THE INCOME TAX APPELLATE TRIBUNAL
DELHI "I" BENCH: NEW DELHI

BEFORE MS.MADHUMITA ROY, JUDICIAL MEMBER &
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

ITA No.1564/Del/2016
[Assessment Year : 2010-11]

DCIT Circle-18(1) New Delhi	vs	**New Delhi Television Ltd.** 207, Okhla Industrial Estate Phase-III, New Delhi ***PAN-AAACN0865D***
APPELLANT		**RESPONDENT**

ITA No.1623/Del/2016
[Assessment Year : 2010-11]

New Delhi Television Ltd. 207, Okhla Industrial Estate Phase-III, New Delhi ***PAN-AAACN0865D***	vs	**DCIT** Circle-18(1) New Delhi
APPELLANT		**RESPONDENT**

Appellant by	Shri Sachit Jolly, Sr.Adv. & Ms. Sherry Goyal, Adv.
Respondent by	Shri Dharm Veer Singh, CIT DR
Date of Hearing	16.12.2025
Date of Pronouncement	06.03.2026

ORDER

PER MANISH AGARWAL, AM :

The captioned cross-appeals are filed by Revenue and assessee against the directions of Dispute Resolution Panel ("DRP") dated 18.12.2015 on the objections filed by the assessee against the draft assessment order dated 27.01.2016 passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ("the Act") pertaining to assessment year 2010-11.

2. Brief facts of the case are that the assessee company is engaged in the business of television news broadcasting through its three channels namely, NDTV (24x7), a 24 hours English news channel; NDTV India, a 24 hours Hindi news channel; and NDTV Profits, a 24 hours business news channel. The return of income for the year under appeal was e-filed on 13.10.2010, declaring loss of INR 20,18,44,098/-. The case of the assessee was selected for scrutiny and notice u/s 143(2) of the Act was issued on 14.09.2011. Since the assessee was having international transactions with its Associated Enterprises ("AEs"), therefore, a reference was made u/s 92CA of the Act to Transfer Pricing Officer ("TPO") for determination of Arm's Length Price ("ALP") of the international transactions carried out by the assessee. The TPO vide its order dated 22.01.2016, had enhanced the income of the assessee by making transfer pricing adjustment for the transactions with its AEs at INR 3,29,04,214/- which comprises of INR 39,02,614/- adjustments on account of Business Support Services and further adjustment of INR 2,90,01,600/- towards Corporate Guarantee. Thereafter, AO passed draft assessment order u/s 143(3)/144C(1) of the Act dated 30.04.2015 wherein the AO proposed total income to be assessed at INR 29,59,08,060/- by proposing following additions/disallowances:-

(i)	Disallowance out of ESOP expenses	Rs.39,740/-
(ii)	Disallowance u/s 14A r.w. Rules 8D	Rs.1,34,19,838/-
(iii)	Disallowance u/s 40(a)(ia) of commission	Rs.43,00,37,977/-
(iv)	Disallowance u/s 40(a)(ia) for transmission and uplinking charges	Rs.3,44,92,877/-
(v)	Disallowance out of software expenses	Rs.2,77,350/-
(vi)	Transfer pricing adjustments	Rs.3,29,04,214/-

3. Against the said order, the assessee filed objections before the ld. Dispute Resolution Panel ("ld. DRP") who vide its order dated 18.12.2015 has accepted some of the objections raised by the assessee and rejected the remaining. Thereafter, AO passed the final assessment order u/s 143(3)/144C of the Act dated 27.01.2016 at a total income of INR 17,06,11,869/- including TP adjustment of INR 3,11,92,489/- comprising of adjustment towards business support segments of INR 21,90,889/- and adjustment towards corporate guarantee of INR 2,90,01,600/-.

4. Aggrieved by the said order, both parties are in appeal before the Tribunal.

5. First we take Revenue's appeal in **ITA No.1564/Del/2016** for **Assessment Year 2010-11**.

ITA No.1564/Del/2016 [Assessment Year 2010-11]

[Revenue's appeal]

6. The Revenue has raised following grounds of appeal:-

1. *"Whether on the facts and circumstances of the case and in law, the Dispute Resolution Panel (DRP) is justified in has erred in deleting the addition made by the AO on account of disallowance u/s 14A of the Income Tax Act, 1961 (Act) amounting to Rs. 1,34,19,838/ on the ground that no exempt income had been earned during the year?*

2. *Whether on the facts and circumstances of the case and in law, the DRP is justified in not upholding disallowance of Rs. 1,34,19,838/- under section14A of the Act without considering legislative intend of introducing section 14A by the Finance Act 2001 as clarified by the CBDT Circular No. 5/2014 dated 10.02.2014?*

3. *Whether on the facts and circumstances of the case and in law, the DRP is justified in not upholding disallowance of Rs. 1,34,19,838/-*

u/s 14A of the Act without considering a legal principles that allowability of expenditure under the Act is not conditional upon the earning of the income as upheld by Hon'ble Supreme Court in case of CIT Vs. Rajendra Prasad Moody [1978] 115 ITR 519?

4. *Whether on the facts and circumstances of the case and in law, the DRP is justified in not approving the proposed disallowance of Rs. 3,44,92,877/- under section 40(a)(i) of the Act on account of non-deduction of TDS on transmission and uplinking charges paid to Intelsat Corporation, USA by relying on its earlier decision for AY 2009-10, ignoring Explanation 6 to Section 9(1)(vi) which was inserted by Finance Act 2012 w.e.f. 01-06-1976?*

5. *Whether on the facts and circumstances of the case and in law, the DRP is justified in not approving the proposed disallowance on account of software expenses amounting to Rs. 2,77,350/- by relying on the decision of the CIT(A) for the A.Y. 2006-07 and 2007-08 without going into merit of the issue. Reliance is placed on this judgment of the Hon'ble Supreme Court in the case of Tata Consultancy Services Vs State of Andhra Pradesh (2004) 271 ITR?*

6. *Whether on the facts and circumstances of the case and in law, the DRP is justified in rejecting M/s Global Procurement Consultants Ltd. & M/s TSR Drashaw as comparables?*

7. *That the order of the Ld. DRP is erroneous and is not tenable on facts and in law?*

8. *That the appellant craves leave to add, alter, amend or forgo any ground(s) of appeal either before or at the time of hearing of the appeal?"*

7. **Ground of appeal Nos. 1, 2 & 3** raised by the Revenue are with respect to addition proposed u/s 14A of the Act of INR 1,34,19,838/- by the AO vide draft assessment order which stood denied by ld. CIT(A).

8. Before us, ld. CIT DR for the Revenue relied upon the order of AO and submits that the assessee made investments in shares and securities from which the income earned is exempt for tax and therefore, the AO has rightly invoked the provision of section 14A of

the Act in terms of CBDT Circle No.05/2014 dated 10.02.2014. Ld.CIT DR further submits that Hon'ble Supreme Court in the case of ***CIT vs Rajendra Prasad Moody [1978] 115 ITR 519 (SC)*** has held that provisions under Act should be construed strictly and since section 14A specifically provides that interest paid on the funds borrowed for making investments earned exempt income should be disallowed and in the instant case undisputedly assessee has paid interest on the funds borrowed part of which were utilized for making investments which will yield exempted income thus the AO has rightly made the disallowance. He, therefore, prayed for the confirmation of the order of AO.

9. Per contra, Ld.AR for the assessee submits that this issue has already been settled in favour of assessee by the decision of Co-ordinate Bench of Tribunal delivered in assessee's own case which stood confirmed by the Hon'ble High Court of Delhi. It is further submitted by ld. AR that since assessee has not earned any exempt income during the year under appeal from these investments therefore, no disallowance u/s 14A should be made. For this proposition, ld. AR placed reliance on the decision of Hon'ble Delhi High Court in case of ***Cheminvest vs CIT [2015] 378 ITR 33 (Delhi)***. Ld. AR submits that amendment in seciton14A is made in the year 2022 and applicable from Assessment Year 2022-23 and onwards and cannot be applied retrospectively. He prayed accordingly.

10. Heard the contentions of both parties at length and perused the material available on record. In the instant case, AO has made

disallowance of INR 1,34,19,838/- by invoking the provisions of section 14A of the Act, ignoring the fact that assessee had not earned any exempt income during the year under appeal. Though it had made investments in shares and securities but since no exempt income was earned, thus in terms of the judgment of Hon'ble High Court of Delhi in the case of Cheminvest vs CIT (supra), no disallowance could be made.

11. It is further observed that in the case of the assessee itself in Assessment years 2008-09 & 2009-10, Co-ordinate Bench of Tribunal has deleted the disallowance made under identical circumstances vide orders in ITA Nos. 3865/Del/2014 dt. 16.06.2020 for Ay 2008-09 and CO No. 233/Del/2014 dt. 14.07.2017 for AY 2009-10. Thus, by respectfully following the judgement of Hon'ble Delhi High Court and of the Co-ordinate Bench of Tribunal in the case of assessee itself for immediately preceding assessment years, we find no error in the order of Ld. DRP in deleting the disallowances made by AO u/s 14A of the Act after invoking the provisions of section 14A of the Act. Accordingly, Grounds of appeal Nos. 1 to 3 raised by the Revenue are dismissed.

12. **Ground of appeal No.4** raised by the Revenue is with respect to the disallowance of INR 3,44,92,877/- made u/s 40(a)(ia) of the Act on the payment of transmission and uplinking charges paid to Intelsat Corporation, USA which was deleted by ld. DRP.

