal upheld the CIT(A)'s action in holding
Vendor and the ultimate customers. The assessee had followed net revenue
from the customers and assesse was a mere intermediary between the
third parties were denied to mere pass through in nature and recovered
products and brands in the capacity of an agent. The payments made to the
in undertaking advertising services for its customers in respect of their
therein was engaged in namely assessee was in advertising agency engaged
wherein it has been held that in the type of services which the assessee
reliance was also placed upon the order of the Tribunal in the

of FOB value of the goods.

is similar to a service provider in the case of the assessee, the appropriate
position of GNP International Sourcing India Pvt. Ltd. vs. ACC dated 18.09.2012
reliance was placed upon in the case of TTA No. 5433/DEL-2012 & TTA No. 5186/DEL-2011 in the case

a profile of almost Rs.16.15 crores as has been determined by the TPO. The

TTA No. 5433/DEL-2012 & TTA No. 5186/DEL-2011
It was his earlier submission that internal comparables are the preferred comparables and the TPO is justified in applying such internal comparables. If no comparable to a higher margin in the comparable group is available, it is of no consequence that in one year such internal comparables give a very low margin as compared to a higher margin in the comparable group.

The departmental stand has not varied.

The assesse has not been excused. Accordingly it was his submission that though no addition has been made but the fact remains that the method of proceeding for 2009-10 assessment year is his submission that even the assessment year is an independent year and acceptance of the assesse's method in the year in which heavy reliance is being placed, it was his submission that each value is to be disregarded.

In support of the same, it was contended that the TPO has held
length price, the assets so used have to be taken into consideration. The assets of the assessee company and while determining the arms
by the assessee in the course of the arguments to the said fact. As such
that the assessee has built the same and due importance has not been given
to the development of the human chain in point, it was his contention
Addressing the findings of the TPO upheld by the DRP in regard

the arms length price

\textit{carried out for the supplies have rightly been supplied for determination of
assets with no ACS. The margins so earned in respect of the activities
and has rightly been characterized the transaction of the assessee as a trader
TPO has rightly re-characterized the transaction of the assessee as a trader
dated 31.12.2010. In the facts of the present case, it was submitted that the
No. 496/Mum/2006 in Sarna Pharmaceutical, India was ACIT by its order
transaction and bench marking the same, reliance was also placed upon the

II.5. Supporting the action of the TPO in re-characterizing the

relation to the sales affected.

\textit{correct in bench-marking the service charges received by the assessee in
in relation to sales affected. Accordingly it was urged that the TPO was
relied by an enterprise from international transaction is to be completed
it was contended that the said rule clearly states that the net profit margin

II.4. Invoking further attention to Rule 10B(1)(e)(i) Regulating TIN-99,

date 28.03.2011.

No. 3869/DEL/2010 in Disbursant India Ltd v. CIT order of Delhi bench
the present case in respect of the trading business for which it provided
in the facts of the present case as to how much profit the AE has made in
determining the arms length price. As such it was not relevant to consider
marking the international transaction entered into with the AE and for
placing on the issue it was urged cannot be a consideration while bench-
the assessment that profit earned by the AE should have any relevance and
it was also submitted that the argument advanced on behalf of
17.10.

adding 32% of the cost incurred in providing support services.

basis of the TP adjustment however the TP was upheld by adopting and
submission that although the rent the cost of goods sold has not been the
GAP International Source Ltd. Referring to the said order, It was his
of the Tribunal which had already been referred upon by the LD. An
Attention was also invited to another order of the Delhi Bench
17.9.

was a human chain in such asset which the assessee had deployed.
margin earned by its associates enterprise on account of the fact that the
wherein it has been held that the Indian entity should get 80% of the total
ordinate bench in the case of IL and Furq. India PRT Ltd. T.T.R (TRIB) 748
17.8. Reference was also placed upon the judgment of the Co-

777/VUM/2010 in the case of Bayer Material Science PRT Ltd. vs ACIT.
purpose, reliance was placed upon, order dated 16/12/2012 TTA No.
definitively not the cost incurred in providing indenting services. For the said
the goods in respect of which services have been rendered and most
such a business, the basis of the starting point is always the gross value of
It was also his submission that it is a well known fact that in
17.7.
Consider the nature of the business and the business profile of the assesses. View that in the peculiar facts and circumstances, it is necessary first to light of the judgments and orders cited before the bench, we are of the view that careful consideration of the facts, circumstances, and position of law in the subject matter and arbitrariness cannot be over emphasized. Thus on a comprehensive analysis etc. so that the conclusions do not suffer from the same of FAR trap/dangers of applying principles which may not be supported by FAR these matters. The need to maintain a consistent approach on the issues arising in the consistent position of an authority adjudicating on the issues arising in changes in facts and circumstances can lead to wrong conclusions, which are extremely factual in nature and any attempt to ignore the nuanced available on record. In our experience, the transfer pricing issues necessarily submission that the impugned orders deserve to be upheld.

We have heard the rival submissions and perused the material

ITA No. 558/Del/2010 and ITA No. 569/Del/2011 dated 31.10.2012 in the relevant. Attention was also invited to another order of the Delhi Bench in two years of margins applied namely 1.81% and 1.32%. It was urged is not accordingly in the arguments that there is a variation in the

non Af.

justified in considering the margin earned with trading entered into with reference to the services provided and the TPO on these facts is very much support services and what was relevant is the determination of the AIP with

ITI No. 5438/DEL-2011 & ITA No. 5186/DEL-2011
control of Solitz Asia Pte Ltd, Singapore, i.e the associate enterprise of the Group entities of Solitz Corporation, Japan, headquartered in Tokyo. It may be pertinent to refer that Solitz Corporation, Japan has been recognized in the business structure. The business profile of the associate entity shows that it came into existence in March 2005. Since then it has been rendering services to the structure. It is seen that neither the TPO nor the DDI for that matter the CT DI of the structure has either disputed the business profile of the associate entity. It is seen that neither the TPO nor the DDI for that matter has dwelled upon the ownership structure. Both the TPO and DR have taken into consideration our objection in the earlier portion of this order, we have observed in the earlier portion of this order, we have observed in the earlier portion of this order, we have observed in the earlier portion of this order.

