

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I", DELHI

BEFORE SHRI.RIFAUR RAHMAN, ACCOUNTANT MEMBER  
And  
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.442/DEL/2017  
(Assessment Year: 2012-13)

Verizon Communications India P. Ltd.,  
A-Wing, 3<sup>rd</sup> Floor, Radisson Commercial Plaza,  
NH-8, New Delhi 110037  
PAN: AAACW-3738-L

..... Appellant

Vs.

Additional CIT, Special Range-9,  
New Delhi

..... Respondent

Appellant by	:	Shri Ajay Vohra, Sr. Adv. S/Shri Alok Kr. Sinha, Devashish Poddar, Ms. Nupur Jindal & Ms. Hemlata, Chartered Accountants
Respondent by	:	Shri Dharm Veer Singh, CIT-DR
Date of hearing	:	03.12.2025
Date of pronouncement	:	25.02.2026

ORDER

PER S.RIFAUR RAHMAN,AM:

This appeal by the assessee is directed against the Assessment Order passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act,1961 (hereinafter referred to as 'the Act') dated 30.11.2016, for Assessment Year 2012-13. The assessee had raised following grounds of appeal:

1. That the order passed by the Additional Commissioner of Income-tax, Special Range -9, New Delhi ('the learned AO') after incorporating the adjustments proposed by the Deputy Commissioner of Income Tax- Transfer Pricing Officer-3(3)(1), New Delhi ('the learned TPO') and pursuant to the directions of the Dispute Resolution Panel ('Hon'ble DRP') (hereinafter collectively referred as the Revenue'), is contrary to the facts and circumstances of the case, based on

surmises and conjectures, against law and principles of natural justice and thus erroneous and unsustainable.

Proportionate disallowance of deduction claimed under section 80-IA of the Income-tax Act, 1961 ('the Act')

2. Based on the facts and circumstances of the case and in law, the Revenue has erred in proportionately disallowing the deduction claimed by the Appellant under section 80-IA of the Act to the extent of IN 10,121,551.

3. The Revenue failed to appreciate that the Appellant started rendering Telecommunication Services before the sunset date 31 March 2005 after fulfilling all the other conditions prescribed in section 80-IA of the Act and after obtaining National Long Distance ('NLD?)/ International Long Distance ('ILD') licenses, continued to render Telecommunication Services from the existing undertaking itself in a more efficient and secure manner. The Hon'ble Tribunal in the Appellant's own case for AYs 2010-11, 2011-12, 2013-14 and 2015-16 has deleted the proportionate disallowance of the deduction under section 80-IA of the Act by holding that no new undertaking came into existence by virtue of the NLD/ILD licenses, and the nature of services that were being rendered prior to 31 March 2005, fundamentally remained unchanged even under the NLD/ILD licenses.

4. The conclusions of the Revenue that the Telecommunication Services provided by the Appellant under the NLD/ILD licenses constitute an independent undertaking and that the licenses issued by Department of Telecommunications have a bearing on eligibility under section 80-IA of the Act, are without any cogent reasons or without any material or evidence brought on record by the Revenue.

5. Without prejudice to the above, the Revenue erred in facts in ignoring that the income arising from the NLD/ILD licenses are "profits and gains of the eligible business' and hence eligible for deduction under section 80-IA of the Act.

6. The Revenue has erred in excluding an amount of INR 1,58,87,48,702 pertaining to Telecommunication Services revenue credited under the head 'Service Income', in computing the deduction under section 80-IA of the Act without providing any cogent basis for the same.

Disallowance of payments for telecommunications services made to MCI Communication Services Inc. ('MCICS') and MCI International Inc. ('MCII) under section 40(a) (i) of the Act

7. Based on the facts and circumstances of the case and in law, the Revenue has erred in disallowing under section 40(a)(i) of the Act a sum of INR 161,05,56,443, being the amount paid by the Appellant to MCICS and MCII towards provision of Telecommunication Services outside India.

8. The Revenue erred in law in characterizing payments made to MCICS and MCII as 'Royalty' under section 9(1)(vi) of the Act and the India-US Double Taxation Avoidance Agreement ('Tax Treaty') disregarding various judicial pronouncements. The Hon'ble Tribunal in the Appellant's own case for AYS 2010-11, 2011-12, 2013-14 and 2015-16 held that the above Telecommunication charges paid to MCICS and MCII are not in the nature of 'Royalty' under the Tax Treaty and hence not chargeable to tax in India and consequently TDS is not required under section 195 of the Act. Hence, the disallowance under section 40(a)(i) was deleted.

9. The Revenue erred in law in applying the definition of 'Royalty' in section 9(1)(vi) of the Act as amended vide the Finance Act, 2012 in interpreting the definition of 'Royalty' contained in Article 12 of the Tax Treaty.

10. Without prejudice to the above, the Revenue failed to appreciate that an amendment to the provisions of section 9(1)(vi) of the Act with retrospective effect cannot give rise to withholding tax obligations for transactions concluded prior to such amendments as affirmed by this Hon'ble Tribunal, various Hon'ble High Courts and the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42 (SC).

Disallowance under section 40(a)(ia) of the Act on non-deduction of tax on office running and maintenance expenses

11. The Revenue has erred in disallowing an ad-hoc amount of INR 242,300 on alleged non-deduction of taxes under Section 194C of the Act in complete disregard of the fact that the expenditure had already been disallowed suo moto by the Appellant while filing its return of income.

### Transfer Pricing Grounds

12. On facts and in law, the Revenue has erred in making an adjustment of INR 834,957,287 to the total income of the Appellant on account of the difference in the arm's length price ('ALP') of its international related party transactions under the provisions of section 92CA(4) of the Act.

13. On facts and in law, the Revenue has erred in rejecting the transfer pricing analysis undertaken by the Appellant and in doing so, not appreciating that the conditions set out in section 92C(3) of the Act are not satisfied in the present case.

14. On facts and in law, the Revenue erred in rejecting the Appellant's business model [Limited Risk Model (LRM)] and re-characterizing the Appellant as a full risk service provider based on assumptions, conjectures and surmises.

15. On facts and in law, the Revenue erred disregarding the functional profile of the Appellant pertaining to provision and availing of business services in a LRM model and in doing so, erred in:

- Questioning the commercial expediency of the business of the Appellant; and
- Disregarding the nature of services, receipt of services, ensuing benefits and pricing.

16. On facts and in law, the Revenue erred in summarily rejecting the Transactional Net Margin Method ("TNMM") selected by the Appellant, without demonstrating its inadequacy or infirmity.

17. On facts and in law, the Revenue erred in selecting the Other Method to benchmark the international transaction without citing any comparable uncontrolled transaction / situation. The Appellant craves leave to alter, amend, or withdraw all or any of the Grounds of Appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing.

18. The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.

Others

19. Without prejudice to the above, the deduction under section 80-IA of the Act is allowable based on finally assessed income.

20. Without prejudice to the above, the Revenue has erred in facts in not giving credit for advance tax of IN 6,00,000 and taxes deducted at source of IN 10,11,24,997 while determining the tax payable, as per the notice of demand issued to the Appellant.

21. That in view of the aforementioned errors, the Revenue has erred in computing the interest leviable under section 234B and 234D of the Act amounting to INR 38,92,47,320 and INR 1,87,98,779 respectively.

2. At the time of hearing, the Ld. Authorised Representative (AR) submitted that the assessee has raised 18 grounds of appeal. Ground No. 1 is general in nature and Grounds No. 2 to 6 relate to the issue of deduction under section 80-IA of the Act, which, according to him, is covered in favour of the assessee. Grounds No. 7 to 10 relate to disallowance under section 40(a)(i) of the Act, Ground No. 11 relates to non-deduction of tax, and Grounds No. 12 to 18 relate to transfer pricing issues based on engineering analysis, which, according to him, are also covered in favour of the assessee. Grounds No. 19 to 21 are consequential in nature.

Accordingly, Ground No. 1 is dismissed.

Coming to Grounds No. 2 to 6, the relevant facts are that during the assessment proceedings, the Assessing Officer observed from Form No. 10CCB dated 12.11.2012, duly certified by a Chartered Accountant, that the assessee had claimed deduction under section 80-IA of the Act for the first time in Assessment Year 2007-08. As per the provisions of section 80-IA of the Act, the deduction is available for a period of ten years, i.e., 100% of profits for the first five years and 30% for the remaining five years. The deduction under section 80-IA can be claimed

in any ten consecutive years out of a block of fifteen years commencing from the year in which the telecommunication undertaking starts providing services. The Assessing Officer further observed that, as per the records submitted during the assessment proceedings, the assessee obtained an Internet Service Provider (ISP) licence from the Department of Telecommunications (DoT) in May 2003 and started providing services under the said licence during the year ended March 2003. Accordingly, the assessee was eligible for a tax holiday of 100% of profits up to Assessment Year 2011-12 and 30% of profits from Assessment Year 2012-13 to 2016-17. The Assessing Officer further observed that the assessee had also claimed deduction under section 80-IA of the Act on profits arising from the provision of National Long Distance (NLD) and International Long Distance (ILD) services. Referring to the provisions of section 80-IA of the Act, he observed that, in order to be eligible for deduction under the said section, the undertaking was required to satisfy the following conditions:

*“The undertaking or the enterprise, in order to be entitled to claim the deduction under section 80-IA of the Act would have to satisfy the following conditions:*

- *The undertaking or the enterprise is not formed by splitting up or reconstruction of a business already in existence;*
- *The undertaking or the enterprise is not formed by the transfer to a new business of machinery or plant previously used for any purpose.*
- *Undertaking should have started providing telecommunication services on or before March 31.2005.*

3. The Assessing Officer observed that an undertaking which had commenced providing telecommunication services on or before 31st March 2005 would be eligible for the tax holiday. He further observed that, in the present case, the

assessee had commenced services under the ISP undertaking prior to 31st March 2005 and complied with the aforesaid conditions and, therefore, was eligible for deduction under section 80-IA of the Act. However, he noted that the issue which required examination was whether the rendering of services under the NLD/ILD licences amounted to an expansion of the existing ISP undertaking, which had commenced providing telecommunication services prior to the sunset date of 31st March 2005, and accordingly was eligible for deduction under section 80-IA of the Act, or whether it amounted to setting up of a separate, new and independent undertaking after the sunset date of 31st March 2005. When the assessee was asked to explain the same, it submitted detailed submissions vide letter dated 24.12.2015. After considering the submissions, the Assessing Officer rejected the same and observed as under:

*“The assessee in its submissions dated 24 December 2015 has itself admitted that deduction u/s 801A of the Act only requires that the assessee should commence providing eligible telecommunications services prior to April 1, 2005. And in the present case even if we assume that ISP services and ND/ILD services are the same, then the NLD/ILD services which the assessee is claiming as eligible telecommunications services have not commenced before April 1, 2005 which is an admitted fact. Alternatively, even if it is presumed that the ISP services and NLD/ILD services are the same services, then also they have not commenced together and only in respect of ISP services, the assessee was having eligibility to claim deduction u/s 801A.*

*(ii) The contention of the assessee that in principle, the licenses issued by the DOT should have no bearing on the eligibility for deduction us 801A, also does not hold good. Since, without having DOT licenses, the assessee is not even eligible to provide such services in India. Therefore this proposition is very absurd. If someone is not even eligible to provide some kind of services, then how a statutory claim can be availed by it*

*(iii) Further, the assessee has submitted that NLD/ILD licenses have been taken by the assessee company, purely to enhance its data transmission services and provide a more secure environment to its customers for transmission of their data. Therefore, it is evident that the service-base of the existing undertaking has been widened and upgraded and it is not possible without having an extension of existing undertaking in terms of infrastructure, i.e. expanding network, increasing man power, installing new assets etc. to the undertaking in terms of infrastructure, i.e. expanding network, increasing man power, installing new assets etc. to the undertaking*

*(iv) Reference is made to the decision of Hon'ble Bombay High Court In the case of CIT Bombay CIT-I vs. Associated Cement Companies Ltd 118 ITR406 which has examined the issue as to what constitutes an expansion/extension of undertaking vis-a-vis establishment of new undertaking. The courts have held that where a new activity can exist without the base of existing undertaking it can be said that a new undertaking has emerged.*

*"There can be no doubt that the construction of each of the new kilns at each of the four factories has resulted in an expansion of the factory itself. That by itself would, however, not disentitle the assessee to the relief under s. 15C. Establishment of a new industrial unit as a part of an already existing industrial establishment may no doubt result in an expansion of the industry or the factory, but if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and is itself, independently of the old unit, capable of production of goods, then, in our view, it could be classified as a newly established industrial undertaking."*