13. Heard the contentions of both parties at length and perused the material available on record. At the outset, it is seen that the disallowance of similar nature by invoking the provisions of section 40(a)(ia) of the Act was made in preceding Assessment Years i.e. in AY 2008-09 where the coordinate bench by following its earlier order in CO No. 233/Del/2014 dt. 14.07.2017, has deleted the disallowance so made. The relevant observations of the Co-ordinate Bench in its order in ITA No. 3865/Del/2014 for AY 2008-09 dated 16.06.2020 is reproduced as under:-

> *70. "Identical issue has been considered by the coordinate bench in case of the assessee for assessment year 2009 – 10 is under:-*
>
> ***"57.** The second ground of appeal is against the deletion of disallowance of Rs. 78123855/-on account of transmission and up linking charges paid by the assessee to Intelsat Corporation USA without deduction of tax at source. During the course of assessment proceedings it was found by the ld AO that assessee has made payment of transmission and up linking charges of Rs. 145251704/- and out of which a sum of Rs. 78123855/- was paid to M/s. Intelsat Corporation USA. The ld Assessing Officer was of the view that above is deemed income of the recipient u/s 9(1) of the Act and therefore, the assessee was liable to deduct tax at source on such payment. Hence, he disallowed the above sum holding as under:—*
>
> *"**4. Transmission and uplinking Charges***
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> *In the P & L Account the assessee had debited Rs.14,52,51,704/- under the head Transmission and Uplinking Charges. In the notes to account the assessee has furnished the details of expenditure in foreign currency. It has been reported that Rs. 14,52,51,704 has been incurred under the head subscription, uplinking and news service charges. Vide order sheet dt.15.02.2013, the assesses was required to furnish the details regarding TDS on uplinking and transmission charges.*
>
> *The assessee in its reply dt. 11.03.2013 and 22.03.2013, submitted that the payment has been made to a foreign company and in view of the decision of Hon'ble ITAT Delhi, in DCIT v. PanAmSat International System Inc.103 TTJ 861 (Delhi), it is not obliged to deducts TDS. The relevant para of reply dt. 11.03.2013 and 22.03.2013 are reproduced as under:*

Reply dated 11.3.2013 (filed on 22.03.2013)

We have been show-caused as to why disallowance be not be made in respect of transmission and uplinking charges for the non-deduction of TDS u/s 40(1)(ia) paid to Intelsat? Please note that we have already given the details of transmission and uplinking charges to your honour vide our submission dated 11th March 2013. We reiterate that the provisions of TDS/withholding taxes were fully complied with. The payments were made after obtaining the requisite certificates from the Chartered Accountant as defined in the explanation to section 288B of the Income Tax Act'1961. Copies of Form 15CA/CB issued by an independent chartered accountant were also placed before you.

We respectfully submit that there should not be any disallowance on account of non-deduction of TDS/withholding taxes from the payments made to Intelsat Corporation, we are giving below a brief note on the same:

During the year under consideration, the assessee Company booked the expense of Rs. 7,81,23,855/- on account of transponder services received from M/s Intelsat Corporation (Intelsat) in terms of its agreement for the use of satellite (transponder capacity).

Before we proceed to our specific submission and a fact of the case, we here-in-below submits the nature of transaction entered between the assessee Company and Intelsat Corporation to understand its taxability and application of provisions of section 195 of the Act.

The assessee Company is engaged in the business of broadcasting, operating a TV channel. The assessee Company video-graphs events that takes place as and when they happen in the form of programs and by using transmission and up-linking facilities, it sends signals to a satellite that is hovering in space. The signals sent to the satellite are decoded and downlinked over the area covered by the satellite. A transponder is a part of the satellite which receives such signals from the earth stations and re-transmits the same back to the earth with or without amplifying them.

The assessee Company entered into an arrangement with Intelsat Corporation, a Company incorporated in and resident of USA for using such transponder capacity, to make the signals available to the cable operators, who in turn beam the signals to the viewers in their homes.

The above services are like standard facility used for transmission of programs by various media companies. The assessee Company makes use of such facility during the year provided by the Intelsat Corporation.

The assessee Company most respectfully submits the following points for favourable consideration on merits:

The payments in question made to Intelsat Corporation are not a "Royalty" within the provisions of Act as they exist during the year in question. (A retrospective amendment is made in Section 9(1)(vi) by the Finance Act, 2012 to include consideration paid for the use or right to use of transmission by satellite within the ambit of the definition of "Royalty")

Even after the above amendment in the Income Tax Act, 1961, there is no change in definition of the tern 'Royalty" under the DTAA between the India - USA. Therefore, even today the payments in question could not be taxed as "Royalty" in the hands of recipient in view of the favourable position on this issue in relevant DTAA.

These payments were made after obtaining the requisite certificates from the Chartered Accountant (CA) who certified that the above sums were not chargeable to tax in India, as it constituted business income under Article 7 of the DTAA and in the absence of Permanent Establishment ('PE'), same could not be liable to tax in India.

Intelsat Corporation is a non-resident company incorporated under the laws of USA and is a tax resident of USA and, therefore, the provisions of DTAA entered between India and USA are applicable on Intelsat which are more beneficial to Intelsat.

For the year in question, the revenue of transmission and up-linking facilities in the hands of Intelsat Corporation were already held not taxable by the Honble Delhi High Court vide order dated 28/9/2012.

The issue whether the recipient of such charges is liable to tax in India is also settled by the Jurisdictional High Court in the case of Asia Satellite Telecommunications Co. Ltd. v. DIT, (332 ITR 340) in favour of the taxpayer. Similarly, such charges were also held not liable to tax in India in view of Article 12(3) of DTAA entered between India and USA in the case of DCIT v. PanAmSat International System Inc (103 TTJ 861 (Delhi).

In view of the facts and the legal position stated above, it is clear that the assessee Company had no liability to deduct tax on such payments under section 195 of the Act which provides that any person would liable to deduct tax if the payments made to non-resident are chargeable to tax. When it has already been held be the jurisdictional High Court/Tribunal that such sum is not taxable in India in the recipient, no liability could be fastened on the payer to deduct on such sum. Thus, the disallowance of above sum by invoking the provisions of section 40(a)(i) of the Act will be arbitrary and unwarranted.

The legal view prevailing at the time of previous year 2008-09 was that such payments were not chargeable to tax in India under section 9(1)(vi) read with section 195 of the Act. Therefore the assessee Company was correct in law in not deducting tax at source on such payments at that point of time. The case of the assessee Company is also supported from the fact that Intelsat Corporation was held not liable to tax in India by the Jurisdictional High Court.

Without prejudice to above submissions on merit and in alternate, *the assessee Company most respectfully submits that on the facts of the case the disallowance under section 40(a)(i) of the Act is unwarranted as the above provisions are applicable only in a situation where the expenses remain unpaid/payable as on 31st March of the previous year and no taxes have been deducted/deposited on the same, are not applicable in the present case. To support the above, reliance is placed on the decision in the case of* ***Merilyn Shipping & Transports v. Addl. CIT, 146 ITJ 1, ITAT (Vishakhapatnam) wherein it has been held that section 40a(ia) of the Act can be invoked only to disallow expenditure of the nature referred to therein which is shown as payable as on the date of balance sheet.***

It is admitted fact in present case that the above amount were paid during the year in the foreign currency as disclosed in the Audited Accounts of the year in question Therefore, the provision of section 40(a)(ia) of the Act could not be invoked in view of the decision in the case of ***Merilyn Shipping & Transports (supra)*** *as no expenses remained as payable as on March 31, 2009. Thus, in alternate on this account also no addition is warranted.*

The submission of assessee was duly considered and are not acceptable. *The payments made under the head Transmission and uplinking charges are covered under the definition of royalty as define in section 9 of the I. T. Act. The provisions of the section 9 which defines the term royalty are reproduced as under:*

Section 9 Income deemed to accrue or arise in India.

(1) The following incomes shall be deemed to accrue or arise in India....

(vi) income by way of royalty

payable by-

(a)	*The Government; or*
(b)	*A person who is a resident, except where the royalty is payable in respect of any right, property or information used or services*

utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or....

(c) Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of , any data, documentation, drawing or specification relating to any patent, invention, model, design,

secret formula or process s or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government.

87a. Explanation 6 - For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for downlinking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret...

(87a. Inserted by the Finance Act, 2012, w.r.e.f. 1-6-1976.

The provisions of section 9(1)(vi) regarding income by way of royalty were very clear and specific. The word "process" included the Transmission and uplinking charges however, looking to the disputes in the various courts and contrary judgments in this regard, a clarification / amendment has been inserted by the Finance Act, 2012 (with retrospective effect from 01.06.1976) which clearly says that the "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal). In view of the present status of the legislation the Transmission and uplinking charges paid by the assessee without deducting any TDS would invite the consequences of provisions of section 40(a)(i).

The assessee argument that no technical knowledge has been made available to it therefore it is not covered in the included services. The submission of the assessee is acceptable to the extent that no technical knowledge has been made available. However, for royalty the requirement of make available of technical

knowledge is not required under the DTAA. It is only in the case of fee for technical services/include services. Therefore the clause regarding make available in the DTAA will not help the assesse in any way, from the liability of deducting TDS on Transmission and Uplinking charges.

The decision of Honble ITAT Delhi in the case of PANM international system is also not applicable because the payment of transmission and uplinking charges has now been covered under the definition of royalty through amendment in Finance Act,2012. In the case of PANM International system the issue examined by the Honble ITAT was regarding making technical knowledge available for the TV Channels. Where in the case under consideration the uplinking and transmission charges are being taken as royalty as defined u/s 9(1)(Vi).