A fact driven branch of law to our minds, the said exercise is necessary, the fact that they had been discussed in the earlier part of this order, being out once again for our consideration the facts available on record, despite ordinary submission, addressed the facts correctly, we propose to set aside. Thus embodied by the order, things are considered in particular facts and circumstances of that specific case. Therein are to be considered in the context of the questions which are thereupon called upon to decide. Consequently, the principles laid down in the case at hand is the law to mention that a judgment decides only the case it is upon. It is the law to mention that a judgment decides only the case it is upon. The principles can be drawn. Similarly, the applicability of the principles of law, as evident that the conclusion in the context of the rules and provisions, in TP importance of such an exercise cannot be over emphasized. It is on this issue for our purposes in order to decide the issues before us. The relevance and
followed on April 1, 2003, by the incorporation of a joint holding business. The two companies have a history of over a century, forming the basis for the establishment of the joint holding in April, 2003.

The ownership structure of SoftBank Group and the control of SoftBank Group Japan (hereinafter referred to as "SCC") has changed over the years.

2.1. **THE OWNERSHIP STRUCTURE**

2.2. **BUSINESS DESCRIPTION**

TP study of 2006-07 financial year.

Note: The material is not clear due to the image quality.
The function of the socho shokai included the overseas markets. The function of socho shokai included the role of processing these materials and manufacturing them into products to be sold and selling them in domestic and overseas markets. The role of processing these materials and manufacturing them into products to be sold and selling them in domestic and overseas markets provided those that were provided with such raw materials, etc., produced chemical and other manufacturing technologies purchased from around the world to steal. These socho shokai are a unique type of business enterprise that is seen only in Japan. They supply raw materials and technology to companies, and specialized trading companies that deal only in a “socho shokai,” which is a general or integrated trading company.

There are two major categories of trading companies in Japan:

1.3.1. The profile of the SCI Corporation is as follows:

SCI (Socho Corporation) is a Japanese entity headquartered in Tokyo. SCI is a general new single entity. Socho Corporation was merged to form a new corporation. The principal operating arms of the Group, Nihonmatsu Corporation and Nissin Industrial Corporation were merged to form a new corporation. The principal operating arms of the Group, Nihonmatsu Corporation and Nissin Industrial Corporation were merged to form a new corporation. The principal operating arms of the Group, Nihonmatsu Corporation and Nissin Industrial Corporation were merged to form a new corporation. The principal operating arms of the Group, Nihonmatsu Corporation and Nissin Industrial Corporation were merged to form a new corporation.

2.2. Profile of the Group

Business and new business development including IT solutions, development and joint products, consumer lifestyle-related energy and mineral resources, chemicals and plastics, real estate activity and wide-ranging covering machinery and equipment, affiliated companies in Japan and overseas. Socho business operations with a network of 740 consolidated subsidiaries and affiliates, SCI is a Japanese entity headquartered in Tokyo. SCI is a general
and steel plant transactions in Japan and overseas.

SMT equipment and telecommunications equipment, or a JV in China, sales of Surface Mounted Technology consist of the manufacture and sale of bonding, primarily information & industrial machinery operations mainly

information & industrial machinery

markets.

parts and engineering, and activities in other-sides (K&K) components, and assembly and sale's automotive of complete building (CBU) vehicles and knocked down Automobile operations of the group consists of the export

Automobiles.

Machinery & Aerospace division

Segments:
The main business of SCL can be categorized under the following

mentioned above.

import/export, and overseas trading of various products as

The profile of the sales group is in particular domestic trading,

In various aspects as a business partner.

and became joint quarantines, etc., supporting their customers

related information, make various business-related proposals,

another, they also supplied their customers with business-

relationships with manufacturers and retailers went beyond.

due to this various functions handled by these companies,

Coordination functions

Marketing functions and

Financial functions, such as financing,

functions, such as information gathering,

Transaction functions, such as trading, stocking.
metals, and copper billets to Japan, and trading of precious ingots and copper billets to Japan, and trading of precious and ferrous ores: Importing of iron ore, aluminum and ferrous ores: Importing of iron ore, aluminum and raw materials and the sale of stemming, cracking, and pig iron.

Mineral Resources Activities include investments in mines and the import and sale of coal.

Coal

and the import and sale of LNG facilities and receiving terminals. LNG vessel ownership.

LNG operations involve investments in gas infrastructure throughout Asia and participation in product trading, imports, and sales ownership; the sale of production equipment and devices; FPSO (Floating Production, Storage, and Offloading) vessel ownership; and gas includes upstream investments and loans.

Oil gas, and LNG

Energy & Mineral Resources Division

ships

sale of new and secondhand ships, and the ownership of

more related equipment, the brokering, purchase, and

supply of shipbuilding equipment and经营理念.

commercial aircraft in Japan (market share of 100%) and the sale of Canada's Bombardier commercial aircraft in Japan (which have a market share

Aerospace Business involves support for sales of Boeing
Development of retail property

in society and markets

Real Estate Development & Forest Products Division

Indonesia:

market operations are centered on a methanol plant in

ethanol

sales companies in Thailand, the Philippines and Vietnam:

Fertilizer operation cover fertilizer manufacturing and

promotion overseas manufactures electronic materials, and other products through JVS with

and the supply of plastic parts packaging materials, and plants of Japanese companies, mainly in China and Asia.