*(v) The Allahabad High Court in the case of CIT vs. Adarsh Cold Storage 280 ITR 58 (Allahabad) has held that the real test to determine whether an undertaking constitutes a new undertaking or an extension of the existing undertaking is to determine whether the undertaking is capable of functioning independently or requires functioning of the old undertaking too.*

*(vi) In the instant case the services under NLD/ILD license are separate distinguishable on the basis that it requires a separate telecom license and it operates on a different intelligent network. And NLD / ILD services can be carried independently even if SP services are not carried in future.*

*(vii) Based on the above law, judgment and nature of services involved, it is held that the assessee company providing NLD / ILD license constitutes an independent undertaking and accordingly, the profits earned from NLD and ILD services are not eligible for deduction u/s 801A of the Act.*

*(viii). Section 80-IA applies to -*

*(i) Any enterprises carrying....*

*(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, [2005].*

*Explanation.—for the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;*

*The assessee company started a new undertaking providing services of NLD and ILD in the year 2008 and received a licence in the year 2008.*

*(ix) The assessee in its submission dated 24 December 2015 stated that "when the foreign direct investment was allowed for the NLD and ILD services, the assessee obtained the NLD and ILD licence in January 2008".*

*As per section 80-IA(4), the assessee company should start services on or after 1<sup>st</sup> day of April, 1995 but on or before the 31<sup>st</sup> day of March 2005, but that is not the case.*

*(x) The assessee stated that "provision of section 801A of the Act do not in any manner prescribe any requirement for any regulatory approval as a pre-condition for eligibility to claim deduction under the section."*

*In this connection reliance is placed upon the judgment of Hon'ble Gujarat in the case of CITY. Jolly Polymers (2012) 342 ITR 87/249 CTR 421 (Guj.) (High Court), where it was held that:*

*"To qualify for deduction under Section 80-1B(4) of the Act, one of the essential requirements is that the industrial undertaking should have begun to manufacture or produce articles or things on or before March 31, 2004. It was*

*held that where the assessee had not even applied for a factory licence before 31st March, 2004, the necessary condition under Section 80-iB was not fulfilled. However, where application for licence was already made before 31st March 2004, but licence was obtained shortly thereafter, such lapse must be viewed as purely technical. The grant of licence would not relate back to the original date of application."*

*Since the facts and condition of the above referred judgments are similar to the case of assessee, drawing strength from the above judgment, the deduction claimed u/s 80-IA for the undertaking providing NLD and ILD services is disallowed."*

4. Further, the Assessing Officer observed that during the assessment proceedings the assessee was asked to explain as to why the other services income of Rs.1,58,87,48,702/- should not be excluded while computing the deduction under section 80-IA of the Act. In response, the assessee submitted detailed submissions vide letter dated 24.12.2015. In the said submissions, the assessee stated that pursuant to the Service Agreement dated 14.12.2007 entered into with MFS Globenet Inc. and the Novation Agreement dated 01.02.2008 executed in favour of MCI Communications Services Inc., USA (MCICS), the assessee provides telecommunication services to customers outside India through MCICS, as the assessee does not have the requisite approvals and infrastructure to provide such services outside India. It was further submitted that the assessee provides telecommunication services to the customers of MCICS within the territorial limits of India, wherever required. Accordingly, it was contended that the other services income received from MCICS also pertained to telecommunication services provided by the assessee to MCICS, enabling MCICS to render end-to-end telecommunication services to its customers, and therefore such income was eligible for deduction under section 80-IA of the Act. The Assessing Officer, after considering the submissions of the assessee, found the same to be unacceptable.

Accordingly, he proceeded to exclude the other services income of ₹1,58,87,48,702/- while computing the deduction under section 80-IA of the Act. Since the assessee did not furnish segment-wise income and expenditure details for NLD and ILD services, the Assessing Officer made a proportionate disallowance on the basis of revenue of each segment. Accordingly, he disallowed an amount of Rs.1,01,21,551/- under section 80-IA of the Act on the basis of the following computation:

Particular		Amount (RS.)
Deduction u/s.80IA calculated as per Form 10CCB	(A)	1,05,14,349
Revenue from NLD and ILD (as per financials)	(B)	3,74.58,39,786/-
Other services Income (as per financials)	(C)	1,58,87,48,702/-
Total (B)+(C)	(D)	5,33,45,88,488
Total Revenue	(E)	5,54,16,12,897/-
Proportionate amount of Disallowance	(A*D/E)	1,01,21,551

5. Aggrieved by the above order, the assessee raised objections before the Dispute Resolution Panel (DRP). However, after considering the submissions of the assessee, the Ld. DRP rejected the objections raised by the assessee. Consequently, the deduction claimed under section 80-IA of the Act was denied in the final assessment order.

6. At the time of hearing, the Ld. AR submitted that the issue under consideration is already covered in favour of the assessee by the decision of the Tribunal in the assessee's own case in ITA No. 2235/Del/2019 vide order dated 28.03.2020. Further submitted that the issue under consideration is squarely

covered in favour of the assessee by the order of the Tribunal in the assessee's own case vide order dated 20.10.2021 in ITA No. 7294/Del/2017.

7. On the other hand, the Ld. DR relied upon the findings of the lower authorities.

8. Considered the rival submissions and perused the material available on record. We observe that an identical issue was considered by the Coordinate Bench of the Tribunal in the assessee's own case, wherein it was held as under:

*"5. The underlying facts in the issue are that the assessee commenced providing telecommunication services from May, 2002. A deduction u/s. 80 IA of the Act was claimed by the assessee on profits derived from telecommunication services. A.Y.2007-08 was taken as the first of the 10 years out of a block of 15 years as stipulated under the provisions of section 80 IA of the Act. Accordingly the assessee claimed the deduction u/s. 80 IA for the first time in A.Y.2007-08. The claim was allowed by the AO.*

*6. In January 2008, the assessee also obtained NLD and ILD licenses from the DoT and continued to provide telecommunication services with enhanced quality. The assessee claimed deduction under section 80-IA of the Act on profits derived from telecommunication services including the services rendered pursuant to these licenses for the assessment years under consideration.*

*7. The AO was of the opinion that the services provided pursuant to ILD/ NLD license constitute a new and independent undertaking and since the license was received in 2008, according to the AO the assessee has not complied with the condition requiring that the telecommunication services should commence prior to 1, April 2005. Since the assessee did not provide any segmental income expenditure for NLD and ILD services, proportionate disallowance is made on the basis of revenue.*

*8. The proportionate disallowance for the year under consideration is as under :-*

4. **Proportionate disallowance of Section 80-IA claim by Ld. AO in the assessment order**  
The Ld. AO made the following proportionate disallowances for the subject years under appeal:

S. No.	Assessment Year	Amount of deduction claimed under section 80-IA of the Act	Amount of proportionate disallowance of section 80-IA claim
1.	2010-11	INR 21,02,98,950	INR 11,14,74,058
2.	2013-14	INR 7,22,99,439	INR 7,04,26,915
3.	2015-16	INR 4,99,00,321	INR 4,93,69,369

9. Assessee carried the matter before the CIT(A) but without any success.

10. Before us the Counsel for the assessee drew our attention to the decision of this Tribunal in assessee's own case for A.Y.2011-12 and pointed out the relevant findings of this Tribunal claiming that the issue has been decided by the Tribunal in favour of the assessee.

11. Per contra the DR did not bring any distinguishing decision in favour of the revenue.

12. We have carefully considered the orders of the authorities below and have carefully perused the decision of this Tribunal in assessee's own case for A.Y.2011-12.

13. We find force in the contention of the counsel. This Tribunal in A.Y.2011-12 has resolved this quarrel in favour of the assessee. The relevant findings read as under:-

*.....The Revenue's case hinges upon the presumption that the services provided under the new licenses tantamount to acquiring of a new undertaking which has come into existence with additional infrastructure and these new services are not possible without new undertaking coming into existence post cut-off date of 31<sup>st</sup> March, 2005 prescribed in Section 80IA (iv)(ii) of the Act. This presumption is nowhere backed by any material or any evidence or any kind of inquiry that whether any separate undertaking has been established to provide services in the light of second license obtained by the assessee. The main conditions for eligibility of deduction u/s.80IA is that, firstly, it is available to an undertaking or an enterprise carrying on eligible business which here in this case is telecommunication services; secondly, undertaking must have started rendering the telecommunication services on or after 1st April, 1995 but before 31st March, 2005 and lastly undertaking is not formed by splitting up or reconstruction of business already in existence or form of a transfer to a new business or a machinery or plant previously used for any purpose. The assessee was in the business of transmission of data or provision of internet services which it qualified for deduction within the ambit and scope of Section 80IA(iv). After obtaining ISP license in May, 2002 it has been carrying on such services and reporting the revenue from the provision of telecommunication services. The main issue here is, if the assessee has got a license in January, 2008 under NLD / ILD license from DOT whereby it has enhanced its existing services in a much secured form, then whether it tantamount to setting up new undertaking. Now in our opinion both the authorities erred in equating a license obtained under the DoT regulations with the concept of undertaking in terms of Section 80IA, which is an independent of the license regime or any other regulation of the Dot. The only requirement for the undertaking to claim deduction is that such an undertaking start providing telecommunication services prior to 1<sup>st</sup> April, 2005. The Act does not stipulate that the services undertaken under a separate license to provide better services will constitute a new undertaking, and therefore, benefit u/s.80IA is to be denied. The service rendered under NLD/ ILD license is not separate undistinguishable from the ISP licenses carried out earlier. The license regime of Indian telecom Industry keeps on changing and it cannot be held that the services rendered under the second license was entirely a new line of business albeit it is a conversion between various service, network platform, technologies with the objective to provide secure, reliable, affordable and high quality converged telecommunication services. It has been informed by the Id. counsel that Government of India from August, 2013 has dispensed with separate license policy and introduced the regime of Unified License for all the telecommunication services and also facilitates the migration of existing licenses to unified license. Thus, it cannot be held that if the assessee who was otherwise eligible for tax holiday for a period of ten years and the suddenly one regime of Unified License has been introduced, then all the existing telecom industry will lose the benefit provided under the Act. As pointed out by the Id. counsel, the assessee continued to use the same operational, technical, marketing and*

*administrative support to provide data transmission services under internet and continues to use the same and certain additional bandwidth under the existing arrangement entered with telecom companies for provision of services. It is in fact continuity of services except that the assessee is providing private internet service with more secure form of data transmission between the close user group and it is not entirely a new kind of business. Thus, the reasoning given by the Assessing Officer and Ld. CIT (A) for making proportionate disallowance of deduction cannot be sustained and same is directed to be deleted.”*

14. *Since the factual matrix and the arguments are identical. Facts consider in A.Y.2011-12, respectfully following the decision of the coordinate bench (supra) we direct the AO to delete the proportionate disallowances.*

15. *Ground No.2 to 6 of A.Y.2010-11, ground 2 to 2.5 for A.Y.2013-14 and ground No.2 to 7 for A.Y.2015-16 are allowed.*

16. *The second common grievance relates to the disallowance of telecommunications expenses paid to Foreign Telecom Operators.*

17. *The underlying facts in this issue are that the assessee contracts with its customers for providing data transmission services in India and overseas in a safe and secure manner. While the assessee possesses the requisite licenses and infrastructure to render the telecommunication services in India, it is not able to do so outside India. The assessee has entered into an agreement with MCI Communication Services Inc. (MCICS) and MCI International Inc. for providing telecommunication services outside India. This is a quid pro quo arrangement wherein the assessee provides similar telecommunication services to the Foreign Telecom Operators (FTOs) within India as and when they require. In consideration to the services received from FTO the assessee has made payments to the FTOs. The assessee separately received payments from the FTOs for the telecommunication services provided by it within India.*

18. *The AO disallowed the payments so made u/s. 40 (a) (i) of the IT Act, 1961 for non-withholding of taxes.*

19. *When the matter was agitated before the CIT(A) it was strongly contended that no such withholding of taxes was required in terms of the provisions of section 195 of the Act since the subject payments were not chargeable to tax in India under the provisions of the Act and India-US Double Taxation Avoidance Agreement ('DTAA')."*

9. Since the factual matrix and the arguments in the present year are identical to those considered by the Coordinate Bench in the assessee's own case, respectfully following the aforesaid decision, we direct the Assessing Officer to

delete the proportionate disallowance made under section 80-IA of the Act. Accordingly, Grounds No. 2 to 6 raised by the assessee are allowed.