The above definition clearly indicates that transmission and uplinking charges are covered under the definition or royalty (process) and it has been categorically introduce by the finance 2012 that process includes and shall be deemed to have always included transmission by satellite (including up-linking , amplification, conversion for down-linkiong of any signal). Since the transmission and uplinking charges are covered under the definition of royalty as define under the provision of section 9 therefore any payment made in respect of royalty to a person who is not resident in India , will also be a income deemed or accrue or arising in India. As the expense of transmission and uplinking charges of Rs.7,81,23,855/- to M/s Intelsat corporation is a deemed income which has arisen in India therefore, the assesse was liable to deduct TDS on this payment, under the provision of section 195 therefore, this payment of transmission and uplinking charges to M/s Intelsat Corporation is not allowable under the provisions of section 4 (a)(i). I am satisfied that the assesse has furnished inaccurate particulars of its income and has concealed its correct income on this issue, therefore, penalty proceedings u/s 271 (1)(C) of I.Tax Act have been separately been initiated."

58. *Aggrieved by the draft order of the ld Assessing Officer assessee preferred objection before the ld DRP who vide para No. 7 of its direction directed the AO to delete the above disallowance as under:—*

"6. Disallowance of transmission and up-linking charges u/s 40(a)(i) amounting to Rs. 7,81,23,855/-

Assessee had paid the above amount to Intelsat Corporation, a company incorporated in USA for using transponder capacity, to make the signals available for the cable operators. The AO has disallowed this sum because no TDS was made. Assessee has contended that in the case of Intelsat Corporation, the Hon'ble High Court of Delhi vide order dated 28.09.2012 has held that no tax

was payable by the company on account of the revenue of transmission and up-linking facilities. In view of this, there is no question of TDS on the amounts payable to Intelsat Corporation. DRP has considered the argument of the assessee. In view of the binding decision coming from jurisdiction Delhi High Court, the contention of the assessee is accepted. The AO is directed to drop the proposed disallowance."

59. *Before us the ld DR relied upon the draft assessment order whereas the ld AR vehemently submitted that the issue is squarely covered by the decision of Hon'ble Delhi High Court in case of Intelsat Corporation dated 28.09.2012. He therefore stated that there is no error in the order of the ld DRP.*

60. *We have carefully considered the rival contentions and also perused the facts of the case as well as the decision of the Hon'ble Delhi High Court. We are convinced with the argument of the ld AR that the issue is squarely covered by the decision of Hon'ble jurisdictional high court. The ld DR could not controvert that how this issue is not squarely covered in favour of the assessee and he also could not show us any other judicial precedent so as to persuade us to disagree with the views of the ld DRP. Further merely because the revenue has filed an SLP before the hon'ble Supreme Court against the decision of Delhi High Court cannot be a reason for sustaining the disallowance. In view of this we do not find any infirmity in the direction of the ld DRP in directing the ld Assessing Officer to delete the disallowance transmission and up linking charges paid to Intelsat Corporation USA of Rs. 78123855/- In the result the ground No. 2 of the appeal of the Revenue is dismissed."*

Therefore respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10, we direct learned assessing officer to delete the disallowance of ₹ 73843516/– on account of non-deduction of tax at source on Transmission and uplinking charges. Accordingly ground number [6], [7] and [8] of the appeal are allowed.

14. As the facts are identical thus by respectfully following the orders of Co-ordinate Bench of Tribunal in the case of assessee own case for immediately preceding assessment years which are followed by ld. DRP for deleting the disallowance made by the AO, we find no infirmity in the order of ld. DRP and accordingly, the same is hereby, upheld. Ground of appeal No. 4 raised by the Revenue is thus, dismissed.

15. **Ground of appeal No.5** raised by the Revenue is with respect to disallowance of software expenses amounting to INR 2,77,350/- deleted by ld. DRP.

16. Heard the contentions of both parties at length and perused the material available on record. The AO has made disallowance of software expenses claimed in the Profit & Loss account by holding that assessee has purchased certain software which are capital in nature. Therefore, the AO has treated the said payment as capital expenditure and after allowing depreciation on the same, remaining amount of INR 2,77,350/- was disallowed. It is observed that ld. DRP deleted the said disallowance by following the judgement of Co-ordinate bench in assessee's own case for AYs 2008-09 & 2009-10 where the similar disallowance was deleted by the Co-ordinate Bench of the Tribunal. The relevant observations in AY 2008-09 vide its order dated 16.10.2020 are as under:-

> *19. "We have carefully considered the rival contention and perused the orders of the lower authorities. Identical issue arose in case of the assessee for assessment year 2009 – 10* ***[2017] 83 taxmann.com 282 (Delhi - Trib.)/[2017] 189 TTJ 1 (Delhi - Trib.)*** *wherein the coordinate bench decided the issue as under:-*
>
> > ***"61.*** *Ground No. 3 of the appeal of the Revenue is against direction of the ld DRP to delete the disallowance of Rs. 8245612/- on account of software expenses. During the year the assessee has incurred expenditure of Rs.32435619/- on software expenses and claimed the same as revenue expenditure. The ld Assessing Officer was of the view that it is capital in nature and therefore depreciation @60% thereon is allowable and not the whole expenditure. After considering the submission of the assessee ld Assessing Officer held that computer software expenses to the extent of Rs. 20614030/- shown by the assessee is disallowable as it is capital expenditure. Therefore he allow depreciation @60% on Rs.*

20614030/- amounting to Rs. 12368618/- and thus disallowed a sum of Rs. 8245612/-. The Assessing Officer was of the view that assessee has purchased accounting software and its upgradation and also on software such as google earth, pro Microsoft server calls are purchased which gives the assessee an advantage of enduring nature. The assessee aggrieved with the order of the ld Assessing Officer preferred objection before the ld DRP who directed the ld Assessing Officer delete the above disallowance vide para No. 8 of its order as under:—

'8. Disallowance of software expenses amounting to Rs. 82,45,612/-

The assessee regularly purchases softwares which are used for its programming purposes. The AO has treated it as capital expenditure. This issue was litigated in the earlier years and Commissioner of Income Tax(Appeals) has made the following observation on the same issue for the AY2007-08 which is reproduced below:

"From the submission of the appellant it is clear that the appellant has capitalized certain software purchases on its own. The 'up-gradation of software' and under the head 'other software1 were treated as capital in nature by the AO and depreciation at the rate of 60% was allowed by him. However, on going through the details, it is noticed that these software need regular up-gradation or change as per the requirements of fast changing broadcasting industry. The life of these software are for a shorter period and therefore it cannot be said the same is providing enduring benefit to the appellant. For the AY 2006-07 also, my predecessor CIT(A)-XVI has allowed such expenditure as revenue expenditure in para 3.2 of the appeal order dated 30.09.2011 in appeal no. 228/08-09. The nature of software purchased and the business of the appellant for which the software so purchased were applied remains the same. In view of this, the expenditure under the head upgradation of software and other software amounting to Rs. 2,07,009/- and 5,58,006/- respectively is held as allowable deduction during the year. AO is directed to delete the addition made in this regard. "

Therefore, DRP is also of the view that these expenditures are revenue in nature and hence allowable. AO is directed not to make this addition in assessment order. Objection 1 is treated as disposed off."

62. *The ld DR relied upon the order of the ld Assessing Officer whereas the ld AR relied upon the orders of the ld DRP.*

63. *We have carefully considered the rival contentions. The assessee has been allowed the identical claim in earlier years*

by the ld CIT(A) and based on that decision the ld DRP was also of the view that the above expenditure incurred by the assessee is revenue in nature. The ld DR could not controvert that why the order of the ld DRP is erroneous. In view of this we do not find any infirmity in the direction issued by the ld DRP. In the result we confirm the direction of the DRP. In view of this ground No. 3 of the appeal of the revenue is dismissed."

As there is no change in the facts and circumstances of the case, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2009 – 10, ground number [2] of the appeal of the learned assessing officer is dismissed."

17. As the facts are identical and ld. DRP also followed the order of Co-ordinate bench of the Tribunal in the case of the assessee for preceding assessment years, therefore, by respectfully following the same, we hold that ld. DRP has rightly deleted the disallowance which order is hereby upheld. Ground of appeal No.5 raised by the Revenue is dismissed.

18. **Ground of appeal No.6** raised by the Revenue is with respect to the rejection of Two comparable namely M/s. Global Procurement Consultants Ltd. & M/s. TSR Drashaw selected by the TPO for determination of Arm length price of International transactions with its AE.

19. Brief facts of the case are that the assessee was providing services in the nature of support services, human resources, information technology, administration services, finance control, audit, treasure and accounting services etc. to its AEs. The assessee has chosen TNMM to determine ALP of transactions of business support services provided to its AEs, according to which PLI of the assessee is 12% on cost and average PLI of comparable was 12.26%

and thus no adjustment was made by the assessee. Though the TPO has accepted the TNMM employed by the assessee however, has excluded 11 comparables selected by assessee and further included 06 new comparables and worked out the average margin of 24.95% and leading to the adjustment of INR 39,02,614/- towards international transactions related to business support services provided to its AE's.

20. The Six new comparables selected by TPO are as follows:-

i. APITCO Limited
ii. Cameo Corporate Services Limited
iii. Global Procurement Consultants Limited
iv. HCCA Business Services Pvt. Limited
v. Quadrant Communication Limited
vi. TSR Darashaw Limited

21. While disposing the objections of the assessee, ld. DRP confirmed the inclusion of APITCO Ltd; Cameo Corporate Services ltd.; HCCCA Business Services Pvt. Ltd. and Quadrant Communication Ltd. and, accepted the assessee's contention and excluded 02 comparables selected by TPO i.e. M/s. Global Procurement Consultants Ltd. & M/s. TSR Darashaw. Thereafter, TPO has passed the order giving effect wherein the adjustment was reduced to INR 21,90,889/- with respect to business support services. Against the inclusion of 04 comparables, the assessee is in appeal whereas for the exclusion of 02 comparables, as directed by Hon'ble DRP, the Revenue is in appeal before the Tribunal. Since we are presently dealing with the appeal of Revenue therefore, exclusion of 02 comparables by ld. DRP i.e. M/s. Global Procurement Consultants Ltd. & M/s. TSR Drashaw are discussed herein below.