Plants include the supply of plastic materials of overseas

and fine chemicals.

items worldwide, including organic, inorganic, specifically

Chemical products involve the handling of about 1,400

Chemicals & Plastics Division

Renewable energy

of power plants in Japan and overseas.

and chemical plants, and the supply and operation

energy and chemical plants, and the supply and operations include

Power and energy & chemicals plants
In real estate operations, Sojitz is a comprehensive real estate developer backed by a powerful business network and information gathering skills.

Forest products. Sojitz is recognized as a leader in Japan’s forest products market. Sojitz imports timber and trading of forest products, invests in overseas forest product supply bases, and has operations in Japan covering the distribution of forest products and housing construction materials.

Consumer Lifestyle Business Division

Textiles. One of Sojitz’s traditional strengths. The company has competitive products in many categories, including raw materials for textiles, textile fabrics, bed linen and apparel.

Foods. Food operations are guided by the main themes of “food safety and peace of mind” and include grains, seafood, meat, and other products. Sojitz has a large number of contract producers and JV’s in Japan and other countries.

Overall, the company has an integrated value chain extending from upstream raw materials and processing to downstream retail sales.

General commodities cover products such as woodchips, infant products, tobacco, motorcycle parts, tires, and
global network of services. Consolidated employee strength of 16,442 employees, offering a truly enterprise trading both in Japan and overseas.

Over the years, ISJ expanded to become a major commercial

as well as clinical trial support and other services.

Healthcare materials and the proper management of waste.

Environmental operations include a comprehensive

content through its overseas network.

Content operations include the provision of capital to a

highly advanced network solutions.

Operational include consolidated subsidiaries, "Nissho

Information & Communication Technology (ICT)

New business development group

many other items, Solita has its distinct supply chains in
sales transactions. A contract with the Indian supplier directly for the purchase of goods could also justify India as a mere facilitator. SCL enters into a contract with the buyers in India, according to the foreign sales transactions. Similarly, for imports of goods for buyers in India, SCL has a contact with the Japanese supplier, further SCL also enters into a contract with the importers of goods in India through its Indian office.

Information on the subsidiaries of SCL for providing sales support and business support are engaged as a service provider to the various companies primarily incorporated to undertake trading activity. The primary activities include trading using a warehouse at Mundra, Scl has a branch office doing a warehousing of chemicals in Mundra, Scl has a corporate office at New Delhi. And a branch office doing trading of over 2000 items including metals, machinery, energy, chemicals, textiles, foodstuffs, and general merchandises, which make them unique among other players. These companies play an important role in linking buyers and sellers.
Export from India to other countries also be classified into import from other countries into India. In general, Soiltz India's trading transactions can be classified into two groups: Indian sales and export sales. latch can be classified into manufacturing and machinery, and other parts of the world's machinery products and any other industrial products to Japan. Primarily, Soiltz India deals in export of iron ore, chemicals, iron ore etc.

Chemical and Telecommunication

Automobiles

Machine

mentioned below:

different commodity departments, some of which are commodities during the financial year 2006-07 through its group companies, Soiltz India handle different overseas sales. Soiltz India is provides support services to it Soiltz Overseas Divisions

AE

Collection of account receivables from clients on behalf of

Coordination with customers

Collection of market information

Support in after sales services

Support in business promotion

Business support services

include the following:

different subsidiaries of SC and the main services among others

The assessment has entered into various arrangements with

IT&A NO. 25340/4-2012 & IT&A NO. 25186/DEL-2011
Japan and other Group Companies. The support services facilitating both exports and imports in India through Sojitz accordingly, Sojitz India provides support services for the buyer. Sojitz India doesn't engage in any significant proper function. It takes the ownership of the goods before selling to In case of proper transactions, the assessment performance trading.

Industry groups these commodities in India, and liaising with government or gathering information on demand and supply conditions of Sojitz Japan's customers in India to understand their needs for Sojitz Japan's customers in India. In the quantity and delivery of merchandises to the customers, in the quantities and minimum close contacts with the suppliers to ensure timely traded on this basis. The main types of commodities be sufficient to cover its costs. The turnover of this business may not Sojitz India's only risk on these transactions is volume risk (or commission is from Sojitz Japan. commission the Group Companies Sojitz India's majority of the 2006-07. Majority of the commission earned is from A& and accounts for around 88.67% of its total turnover during FY commission earned by Sojitz India in the Indian sales. bears no price risk on inventory.

On its inward trading transactions, Sojitz India's role is that of a mere service provider. Therefore, Sojitz India never takes title or possession of the merchandise at any moment and
12.5. In regard to the competition, it faces following facets are narrated:

- Products' local prices, market trend, etc.
- Gathering information about customer requirements.

12.4. The nature of services rendered by the assessee are also not disputed in Singapore. However, during the period other national trading companies

In Switzerland, Attands and Podestecco and
Rusel, Weibov, and Westfinance International in Canada;

in Hungary, mostly in the trading companies' exist. Kecso in Hungary, Beherineser and KR
Trading companies exist in Finland, Belgium, and
Other large multinational trading companies as well that have become significant to the

size in recent years and have contributed significantly to the

However, during the period other national trading companies

services.