10. With regard to Grounds No. 7 to 10 relating to disallowance under section 40(a)(i) of the Act, the brief facts are that during the assessment proceedings, the assessee was asked to show cause as to why the telecom charges paid to non-resident telecom operators should not be disallowed under section 40(a)(i) of the Act for non-deduction of tax at source under section 195 of the Act.

11. In response assessee submitted vide letter dated 24.12.2015 with the classification as under:-

S. No	Particulars of Non-resident Telecom Operator	Amount (Rs.)
1	Telecom service charges of MCI Communications Services Inc. (MCICS)	2,42,37,05,989
2	Telecom Services charges to MCI International Inc. (MCI)	32,44,218
3	Telecom charges paid to other non-resident Telecom Operators	1,85,63,523
	Total	2,44,55,13,730

12. The assessee further submitted that the aforesaid payments made to non-resident telecom operators were not in the nature of royalty under the provisions of section 9(1)(vi) of the Act read with the relevant provisions of the India-USA Double Taxation Avoidance Agreement (DTAA).

13. It was also submitted that the retrospective amendments introduced by the Finance Act, 2012, whereby the definition of "process" was inserted in section 9(1)(vi) of the Act, could not be read into tax treaties and could not be applied for interpreting the definition of royalty under the DTAA. In support of this contention,

reliance was placed on the decision of the Hon'ble Delhi High Court in the case of **DIT vs. New Skies Satellite BV and Shin Satellite Public Company Ltd.** (ITA Nos. 473/2012, 474/2012, 500/2012 and 244/2014). The Assessing Officer, after considering the submissions of the assessee, rejected the same and held that the telecom charges paid or payable to non-resident telecom operators constituted royalty within the meaning of Explanation 2 to section 9(1)(vi) of the Act. He relied upon the decision of the Hon'ble Madras High Court in the case of **Verizon Communications Singapore P. Ltd.** (361 ITR 575), wherein it was held that, in view of the retrospective amendments made to section 9(1)(vi) of the Act with effect from 01.06.1976, bandwidth payments made by Indian customers to a Singapore-based company for providing end-to-end internet connectivity outside India were taxable as royalty. Accordingly, the Assessing Officer proceeded to disallow an amount of ₹1,61,05,56,443/- under section 40(a)(i) of the Act.

14. Aggrieved by the above order, the assessee raised objections before the Dispute Resolution Panel (DRP). However, after considering the submissions of the assessee, the Ld. DRP rejected the objections. Consequently, the final assessment order was passed.

15. Aggrieved by the same, the assessee is in appeal before us.

16. At the time of hearing, the Ld. AR submitted that the issue under consideration is fully covered in favour of the assessee. He drew our attention to the decision of the Hon'ble Delhi High Court in the assessee's own case, wherein the detailed findings of the Delhi Bench of the Tribunal in ITA No. 2235/Del/2019 were upheld. He further drew our attention to the relevant findings of the Tribunal, placed on record at pages 1 to 16 of the paper book.

17. On the other hand, Id. DR relied on the findings of the lower authorities.

18. Considered the rival submissions and perused the material available on record. We observe that an identical issue was considered by the Coordinate Bench of the Tribunal, wherein it was held as under:

*“14. After considering the relevant findings given in the impugned order as well as the judgments relied upon by the authorities before us, we find that the Assessing Officer has made the disallowance u/s.40(a)(i) for the payment made to various telecom operators for data transmission outside India. The assessee has entered into an agreement with foreign telecom operators for the provision of data transmission outside India which has been held to be in the nature of royalty in view of the amended provision brought by the Finance Act, 2012 in Section 9(1)(vi) with retrospective effect and in support judgment of Hon'ble Madras High Court has been relied upon in the case of Verizon Communication Singapore (supra).*

*15. As pointed out by the Id. counsel that this issue is no longer in debate in the jurisdiction of Hon'ble Delhi High Cour in the case of DIT vs. New Skies Satellites BV (supra). The Hon'ble Delhi High Court has discussed this issue threadbare and have also distinguished the judgment of Inco Hon'ble Madras High Court in the case of Verizon Communication Singapore (supra). The Hon'ble Delhi High Court after analyzing the provision of Section 9(1)(vi) read with Explanation - 2 have observed that debate regarding data transmission services falls within the ambit of royalty now stands settled by the judgment of Hon'ble Delhi High Court in the case of Asia Satellites Telecommunications Co. Ltd. (supra) wherein it has been held that data transmission services could not qualify as royalty in order to be taxed under the Act. Their Lordships have further held that the amendment brought in the Act with retrospective effect or prospective cannot be read in the DAA. Thus, even if there is an amendment brought in the statute, the same cannot be read into the treaty with respective countries where foreign telecom operators are providing data transmission services outside India. The ratio and principle laid down by the Hon'ble jurisdictional High Court will squarely apply as the payment has been made to foreign telecom operators for data transmission services Thus, this issue stands covered in favour of the assessee. Accordingly, the disallowance made by the Assessing Officer is deleted. The assessee was not required to deduct TDS on such*

*payment as it does not fall within the ambit of royalty, within the relevant Article of DTAA.”*

19. Respectfully following the aforesaid decision, and noting that the same has also been upheld by the Hon'ble Delhi High Court in the assessee's own case, we hold that the disallowance made under section 40(a)(i) of the Act is not sustainable.

20. In the result, grounds raised by the assessee are allowed.

21. With regard to Ground No. 11, the Ld. AR submitted that the Assessing Officer disallowed an amount of Rs2,42,300/- on an ad hoc basis alleging non-deduction of tax under section 194C of the Act. In this regard, he submitted that the said expenditure had already been disallowed by the assessee suo motu in its computation of income. Therefore, he contended that the same amount could not be disallowed again.

22. On the other hand, Id. DR submitted that the issue may be remitted back to AO.

23. Considered the rival submissions and perused the material available on record. We observe that the assessee has already disallowed the aforesaid amount under section 40(a)(ia) of the Act suo motu, and it was submitted before us that the Assessing Officer has made the disallowance once again. In the interest of justice, we deem it appropriate to restore this issue to the file of the Assessing Officer for verification of the assessee's claim and found proper same may be allowed in accordance with law.

24. Accordingly, ground no. 11 of the assessee is allowed for statistical purpose.

25. With regard to grounds on TP issues raised by the assessee, brief facts of the case are, the assessee incorporated on January 2002, is a subsidiary of Verizon Asia Pacific Holdings Pte Ltd with ultimate holding company being Verizon Communications Inc., (Verizon Communications Inc., and its affiliates hereinafter referred to as the 'Verizon Group') located in United States of America. The Verizon Group provides tailored and customized telecommunications connectivity and IT solutions to multinational customers and government agencies. The assessee operates as part of Verizon Enterprise Solution business segment of Verizon Group and commenced providing telecommunication services by obtaining an Internet Services Provider (ISP) license from the DoT in Financial Year ('FY') 2002-03. Thereafter, in order to facilitate provision of telecommunication services in a more efficient and secured manner, the Appellant obtained National Long Distance ('NLD') and International Long Distance ('ILD') licenses from the Department of Telecommunications ('DoT), Govt. of India. During FY 2011-12, the Appellant entered into various international transactions with its AEs which are listed at page number 2 of the Transfer Pricing Officers ('TO's') order. The TPO disregarded the benchmarking analysis conducted by the Appellant using Transactional Net Margin Method ('TNMM') as the most appropriate method in respect of the international transaction of provision and availing of business services and substituted the same with his own analysis without demonstrating the ind. Hence, made an adjustment of IN 834,957,287 to the total income of the Appellant on account of difference in the arm's length price.

26. Based on the order of the TPO, the Assessing Officer proposed an upward transfer pricing adjustment of Rs.83,49,57,287/- in the draft assessment order. Aggrieved by the draft order, the assessee filed its objections before the Dispute

Resolution Panel (DRP). The DRP, after considering the submissions of the assessee, upheld the order of the TPO and confirmed the adjustment.

27. The Id. AR further submitted the written submissions are as under:

■ *Ground of Appeal No. 14 - Incorrect rejection of the Limited Risk Model (LRM) and incorrect re-characterization the Appellant as a full risk service provider without appreciating the facts of the case*

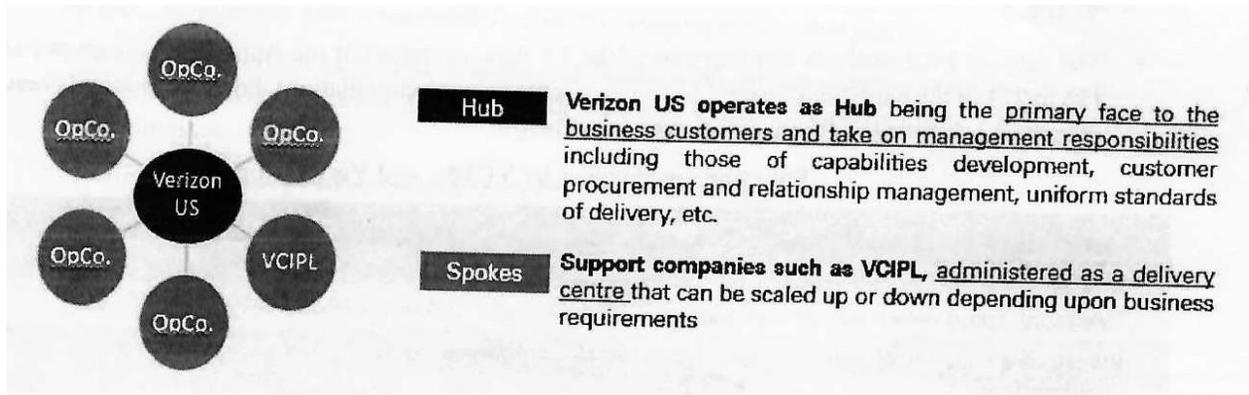
■ *The Group operates in the form of a Hub and Spoke model, which is used in the context of multilocation service provisioning businesses with the 'Hub' being the primary face to the business customers and extensions called 'Spokes' are leveraged to provide the services, distributed across multiple locations. In a wider role, the Hub is expected to take on management responsibilities including those of capabilities development, customer procurement and relationship management, uniform standards of delivery, etc. On the other hand, a Spoke is administered as a delivery centre that can be scaled up or down depending upon business requirements.*

■ *In the Verizon system, Verizon US serves as the sole entrepreneur which carry out functions such as:*

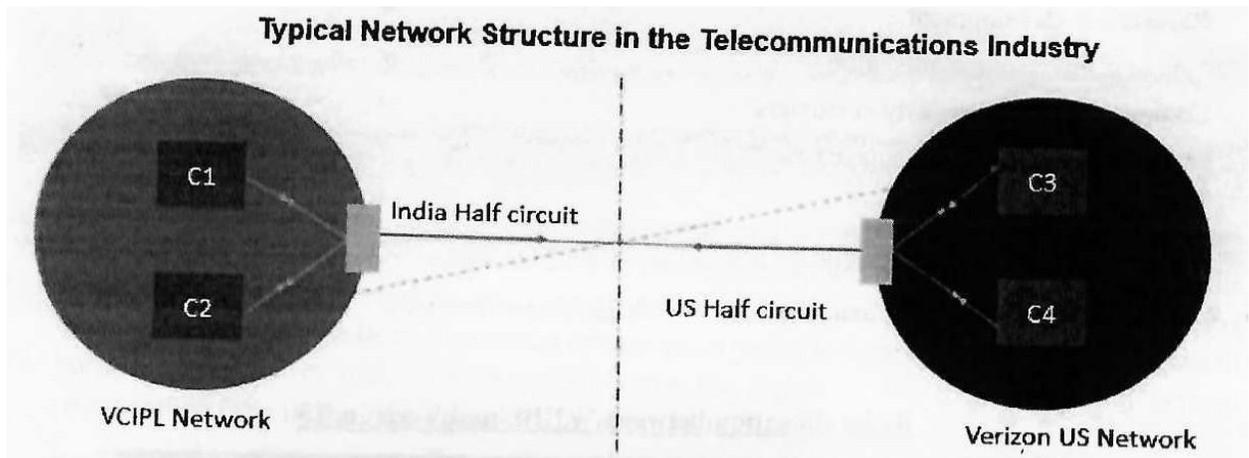
- *Global telecommunications strategy formulation;*
- *Investment in technology and R&D;*
- *Network procurement and management across the globe;*
- *"Verizon" brand development and management; etc*

■ *The other support companies in the Group such as VCIPL, operate as the service arm of the Group, which help the Group in providing telecommunication services to its clients and their affiliates having presence in their local jurisdictions.*

■ *This model is explained below through a pictorial form:*



■ *Typical Network Structure in the Telecommunication Industry*



*-VCIPL, while serving its customers in India, provides connectivity upto India half circuit*

*-Similarly, Verizon US provides services to its customers connecting the US half circuit*

*-It is evident that in the entire supply chain, Verizon US is providing operational support in the form of telecommunications services/connectivity, strategic support in the form of technology, R&D, network procurement, IT, management functions etc. as well as its brand (Verizon) and trademark to VCIPL.*

*-All of the above is evident that the inter-company agreement which dictates the functions and responsibilities of Verizon US and VCIPL. A copy of inter-company*

agreement is given at page 421 to 446 of the Paperbook (page 445 to 470 of convenience compilation).