22. Before us, ld. CIT DR for the Revenue submits that TPO at page 2 of its order has discussed the nature of the services as under:-

> ***2.1 "Nature of shared services***
>
> *2.1.1 The services that may be provided on a shared basis by the service provider ("Shared Services") would include:*
>
> *a. Certain critical services to preserve the quality of services or adherence to corporate governance norms, namely (i) brand promotion and preservation services: (i) MIS services; (iii) legal regulatory compliances services; and (iv) satellite up-linking services (collectively "Mission Critical Shared Services"):*
>
> *b. The services on which the revenues of the consumer would be critically dependent on, namely distribution and sales services ("Profit Centre Shared Services") and*
>
> *c. The services which will provided to the consumer by the service provider for an initial term of two years from the effective date ("Initial Period), namely. (1) human resource management services: (il) Information technology services: (iii) engineering services: (iv) administration services: (v) finance and accounting services (collectively "Other Shared Services")."*

23. Ld. CIT DR for the Revenue drew our attention to para 9 of TPO's order where TPO has applied the filters of current year data and further with respect to the turnover, the TPO has applied threshold limit of INR 01 crore. Likewise, the TPO has also discussed the other filters applied by the assessee which were modified. Ld. CIT DR submits that in subsequent pages of TPO's order, the TPO has discussed the filter applied by him and at page 15 of the order, has discussed the new comparable included by it which includes M/s. Global Procurements Consultancy Ltd. As per TPO, this company is providing similar services as by the assessee.

24. Ld. CIT DR for the Revenue submits that TPO in its order in para 11.3 at page 71 has discussed the inclusion of M/s. Global

Procurements Consultancy Ltd. wherein TPO has observed that main services provided by the company are procuring and managing services to Government Department and their projects execution agendas. Since procurement services are in the nature of business support services, as per ld. CIT DR it is a correct comparable. Ld. CIT DR further submits that Hon'ble DRP has failed to appreciate these facts and incorrectly held that the company is functionally dissimilar and thus, is not a valid comparable. Accordingly, Ld. CIT DR prayed for the inclusion of the said company in the final set of comparables.

25. On the other hand, Ld. AR submits that company, M/s. Global Procurements Consultancy Ltd. is providing technical services to World Bank and undertaking consultancy negotiations and hands to hands services which altogether different from the business support services provided by the assessee to its AEs. Ld. AR submits that as per the information stated by the company on its website and the Annual Report, the company is engaged in provision of procurement services that vary from various industries and with its strategic partnership with various internationally recognized bodies, the scale at which it operates is completely different from the functions performed by the assessee. Ld. AR further drew our attention to the judgement of the Co-ordinate Bench in the case of Philip Morris Services India SA vs DDIT, Circle-2(1), New Delhi in ITA No.827/Del/2014 wherein Co-ordinate Bench has held that company M/s. Global Procurements Consultancy Ltd. is not a valid comparable. He thus, submits that ld. DRP has rightly excluded the

company i.e. M/s. Global Procurements Consultancy Ltd. and requested for the confirmation of the same.

26. Heard the contentions of both parties at length and perused the material available on record. From the perusal of the Annual report and the extracts of website of the company as reproduced by the assessee in its submission before the ld. DRP, available at pages 777 to 779 of PB, it is observed that company, M/s. Global Procurements Consultancy Ltd. was providing services in the nature of preparing and reviewing technical specification and mainly procurement related services for World Bank etc. and thus, is altogether different from the function carried out by the assessee. The Co-ordinate Bench of Tribunal Delhi, in the case of Philip Morris (supra) has also excluded this company from set of valid comparables by appreciating the fact that this company was established by the Government to serve the purpose of professional procurement and management services needs and also to provide combines management services required by the Government Department or their projects execution agencies and therefore its business model is entirely different from the assessee.

27. Before us, Ld. CIT DR for the Revenue has not made out of a that M/s. Global Procurements Consultancy Ltd. is functionally similar and therefore, we are of the considered view that ld. DRP has rightly excluded this company from the final set of comparables, we order accordingly.

28. In this Ground, Revenue has further challenged the exclusion of company M/s TSR Darashaw Limited from the final set of comparables.

29. Heard the contentions of both parties at length and perused the material available on record. The main contention of the revenue is that company is functionally similar however, from the perusal of order of ld. DRP, it is observed that said company is mainly providing three services: (i) Registrar and Transfer Agent Activity; (ii) Records Management Activity; and (iii) Payroll and Trust Fund Activity payroll and all these services as provided by it are altogether different from the services provided by the assessee to its AE. It is further observed that in the case of ***CIT vs Philip Morris Services India S.A vs DCIT [2018] 95 taxmann.com 156 [Del.Trib.],*** the Co-ordinate Bench has held that the company is not comparable which order sought confirmed by the Hon'ble High Court as reported in ***10 taxmann.com 376.*** Further in the case of ***Intercontinental Hotels Group (India) P. Ltd. vs DCIT reported in 126 taxmann.com 313 [Del.Trib.]***, the Co-ordinate Bench of the tribunal has held that the activity of TSR Darashaw Limited is as non-comparable. The relevant observation as contained in para 19 are as under:-

> *19. "The next concern which the Ld.AR for the assessee claims is not comparable is TSR Darashaw Ltd. on the ground that the same operates in three segments i.e. Registrar and Transfer Agent Activity, Record management and Payroll and Trust Fund Activity Payroll, which functions are not similar to the Marketing and Ancillary Management Support Services provided by assessee to its AE. The case of the assessee is the concern, which acts as depository and share registrar cannot be held to be functionally comparable to the assessee. Our attention was drawn to the Annual Report, wherein it is clearly mentioned that the TSR Darashaw Ltd. acts as Registrar and*

Share Transfer Agents, as against the functional profile of the selected concern is different from that of the assessee, which is engaged in providing Marketing and Ancillary Management Support Services to its AE. The said concern is to be excluded from final list of comparables. We also find support from the decision of Hon'ble Delhi High Court in Philips Morris (supra) to exclude it from the final list of comparables. The Hon'ble Delhi High Court in Philip Morris (supra) vide paras 39 & 40 directed the exclusion of TSR Darashaw Ltd. as no segmental information was available in respect of the different segments operated by the company. Accordingly, we hold that TSR Darashaw Ltd. is not to be included in final list of comparables."

30. The assessee company providing services in the area of human resources, information technology, administration services, finance control, audit, treasury and accounting services etc. to its AE which are different from the services provided by TSR Darashaw Limited and revenue has failed to controvert the findings of ld. DRP wherein the ld. DRP observed that this company is a low end service provider, therefore, we find no error in the order of Hon'ble DRP in excluding the same from the final set of comparables. Accordingly, Ground of appeal No.6 raised by the Revenue is dismissed.

31. **Ground of appeal No.7** raised by the Revenue is general in nature, hence dismissed.

32. In the result, appeal of the Revenue is dismissed.

ITA No.1623/Del/2016 [Assessment Year : 2010-11]
[Assessee's appeal]

33. The assessee has raised following grounds of appeal:-

1. *"That on the facts of case and in law, the Assessment Order passed under section 143(3) read with section 144 C of the Act pursuant to the directions issued by the Ld. DRP under section*

144C of the Act is vitiated in law, as the Id. DRP has erred on the facts in confirming the additions/variations made by the Ld. AO/ Ld. Transfer Pricing Officer (TPO) to the Appellant's returned income.

2. *That on the facts and circumstances of the case and in law, the Ld. DRP erred in upholding the disallowance made by the Ld. AO in relation to claim of ESOP expenses amounting to Ra. 39,740.*

2.1 *That the Ld. DRP/AO erred in not allowing the revised claim of the appellant of ESOP expenses amounting to Rs. 7,44,625 computed in accordance with the directions of the Hon'ble ITAT, Delhi in the Appellant's own case for the AY 2006-07 as against the original claim of Rs. 39,740.*

3. *That on the facts of the case and in law, the Ld. TPO/AO has erred in not discharging the statutory onus to establish that any of the conditions specified in clause (a) to (d) of section 92C (3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price.]*

4. *That Ld. AO erred in enhancing the ALP by Rs. 21,90,889/- in respect of the international transaction pertaining to provision of business support services ('BSS') to its associated enterprises(AE) by arbitrarily rejecting the comparables adopted by the Appellant and by selecting the comparables which were not comparables on the basis of FAR(functions performed, assets employed and risk assumed)*

5. *That the Ld. AO/Ld. TPO has grossly erred in making an addition of Rs. 2,90,01,600/- in respect of the alleged international transaction of provision of Corporate Guarantee on the ground that the Appellant should have been compensated for providing such alleged guarantee.*

5.1 *That the Ld. AO /Ld. TPO failed to appreciate that the Appellant did not provide any corporate guarantee during the year but merely gave an undertaking to provide guarantee for and on behalf of its AE and had not actually provided any guarantee.*

5.2 *That the Id. AO/Ld. TPO erred in computing the arm's length alleged guarantee commission rate erroneously based on flawed methodology and adjustments which is excessive and unreasonable. (without prejudice to the Appellant's contention that it had not provided any guarantee)*

6. *That on the facts of the case and in law, the Ld. AO has grossly erred in initiating the penalty proceedings under section 271(1)(c) of the Act.*

The above grounds are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."

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

34. **Ground of appeal No.1** raised by the assessee is general in nature hence, not adjudicated.

35. **Ground of appeal No.2** of the assessee is with respect to the disallowance of INR 39,740/- made at ESOP expenses.

36. Ld. AR submits that originally claim of the assessee was of INR 39,740/- however, in terms of Special Bench judgement in the case of Biocon Ltd. reported in 35 taxmann.com 335, revised working was made and increased claim of ESOP of INR 7,44,625/- was raised in terms of letter dated 20.04.2015 before AO as available at page 839 to 840 of the Paper Book.