Therefore, there is a competition in the market for the said

performed by other players as well like Mahanadi and Kochin.

support service that the assessee is performing are also

intermediator for sourcing the products from India. The

transaction and to avail the services of any other

comparative services to its AL so as to secure

India and across the globe. The assessee has to provide

The assessee faces a competition from players operating in

12.3.1. Competition
sales business is to maintain close contacts with the suppliers to ensure
associates the asessees risk here is also minimal. The functions In Indent
utilised by SCL itself since volume risk is directly borne by the SCL and its
provider and all decision making negotiations planning and network of SCL is
asseesse is exposed to is the volume risk. As asesse is a mere service
majority of the commission is from SCL Japan and the only risk which the
total turn over for 2006-07 financial year and majorty of the commission
earned is from its and amongst the group companies the asessees
sales accounts be its export or import it accounts for about 86.77% of its
by the asesse that the commission earned by the asesse in the Indent
bear no price risk on inventory risk. It is also narrated in the TP study that-
merchandise or enters into contracts in its own name. Consequently it
that capacity at no point of time either it takes possession of the
2.2.8. On the indenting transactions, the asesse is a service provider and in
from India to another country.

further classified into import from another country into India and export
narmely (a) indent sales and (b) propper sales. The indent sales have been
transactions which the asesse enters into can be classified into two groups
facilitator. In its business profile, it is also set out in its TP study that the
seller as the case may be and the asesse only provides services or a
for SCL. The contract entered into by SCL is directly with the Indian buyer or
profile describes asesse as mere facilitator for import/export of goods
consideration would show that the description of asesse's business
book which contains a transfer pricing documentation for the year under
12.1.

A proposal of volume – I table NO. 388/DEL-2011
sourcing products and developing business opportunities worldwide. Exporter or an importer and even as a domestic trader in Japan involves support services. The functions of the AES is informed whether as an activity and core marketing functions and the assurance provider is informed that the associated enterprise undertakes all the leading. In the TP study, addressing the functions, assets and risks in the TP study, addressing the functions, assets and risks.

In the TP study, addressing the functions, assets and risks.

Any other intermediaries for sourcing the products from India.

The transfer pricing study in Chapter 2 as reproduced above, during this period.

The unreported TP Report states that in the category of proper transactions as opposed to indent sales, the assesse has performed.

TPS study defines that the assesse's engagement in this activity is not significant. However, it has not engaged in any significant proper transaction.

To understand the needs of importers communicating with SCI, Japan etc.

desired for exporters maintaining close contacts with SCI customers in India timely delivery of merchandise to the customers in that quantity and grade.
5CL and the assesee merely acts as a conduit for passing the information
negotiations with the supplier and the customers are always undertaken by
the marketing efforts in identifying the customers are also minimal. The
merely as a conduit. The customers largely being traditional, consequence
level of functionality performed. The TP study describes the assesee as acting
with the customers in India for 5CL and its affiliates. Addressing the low
contracts as per the TP study are always entered into by the SC or its Group
intermediary, and at no point of time is part of the supply chain. The
company. It is seen that it is claimed that the assesee merely acts as an
risk for the assesee in comparison to a typical Indian exporter/import
23 of the TP study) are described as low level activity and relatively limited.
The transactions involved as per page 240 of the paper book (internal page
The assesee on the other hand undertakes indirect sales on behalf of SC.
markets, and forays into emerging technologies are also taken by the AE.
and prioritization etc. Further decisions relating to entering into new
services are also taken by the AE in terms of the export, importing, sequence
the AE, all major decisions relating to sourcing the contract and related
entering new ventures, marketing and sales functions are all performed by
212.2 The TP study further shows that the development of strategies
contract with the buyer/seller with regard to the supply of goods directly.
marketing and distribution of wide variety of products. The AE enters into a
These aspects of the assesse is classified as low risk borne company. Warranty risk (no warranty risk borne by the assesse), considering all—

difference in exchange currency and conversion rates is borne by assesse’s.

indirectly affected). Foreign risk (assesse paid in currencies of AE so is probability which risk too is directly borne by the AE so assesse is indirectly involved in the export risk borne by the AE which customer the risk is borne by them). Volume transfer pricing report, it is seen that assesse has no credit risk as the AE is directly invoicing the end customer the risk is borne by them.

Looking at the risks to which the assesse is exposed, per the:

Global network of SC:

operation in India. For rendering services to the AE, the assesse uses the network developed not does not have any intellectual asset in its business. The operation of the Global trading network. The assesse is stated to have by SC and the SC possesses entrepreneurial knowledge with respect to intangible assets required to carry out the operations of the assesse are owned as per the TP Study report on record which has not been controverted the.

As per the TP Study report on record which has not been controverted that TP report internal improvements, computers office equipment, furniture and fixtures.

It is seen that the assets utilized by the assesse are vehiculars.

Accounting, IT Legal and Human Resources Management etc.

provider with a minimum risk in regard to the strategic policies Finance and performed show that the assesse was described as a limited service between the SC and the customers. Consequently analyzing the functions.
Accordingly after considering the detailed, FAR analysis of the assessee considered the TP study available on record which has not been controverted by the TPO or the DR it is seen that as far as the indenting activities are concerned the assessee is engaged in a low risk activity.

12.16 A further study of its transfer pricing policies report shows that the assessee for selecting the most appropriate method (MM) considering the applicability/feasibility of each of the prescribed methods namely:

- Comparable Uncontrolled Price Method (CUP)
- Resale Price Method (RPM)
- Cost Plus Method (CPM)
- Transaction Net Margin Method (TNMM)
- Profit Split Method (PSM)

discards all except TNMM for the reasons given at pages 251 to 255. Since the selection of method is not an issue in the present proceedings reference to all the comparables is avoided. Considering the nature of the transaction and the availability of relevant comparable data, TNMM was considered to be the most appropriate method in selecting the comparables. Discussion thereon is also being avoided as it is not an issue raised in the present proceedings.

The assessee took itself as the tested person the OP/TC was considered as the most appropriate PL by the assessee.

12.17 In the above background it is seen that the TPO has discarded the method and computed the Arms Length Price (ALP) on the basis of profit earned by the assessee in its trading activities, and the margin earned thereon has been applied on the basis of Total FOB value of the goods.
On a consideration of the business profile of the assessee as available on record and the nature of services rendered and the risk profile.

12.19.

Working out the Arms Length Price.

(a) The profit or the profits of Indenturing activity for applying the margins earned in the trading activities; no then is there any justification on facts in (d) if the answer posed to the query in (a) is

(b) Operative cost of the assessee.