#### *Characterization of the Assessee*

■ *The overall telecommunications business of the Group is a technology driven business. Design and development of technology, new product/ service offering, laying out the global network, operating specifications, etc. are the prime responsibilities of Verizon US whereas deployment of network assets in India, level of investments/ capital expenditure are some of the responsibilities that lie with VCIPL.*

■ *The detailed FAR analysis forming part of the TP documentation of the Appellant is given at page 196 to 213 of the paperbook (page 114 to 131 of convenience compilation). For your Honour's ready reference, a summary of the same is reproduced below:*

#### **Functions performed by VCIPL and Verizon US**

<b>Functions</b>	<b>Verizon US</b>	<b>VCIPL</b>
Global telecommunication strategy formulation	✓	×
'Verizon' brand development and management	✓	×
Investment in technology and products/ solutions development	✓	×
Sales and marketing	✓	✓*
Global customer relationship development and management	✓	✓*
Research & Development	✓	×
Planning and resource allocation	✓	×
Contracting with third party customers	✓	✓*
Network operations and management	✓	✓*
Telecommunication services	✓	✓
CPE procurement and installation	✓	✓*

✓ Routine functions    ✓\* Limited functions    × Insignificant functions

**Risks allocation between VCIPL and Verizon US**

Risks	Verizon US	VCIPL
Market Risk	✓	×
Contract Risk	✓	✓*
Price Erosion Risk	✓	×
Low Cost Substitutes Risk	✓	×
Overcapacity Risk	✓	×
R&D Risk	✓	×
Foreign Exchange Risk	×	✓
Bad debt Risk	✓	✓*
Inventory Obsolescence Risk	✓	✓*

✓ Normal Risk    ✓\* Limited Risk    × No Risk

**Characterization**

- *Verizon US takes on the responsibility for, and bear the costs of, the key business value drivers and employ the relevant personnel associated with managing these value drivers.*
- *VCIPL is characterized as limited function and risk bearing service providers that will benefit from the corporate-wide functions and support provided by Verizon US as the primary entrepreneur in the business.*

*Thus, owing to the above FAR profile of the VCIPL and the following:*

*The Verizon telecommunications business worldwide is highly interconnected and functions as an integrated global organization in order to serve multinational customers that have telecommunications needs in multiple countries;*

*Provides seamless management, operational and support services to the Group companies across the globe;*

*Leverages the experience of the Verizon US in the operation and reduce any redundancy and cost for such services; and*

*Direct Cost of services provided by Verizon US to various OpCos. is not easily identifiable as Verizon US is providing these services to all its support arm's.*

*the Group implemented the LRM structure to adequately compensate the entities across the globe (including VCIPL) at arm's length, for the intra-group supply of telecommunications services.*

- *In view of the above, though VCIPL derives its revenue from third party customers, the AE of the Appellant ensure that it earns an arm's-length return for its business operations in India. This is ensured by following the below mentioned remuneration model to compensate VCIPL for its overall business operation in India. The Appellant earns the higher of the following as an assured remuneration from its business operations in India:*

*Operating margin of 11 percent return on sales; or*

*14 percent of value-added costs incurred.*

- *It is important to note that the Appellant is remunerated at the higher of 11% return on sales or 14% on VAE which is higher than normal industry average returns earned by the comparable companies operating under similar market conditions, which has also been substantiated VCIPL through a comprehensive benchmarking analysis. Moreover, it is pertinent to note that in the relevant year VCIPL was compensated at cost [VAE] plus 14% mark-up instead of 11 % of the third party turnover which means, the Appellant was actually compensated with a service fee of even higher margin than 11% of the third party revenue. The above remuneration model ensures that the Appellant earns an arm's-length return from its operations as a telecommunication service provider in India bearing limited risk associated with such business operations. During the FY 2011-12, the Appellant earned a NCPM of 14.1 per cent. A detailed computation of the LRM is given at page 504 of the Paperbook/ page 245 of convenience compilation and also as Annexure 1 to this summary.*
- *Further, in the years, when the Appellant's business could not result into the adequate profitability as required in the LRM, it had received additional compensation under LRM as depicted in the profitability results for FYs 2008-09 and 2009-10.*

Particulars (Amounts in INR)	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12
Operating profit	45,900,334	(305,223,875)	(251,847,651)	485,421,196	1,030,933,174
Standalone OPVAE	46.19%	-107.13%	-27.36%	37.75%	74.02%
OPVAE (after LRM)	37.73%	17.67%	14.53%	14.07%	14.07%
Net GTP Revenue (Cost)	(9,170,547)	355,572,846	385,535,480	(304,519,243)	(834,957,287)

(refer page 12 of TPO order)(Pg 267 of convenience compilation)

- *As the LRM provides an assured return to the support entity owing to the routine functions and risks assumed by it, wherever the business carried out by the support entity would not result in adequate profitability as required under LRM, it would receive additional compensation under LRM as depicted in the profitability results for FYs 2008-09 and 2009-10, wherein, the entity otherwise suffered loss in the business, but was compensated through the LRM structure to achieve arm's length return in the business*

*Ground of Appeal No. 15 - Disregarding the functional profile of the Appellant by questioning the commercial expediency of the business of the Appellant.*

- *Acknowledging the FAR profile of the Applicant, the TPO has accepted the one way adjustment arising out of application of LRM (where a shortfall below the higher of margin equal to 11 % return on sale or cost plus 14% is made good by the AE);*
- *However, in a situation of excess profits, when it comes to ensuring that VCIPL retains a routine return the higher of margin equal to 11% return on sales or of cost plus 14% and the remaining/ non-routine business profits are given back to the entrepreneur, the TPO held it to be unacceptable.*

*13. In this regard, it is the considered view of the undersigned that a contractual transfer and re-assignment of risks cannot be allowed to justify the model on which , you are operating. Considering your functions, risks and assets, it may be fair for your AE to step in and true up your accounts through upward transfer pricing adjustments so that your transactions with your AE are held to be at arm's length, but your AE cannot cap the upside of your profits by arranging the pricing of its services and your services rendered to each other,| through a contractual arrangement where your*

*upside profits are necessarily capped at a pre-decided mutually agreed level even if the same may be what your comparables might be earning.*

*(refer page 19 of TPO order)*

- *Hence, the moment the application of LRM has resulted in compensation to the entrepreneur as in FYs 2010-11 and 2011-12 since it earned greater returns than justified under the LRM, the same has been questioned by the TPO during the current year assessment proceedings.*
- *Further, the Appellant would like to place reliance on the Hon'ble Delhi ITAT ruling in case of Mercer Consulting (India) Pvt. Ltd. vs. DCIT [ITA No.966/Del/2014], wherein the ITAT has held that every business has its own unique features and it not possible for an outsider to calculate the profitability of that business. The relevant extracts of the same are reproduced below for your ready reference:*

*“10.6 We find that every business has its own unique features. Key functions of a business vary from case to case. Even if the key fund ions are similar, still some peculiarities make one different from another. Only the concerned businessman knows its salient features. In the absence of any separately identifiable figures of each segment, mechanism for allocation of revenue and expenses depends upon the critical features of each business. In one business, such allocation may be justified on one yardstick, while in another, it may be justified on another. The crux is that it is not possible for an outsider to precisely calculate the profit realised of a particular segment when the results are reported on entity level..... ”*

*VCIPL FAR profile can be equated to that of a limited risk distributor (LRD)*

- *In the instant case, in Verizon's overall supply chain, the FAR profile of VCIPL for transfer pricing purposes, may be equated to that of a LRD of telecommunication services, wherein an LRD is expected to earn an assured net return commensurate with its functions and risk profile;*

*The following table depicts the mechanics of how such functions are remunerated:*

<i>Particulars</i>	<i>Case 1-Normal Selling price to customer</i>	<i>Case 2- Hike to selling price to customer</i>	<i>Case 3- Decrease in selling price to customer</i>
<i>Sales Price</i>	100	120	80
<i>Purchase price (purchased from the Enterprises)</i>	85	109	71
<i>Selling, general &amp; Administrative expenses (VAE)</i>	13	13	13
<i>Operating Profit (OP)</i>	2	2.4	1.6
<i>OPM</i>	2.00%	2.00%	2.00%
<i>OP/VAE</i>	15.38%	18.46%	12.31%

- *The above example clearly reflects, with any impact on the price, remuneration to the LRD remains steady, whereas it is the Entrepreneur who absorbs the risks and rewards in the supply chain.*

*LRM is followed uniformly across the globe*

- *It is also pertinent to note that the LRM has not only been adopted by Verizon Group in India but across the globe, wherein the OpCos are remunerated in a similar manner and the same has been acceptable in their respective tax jurisdictions. Most of the nations where Verizon has a presence follow international guidance such as OECD Guidelines etc. The TPO has also acknowledged the importance of international guidance in his order. Thus, there is no reason why LRM should not be applied and accepted in the Indian context.*
- *In view of the above« the Appellant humbly submits that under the LRM, the Appellant is getting remunerated at arm's length in accordance with its functions and risks and consequent characterization.*
- *regard to TPO's remark that the Appellant has contractually transferred its functions and risks, the Appellant would like to submit*

*that it is the actual conduct of the Appellant and its group companies which has been formalized by way of an inter-company agreement.*

- *Reference in this regard can be placed on the guidance issued by OECD as part of Action plan 8 to 10 of BEPS project to which India is also a signatory which states that where written contract is available, it should act as starting point for determination of arm's length price. Relevant extract represented below:*

*“1.42 A transaction is the consequence or expression of the commercial or financial relations between the parties. The controlled transactions may have been formalised in written contracts which may reflect the intention of the parties at the time the contract was concluded in relation to aspects of the transaction covered by the contract, including in typical cases the division of responsibilities, obligations and rights, assumption of identified risks, and pricing arrangements. Where a transaction has been formalised by the associated enterprises through written contractual agreements, those agreements provide the starting point for delineating the transaction between them and how the responsibilities, risks, and anticipated outcomes arising from their interaction were intended to be divided at the time of entering into the contract.”*

*(Emphasis supplied)*

- *As regards TPO's remark on the Appellant being a “full-fledged license holder”, it may be noted that owing to the statutory requirement of getting a license to operate as a telecommunication service provider, the Appellant in its local territory has applied for and been granted the required license by the Telecom Regulatory Authority of India (‘TRAI), which has been defined to be one of the functions to be carried out by VCIPL as part of the inter-company agreement. However, holding a license only makes VCIPL eligible but not fully capable of providing the required range of services to the customers in the defined territory. For VCIPL to be able to efficiently and effectively serve its customers, it will need to continue to rely*

*upon the strategy and service support it requires from Verizon US from time to time as well as the Verizon Group's global network.*

*Disregarding the fact that the LRM has been allowed by the TPO in all the previous years (in which the LRM was effective) in the Appellant's own case and there being no change in the facts and circumstances in AY 2012-13 vis-à-vis the aforesaid years*

- *the Appellant adopted the LRM business model consistently for the past assessment years Le. AY 2008 09 to AY 2010 11. The way in which the Appellant provides services to its third party customers as well as its AEs and the manner in which it is compensated has not undergone any changes in the current year, vis-à-vis the aforesaid past years*
- *It is also important to note that FY 2010-11 happens to be a year with similar result as FY 2011-12 (i.e., the LRM has resulted into a payout of non-routine profits of the business back to the entrepreneur after awarding routine business profits to VCIPL and there was no adverse inference drawn by the TPO's predecessor after thoroughly analyzing the entire facts and circumstances of the case*
- *The Hon'ble Supreme Court in Radhaswami Satsang vs. CIT (193 ITR 321) has clearly laid down that where a fundamental aspect permeating through the different assessment years have been found as a fact one way or the other, and the parties have allowed the position to be sustained by not challenging the order, it is not allowed to change (the position in any subsequent year*