37. Heard the contentions of both parties at length and perused the material available on record. At the outset, it is seen that this issue has already been decided by the Co-ordinate Bench in assessee's own case for AY 2008-09 wherein the Co-ordinate Bench in ITA No.3865/Del/2014 vide para 12 & 13 of its order made the following observations and dismissed the appeal of the Revenue:-

12. *"We've carefully considered the rival contention and perused the orders of the lower authorities. We find that identical issue is covered in favour of the assessee by the decision of the honourable Delhi High Court in assessee's own case for*

assessment year 2006 – 07 and 2007 – 08. The order of the honourable High Court for assessment year 2007 – 08 reported in 99 taxmann.com 401 (Delhi)/[2017] 398 ITR 57 (Delhi) has held as under:-

> *"2. Learned counsel for the assessee appearing on advance notice, on the other hand, urges that there is no infirmity with the approach of the Income-tax Appellate Tribunal and that this Court had on July 12, 2016 given reasons for not entertaining the appeal which was not dismissed merely on the ground of delay. The previous order of the Court records inter alia as follows :*
>
> *"7. As far as this issue is concerned, it is pointed out by the learned counsel for the assessee that the issue stands covered in favour of the assessee and against the Revenue by the order of this Court dated August 18, 2015 in I.T.A. No. 107 of 2015 (CIT v. Lemon Tree Hotels Ltd.). The Court had affirmed the order of the Income-tax Appellate Tribunal deciding the issue in favour of the assessee in the said case where the addition made by the Assessing Officer by way of disallowance of the expenses debited as cost of ESOP in profit and loss account was deleted by the Income-tax Appellate Tribunal.*
>
> *8. In the present case, the Income-tax Appellate Tribunal has by the impugned order restored the matter to the file of the Assessing Officer for re-adjudication. The impugned order of the Income-tax Appellate Tribunal is consistent with what has been held by this Court in Lemon Tree Hotels (supra). Consequently, no substantial question of law arises as far as this issue is concerned."*
>
> *3. In Lemon Tree Hotels Ltd. (Supra) (referred to by the previous order), the court had relied upon a ruling of the Division Bench of the Madras High Court in CIT v. PVP Ventures Ltd. [2012] 23 taxmann.com 286/211 Taxman 554. In PVP Ventures Ltd. (supra), the Madras High Court, after considering the SEBI's claim held as follows (page 314 of 1 ITR-OL) :*
>
> *"As regards the second issue which is now canvassed before this Court, viz., On the issue of expenditure of Rs. 66.82 lakhs towards the issue of shares to the employees stock option is concerned, the Tribunal pointed out that the shares were issued to the employees only for the interest of the business of the assessee to induce employees to work in the best interest of the assessee. The allotment of shares was done by the assessee in strict compliance with SEBI regulations,*

which mandate that the difference between the market prices and the price at which the option is exercised by the employees is to be debited to the profit and loss . . . the Tribunal in its order stated that it was a benefit conferred on the employee. So far as the company is concerned, once the option was given and exercised by the employee, the liability in this behalf got ascertained. This was recognised by the SEBI and the entire employees stock option plan was governed by the guidelines issued by the SEBI. On the facts thus found, the Tribunal held that it was not a case of contingent liability depending on the various factors on which the assessee had no control. The expenditure in this behalf was an ascertained liability, thus the expenditure incurred being on lines of the SEBI Guidelines, there could be no interference in the relief granted by the assessing authority for the expenditure arising on account of the employees' stock option plan. This expenditure incurred as per the SEBI Guidelines and granted by the Officer could not be considered as erroneous one calling for the exercise of jurisdiction under section 263 of the Act." 4. The Special Bench ruling in Biocon Ltd. (supra) considered the matter rather elaborately and also examined all the previous decisions. It scrutinised different accounts of ESOPs and the points of time when they could have vested. The observations of the Special Bench in this regard, inter alia, are as follows (page 623 of 25 ITR (Trib)) :

"When we consider the facts of the present case in the backdrop of the ratio laid down by the Hon'ble Supreme Court in Bharat Earth Movers v. CIT [2000] 245 ITR 428 and Rotork Controls India (P.) Ltd. v. CIT [2009] 314 ITR 62 (SC), it becomes vivid that the mandate of these cases is applicable with full force to the deductibility of the discount on incurring of liability on the rendition of service by the employees. The factum of the employees becoming entitled to exercise options at the end of the vesting period and it is only then that the actual amount of discount would be determined, is akin to the quantification of the precise liability taking place at a future date, thereby not disturbing the otherwise liability which stood incurred at the end of the each year on availing of the services.

As regards the contention of the learned Departmental representative about the contingent liability arising on account of the options lapsing during the vesting period or the employees not choosing to exercise the option, we

find that normally it is provided in the schemes of ESOP that the vested options that lapse due to non-exercise and/or unvested options that get cancelled due to resignation of the employees or otherwise, would be available for grant at a future date or would be available for being re-granted at a future date. If we consider it at micro level qua each individual employee, it may sound contingent, but if view it at macro level qua the group of employees as a whole, it loses the tag of 'contingent' because such lapsing options are up for grabs to the other eligible employees. In any case, if some of the options remain unvested or are not exercised, the Page | 11 discount hitherto claimed as deduction is required to be reversed and offered for taxation in such later year. We, therefore, hold that the discount in relation to options vesting during the year cannot be held as a contingent liability.

C. Fringe Benefit

. . . Act 2005, with effect from April 1, 2006. Memorandum explaining the provisions of the Finance Bill, 2005 highlights the details of the fringe benefits tax. It provides that : 'Fringe benefits as outlined in section 115WB, mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including former employees) by reason of their employment'. Charging section 115WA of this Chapter provides that : 'In addition to the Income-tax charged under this Act, there shall be charged for every assessment year . . .'fringe benefit tax in respect of fringe benefits provided or deemed to have been provided by an employee to his employees during the previous year'. Section 115WB gives meaning to the expression 'fringe benefits'. Sub-section (1) provides that for the purposes of this Chapter, 'fringe benefits' means any consideration for employment as provided under clauses (a) to (d). Clause (d), which is relevant for our purpose, states that: 'any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees)' shall be taken as fringe benefit. The Explanation to this clause clarifies that for the purposes of this clause,—(i) 'specified security' means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme thereof, includes the securities offered under such plan or scheme. Thus it is discernible

from the above provisions of the Act that the Legislature itself contemplates the discount on premium under ESOP as a benefit provided by the employer to its employees during the course of service. If the Legislature considers such discounted premium to the employees as a fringe benefit or 'any consideration for employment', it is not open to argue contrary. Once it is held as a consideration for employment, the natural corollary which follows is that such discount (i) is an expenditure; (ii) such expenditure is on account of an ascertained (not contingent) liability; and (iii) it cannot be treated as a short capital receipt. In view of the foregoing discussion, we are of the considered opinion that discount on shares under the ESOP is an allowable deduction.

II. If yes, then when and how much ?

Having seen that the discount under ESOP is a deductible expenditure under section 37(1), the next question is that 'when' and for 'how much' amount should the deduction be granted ?

The assessee is a limited company and hence it is obliged to maintain its accounts on mercantile basis. Under such system of accounting, an item of income becomes taxable when a right to receive it is finally acquired notwithstanding the fact that when such income is actually received. Even if such income is actually received in a later year, its taxability would not be evaded for the year in which right to receive was finally acquired. In the same manner, an expense becomes deductible when liability to pay arises irrespective of its actual discharge. The incurring of liability and the resultant deduction cannot be marred by mere reason of some difficulty in proper quantification of such liability at that stage. The very point of incurring the liability enables the assessee to claim deduction under mercantile system of accounting. We have noticed the mandate of the Hon'ble Supreme Court in Bharat Earth Movers [2000] 245 ITR 428 that if a business liability has definitely arisen in an accounting year, then the deduction should be allowed in that year itself notwithstanding the fact that such liability is incapable of proper quantification at that stage and is dischargeable at a future date. It follows that the deduction for an expense is allowable on incurring of liability and the same cannot be disturbed simply because of some difficulty in the proper quantification. A line of distinction needs to be drawn between a situation in which a liability is not incurred and a situation in

which the liability is incurred but its quantification is not possible at the material time. Whereas in the first case, there cannot be any question of allowing deduction, in the second case, deduction has to be allowed for a sum determined on some rational basis representing the amount of liability incurred."

5. Having regard to the above discussion, especially that the previous order dated July 12, 2016 in ITA No. 366 of 2016 had considered the same items of expenditure, under section 34, we are of the opinion that no question of law arises. The appeal is accordingly dismissed."

13. In view of this, we dismiss ground number (1) of the appeal of the learned assessing officer."

38. As the facts are identical and ld. DRP has also followed the judgement of hon'ble Delhi high court in the case of assessee itself for preceding assessment years, therefore, by respectfully following the judgment of hon'ble jurisdictional high court and of the Co-ordinate Bench for preceding assessment years, we allow Ground No.2 raised by the assessee and direct the AO to delete the addition.

39. **Ground of appeal Nos. 3 & 4** raised by the assessee are with respect to the adjustment made in Arm's Length Price ("ALP") with respect to business support services rendered to its AEs.

40. The facts pertaining to this issue have already discussed at length in the Revenue's appeal while deciding Ground of appeal No.6 in Revenue's appeal.