(c) Facts of the present case or would it be the joint (1) (e) be the FOB value of goods on the answer to the query posed in (b) is

"Yes", then would the costs referred to in Rule is

(d) If the answer to the query posed in (e) is

"Yes", correctly applied to the indenturing activity by the assessee with non-ces.

"Yes", then were the margins earned in the trading activity.

(e) If the answer to the query posed in (f) is

"Yes", whether the TPA on facts was justified to

--- formulate the questions under:

(1) If no to adjudicate upon the issues it would be appropriate for us to

In the aforementioned background we are of the view that in

12.18

TFA No. 54939/DEL-2012 & TFA No. 5186/DEL-2011

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matter of record that in these years the assessee has also shown profits on low risk business, which has also been the claim of the assessee. It is a performed and the assets deployed it can be safely concluded to be that of a nature of the risk profile of the assessee and on considering the functions he is exposed to price risk of the risk linked with offering credit sales. From the information attached as a service provider. Consequently the assessee is not indebtedness activity as a service provider. Indebtedness the title is not transportation as the title in goods is never held by the assessee for its to incur cost either for maintaining or storing the inventory or for the unremittable and as such are taken to be correct the assessee does not need services rendered and the agreements advanced which also remain important. The negotiations are directly done by SCI and the Indian customers entered into by SCI and Indian customer directly whether for export or possession of the merchandise is in assessee's hands. The contract is providing indebtedness services. At no point of time the title in goods or contracted terms and the unremittable stand on the assessee is merely a service provider to the extent of 86.7% of its total earnings. As per the endorsed facts available on record it is that the assessee is 12.20.

The endorsed facts available on record is that the assessee is

Business People, Fair Analyses, which we have deliberated on in the earlier
the negative is being elaborated in the following para based on the decisive factors as to why the question framed in (a) has been answered in the activity of a service provider is similar to the activity of a trader. The of the assessee, we are of the view, that the TP erred in considering that
exposure for price risk, credit risk, warrant risk, etc. are some of the risks to
neglect the terms of the contract to decide the level and extent of
performance of the critical functions, like decisions to purchase into contracts.
The critical functions were being performed by the TPO. Where all the
light on the aspect for updating the action of the TPO. Where the TPO has led any discussion nor has the DRP cared to know any
assessor's activity from a service provider to that of a trader. As observed,
record either justifying the action of re-characterizing the nature of
level of trading activity in its own name, there is no reason available on
distinct and separate entirely because the assessor was also having a small
the margin earned in trading activity to indentifying activity as the two are
the negative we see that there is no reasonable and justification for applying

22.21 Considering the next question posed even if the answer in (a) is in
the question posed in (a) is answered in the negative.
assessor. In its indentifying activity these facts are not evident. Accordingly
which would necessitate the contract being entered into and negotiated by
entrepreneur is exposed to price risk, cost risk, credit risk, warranty risk, etc.
activity. It is an accepted economic practice that the trader acting as an
rights to re-characterize. The assessor's indentifying activities as trading
a trader, in which eventually the TPO would have been well within his
activities. Hence the assessor was performing all of some of the functions of
made a wrong claim on facts while claiming to be engaged in indentifying
been brought on record by the TPO to either justify that the assessor has
its own trading with non-As. In the facts available on record, nothing has
The assessors, namely trademark owners, licensees, and other intellectual property rights precipitously. In the context of trademark infringement, reference may also be made to page 248 of this paper book which contains the study of the above mentioned trademark infringement. Reference may also be made to the network of SCF for rendering its services. The facts of the present case are supported by the present report. The facts of the present case are supported by the present report.
12.24. As such, it is seen that no intangible assets are held by the business operations in India.

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 pari passu 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 consideration that on facts re-characterization was not called for and
the assessment is exposed to the two activities discussed above we are of
assess in the two ventures and on a consideration of the risks to which
the two separate class of activities and, considering the assessment performed by the
On a detailed consideration of the functions performed by the assessment in
the facts of the present case, this power has been erroneously exercised.
the powers to re-characterize the transaction if so warranted on facts, in
doubt that the TPO under the Income Tax Act and the rules there under has
the TPO can re-characterize the transaction under the Act. We hold that no
of the issue as Ld. CT DR has specifically supported by order the view that
applied to other activity we consider it necessary to address another aspect
be

12.27. While holding that the margins of one activity cannot be

in the first year it is 1.83% in the other it is 13.29%.
from assessment's own record of the two years under consideration whereas
move upwards in regard to the trading activity. This fact is demonstrated
risks being of a higher level the rewards if the venture succeeds can also
only the efforts required/earned the risk borne is completely different. The
same has directly been done by the assessment and not by the SC/TS such not
risk and other related risks of inventory risk etc. The regulations for the
assess as any other trader has exposed himself to the price risk the credit
goods has been held for these contracts in assessment own name so such the
entered into contracts with the parties in India in its own name. The title in
available on record shows that in the trading activity, the assessment has
the DRP. At the cost of repetition the consistent and unrebutted material
The query posed in (c) calls upon us to decide whether as per Rule 108(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 negative. 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) reads as under:

Determination of arm’s length price under section 92C.