*Ground of Appeal No. 16 and 17 - No uncontrolled comparable transaction was brought on record to apply the Other Method by the TPO*

- *To benchmark the arm's length nature of the subject transactions, the Appellant has applied the TNMM and based on the functions, assets and risks analysis the Appellant was selected as the tested party for the economic analysis, being the least complex entity. A comprehensive and methodical search was undertaken by the Appellant to identify uncontrolled comparable companies engaged in*

*rendering of telecommunications services as provided by the Appellant. Based on the search results, the Appellant determined the international transaction to be at arm's length (detailed economic analysis is given at page 221 to 231 of paperbook or page 139 to 149 of convenience compilation).*

- *However, the TPO failed to consider the above FAR and rejected the Appellant's economic analysis and adopted Other Method to be the most appropriate method. The TPO determined the Arm's length price of the International transaction without bringing on record any comparable uncontrolled transactions having similarity with the International transaction of the Appellant.*
- *Provision of Rule 1 OB precisely states that for application of Other method the price of comparable uncontrolled transaction is to be identified to arrive at the arm's length price:*

*"10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction or a specified domestic transaction shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts. "*

- *Therefore, it is pertinent to note that very requirement to apply the Other Method is to compare the international transaction with similar uncontrolled transaction. The TPO is therefore duty bound to bring on record a similar comparable uncontrolled transaction to determine the ALP. The TPO has only mentioned in its order "the transaction is benchmarked using Other Method", however, the TPO has failed to bring on record any comparable uncontrolled transaction. The TPO has thus violated the mandatory provision of Section 92C of the Act read with Rule 10AB of the Rules.*

- *The Appellant submits that by only mentioning 'other method', it does not satisfy the conditions laid down in Section 92C of the Act, read with Rule 10AB. The TPO ought to have brought on record a comparable uncontrolled transaction.*
- *The entire purpose of transfer pricing is to compare the international transactions of the appellant with third party uncontrolled transactions, the TPO without bring on record any uncontrolled transaction has determined the arm's length price of the International transaction on an Adhoc basis*
- *In this regard, the Appellant submits that the Hon'ble Bombay High Court in the case of Johnson & Johnson Ltd. [Income Tax Appeal No. 1030 OF 2014] has held that the TPO cannot determine the ALP without bringing on record any comparable uncontrolled transaction as per section 92C of the Act. The relevant extract of the decision is as follows:*

*“(d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in Section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical know-how has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know-how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know-how royalty by the TPO was Adhoc and arbitrary as held by the CIT(A) and the Tribunal.”*

*(Emphasis supplied)*

- *Further, the Appellant would like to rely on the Hon'ble Bombay High Court decision of Merck Limited (Income Tax Appeal No. 272 OF 2014) wherein it was held as follows:*

*“(d) The finding of the Tribunal that the TPO has not applied any of the method prescribed under Section 92C of the Act to determine the ALP in respect offees for technical knowhow/consultancy fee paid by the Respondent Assessee to its AE is not disputed before us. Further, the finding of the Tribunal that even in respect of three fields where Respondent Assessee had availed the services, no exercise to bench mark the same with similar transactions entered into between independent parties was carried out before holding that the ALP in the three areas availed is Rs. 40 lakhs, is not disputed. The finding ofthe Tribunal that the agreementfor technical knowhow / consultancy was in respect of all the twelve services and Respondent Assessee could avail of all or any one of these twelve areas listed out in the agreement as and when the need arose. We find the Agreement is similar to a retainer agreement. Consequently, the finding of the Assessing Officer attributing nil value to nine of the services listed in the agreement which were not availed of by the Respondent Assessee in the present facts was not Justified. Moreover, not adopting one of the mandatorily prescribed methods to determine the ALP in respect of fees of technical services payable by the Respondent Assessee to its AE, makes the entire Transfer Pricing Agreement unsustainable in law.”*

*(Emphasis supplied)*

- *Further, the Appellant would like to rely on the Hon'ble Delhi Tribunal decision of SABIC India Pvt Ltd. (Income Tax Appeal No. 454 OF 2021), further accepted by the Hon'ble High Court (ITA 514/2024 & CM APPL. 59663/2024) vide order dated 14.10.2024, wherein it was held as follows:*

*“33. The Guidelines rightly observe that the Rule 10AB of the Rules does not describe any methodology but provides flexibility to determine the price in complex transactions where third party*

*comparable prices/transactions may not exist. The said method would be most appropriate in cases where the other methods are found to be inapposite on account of difficulties in obtaining comparable data on account of uniqueness of the transactions, which are to be benchmarked. The relevant extract of the said guidelines is reproduced below.... ”*

*(Emphasis supplied)*

- *Further, the Appellant would like to rely on the Hon’ble Ahmedabad Tribunal decision of Ineos Styrolution India Ltd (Income Tax Appeal No. 58 OF 2022) wherein it was held as follows:*

*In the present case, the Ld. TPO without searching for similar uncontrolled transaction between non associated enterprises, straightaway treated the value of the international transaction to be at “NIL”. In the present case, no search was conducted to find out the independent entity in a comparable transaction and the arm’s length price of the international transaction was treated to be NIL. Further, accrual of benefit to assessee or the commercial expediency of any expenditure incurred by the assessee cannot be the basis for disallowing the same, as held by Hon ’ble Delhi High Court in the case of EKL Appliances Ltd. [2012] 345ITR 241 (Del.). In our considered view, the assessee has been able to demonstrate, with substantial supporting material that it availed India specific services from its Head Office / Regional Office. The Ld. Transfer Pricing Officer in view has taken a rather restrictive view in coming to the conclusion that no services were rendered for which any independent third party would pay and hence it was not possible to determine arm’s length price in the instant set of facts. As held in various decisions, the TPO cannot stand in judgment on what benefits the assessee has derived from the services and assessee’s obligation lies to the extent of demonstrating receipt of services. Once, the assessee has been able to demonstrate receipt of services, in our view, Transfer Pricing adjustment without applying any prescribed benchmarking method is unsustainable and Ld. TPO cannot determine ALP at “Nil” and has*

*to determine ALP under any one of the methods prescribed under the Income Tax Act read with the IT Rules. Accordingly, in our view, Ld. TPO has erred in facts and in law in treating the value of the transactions at "Nil '.*

*(Emphasis supplied)*

*In addition to the above, the appellant would also like to rely on the following additional decisions:*

*— Kodak India Private Limited (Bombay High Court) [Income Tax Appeal No. 15 of 2014]*

*— CEVA Freight India Pvt. Ltd. vs DCIT, Delhi Tribunal (ITANo. 2434/Del/2014)*

*— Abbott Healthcare (P.) Ltd Mumbai Tribunal [ITA No. 535/Mum/2012]*

*— Lintas India Private Limited ITA No. Mumbai Tribunal [1156/Mum/2015]*

*— FCB Ulka Advertising P. Ltd. Mumbai Tribunal [ITANo. 2194/Mum/2017]*

- *Therefore, in light of the above decisions, the appellant submits that the TPO could not have determined the ALP without bringing on record any comparable uncontrolled transaction.*
- *The Appellant further submits that it is merely an assumption of the TPO that no third party would have agreed to pay for these services, which clearly lacks the validity of the application of the Other method by the TPO. On one hand the TPO admits that the Appellant has actually received the services but on the other hand, by making the underlying TP adjustment, the TPO has treated the cost of receipt of services at NIL. Going by this logic, the TPO agrees that the Appellant has rightly availed the services but is not ready to accept that the services come for a price.*
- *In view of the above, the approach of the TPO to benchmark the international transactions of the Appellant and to make the TP*

*adjustment lacked valid and sufficient reasoning including the following:*

*Although the TPO admits that to apply the Other method, the controlled transaction should be compared with an uncontrolled third party transaction however, the TPO has failed to bring on record any such transaction basis which he has formed his opinion that the Appellant has shifted its profits;*

*The TPO acknowledges that the pricing in this case cannot be determined on any scientific principle and therefore, in the absence of any information about the cost of the services, the TPO has gone ahead to adopt any arbitrary manner to benchmark the transaction by applying the invalid Other method and alleged that the Appellant has shifted its profits to its AE. However, when the Appellant also claims that since the cost data is not available to price the transactions, it has applied more scientific and appropriate method i.e. TNMM to benchmark the subject transaction, the TPO has refused to accept the same without giving any cogent reason thereof.*

*Further, the TNMM analysis carried out by the Appellant are duly supported by the analysis of third-party scenarios whereas, the TPO failed to substantiate the basis of his opinion.*

*At one side, the TPO accepts that the subject transactions have bearing on the profits of the Appellant however, on the other hand the TPO has rejected the application of most appropriate method, TNMM which tests the arm's-length character of a transfer price in a controlled transaction by comparing the operating profitability earned by one of the parties engaged in the controlled transaction to the operating profitability earned by uncontrolled parties engaged in similar business activities*

*Once net margin of Appellant is higher, it means all international transactions entered by Appellant with its AEs are at ALP*

- *The Appellant's net margin (NCPM) of 14.1% (which takes into consideration all the inter-company transactions of the Appellant) is*

*higher the weighted average NCPM of 13.47% earned by comparable companies engaged in the similar business activities as that of the Appellant, it can reasonable be concluded that the all the international transactions undertaken by the Appellant with its AE are at arm's length*

- *The above view of the Appellant is also supported by a very recent judgement of the Hon'bie ITAT in case of Amphenol Interconnect India Pvt. Ltd. Vs. DCIT [ITA No.1486/PN/2010] wherein it was held that:*

*"Now let us analyse the arguments of CIT DR on broad proposition that the assessee was not justified in aggregating the transactions of Exports, Imports and commission into a single activity for the purposes of determining the ALP under TNMM method. Accordingly, the assessee has rightly aggregated the above transactions for the purposes of determining the ALP under TNMM. Even if the various transactions are evaluated independently, the net final result remains the same. The assessee has adopted TNMM for determining the ALP for the various transactions and the assessee had contended that its net operating margin is much higher than the comparable companies. This fact has not been disputed by the TPO since he himself has accepted that more than 95% of the exports and imports are at ALP as per the TNMM method. Accordingly, even if the various international transactions are evaluated separately, the final result remains the same. The assessee has adopted TNMM wherein the net operating margin of the assessee is compared with the net operating margin of the comparables. Once the net margin of the assessee is higher, it means that all the international transactions entered into by the assessee with its AEs are at ALP."*

*(Emphasis supplied)"*

28. The Ld. AR further submitted a reconciliation of the tested margin with the audited financial statements is as under:-

Line-by-line reconciliation of Fosted Party Margin with audited financials

Particulars	Third Party Business (A)		LRM Adjustment (AE business) (B)	Total (A+B)	Non-operating items	Total	As per Financials	Remarks
Internet Service Income							168,896,139	
Income from leased lines (MPLS and IPLC)	3,952,864,193		-	3,952,864,193		3,952,864,193	3,745,839,786	Schedule 13 of the P&L account
Professional and customer premises equipment sales and maintenance							38,128,270	
Other service income			1,588,748,702	1,588,748,702		1,588,748,702	1,588,748,702	
<b>Operating Income</b>	<b>3,952,864,193</b>		<b>1,588,748,702</b>	<b>5,541,612,897</b>		<b>5,541,612,897</b>	<b>5,541,612,897</b>	
Other income					1,670,978	1,670,978	1,670,978	Schedule 14 of the P&L account
<b>Telecommunication Service Charges</b>	<b>1,529,158,303</b>	<b>1,529,158,303</b>				<b>1,529,158,303</b>		
Add: Colocation rent (considered as part of value added costs)						126,538,935		Face of the P&L Account
Add: Network repair and maintenance (considered as part of value added costs)						33,923,687		
						<b>1,689,620,828</b>		
<b>Other Service Charges</b>			<b>2,423,705,989</b>			<b>2,423,705,989</b>	<b>2,423,705,989</b>	Face of the P&L Account
<b>Value Added Costs</b>								
Purchase of customer premises equipment	14,489,747					14,489,747	14,489,747	Face of the P&L Account
License fees	358,400,031					358,400,031	358,400,031	Face of the P&L Account
Colocation rent	126,538,935					126,538,935	126,538,935	Considered as part of value added costs
Network repair and maintenance	33,923,687					33,923,687	33,923,687	Considered as part of value added costs
Personnel Expenses	291,310,733					291,310,733	291,310,733	Schedule 15 of the P&L account
Administration, Selling and Other Expenses	496,200,410					496,200,410	496,200,410	
Finance charges	24,570,417					24,570,417	24,570,417	
Adjustment for items excluded in TP report-								
Non-Routine Expenses								
Foreign exchange gain	(706,696,044)							
Miscellaneous Income	(459,732)							
Provision for doubtful debts and advances	(4,938,468)							
Fixed Assets written down value	(635,334)							
Depreciation	360,068,433							Face of the P&L Account
Prior period items								
<b>Total Value added costs</b>	<b>1,392,772,815</b>	<b>1,392,772,815</b>						
<b>Total Costs</b>		<b>2,921,931,021</b>	<b>2,423,705,989</b>	<b>5,345,637,010</b>				
<b>Operating Income</b>		<b>1,030,933,174</b>	<b>(834,957,287)</b>	<b>195,975,887</b>				
<b>LRM Adjustment calculation</b>								
Target Margin (14% of Value Added Costs)		194,988,194						
LRM Adjustment		(835,944,880)						
Bad debt reimbursement		987,694						
TP Adjustment		(834,957,286)						
<b>LRM result</b>		<b>195,975,888</b>						
NCPM		14.07%						
<b>PBT reconciliation</b>								
LRM Result		195,975,888						
Adjustment for items excluded in TP report -								
Other income					1,670,978			
Non-Routine Expenses								
Foreign exchange gain		(706,696,044)						
Miscellaneous Income		(459,732)						
Provision for doubtful debts and advances		(4,938,468)						
Fixed Assets Written down value		(635,334)						
Prior period items								
<b>Profit for the year before tax and prior period adjustments</b>		<b>(115,082,713)</b>					<b>(115,082,713)</b>	