41. Before us, in this Ground of appeal, main contention of the assessee is that TPO has included one company namely APITCO Ltd. in the final set of comparables which as per assessee was not a valid

comparable and deserves to be excluded. Ld.AR for the assessee submits that APITCO Ltd. is purely a Government Company and has functionally dissimilar as APITCO is engaged in the business of providing technical consultancy and high end support services. Ld. AR submits that APITCO Ltd. is a government undertaking and is bound to receive funding, technical and operations assistance from the best minds which is not available to the assessee. Ld.AR also filed written submission in this regard which reads as under:-

7. *"It is the case of the Assessee that APITCO Limited is liable to be excluded on the basis of the difference in functional profile: It is submitted that APITCO is engaged in provision of technical consultancy and high end support services. It is submitted that comparison of the same with Assessee's provision of limited risk business support services is erroneous.*

8. *Furthermore, APITCO being a government of India undertaking is bound to receive funding, technical and operations assistance from the best minds which is different from the Assessee. The service description suggests that APITCO works predominately on government initiative project, therefore, the same is not comparable. Reliance in this regard is placed on the Hon'ble Tribunal's decision in the case of Turner & Townsend Pvt. Ltd. v. ACIT (ITA No. 8763/DEL/2019). being functionally different was directed to be excluded. The Hon'ble Tribunal held as under:*

> *"8. On going through the records and also the submissions made by the assessee it is found that the APITCO provides numerous services which are not provided by the assessee, the assessee is not involved in to skill development entrepreneurship development and training, research studies, asset reconstruction and management Services. Energy Related Service, Tourism Infrastructure Development and Environmental Management. Further, by going through the financial statement of the company for the Financial Year 2011-12. it is found that the APITCO is held by public share holder whereas the assessee is held by Private Limited Company. Services description suggests that APITCO works predominantly on government initiative project. Thus, the ratio laid down in the following judgments suggests that the APITCO cannot be a good comparable.*

- *Terex Equipment (P) Ltd. ACIT (2019) 104 taxmann.com 323 (Delhi-Trib)*
- *DCIT. Terex India (P) Ltd (2019) 104 taxmann com 281 (Delhi)*
- *Philip Morris Services India S.A v. DCIT (2018) 95 taxmann.com 156 (Delhi -Trib).*
- *Virginia Transformer India (P.) Laid. v. ITO [2017] 84 taxmann.com 245 (Delhi-Trib):*
- *International SOS Services India (P.) Ltd. v. DCIT (2016) 67 taxmann.com 73 (Delhi-Trib)*
- *CIT v. Principal Global Services (P) Ltd [2018] 95 taxmann.com 315 (Bombay):"*

It is submitted that the assessee is providing only simple support services whereas the services provided by APITCO Ltd., are very diverse and high-end ones rendering APITCO Ltd., non-comparable with the assessee.

9. *Moreover, APITCO Ltd. was formed by the key national level financial institutions in association with state-level institutions and banks, and accordingly being a government enterprise, it was established to provide technical services to other Government companies and body corporate. In this regard, reliance is placed on the ruling of the Hon'ble Bombay High Court in the case of Commissioner of Income-tax-2, Pune v. Principal Global Services (P.) Ltd. [2018] 257 Taxman 244 (Bombay), wherein it has been held that customer profile of comparable being completely different inasmuch as the comparable dealt with Government bodies as against assessee dealing only with its AE, was incomparable. It is submitted that in the present case too, the Assessee is providing services only to its AEs whereas APITCO Ltd. deals with the government for provision of services.*

10. *Reliance is also placed on order dated 15.02.2016 passed by the Hon'ble Tribunal in the case of Adidas Technica Services P. Ltd. v. DCIT [ITA No. 1233/DEL/2015] (Ref. Item No. 28 in Paperbook Vol. IV-Pgs. 1536 to 1551, rel. a Pgs. 1544-1545)"*

42. Ld. AR thus, requested for the exclusion of the APITCO Ltd. from the final set of comparables.

43. On the other hand, Ld. CIT DR drew our attention to the services provided by the assessee as stated in the TP Study Report, according to which assessee is providing critical services. He further

drew our attention to page 365 of the Paper Book which is part of the TP study report wherein functions performed by the assessee are stated according to which the assessee is providing following functions:-

3.1.1 Functions performed

"NDTV Is engaged in the provision of shared services to its associated enterprises NNPLC, NDTV EM and NDTV ME Venture FZ LLC ("NDTV ME"). The scope of services that NDTV is rendering to its associated enterprises is listed in Shared Services Agreement ("Agreement"). The shared services provided by NDTV to its associated enterprises are basically in the nature of business support services in the areas of human resource, information technology, administration services, finance control, audit, treasury and accounting services etc. In this regard, the services provided by the Company include the following:

Human resource services

NDTV Is responsible for rendering human resource related support to its associated enterprises. This entails support in all aspects, starting from recruitment to exit procedures. In this regard, the Company is involved in recruitments, negotiation and documentation of service agreements. The Company is also responsible for Identification and execution of the induction process, leave policy and exit process for its associated enterprises. The Company is engaged in designing the compensation structure of the employees of its associated enterprises. The Company also undertakes regular HR database management and performance management activities. The associated enterprises also engage NDTV for specific projects on a need basis.

Financial services

NDTV is responsible for formulation and implementation of accounting policies and guidelines customized for local requirements. NDTV undertakes ongoing financial controlling, financial reporting and MIS activities for its associated enterprises.. NDTV is involved in preparing business plans, budgets and forecasts for these enterprises. The Company provides also provides services such as treasury and procurement activities, ERP maintenance, audit and accounting services.

Information Technology services

The Company is the provider of IT services to its associated enterprises. These support services are in the nature of server support, infrastructure support and user support. Along with this, NDTV also provides internet, email and back up facilities to its associated enterprises.

Administration services

NDTV is engaged in providing various general administration support services to its associated enterprises. NDTV is responsible for security of personnel, maintenance NDTV is engaged in providing various general administration support services to its of office premises, staff welfare and entertainment.

Legal

NDTV is engaged in undertaking corporate compliance, drafting of transactional documents and agreements, providing advice on legal matters and co-ordinating litigation for its associated enterprises. The services include complete portfolio of services related to compliance and legal functions of the associated enterprises.

Engineering

NDTV undertakes playback and monitoring services, advertisement insertion service and other technical services such as dubbing, digitizing, encoding of content, library services, technical quality controls etc for its associated enterprises. It also provides support services for MOR, outdoor broadcasting, broadcasting (besides broadcast systems design, Integration and commissioning and training, and maintenance support for equipment).

Other than the services articulated above, NDTV is also engaged in rendering miscellaneous services in the areas of taxation and corporate communication."

44. Ld. CIT DR for the Revenue drew our attention to para 11.1 at page 66 of the order of TPO where Income from Operations declared by APITCO Ltd. is reproduced and stated that various heads of income are almost similar to heads of income declared by the assessee. Ld. CIT DR further submits that under Rule 10B of the Income Tax Rules, 1962, when TNMM method is selected, only function applicability is to be seen and not the product comparability. Ld. CIT DR further submits that APITCO Ltd. cannot be excluded merely because it is a Government Company. For this, he placed reliance on the judgement of Co-ordinate Bench of Bangalore Tribunal in the case ***Astra Zeneca Pharma India Ltd. vs DCIT [2023] 147 taxmann.com 479 [Bang. Trib.]*** wherein the Co-

ordinate Bench has held that ITDC could not be excluded merely because it is Government Company.

45. Ld. CIT DR further placed reliance on the judgement of the Co-ordinate Bench of ITAT, Delhi Tribunal in the case of ***Copal Research India (P.) Ltd. [2016] 73 taxmann.com 157 [Del.Trib.]*** wherein Co-ordinate Bench has held as under:-

> *6.5. "……We are of the view that in a TNMM methodology identical FAR analysis cannot be insisted upon and the method is infact resorted to when the complete data is not available. In that case the impact on the net profitability of the minor variations in the comparable companies so selected is considered capable of tolerating minor variations in the FAR analysis of the comparables.* ***The selection of this method is resorted to for this very purpose and the method is robust enough to tolerate minor variations if any. It is a fact that a perfect near identical comparable company is a rarity and generally can be said to be a virtually impossible condition incapable of being fully fulfilled. We are of the view that it is for this very purpose that TNMM as a method is often resorted to. The minor difference if any are addressed by comparing net profitability of the comparables.*** *Thus broad comparability of a fairly large number of comparable companies can further ensure that minor variations if any are offset by taking a fairly large sample."*

46. Ld. CIT DR thus, submits that the TPO / AO has rightly included the APITCO ltd. as a valid comparable and he prayed accordingly.

47. In re-joinder, Ld.AR for the assessee submits that APITCO Ltd. cannot be held as a valid comparable and the judgement of Bangalore Bench in the case of Astra Zeneca Pharma India Ltd. (supra) relied upon by Ld. CIT DR, had not considered the judgement of Hon'ble Jurisdictional High Court in the case of Philip Morris Services India

SA (supra)thus, is *per incurium*. He thus, submits that APITCO Ltd. should not be excluded from the final set of comparables.

48. Heard the contentions of both parties at length and perused the material available on record. In this ground, the dispute is regarding inclusion of APITCO Ltd. as a valid comparable which according to assessee, is functionally dissimilar and since it is a Government company, enjoyed added advantages which includes availability of best of the technical minds at its disposal as compared to assessee company. In the case of ***Adidas Technology Services*** in ***ITA No.1233/Del/2015***, the Co-ordinate Delhi Bench of Tribunal has observed that APITCO is a government company and its operation are mainly based on policy requirement of the Government and the fact that it is preferred of Government Trust which cannot be ignored and thus, the Co-ordinate Bench held that said company is not a valid comparable.

49. Coming to the facts of the present case, the functions carried out by the assessee under business support services provided to its AE as reproduced herein above, clearly established that assessee is providing general services to its AE which do not require services of any kind from technical and highly competent personnel whereas the services provided by APITCO are highly specialized and therefore, cannot be held as valid comparable. The Hon'ble Delhi High Court in the case of Philip Morris Services India SA (supra) has held APITCO Ltd. is not a good comparable.