108. (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) Transcational net margin method, by which...
facts, we have also taken into consideration the orders referred upon by the
fact driven and such is may be pertinent to add that while determining the
issues in transfer pricing are very fact specific and conclusion necessarily are
required to address these issues at this stage. Since we are of the view that
important and relevant factors have been addressed as such we
arguments on the creation of and contributing to the human

Goods. A surc (c) a oda or droc on autopsy
was not correct in holding that the costs: as per the Rule were FOB value of
India also in their own name: in these unquoted facts on record the TPO
entered in the name of SCL and its subsidiaries at one end and the customers in
the cost of goods: title in goods never vests with the asset of the assees and the
price risk, warranty risk, inventory risk, etc. whose funds are not locked in
entity as a service provider functioning as a facilitator who is not exposed to
mean the FOB value of goods. The assees demonstrably a low risk
not suggest that in the case of a case like the present case the costs would
analyse of the assees, the costs referred to in Rule 10B (1)(b) does
transactions, we are of the view that on the basis of the detailed Fair
length, while considering the action of the TPO in re-characterising the
on the facts of the present case which have been discussed at

Relevant basis:
emphasised by the enterprise of having regard to any other
incurred or sales effected or asset and employed or to be
associated enterprise is computed in relation to costs
from an international transaction entered into with an
the net profit margin realised by the enterprise

(i)
intangible is being created. It is seen that there is no material on record as risk activity of facilitator does not lead to the conclusion that a human expert's commanding high salaries, the simple performance of a low eventually occurring the personnel are necessary highly qualified sought the correct or grossly wrong as such due to the high risks of both services are being performed when the analytical/optimal may turn out to way of analysis, reports and opinions being provided as such value added admirably are performed by the AS or the assessee is contributing by department that the assessee is performing critical functions which required for indentifying and acting as a facilitator. It is not the case of the may have acquired during employment as no specific skills for indentifying are cannot restrain the learning personnel from utilizing any skills which they choose to move on for better options. The assessee does not need to and required by the personnel who replace the existing personnel who may assessee is low and skill requirement is so low that no specific skills are the level and degree of the qualification required of the personnel of the and all inferences and personal etc utilized internally belong to the AE or the assessee has been able to render services utilizing the networks of the AE assets and supply chain inferences. The unreported fact on record is that concurred with the conclusion of the TP that the assessee has created human risks to which the assessee is conscientiously exposed we are unable to the assessee the assets deployed using the inferences of SC networks the for the present purposes or consideration of the functions performed by which are fact driven, we propose to discuss the inferences subsequently.

Favour. However in order to maintain coherence and lucidity in our findings

TIA No. 543943D-2012 & TIA No. 51869DEL-2011
from the standpoint taken by the department in the TP procedures.

proceedings for 2009-10 assessment year but no deviation from the TP activity vis-à-vis the indemnity activity, decried. The CL DTR has been at

through adjudgements have not been made as the margins in the trading asssessment according to the CL DTR the method has not been accepted

two years under consideration, same method has been followed by the
the immediately subsequent assessment after the assessment year, that is the immediately subsequent assessment after the

and only on comparable there have been a dispute, Similarly in 2008-09

assessment year wherein the revenue has accepted the method applied

We further support the view taken by referring to 2006-07

In the facts of the present case.

no justification to apply the margins of trading activity to indemnity activity is

(4) and (b) accordingly relying on the same we hold that there is

detailed far analysis done in the earlier press especially while considering

the distinctions in the two separate sets of activities and the conclusions on the

distinctions are not necessary as it would necessitate re-iterating the

to be considered. For the said purpose we are of the view that elaborate

protests of indemnity activity for working out the arms length price requires

justification on facts in applying margins earned in trading activity to the

since the answer to question (e) is in the negative the question regarding

coming to the final question which we have passed to ourselves

12.34

the network and interlinkages of of AE.

To how supply chain interlinkages are being created as the assessee is using
The approach of the assesse in allocating the common turnover basis, the approach of the assesse in allocating the common activities and certain expenses on being asked, were allocated on a different basis. The assesse's claim was that assesse utilized were same for both.

13.1.2

It is seen therein the stand of the assesse, was that the material science Pvt. Ltd. 16.12.2011 in 13.1.2 TTA No.07977/W/m/2010 in the case of Bayer.

13.1. The first order which we propose to discuss is the order dated 13.1. They are being discussed separately herunder-

---

TPOs action upheld by the DRP cannot be upheld by us. Accordingly on the issues addressed before us we are of the view that the heretofore are the detailed reasoning given.

12.35.
excess amount granted for goods or services is made to an "NG. We, however, see no substance in this plea. When an

- For ready reference, we reproduce para 92 from the said order:

13.2.2. A perusal of the said order would show that the findings therein

unrelated power.

on record which necessitate such an action and it is not in arbitrary
balance with the duty to do so only on consideration of the facts available
material which operates while exercising the power which necessarily is to be
as powers to do so have been vested on the TP. However, there is a
At the outset there can be no quarrel with the said proposition. 13.2.2

proposition that transactions can be re-characterized by the TP.

Munjal has also been referred to by the LG, CIT Dr. in support of the
others in the case of Seria Pharmaceuticals (India) Pvt. Ltd. vs ACT,
13.2.2. Order dated 31.12.2010 in ITA NO.02469/Mum/2006 and

admitted activity cannot be treated apart with the trading activity.

the ITAT infact supports, the view taken in the present proceeding that the
has not been rebutted. The stand of the TP which has been approved by
provider and acts as a facilitator and the fair analysis available on record
proceedings. In the facts of the present case the assessee is only a service
fact to be taken into consideration and it is not a fact in the present
was achieved through the efforts of the assessee which is a relevant point/

The material fact prevalent in the said case was that the turnover 13.1.3
activities as trading activity in the present case, some necessary exercise.