29. The Ld. AR also submitted the Limited Risk Model (LRM) computation chart in support of his contentions as under:-

Particulars	(Amount in Crores)		Reference	Remarks	Total (C column + D Column)
	Third party business	LRM Adjustment (AE Business)			
Internet service income	395 (154+241)		A		395
MPLS (leased lines)			B		
Other service income		159	C	LRM Adjustment (TP Adjustment)	159
Bandwidth charges	152		D	Difference - 83 cr (243-159)	152
VAE	139		E		139
Telecom service charges		243	F		243
Margin (14% of value added costs)	20 cr		(G = C-E)	LRM Result	20
	(159 cr - 139 cr) or 20 cr/ 139 cr				
	195,975,887				

30. On the other hand, the Ld. DR submitted that the assessee's claim of operating under a Limited Risk Model was not correct. He submitted that the assessee had heavily relied upon the Berry Ratio, which has limited applicability. In this regard, he drew our attention to page 139 of the paper book, wherein the assessee had disclosed revenue segmentation. He further drew our attention to page 174 of the paper book and compared the same with page 19 of the paper book. The Ld. DR submitted that the assessee had claimed expenditure of Rs.527.37 crores; however, in the LRM computation, the expenditure considered was only Rs.139 crores, which, according to him, required explanation. He further drew our attention to the OECD Guidelines on the application of the Berry Ratio and submitted that the same has limited applicability. In this regard, he referred to the relevant extracts from the OECD Guidelines, which read as under:

*"B.3.5. Berry ratios*

*2.106. "Berry ratios" are defined as ratios of gross profit to operating expenses. Interest and extraneous income are generally excluded from the gross profit determination; depreciation and amortization may or may not be included in the operating expenses, depending in particular on the possible uncertainties they can create in relation to valuation and comparability.*

*2.107. The selection of the appropriate financial indicator depends on the facts and circumstances of the case, see paragraph 2.82. Concerns have been expressed that Berry ratios are sometimes used in cases where they are not appropriate without the caution that is necessary in the selection and determination of any transfer pricing method and financial indicator.*

*See paragraph 2.98 in relation to the use of cost-based indicators in general.*

*One common difficulty in the determination of Berry ratios is that they are very sensitive to classification of costs as operating expenses or not, and therefore can pose comparability issues. In addition, the issues raised in paragraphs 2.99-2.100 above in relation to pass-through costs equally arise in the application of Berry ratios. In order for a Berry ratio to be appropriate to test the remuneration of a controlled transaction (eg. consisting in the distribution of products), it is necessary that:*

- The value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is proportional to the operating expenses,*
- The value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is not materially affected by the value of the products distributed, i.e. it is not proportional to sales, and*
- The taxpayer does not perform, in the controlled transactions, any other significant function (eg. manufacturing function) that should be remunerated using another method or financial indicator.*

*2.108.A situation where Berry ratios can prove useful is for intermediary activities where a taxpayer purchases goods from an associated enterprise and on-sells them to other associated enterprises. In such cases, the resale price method may not be applicable given the absence of uncontrolled sales, and a cost plus method that would provide for a mark-up on the cost of goods sold might not be applicable either where the cost of goods sold consists in controlled purchases. By contrast, operating expenses in the case of an intermediary may be reasonably independent from transfer pricing formulation, unless they are materially affected by controlled transaction costs such as head office charges, rental fees or royalties paid to an associated enterprise, so that, depending on the facts and circumstances of the case, a Berry ratio may be an appropriate indicator, subject to the comments above.”*

31. The Ld. DR further submitted that the Berry Ratio can be effectively used only in cases where the value of goods has no role to play in the profits earned and where the profits are directly linked to operating expenditure. He contended that, where the assessee uses significant intangibles or fixed assets, the Berry Ratio would not be an appropriate profit level indicator. In support of his contentions, the Ld. DR relied upon the decision of the Hon'ble Jurisdictional High Court in the case of **Sumitomo Corporation India Pvt. Ltd. vs. CIT** (2016) 387 ITR 611 (Del.) and drew our attention to paragraph 45 of the said judgment. ¶ The Ld. DR further submitted that the Berry Ratio has limited applicability and relied upon the observations of the Hon'ble High Court in the case of **Sumitomo Corporation India Pvt. Ltd. vs. CIT** (supra). He submitted that traditionally, the denominator of the Berry Ratio comprises selling, general and administrative expenses. As observed by the Hon'ble Court, the Berry Ratio can be effectively applied only in cases where the value of goods has no role to play in the profits earned by the assessee and where profits are directly linked to operating expenditure incurred by the assessee. He further submitted that where the assessee uses intangibles as part of its business, the Berry Ratio would not be an appropriate Profit Level Indicator (PLI), as the value of such intangibles would not be captured in the operating cost. Therefore, computation of the arm's length price based on net profit margin with operating cost as the base would not be appropriate. He also drew our attention to the observation of the Hon'ble High Court that the Berry Ratio would not be suitable in cases where the assessee owns substantial fixed assets, as the value added by such assets would not be reflected in the Berry Ratio. The Ld. DR further submitted that the model followed by the assessee is not truly a Limited Risk Model. In this regard, he drew our attention to page 44 of the paper book and to

Note 28 of the financial statements, wherein it was stated that, as per the specific agreements, the assessee provides marketing and sales support services to group companies, and other group companies provide assistance in providing telecommunication services, as required by the assessee. He further drew our attention to page 7 of the TPO's order, wherein the TPO discussed the compensation mechanism under the LRM structure. It was observed that under the LRM structure, the assessee's third-party sales and value-added costs are considered, and either 11% of sales or 14% of value-added expenses (i.e., expenses excluding line costs and certain other costs) is computed, whichever is higher, and treated as the target profit. The Ld. DR further drew our attention to the detailed discussion by the TPO analysing the functions performed by the assessee and its Associated Enterprise (AE) in the USA. He referred to the chart in the TPO's order showing that the assessee was involved in sales and marketing, global customer relationship management, contracting with third-party customers, network operations and management, provision of telecommunication services, and customer premises equipment (CPE) procurement and installation. He further drew our attention to the risk allocation between the parties, as discussed by the TPO, and submitted that the assessee bears significant contract risk. He referred to the observation of the TPO at page 27 of the order, wherein it was stated that the LRM structure followed by the assessee is essentially the type of arrangement cautioned against by the OECD. The operational risk clearly rests with the assessee, which is a licensed entity operating in India and faces regulatory risk and competitive market realities of the Indian market. It was further observed by the TPO that, although contractual arrangements were made to shift risks to the AE, the real operational risks continue to be borne by the assessee. Along with the risk,

the potential upside profits were also sought to be shifted to the AE through pricing arrangements. The Ld. DR further drew our attention to page 28 of the TPO's order, wherein it was observed that the services mentioned in the inter-company services agreement, which give rise to the LRM structure of the assessee, are described in very generic terms. The obligations of the assessee and its AE are broadly stated, and it is not possible to clearly identify or state the exact nature of services rendered or received. Although the assessee attempted to explain the same in its submissions, it was observed that such explanations were also general in nature. He further drew our attention to page 30 of the TPO's order, wherein the TPO observed as under:

*"The above methodology is true for the assessee as well, except that VIPL has to be read as VCIPL and the OP/VE target for the assessee is 14% instead of VIPL's 11%. Thus, the undersigned is not wrong in understanding the pricing methodology or the overall LRM structure in the case of the assessee. As noted above, the third party operational revenue is first ascertained and then the respective adjustments are made to arrive at the prices of services to be paid or charged for business services as noted in the Intercompany Agreement. In a way, the pricing of the provision and receipt of business services in the LRM structure are accounting adjustment entries derived from the reverse calculations in order to leave only a targeted profit for the assessee."*

32. He further drew our attention to page 31 of the TPO's order, wherein the TPO concluded as under:-

*"That is like telling the assessee that, "I as your AE will take care of you and will ensure your bare minimum survival. You will always test healthy in transfer pricing assessments because we will be able to show that you are at margins comparable to the others in India, while I shall take away from you whatever your upside profits have through the pricing of our services to each other." The above is actually the essence of the LRM structure. It is notable that the list of*

*same set of services fetch different price in different years. In all the years where LRM adjustments are leading to shifting of assessee's profits to the AE, the price of availing services exceeds that of rendering the said services. It is further notable that it is not demonstrable by the assessee that the quantum or nature of the services that it provided or received from its AE differed in any way from year to year to justify the increase of payments for the availing of such services where LRM adjustments are leading to capping of the upside profits."*

33. With regard to other method, he brought to our notice page 33 of the TPO order and brought to our notice detailed observations of the Id. TPO as under:-

*The three international transactions which have been the subject matter of this order are once again reproduced below:*

<i>S.No</i>	<i>Description of the transactions</i>	<i>Amount (In INR)</i>
<i>1.</i>	<i>Provision of Business Services</i>	<i>158,87,48,702</i>
<i>2.</i>	<i>Availing of Business Services</i>	<i>242,37,05,990</i>
<i>3.</i>	<i>Provision of MPLS Services</i>	<i>241,87,27,642</i>

*Out of the above three, as the above order has demonstrated, the international transactions of providing and availing business services are derived prices arrived at through reverse calculations after the profits of the assessee from its third party transactions and income from AE for provision of MPLS Services had been worked out. Through the derived pricing of these two transactions, the assessee's profits to the extent of Rs. 83,49,57,287/- were transferred to the AE by way of RM Adjustment. Due to this, the question arises whether any of the transactions can be considered at arm's length. As has been demonstrated in the order, the pricing of MPLS Services was essentially out of compulsion for the AE as it was paying the same rate to unrelated party and it had to meet DoT requirements. Hence, a Comparable price exists for the same. However, through the pricing of the other two transactions, LRM adjustment resulted in shifting out of Rs. 83,49,57,287/-. Thus, out of the total receipt of Rs. 241,87,27,642/- in relation to provision of MPLS Services to AE, one view can be drawn that the LRM adjustment essentially reduces*

*the compensation received by the assessee for rendering MPLS services and hence, the same is also not at arm's length.*

*However, it is noted in this case that there are 3 unknown prices and only one reference point suggesting that at least one number has to be taken as acceptable. In the current scenario, the only transaction that has a comparable price is the MPLS services of Rs. 241,87,27,642/-which has at least a third party comparable. Assuming that the same is sacrosanct and benchmarked, the assessee's overall profits in the absence of provision and receipt of business services are Rs. 103,09,33,174/-. Since the pricing of provision and receipt of services is based on reverse calculations and have been demonstrated to be not at arm's length in this order, the benchmarking of the same using entity level TNMM is rejected.*

*Accordingly, this office is of the view that there may be two ways of carrying out the benchmarking exercise. The first way is to disregard the prices of the two international transactions of provision and receipt of business services per se and treat the net effect of the two i.e. the LRM adjustment as the international transaction. It is notable that the same qualifies as an International Transaction as per S 92B of the Income Tax Act which reads as follows:*