50. Further the coordinate bench of Delhi Tribunal in the case of Turner & Townsend Pvt. Ltd. in ITA NO. 8763/Del/2019 vide its order dt. 28.06.2023 has held the APITCO Ltd as not a valid comparable for bench marking the international transactions, the relevant observations are reproduced as under:

> 8. *"On going through the records and also the submissions made by the assessee it is found that the APITCO provides numerous services which are not provided by the assessee, the assessee is not involved in to skill development entrepreneurship development and training, research studies, asset reconstruction and management Services, Energy Related Service, Tourism Infrastructure Development and Environmental Management. Further, by going through the financial statement of the company for the Financial Year 2011-12, it is found that the APITCO is held by public share holder whereas the assessee is held by Private Limited Company. Services description suggests that APITCO works predominantly on government initiative project. Thus, the ratio laid down in the following judgments suggests that the APITCO cannot be a good comparable.*
>
> - *Terex Equipment (P.) Ltd. v. ACIT [2019] 104 taxmann.com 323 (Delhi - Trib.);*
> - *DCIT v. Terex India (P.) Ltd. [2019] 104 taxmann.com 281 (Delhi)*
> - *Philip Morris Services India S.A v. DCIT [2018] 95 taxmann.com 156 (Delhi - Trib.);*
> - *Virginia Transformer India (P.) Ltd. v. ITO [2017] 84 taxmann.com 245 (Delhi - Trib.);*
> - *International SOS Services India (P.) Ltd. v. DCIT [2016] 67 taxmann.com 73 (Delhi - Trib.);*
> - *CIT v. Principal Global Services (P.) Ltd [2018] 95 taxmann.com 315 (Bombay);*
>
> 9. *Further, it is found that more than 75% of the Revenue earned by the APITCO in the Financial Year 2011-12 was from the activities like Skill Development, Cluster Development, Research Studies, Micro Enterprises Development, Environmental Management etc. But the assessee is only engaged in providing Project Management, Cost Management and Management Consultancy Services. Thus, functionally APITCO is not a comparable company to the assessee.*
>
> 10. *For the above said reasons, we are of the opinion that APITCO is functionally different and the same should be excluded from the list of comparables selected by the TPO. Accordingly the APITCO is*

ordered to be excluded as comparables for bench marking international transactions for assessee company. Accordingly, the Ground No. 2 & 3 of the assessee are allowed."

51. Regarding the arguments of Ld.CIT DR that under TNMM method, brought comparabilities to be considered and not the product comparability. We find that Hon'ble Delhi High Court in the case of ***Rampgreen Solutions Pvt.Ltd. vs CIT*** reported in ***[2015] 377 ITR 533 (Delhi)*** held that while selecting the comparables transactions or entities, the basis should be one of similarity with the control transactions/entities and mere broad similarity is not sufficient. Following the aforesaid judgements of Hon'ble Delhi High Court, the Hon'ble Court in the case of ***Avenue Asia Advisors Pvt.Ltd. vs DCIT in ITA No.350/2016*** dated ***18.09.2017*** has further analyzed the said judgement and laid down certain principles. The relevant observations of the Hon'ble Court as contained in para 19 & 20 of the judgment are as under:-

Analysis of the decision in Rampgreen Solutions

19. "The first and the foremost issue that arises in this case is with respect to the applicability of tests laid down in ***Rampgreen Solutions (supra),*** *which has rendered on 10th August, 2015. This decision has clearly laid down the various principles on the basis of which determination of comparables needs to be undertaken while fixing the ALP and the margin that needs to be assigned. This Court had specifically rejected the proposition that broad functionality is sufficient to find the comparable entity though the TNMM method allows broad flexibility tolerance in the selection of comparables. This proposition having been rejected, the Court in* ***Rampgreen Solutions (supra)*** *held as under:*

"43. In our view, the aforesaid approach would not be apposite. In so far as identifying comparable transactions/entities is concerned, the same would not differ irrespective of the transfer pricing method adopted. In other words, the comparable transactions/entities must be selected on the basis of similarity with the

controlled transaction entity. Comparability of controlled and uncontrolled transactions has to be judged, inter alia, with reference to comparability factors as indicated under rule 10B(2) of the Income Tax Rules, 1962. Comparability analysis by the transactional net margin method may be less sensitive to certain dissimilarities between the tested party and the comparables. However, that cannot be the consideration for diluting the standards of selecting comparable transactions/entities. A higher product and functional similarity would strengthen the efficacy of the method in ascertaining a reliable arm's length price. Therefore, as far as possible, the comparables must be selected keeping in view the comparability factors as specified. Wide deviations in profit level indicator must trigger further investigations/analysis.

44. Consideration for a transaction would reflect the functions performed, the significant activities undertaken, the assets or resources used/consumed, the risks assumed. Thus, comparison of activities undertaken /functions performed is important for determining the comparability between controlled and uncontrolled transactions/entity. It would not be apposite to ignore functional dissimilarity only for the reasons that its impact may be reduced on account of using arithmetical mean of the profit level indicator."

20. A perusal of the above decision reveals that the following steps ought to be undertaken in identification of comparable transactions/entities.

** The principle governing the identification of comparable transactions would be the same, irrespective of whichever transfer pricing method is adopted.*

** Comparable transactions must be selected on the basis of a similarity with the controlled transaction/entity.*

** Rule 10B (2) of the Income Tax Rules, 1962 ought to be borne in mind while choosing the factors of comparability in respect of uncontrolled transactions.*

** Even while adopting the TNMM method, the standard for selection of the comparable transactions/entitles cannot be diluted.*

** Wide deviation in the Profit Level Indicator ('PLI') would require further investigation/analysis.*

** For comparison of transactions, factors such as the nature of capital, resources used, the risks assumed, etc. ought to be considered.*

Broadly, therefore, the dictum by this Court was that though in the TNMM method there is sufficient tolerance, mere broad functionality is by itself insufficient."

52. In view of the above, it is now settled by the Hon'ble Jurisdictional High Court that though under TNMM method, there is sufficient tolerance, mere broad functionality is by itself insufficient. Thus, unless the product comparability is to be established, such comparable cannot be taken as a valid comparable. Accordingly, this argument of Ld.CIT DR is not acceptable.

53. As observed above, in the instant case also, the assessee is providing simple support services whereas the APITCO Ltd. is providing diversified services and therefore, is not valid comparable. Accordingly, by respectfully following the judgement of hon'ble Delhi high court in the Philip Morris Services (supra) and further of the coordinate benches of Tribunal as stated above, we hold that APITCO Ltd. is functionally dissimilar and thus we direct the AO/TPO to exclude the same from the final set of comparables for benchmarking international transactions of the assessee. Ground of appeal Nos. 3 & 4 raised by the assessee are thus, allowed.

54. **Ground of appeal No.5** raised by the assessee is with respect to the addition of INR 2,90,01,600/- made by making adjustment by holding provision of Corporate Guarantee as international transaction.

55. Ld. AR for the assessee submits that assessee is not providing any type of corporate guarantee during the year under appeal. In May, 2007, NDTV raised Coupon Bonds which were due in 2012. In AY 2008-09, when for the first time the issue of corporate guarantee was arose, special bench was constituted to decide whether a corporate guarantee would constitute an international transaction u/s 92B of the Act. The Special Bench in terms of its order dated 24.08.2017 has held as under:

> *(1) Corporate Guarantee*
>
> *"The present issue is with respect to Step-up Coupon Bonds of USD 100 Million issued by the Assessee's U.K. subsidiary M/s NDTV Networks PLC4 on 30 May 2007, outside India to various investors. The Assessee gave an undertaking in connection with this to provide a guarantee for and on behalf of NNPLC, as and when required. Subsequently, in November 2009, NNPLC repurchased the Step up Coupon Bonds, which were due in 2012.*
>
> *At the outset, we respectfully submit that no corporate guarantee has been provided by the Assessee Company in respect of the bonds issued by NDTV Networks Plc. (NNPC) and also that the guarantee was never availed. The Assessee had merely provided an undertaking that it shall provide guarantee subsequently (120 days prior to 3 years from the issuance of bonds as and when required) which was never provided by the Assessee since the bonds were redeemed before the expiry of 120 days prior to three years. Such undertaking cannot be said to be an international transaction as per Section 92B of the Act.*
>
> *The TPO/AO/DRP made addition in the hands of the Assessee on account of notional interest on the ground that the transaction constitutes a corporate guarantee.*
>
> *The issue whether the undertaking given by Assessee amounts to corporate guarantee first arose in AY 2008-09. On this issue, for AY 2008-09 in Assessee's own case, a Special Bench was constituted (Kindly refer Pg 899 of Paperbook Volume 4) to consider whether a corporate guarantee would constitute an international transaction in terms of Section 92B of the Act. The Special Bench reference came to be disposed of by the Special Bench on 23 August 2017 (Kindly refer Pg 900 of Paperbook Volume 4) in the following terms:*
>
> > *"The Ld. AR submitted at the outset that the question proposed for consideration and decision before this special bench does not arise in the present appeal. He submitted that the assessee*

only gave an undertaking and not a corporate guarantee for the Bonds issued by its Associated Enterprise. To fortify the point, he referred to certain clauses of the Agreement. This was opposed by the Ld. DR.