However, for the justification of re-characterising the indenture

of legally sustainable merits. The objection raised by the learned counsel is devoid
these decisions continue to remain unaffected by these
provisions in the respective countries. The rationale and logic of
they would have been in the absence of such re-characterisation
position in India. Continuing to be prevailent and as useful as

ALP payment is permissible, case to be referred to in India. These
the countries where re-characterisation of payment in excess of
the legislative, but that does not mean that Indian precedents from
legislation, but that does not mean that Indian precedents from
respective of payments made in excess of ALP have not yet been
in excess of ALP, in India, re-characterisation the amount paid

to reduce this effective of a payment in excess of ALP, by providing for re-characterisation. The amount paid
including Canada by way of Section 247(2) of Canadian income

rules, the deduction on account of ALP adjustment, does not

the deduction on account of ALP adjustment, does not

a natural corollary of this finding that the payment so made in
a natural corollary of this finding that the payment so made in

wholly characterised as payment of goods or services. It is only
who is wholly characterised as payment of goods or services. It is only

foreign AE in the garb of payment made to the foreign AE is
the garb of payment made to the foreign AE is

and associated enterprises situated in that tax jurisdiction, and — second, a
domestic tax liability is reduced in respect of income from the
associated enterprises, it has two implications - first, that
Rationability for preferring them is based on the fact that for internal
3.3.1. The said proposition is an accepted proposition. The
to other comparables.
DRT in support of the proposition that internal comparables are preferable
20.1.2011 in ITA No. 3839/DEL/2010 and others in Bima Sar (India) Ltd. vs
13.3. Attention has also been invited by the Revenue to the order dated
General Proposition
on record and which are peculiar to itself and it does not lay down any
the case of Serida Pharmaceuticals India vs. A.C.I. proceeds on facts available
assumption. The order of the Mumbal Bench of the Co-ordinate Bench in
and the DRT are devoid of discussion on facts and proceed on General
was justified in re-characterizing the transaction as the order of the TPO
were unable to conclude with the stand of the Revenue namely that the TPO
found it to be contrary to the stand of the Revenue in the present case. On the facts of the present case, and the TPO in Seberia
upheld for re-characterizing in the facts of Serida Pharmaceuticals case does
not help the Revenue in the present proceedings. The TPO in Serberia
characterization of the transaction the powers of the TPO which have been
not, credit risk etc. As such in the absence of facts justifying the re-
the name of the assessee as such neither there is a price risk, inventory risk
have been purchased in his name nor are the contracts entered into are in
the contrary, the consistent stand of the assessee is that neither the goods
acting as a "trader", No such discussion, reasoning or fact is on record. On
has to be done by the TPO. It has to be demonstrated from facts to show as

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ITA No. 3839/DEL.2010 & ITA No. 5186/DEL-2011
Information Technologies (India) F.R. Ltd. for the proposition that profit of
Attention has also been invited on behalf of the Revenue to the

34. A supplier and the assessee has traded at his own
nature of the goods in which the AEs have transacted with the buyer Indian
distinction but even otherwise, no similarity has been established in the
Not only the two activities are entirely distinct which is the material
the international transactions of support services entered into with the AE.
13.3. There is no similarity between the international comparable applied and
arrived at in the said order/applied./applicable.
those of a trader are separate and distinct and the make the conclusion

and the material distinction in the two activities namely that of a facilitator in
the level is limited to some sales to local entities. No comparison has been made
provider and the trading activity which the assessee has done at its own
development Inducing IT solutions wherein the assessee is a service
products, consumer lifestyle related business and new business
resources, chemical and plastics, real estate development and forest
trading activities entered into by the associated enterprise with its Indian
in the facts of the present case, looking at the diverse nature of
13.3.2

are necessarily have to be the same and identical
transactions, have been undertaken with related parties, unrelated parties
However, for doing so the nature of service/product in respect of which
comparables no adjustments need be made as FTR analysis remains to show.

34
Consequently, the finding therein has no bearing on the present international transactions in the facts of the present case has no relevance. Profits of the AE can not be a consideration while benchmarking the TPO has proceeded on the footing that the two activities are similar and no consideration of the business profile, financial analysis of the assesses, we have come to the conclusion that the two activities are similar and no consideration of the 13.4.2

assess for assessing the departmental stand. The said order has no relevance in the facts of the present case. The TPO has proceeded on the facts of the present case, neither the TPO has directly proceeded nor has been passed the rational canvassed by the TPO. The said order of the said order shows that as in the facts of the said case requested the bench to lay down the proposition that no adjustment of best can exceed the amount of margins retained by the assesses, as well as the AE. A perusal of para 67/86 69 would show that T3.4.1 A perusal of the said order shows that in the absence of transactions in order to arrive at Arms Length Price. The AE cannot be a consideration while benchmarking the international
13.5. Reliance on behalf of the Revenue has also been placed upon the
of Li & Fung (India) Pvt. Ltd. copy filed by the Ld. CIT DR.
13.5.1 A perusal of the said order rendered by one of us (Ld. AM) would
show that the assessee company therein provided buying/sourcing services
for supplying the consumer goods from India for its AE Li & Fung India Pvt. Ltd,
Hong Kong who was sourcing the goods on behalf of its international
customers. The assessee was paid service charges for the services
computed on the basis of cost plus mark up method.
13.5.2 The crucial fact for holding that FOB value of goods should be the
basis for commission of the assessee was the fact that the assessee
admittedly utilizing its human intangibles and supply chain intangibles which
had created by it at own cost had performed all the critical functions
and in the facts of that case and the AE demonstrably and admittedly had
no competence to execute the contracts on its own and thus being
completely dependent on assessee for rendering the services was earning
commission FOB value of goods and the assessee, on the other hand
was being necessarily compensated by cost plus mark up.
13.5.3 Thus in those facts where all the critical functions were being
performed by the assessee utilizing its unique intangibles, who had the
professional and technical capabilities which was further demonstrated
from the fact as the assessee in the facts of that case in the earlier years was
claiming and had been allowed Sec 80D deductions. Thus the existence of
expert knowledge and the demonstrated core competence of the assessee
entirely different. It was also held that the amount of adjustment
20:80 ratio. The facts and FA analysis in the present proceedings are
by the assessees. As a result, the overall earnings of the AE were reduced to
the assessees be deprived of it since critical functions were being performed
this when the AE could earn commission on FOB value of goods why should
available to the AE who was unable to execute the contracts on its own,
manufacturers and labour costs and its pricing cost advantages to make
supply chain management and delivery, location & advantage and
and unique intangibles developed over the years at its own cost utilised the
FOB was completely dependent on the assessees who had used its tangible
said to be at arm's length. The earnings of the AE received at a percentage of
these facts, it was held that such a transaction in the face of it could not be
performed by the assessees who were paid only on cost plus basis. Thus on
commission on FOB value and all the critical functions were being
held to be not capable of executing the contracts and was receiving
proceeds on peculiar facts and circumstances of that case where the AE was
13.5.4 As such the finding arrived in the order of IA Fung India Pvt. Ltd.
Facilitator,