*92B. (1) For the purposes of this section and sections 92, 92C 92D and 92E "International transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money or any borer transaction having a bearing on the profits, income, losses or assets of such enterprises; and shall include a mutual agreement or arrangement between wo or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises:*

*Having duly rejected the TNMM of the assessee as the most appropriate method in the order and noting that TNMM cannot be used to price this LRM adjustment, the undersigned is of the view that the LRM adjustment in the instant case can be benchmarked adopting "Other Method" and asking what would have been the pricing in an independent third party scenario. No third party would agree to*

*shifting of its residual profits based on contractual shifting of risks even as it faces real operational risks. It would be entitled to the residual upside profits. Thus, the LRM adjustment is reduced to NIL and an upward adjustment of Rs. 83,49,57,287/- is made in the instant case.*

*The other available method in the instant case would be to treat the two international transactions as accounting entries having a bearing on the profits of the assessee which can be benchmarked using "Other Method" by asking the question what would have been the price of the transactions in an uncontrolled third party environment. In the absence of any information about the costs of the said services to the assessee or the AE, the undersigned can proceed to evaluate the cost of the international transaction of availing services to ensure that no shifting of profits earned by the assessee in India takes place. Accordingly, the amount pertaining to availing of services of Rs. 242,37,05,990/- is reduced to Rs. 158,87,48,702/-. Accordingly, the Assessing Officer may proceed to upward adjust the income of the assessee by Rs. 83,49,57,287/- as expenses of the assessee stand reduced to this extent. It is notable in the instant case that the pricing of international transactions in this case cannot be determined on any scientific principles. Hence, the same are essentially accounting entries arrived at by targeting profits of the assessee and have a direct bearing on the profits of the assessee. Hence, even the proviso to S 92C in relation to the 5% range of international transaction cannot be arrived at as the true price of the transactions does not exist. In any case, the assessee's adjustment does not fall within 5% of the value of international transactions. In either case, the upward adjustment in the case of the assessee works out to Rs. 83,49,57,287/-."*

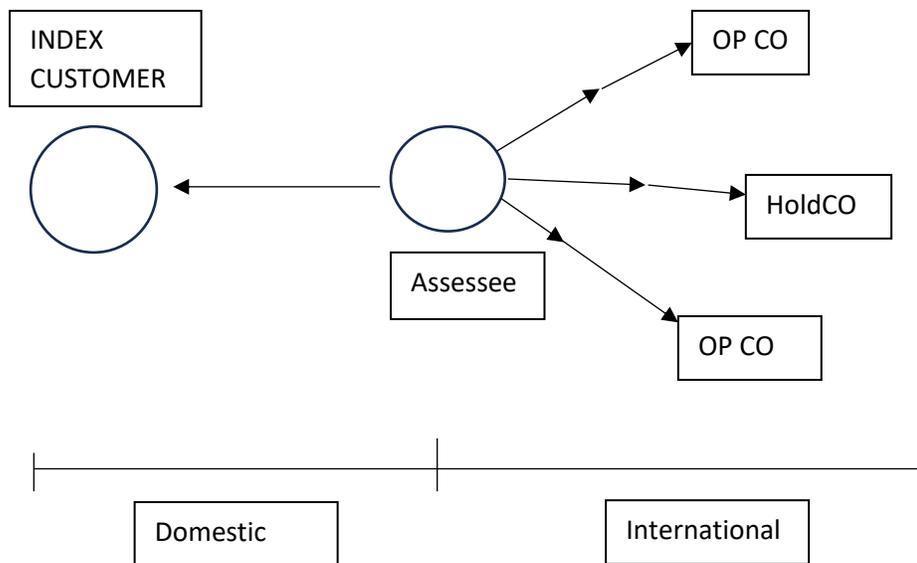
34. Accordingly, the Ld. DR relied upon the detailed findings of the TPO and submitted that the TPO had no option but to make the transfer pricing adjustment as proposed. He also placed reliance on the findings of the Dispute Resolution Panel (DRP), which upheld the action of the TPO. In rejoinder, the Ld. AR once again drew our attention to the Limited Risk Model (LRM) computation and explained the same. He drew our attention to page 24 of the paper book, wherein the telecom service charges were recorded as the main line item. He further drew our attention

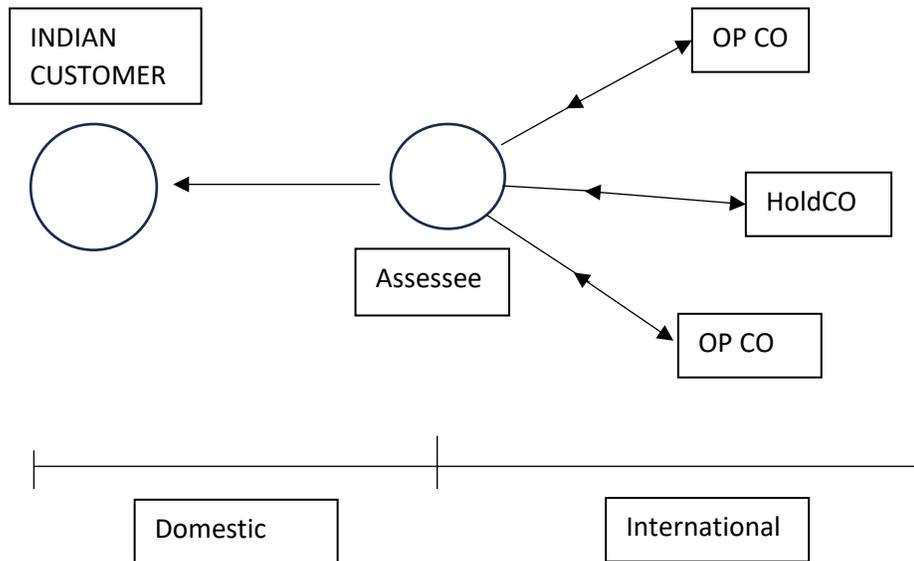
to page 36 of the paper book, wherein the details of services rendered were listed. With regard to the reliance placed by the Ld. DR on the decision of **Sumitomo Corporation India Pvt. Ltd. vs. CIT** (supra), the Ld. AR submitted that the Ld. DR had relied only on paragraph 45 of the judgment. He submitted that, in order to appreciate the true ratio of the decision, paragraphs 35 to 47 of the judgment need to be read together. He contended that the said decision is distinguishable on facts.

35. Considered the rival submissions and perused the material available on record. We observe that the TPO has rejected the benchmarking analysis adopted by the assessee on the basis of TNMM adopted as the most appropriate method considering the Limited Risk Method. We further observe that the application of the "Other Method" by the TPO is based on the observation that the assessee had earned positive profit in the third party business but declaring the actual result with negative profit. He was not convinced with the compensation guaranteed to the assessee by the Holding company on the basis of minimum guaranteed based on the LRM model on the basis of 14% on the value added expenses or 11% on the bet sales.

36. After considering the various documents and financial records submitted before us, we observed from the basic documents i.e., the service agreement in relation to the provision of telecommunications services entered on 14 December 2007 between the Verizon Communication Inc (Holdcos) and other operating companies ('OpCos'). In the operating companies includes the assessee (VCIPL) to provide telecommunication services between the parties to the ongoing overall operations of the business. This agreement was entered by the HoldCos due to the reason that HoldCo has acquired the MCI group who were operating Globenet

providing services to all the other operating services in the MCI Group. Since the above operations are acquired by the Verizon Communications Inc. Subsequently, they formed a holding company to provide services to all the operating companies in the name and style of Verizon European Holding Ltd, fresh amendment was signed with all the other operating entities vide agreement dated 23<sup>rd</sup> December 2008. From the above service agreement, it was agreed between the parties that all the service model, R&D and other policies for running the business across the globe will be controlled and devised by the HoldCo and the OPCOs will invest in the basic capital assets and other relevant software to carry on the regular business of servicing the customers within their territories. The operation of the telecommunication services as understood from the submissions made before us are:





37. From the above, it is clear that group operates in the form of Hub and Spoke model, however, this slightly different in the perspective of the operation of the assessee as the main profit centre. The telecommunication services are an umbrella term for a wide range of information transmission technologies and includes wired phones, mobile phones, fibre optics, microwave communication, radio and television broadcasting, satellites, and the internet. From the chart 1 above, we observed that the assessee provides services to the HoldCo and their customers (global customers), providing only on the basis of value addition, since the customers are based outside India and all the services are initiated outside India and the assessee provides telecommunication services to them by delivering the services initiated outside India(completing the loop).

38. On the other hand, the assessee needs support services from its HoldCo and other OpCos to complete the services initiated in India. From the above it is important to understand that in the telecommunication services provided by all the parties, who completes the communication loop initiated by each party. From the agreement we observed that all the parties in the group have agreed to provide the same in harmonious manner. They have also agreed for compensation on the basis of LRM method. Since that actual work of marketing and other related services are provided outside India and assessee only delivers to the respective customers. It only requires expenses which are termed in the technical terms, value added expenses. The issue raised by both the parties, whether the Berry Ratio can be applied in the telecommunication services as discussed above.

39. We observed that under the OECD Guidelines, the Berry ratio is identified as one of the PLIs under the TNMM. The guidelines provide criteria for using the Berry ratio as a PLI. These criteria are as follows:

- the value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is proportional to the operating expenses.
- the value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is not materially affected by the value of the products distributed, i.e., it is not proportional to sales; and
- the taxpayer does not perform, in the controlled transactions, any other significant function (e.g., manufacturing function) that should be reimbursed using another method or financial indicator.

40. From the services provided by the assessee is only completing the communication loop and does not add any significant function except utilises the preinstalled facilities by using the existing fixed assets and certain added expenses. The definition of the value-added expenses is already finalised and agreed upon in the agreement signed by both the parties.

41. We observed that the above said agreement also finalises the compensation, definition and method of calculation in the significant and unambiguous manner. The relevant compensation toward the telecommunication services were also finalised in the same agreement for both the parties involved ie., Holdco and OpCos, for the sake of brevity, the important clauses are reproduced below:

### 3 FEES AND OTHER SUMS DUE

3.1. *In consideration of the Telecommunications Services to be provided by each Party to the other under this Agreement, Globenet and Opco shall pay the Telecommunications Services Fees to the other Party, The Telecommunications Services es shall be calculated in accordance with the provisions of Schedule 1 which fully sets out the method of calculating the Telecommunications Services Fee under the limited risk model implemented by this Agreement together with (in conjunction with the other provisions of this clause) the assumptions and conventions applicable thereto.*

3.2. *On or before the tenth Business Day following the end of each calendar month (or as soon as reasonably practicable thereafter), each of OpCo and Globenet shall provide GTP Accounting with such financial information (together with such supporting documentation as they may reasonably request) as is reasonably necessary for the Telecommunications Services Fees, for such calendar month, to be calculated by GT Accounting on behalf of Globenet and Opco.*

### 3.3

3.3.1 *The Telecommunications Services Fees for the first month (or part thereof) falling after the Effective Date and thereafter for each month in each year shall be calculated by GP Accounting on behalf of Globenet and Opco based*

*upon the actual financial results of the relevant Verizon Group companies for the relevant period and year to date (if available) or upon the most current available data of the relevant Verizon Group companies for the relevant period (to the extent that actual financial results are not available).*

*3.3.2 To the extent actual financial results are not used to calculate the Telecommunications Services Fees, such Telecommunications Services Fees will be re-calculated using actual financial results for the relevant period as soon as reasonably practicable after such results become available and (where the Telecommunications Services Fees calculated from such actual financial results are different than those invoiced in respect of the relevant period), an invoice in respect of the relevant balancing amount shall be issued by OpCo or Globenet (as applicable) as soon as reasonably practicable thereafter.*

*3.4 For the purposes of calculating all sums referred to in and/or payable under this Agreement, Local GAAP shall be used at all times unless GTP Accounting considers that the use of Local GAAP will result in non-arm's length pricing for both the Parties. In these exceptional circumstances GTP Accounting will determine the optimum generally accepted accounting principles to be used for delivering arm's length pricing for both Parties.*

*3.5. All sums payable under this Agreement shall be calculated and shall be payable in US dollars unless otherwise agreed by the Parties. When required, conversions will be made into other local currencies in order to comply with local VAT legislation.*

42. Further we observed that the above agreement contains various definitions, the important definition relevant for the discussion are reproduced below:

*“Net Sales:- net revenue arising from all Telecommunications Services on the books of OpCo as recognized in Local GAAP;*

*Operating Profit before Transfer Pricing:- equals the Operating Profit (as determined by GTP Accounting) for the month before (i) Bad Debt Expense for the month, (ii) Inventory Obsolescence Expense for the month, (iii) the Globnet Amount, (iv) any realized foreign exchange gain/loss for the month, and (v) reduction of any withholding taxes pursuant to Clause 3.8.2;*

*Target OpCo Return:- equals the greater of: 1) OpCo's Value Added Costs multiplied by the Net Cost Plus Percentage, or ii) OpCo's Net Sales multiplied by the Operating Margin Percentage;*

*Value Added Costs:- all operating expenses incurred in OpCo's accounts except for line costs, Bad Debt Expense, interest expense, realized and unrealized foreign exchange gains and losses, foreign income taxes, domestic income taxes, Inventory Obsolescence Expense, Impairment Expense, and any other expenses not related to the operation of the relevant business activity; for the avoidance of doubt, Value Added Costs shall include expenses, as recognized by local GAAP, associated with the provision of telecommunications services (except for line costs) including, advertising, promotion, sales, marketing, warehousing and distribution, administration, depreciation and amortization, and other expenses incurred by the OpCo as the Parties may agree from time to time.*

#### *4 Calculation of Telecommunications Services Fees*

##### *4.1. Calculation of the Telecommunications Services Fee Payable to OpCo*

*4.1.1 The monthly Telecommunications Services Fee payable to OpCo by Globenet (or the Globenet Amount as set forth in Clause 3.6.2 of the Agreement) shall equal the sum of the following amounts: (a) OpCo's Value Added Costs incurred for the month; (b) the Reimbursed Costs for the month; and (c) the Target OpCo Return for the month."*

43. Further, they have also provided sample service invoice format payable to OpCos and Globenet (presently applicable to Verizon Holding Company) as under:

**Sample OpCo P&L**

Net Sales		190
Line Costs	-	146
Cost of Services Provided	-	4
<b>Gross Margin</b>	=	<b>40</b>
Selling Expenses	-	20
Administration	-	10
Depreciation	-	6
<b>Operating Profit before Transfer Pricing</b>	=	<b>4</b>
Bad Debt Expense, or	-	4
Adjusted Bad Debt Expense (the lesser of the two)	-	3.2
Inventory Obsolescence Expense	-	1
Realized Foreign Exchange Loss	-	2
<b>EBIT</b>	=	<b>(2.2)</b>
<b>Calculation of Reimbursed Costs</b>		
Net Sales		190
Bad Debt Percentage	x	1%
Routine Bad Debt (< of 3.2 or 1.9)	=	1.9
Bad Debt Expense	=	4
<b>Non-Routine Bad Debt Expense</b>		<b>2.1</b>
Net Sales		190
Inventory Obsolescence Percentage	x	0.5%
Routine Inventory Obsolescence	=	0.95
Inventory Obsolescence Expense	=	1.00
<b>Non-Routine Inventory Obsolescence Expense</b>		<b>0.05</b>
Realized Foreign Exchange Loss		2
<b>Foreign Exchange Reimbursement (to be reimbursed at the sole discretion of Globenet)</b>		<b>0</b>
<b>Total Reimbursed Costs</b>		<b>2.15</b>
<b>Calculation of Target OpCo Return</b>		
Cost of Services Provided		4
Selling Expenses	+	20

Administration	+	10
Depreciation	+	6
	=	40
OpCo Value Added Costs	x	14%
Net Cost Plus Percentage	=	<b>5.6</b>
<b>Net Cost Plus Return Calculation</b>		
Net Sales		190
Operating Margin Percentage	x	11%
<b>Operating Margin Return Calculation</b>	=	<b>20.90</b>
<b>Target OpCo Return (Greater of Net Cost Plus Return Calculation or Operating Margin Return Calculation)</b>		
		<b>20.90</b>
<b>Target OpCo Return Calculation plus Reimbursed Costs</b>		
		<b>23.05</b>
<b>Net Transfer Price Adjustment</b>		
Target OpCo Return		20.90
Plus: Reimbursed Costs	+	2.15
Less/(Plus): Operating Profit/(Loss) Before Transfer Pricing	-	4.00
Equals: Net Transfer Price Adjustment	=	<b>19.05</b>
<b>Calculation of Telecommunications Services Fees Payable to OpCo</b>		
OpCo Value Added Costs		40.00
Plus: Reimbursed Costs	+	2.15
Plus: Target OpCo Return	+	20.90
Equals: OpCo Telecommunication Services Fee (the Globenet Amount)	=	<b>63.05</b>
<b>Calculation of Telecommunications Services Fees Payable to Globenet</b>		
Operating Profit before Transfer Pricing		4.00
Plus: OpCo Telecommunication Services Fee	+	63.05
Less: Target OpCo Return	-	20.90
Less: Reimbursed Costs	-	2.15
Equals: Globenet Telecommunication Services Fee (the OpCo Amount)	=	<b>44.00</b>

44. From the above calculation given in the agreement and the actual result as well as calculation submitted by the assessee are divergent and not matching the above sample method accepted between the parties. Particularly the minimum guaranteed return to the OpCos. In our view, the actuals should have been as under:

Income from third parties	Rs. 395.29 crores
Income from AE Business	Rs. 158.87 crores
Total Net Income (refer the definition)	Rs. 554.16 crores
Less Line Cost	Rs. 152.92 crores
Less Value Added Expenses	Rs. 139.28 crores
Less Telecom Charges (HoldCo)	Rs. 242.37 crores
Net Income before tax	Rs. 19.59 crores

45. We observed from the above result that the assessee was compensated at Rs. 19.59 crores which is 14% of the value-added expenses, which is only the minimum of the targeted profit whereas the promised targeted profit is 11% on net sales or 14% on VAE, whichever is more. On careful interpretation of the compensation proposed in the above chart, the assessee would be compensated with higher of 14% of value-added expenses or 11% of the net sales. As per the definition of the net sales, it is mentioned as "net revenue arising from all the telecommunications services on the books of OpCo as recognised in local GAAP. Considering the above, the revised compensate on to the assessee should have been as under:

11% of the net sales is (services to 3<sup>rd</sup> parties) (11% on Rs. 393.75) Rs. 43.31 crores  
(or)

14% of Value added expenses is (14% on 139.38) Rs. 19.50 crores.

Therefore, in our view, as per the agreed terms, the assessee was not compensated properly. Further, we observed that as per the above agreement, the HoldCo's compensation also illustrated as under: (we have not considered the reimbursement cost here)

Operating Profit before Tax (P&L)	Rs.(-)11.51 crores
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Plus: OpCo telecommunication service fee Rs. 182.59 crores

(Value added exps plus margin)

Less: Target OpCo return	Rs. 43.31 crores
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Net result is the compensation	Rs. 127.77 crores
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(compensation to HoldCo)

46. From the above calculation accepted by the parties, shows that they have devised the compensation such a manner that the OpCos will retain only the targeted return and the value-added expenses whereas the HoldCo will cover the net margin including if there is any loss from the operation. In our considered view, there is accepted method by both the parties to compensate the OpCos but the assessee could not submit any document how the working of the telecommunication services charges was calculated for the services rendered by the HoldCo as well as other OpCos or other AEs to the assessee as per the charges

accounted in the books. We further observed that services provided by the assessee to 3<sup>rd</sup> parties is Rs. 393.75 crores during the year 2012 and in 2011 the same was Rs. 299.58 crores (after adjusting the services provided to the other AEs or to HoldCo) and the charges recovered by HoldCo at Rs. 242.37 crores and 177.14 crores for 2012 and 2011 respectively. The resultant percentage are 0.616% and 0.592% against the services provided to 3<sup>rd</sup> parties. It is not clear how the same are calculated by the GTP accounting, which is the common accounting body to settle the service charges between the OpCos and HoldCo. We do not intend to go into details on this aspect as the TPO has not looked into this aspect. TPO should have bench marked separately for services provided and received. At the same time, the compensation mechanism is accepted by the parties as per the service agreement, the same are applicable globally, the same should be accepted and compared if there is any similar comparables. It is industry specific and also harmonious working of global entities.

47. Keep that as it is, we observed that the TPO adopted a simplistic approach of adopting the net service charges charged for service provided and received. In our view, it is not the proper approach to determine the bench marking for both the activities, which looks similar, but the functions of both the entity level and risk absorption levels are different. The compensations are agreed with the HoldCo by all the OpCos. Therefore, in our considered view, the TPO has to do the bench marking separately for both the transactions. He failed to do the same and adopted the simpliciter approach to complete the transfer pricing adjustment.

48. Leave aside the above discussion, since the parties involved have agreed to work on the service agreement, the assessee should be compensated properly as

per the agreed terms as discussed above. We observed that the Ld DR vehemently argued that the Berry Ratio cannot be applied in the given case due to the complexity and the assessee owns substantial fixed assets. In our considered view, the application of TP study has to be dealt on the basis of harmonious application and appreciation of appropriate facts on record. In this case, the assessee completes the services initiated by the group entities and it only completes the transaction, it adds only the value to the services offered by the group entities to their customers. Since, the services provided by the assessee is only adds the value to the services offered by the HoldCo and Other Operative entities within the group. The Berry ratio can be applied in the given case under consideration.

49. As discussed above, in our considered view, as per the agreed compensation, the assessee was not compensated to the extent of above table. Therefore, we direct the AO/TPO to restrict the ALP adjustment to the extent of Rs. 23.81 crores (Rs. 43.31 – 19.50) which is the agreed targeted margin to the OpCo, as the assessee being one of the OpCo, the agreed targeted profit should be compensated on the basis of formula devised by the parties involved. Accordingly, we accept the TP study submitted by the assessee on the basis of taking the TNMM as the basis and NCPM was selected as most reliable PLI and adopted the compensation on the basis of the berry ratio as the PLI for the transactions of services rendered by the assessee, in that process they have adopted the 14% margin on value added expenses instead of compensating on the basis of 11% on net sales, for the comparable purpose. We further observed that the assessee had submitted the TP report by determining the weighted average margin of tested party at 13.47% while comparing the achieved result as computed by them on the basis of targeted profit considering the 14% margin on the value added expenses instead of margin on the

net sales. The promised targeted margin was 11% on sales. After considering the business model of the assessee, they have devised a formula on the basis of services structured within group. At the same time, we observed that 14% on VAE and 11% on net sales are not same and gives completely different results, as discussed in the paragraph no.45 above. In our view, the targeted margin offered to the OpCos are growth oriented and further we observed that the LRM method was adopted by the assessee/group consistently and it was accepted by the TPO in all the previous years, where the LRM was effective in the assessee's own case and there being no change in the facts and circumstances, why the same should not be accepted in the year under consideration. As held in the case of Radhaswami Satsang (supra), where a fundamental aspect permeating through the different assessment years have been found as a fact one way or other, and the parties have allowed the position to be sustained by not challenging the order, it is not allowed to change the position in any subsequent year. Hence, in our view the consistent result has to be applied in the given case also, it cannot be a situation where the revenue cherry picks the results.

49. We further observed that the targeted margins are devised on the entity level and it applies to both the transactions of telecommunication services, i.e., for service rendered and serviced acquired, the compensation is for entity level. Can the profit be accepted as per the agreement for the TP adjustments?. We observed that the LRM is not only been accepted and adopted by Verizon group in India as well as across the globe, all the OpCos are remunerated similarly and the same is accepted in their respective tax jurisdictions. Therefore, we should accept the uniform method adopted by the group across the globe and as discussed above, the compensation is growth oriented and not restrictive, it may give different

results depending upon the performance of each year, the same is business risk comes along with the peculiar business model. Therefore, we are inclined to accept the submissions of the assessee in this regard and except the method of calculation of targeted margin adopted in the year under consideration as discussed in the para no 45 above.

49. In the result, Grounds No. 12 to 18 raised by the assessee are partly allowed.

50. In the result, the appeal filed by the assessee is allowed as per above terms.

**Order pronounced in the open court on this 25<sup>th</sup> day of February, 2026.**

Sd/-

(ANUBHAV SHARMA)

JUDICIAL MEMBER

Delhi, Dated 25/02/2026

Sd/-

(S.RIFAUR RAHMAN)

ACCOUNTANT MEMBER

**NV/-**

**Copy of the Order forwarded to :**

1. The Appellant ,
2. The Respondent.
3. The PCIT
4. The DR, ITAT
5. Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar) ITAT, DELHI