extent, exposed were all taken by them wherein the assessees were merely a
names, negotiations were done by them and the critical decisions of timing,
global players for over 50 years. The contracts were entered into in their
admittedly were taken by the AE's i.e. SCJ and its affiliates who have been
expert knowledge available for taking critical decision. The critical decisions
suggest that the assessees which came into existence in March 2003 had the
was on record. There was no such evidence/material available on record to
transactions. The trading transactions involve risks and
transactions, it is clear that the indent of the assessee is different from the trading

We agree with the assessee's proposition that the

Reproduced hereunder from the said order:-

transactions they were the preferable, comparable. Relevant findings are

Thus when there were internal comparables in the same nature of

AES, as applied to margins earned from the AE it was the same service.

view taken, the assessee there is agreed that the margins earned with non-

were held to be different from Indebted transactions as support the

13.6.1 A perusal of the said order shows that trading transactions

Corporation India Pvt. Ltd. v. DIT case,

dated 31.01.2013 in ITA No. 5095/DEL/2011 in the case of Sumitomo

13.6 At attention on behalf of the revenue has also been invited to order

between the assessee and the AE. The compensation was allocated in the ratio of 80:20

computed by the TP can not exceed the amount which could have been
commission at the rate of 5 per cent on the FOB value of goods sourced by

factors. Reflected the assessed cost plus 15 per cent APL and held that

however, looking at function assets and risks analyses (FAAR) and other

to be the most appropriate method for determination of APL. The TPO

it filed its TP Report claiming TNMM with cost plus 15 per cent remuneration

factualising sourcing of apparel merchandise from India for the parent group.

wholly owned subsidiary of GAP International, USA, and was enquired in

considered by the co-ordinate bench. In the said case, the assesse was a

For the said purpose it is necessary to refer to the facts

the TP adjustment.

relied upon the same for the proposition that make up of 32% was upheld in

case was considered and distinguished by the assesse. The Revenue has

lid v. ACIT (2012) 25 Taxmann.com 414 for the proposition that if a Fund


Relyance has also been placed on order dated 18.09.2012 in TTA

the view taken.

from the said order as in the facts of the present case it supports the case of

Accordingly if is seen that no strength can be derived by the Revenue
13.7.2 Considering the FAR analysis it was held by the co-ordinate bench that the assessee was a low risk procurement service provider. The co-ordinate bench concluded that the assessee proposed the use of TNMM as the most appropriate method with net profit/(total cost as PLI). The department accepted the TNMM with a percentage of FOB value of goods procured by parent as PLI. The dispute in regard to use of the same

the foreign enterprise through Indian vendors was the most appropriate

profit level indicator (PLI) for determining APL. This was so because the

functions performed, assets owned and risks assumed by the assessee were

substantially more than limited risk and assessee’s functions were not only

that of a service provider. Further but of a higher responsibility it was

inferred that the assessee created substantial intangible assets through its

operations. The TPO also alleged that on account of operating in a low cost

economy, the assessee had generated location savings in India which had

not been factored into its remuneration model. The TPO thus rejected

the assessee’s cost plus remuneration based model. TPO’s report was

accepted by DRP. The issue was agitated by the assessee before the

Tribunal.
considering the EAC analysis and order of L & Fung the issue was decided in
the following manner.

"vi. Considering above we conclude that non risk
bearing procurement facilitating functions which are
preordained by contract and handbook the appropriate PL will
be net profit/total cost and not the % of FOB value of goods
sourced by AE. Accordingly, we uphold the net profit/total cost
remuneration model adopted by the assessee. Having held so
now we proceed to decide the percentage of markup to be
applied to assessee's cost."

13.7.3.
Since in the facts of the present case the assessee had applied cost
plus 15% AIP and the entire commission of L & Fung Group to L & Fung
India worked out as per the calculations provided by the assessee's counsel,
that his suggestion with the Office of L & Fung India worked out of 32.43% be
applied. The said proposal of the assessee was accepted and 32% cost plus
markup was accepted. In the facts of the present case the same have no
role to play as it was a concession given by the assessee in the said case.

14. Accordingly for the reasons discussed hereinabove on facts and law in
the light of the arguments advanced before the Bench and the material
available on record the ground no 2 in ITA No. 5186/DEL/2011 and ground
NO 3 to 8 in ITA No. 5434/DEL/2012 are decided in assessee's favour.

15. In ITA 5433/DEL/2012 in the remaining ground 9 the assessee has
assailed the action of the TPO upheld by the DRP in limiting depreciation to
15% in regard to the computer peripherals as opposed to the 60% as per
assessee claim. It is seen that the issue is no longer res intera as the same
stands covered by the judgment of the High Court in appeals favour in the case of CIT v/s. BSES Rajdhani Limited. Both the parties have been heard. The AO is directed to grant necessary relief. Ground No. 9 is allowed. In the result, ITA 5166/Del/2011 is allowed and ITA 5433/Del/2012 is partly allowed for statistical purposes.

The order is pronounced in the open court on 15th April 2013.

Dated: 15/04/2013

[Signature]

Accountant Member

[Signature]

Judicial Member

[Signature]

Assistent Registrar

ITAT New Delhi

Delhi Beaches, New Delhi

[Signature]