We have extensively heard both the sides. In our opinion, the assessee only incurred an obligation by giving an undertaking, which is short of guarantee. As such, the question before the special bench as to whether the giving of corporate guarantee is an international transaction does not arise in the instant appeal. This reference is accordingly returned to be placed before the Hon'ble President for taking an appropriate decision in this regard

The decision of the Special Bench of the Tribunal was assailed by the respondents before the High Court by way of W.P.(C) 559/2018, inter alia, on the following ground (Kindly refer ground (c) of Writ Petition at Py 925 of Paperbook Volume 4):

> *c. BECAUSE the net effect of first the Regular Bench making a reference to the Special Bench and then Special Bench by way of the impugned order dated 23.08.2017 is that the Revenue would never get to argue the matter on merits and would be precluded from placing and referring to the material on record to demonstrate as to how in the facts of the present case. Corporate guarantee provided by the Assessee though couched on an "undertaking" wat an international transaction warranting transfer pricing adjustment as per provisions of Chapter X of the Act. In this regard, it is pertinent to point out that after the passing of Order dated 23.08.2017, the Regular Bench would be bound by the order of the Special Bench and would never go into the peculiar facts of the Present case, on merits."*

The Department Appeal came to be dismissed on 19 January 2018 (Kindly refer Pe 934 of Paperbook Volume 4).

The judgement of the High Court was also challenged before Hon'ble Supreme Court by the Department by way of a Special Leave Petition (Civil) Diary No. 38568/2018, inter alia, on the following ground (Kindly refer Ground VII of SLP at Page 969 of the Paperbook Volume IV):

> *"VII. THAT, the Hon'ble High Court ought to have appreciated that the learned Special Bench had rendered certain findings which were not correct and therefore, the Department had filed the Writ Petition for getting the findings corrected However, in the absence of suitable clarification by the Hon'ble High Court, the learned Division Bench of the ITAT may get swayed/impacted by the observations/findings of the Special Bench and in the said event, the case of the Department may get prejudiced."*

SLP filed by the Department came to be dismissed by the Supreme Court on 16 November 2018 (Kindly refer Pg 976 of Paperbook Volume 4)

Subsequently. Division Bench of Hon'ble Tribunal for AY 2008-09 examined whether AO could have independently examined the issue of whether the alleged guarantee was an international transaction and consequential transfer pricing adjustments could have been made. The Division Bench of Hon'ble Tribunal held that under the statutory scheme it was only the TPO which could have undertaken that exercise and made consequential transfer pricing adjustments. It thus proceeded to remit the entire issue of corporate guarantee to AO/TPO. (Kindly refer Page 1014 of Paperbook Volume 4), Aggrieved by the same, Assessee filed an appeal before Hon'ble Delhi High Court.

The Delhi High Court in ITA 204/2020 for AY 2008-09, modified the Tribunal order and has held as under:

> *"9. Mr. Jolly, learned senior counsel, who appeared for the appellant principally contended that once the Special Bench of the Tribunal had come to hold that the transaction was not a corporate guarantee, there was clearly no occasion or justification for the matter being remanded to the TPO. According to Mr. Jolly, the nature of the international transaction having already been ruled upon, there was no uccasion for the mater being remitted and it was tho incumbent upon the Tribunal itself to examine the issue*
>
> *10. Mr. Rai, learned counsel appearing for the respondents however, draws our attention to the conclusions which were ultimately rendered by the Special Bench and which had held that while the transaction did not answer the attributes of a corporate guarantee, it was liable to be viewed as the incurring of an obligation by giving an undertaking. Whether the incurring of an obligation by giving an undertaking would amount to an international transaction, as envisaged under Section 928 of the Act, according to Mr. Rai, is an issue which would necessarily have to be examined and evaluated by the TPO.*
>
> *11. However, and as we view Para 63 of the order of the Tribunal, we find that the same does not render any clarity on this aspect. A bare reading of Para 63 indicates that the Tribunal's terms of remit are couched in extremely broad terms and evidently fail to clarify that the solitary question which remained for consideration was whether the obligation incurred by giving on undertaking would amount to an international transaction and if the answer to the above be in the affirmative the consequential transfer pricing adjustments that may be warranted.*

12. While it was suggested by Mr. Jolly that in view of the above, the matter may be examined by the Tribunal itself, we find that the same may not be the appropriate or prudent process to adopt since the authorities below would in the first instance have to firstly examine and render a finding as to whether the obligation which the Special Bench spoke of amounts to an international transaction.

13. In our considered opinion, therefore, the end of justice would merit that the matter being remanded to the AO with the clarification that the remit shall be confined to examining whether the undertaking of the obligation in question amounts to an international transaction, to he answered first and at the outset. The aforesaid question would have to be examined and considered by the AO after giving an opportunity to the appellant.

14. Mr. Rai, learned counsel representing the respondents, submits that the AO would, in light of the direction framed by the Court, undertake such an exercise and only once it comes to a conclusion that the obligation amounts to an international transaction, consider transmitting the matter to the TPO. The statement so made is recorded and accepted.

15. We, consequently, and for the aforesaid reasons, set aside the order of the Tribunal to the aforesaid extent. The appeal shall stand disposed of in terms of the directions referred to above, All rights and contentions of respective parties on merits are kept open.

16. While parting with this appeal we were informed that in the absence of any order of restraint operating on this appeal, the AO had in fact transmitted the matter for the consideration of the TPO for examining whether the transaction would foll within the ambit of Section 928 of the Act and that pursuant to the above, and acting in terms of the directions framed by the Tribunal, a final order came to be passed by the TPO which led to the drawl of a draft assessment order by the AO.

17. We had in terms of order of 11 Jamary 2022 provided that the aforesaid exercise would abide by the final result on the instant appeal. Since we have set aside the principal direction of remit framed by the Tribunal and a de novo exercise in liable to be undertaken by the AO. the order of the TPO as well as the draft assessment order, shall also consequently stand set aside."

56. Against such order, Revenue has filed Writ Petition before the Hon'ble Delhi High Court wherein Hon'ble Court vide its order dated

19.01.2018 has held that once the Special Bench has been disbanded and the matter was sent back to the Division bench for decision, Hon'ble Court has denied to interfere in the said order against which the Revenue has filed SLP before Hon'ble Supreme Court which was also dismissed in terms of order dated 16.11.2018 placed at page 978 of the Paper Book.

57. Ld.AR further submits that Co-ordinate Bench in AY 2008-09 had sent the issue of corporate guarantee to the file of the AO/TPO. Against such findings, assessee preferred appeal before Hon'ble jurisdictional High Court where the Hon'ble High Court in ITA NO. 204/2020 had modified the order of the Tribunal and gave following directions:-

> *9. "Mr. Jolly, learned senior counsel, who appeared for the appellant principally contended that once the Special Bench of the Tribunal had come to hold that the transaction was not a corporate guarantee, there was clearly no occasion or justification for the matter being remanded to the TPO. According to Mr. Jolly, the nature of the international transaction having already been ruled upon, there was no occasion for the matter being remitted and it was thus incumbent upon the Tribunal itself to examine the issue.*
>
> *10. Mr. Rai, learned counsel appearing for the respondents. however, draws our attention to the conclusions which were ultimately rendered by the Special Bench and which had held that while the transaction did not answer the attributes of a corporate guarantee, it was liable to be viewed as the incurring of an obligation by giving an undertaking. Whether the incurring of an obligation by giving on undertaking would am an international transaction, as envisaged under Section 928 of the Act, according to Mr. Rat is an issue which would necessarily have to be examined and evaluated by the TPO.*
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> *11. However, and as we view Para 63 of the order of the Tribunal, we find that the same does not render any clarity on this aspect. A bare reading of Para 63 indicates that the Tribunal's terms of remit are couched in extremely broad terms and evidently fail to clarify that the solitary question which remained for*

consideration was whether the obligation incurred by giving on undertaking would amount to an international transaction and if the answer to the above be in the affirmative the consequential transfer pricing adjustments that may be warranted.

12. *While it was suggested by Mr. Jolly that in view of the above, the matter may be examined by the Tribunal itself, we find that the same may not be the appropriate or prudent process to adopt since the authorities below would in the first instance have to firstly examine and render a finding as to whether the obligation which the Special Bench spoke of amounts to an international transaction.*

13. *In our considered opinion, therefore, the end of justice would merit that the matter being remanded to the AO with the clarification that the remit shall be confined to examining whether the undertaking of the obligation in question amounts to an international transaction, to be answered first and at the outset. The aforesaid question would have to be examined and considered by the AO after giving an opportunity to the appellant.*

14. *Mr. Rai, learned counsel representing the respondents, submits that the AO would, in light of the direction framed by the Court, undertake such an exercise and only once it comes to a conclusion that the obligation amounts to an international transaction, consider transmitting the matter to the TPO. The statement so made is recorded and accepted.*

15. *We, consequently, and for the aforesaid reasons, set aside the order of the Tribunal to the aforesaid extent. The appeal shall stand disposed of in terms of the directions referred to above. All rights and contentions of respective parties on merits are kept open.*

16. *While parting with this appeal we were informed that in the absence of any order of restraint operating on this appeal, the AO had in fact transmitted the matter for the consideration of the TPO for examining whether the transaction would fall within the ambit of Section 928 of the Act and that pursuant to the above, and acting in terms of the directions framed by the Tribunal, a final order came to be passed by the TPO which led to the drawl of a draft assessment order by the AO.*

17. *We had in terms of order of 11 January 2022 provided that the aforesaid exercise would abide by the final result on the instant appeal. Since we have set aside the principal direction of remit framed by the Tribunal and a de novo exercise in liable to be undertaken by the 40 the order of the TPO as well as the draft assessment order, shall also consequently stand set aside."*

58. Ld.AR submits that since the matter has been sent back by Hon'ble Delhi High Court to the file of AO/TPO to decide whether corporate guarantee is an international transaction or not which is yet to be decided by the AO/TPO, therefore, the issue in the present appeal being identical, may be sent back to the file of TPO/AO with the same directions.

59. On the other hand, Ld. CIT DR for the Revenue had not objected to the prayer made and confirmed the factual aspect submitted by the Ld. AR for the assessee.

60. After hearing both the parties and perused the material available on record. It is observed that Hon'ble Delhi High Court while deciding the appeal of the assessee on this issue, vide its order dated 29.01.2025 directed the TPO to examine whether the transaction fall within the ambit of section 92B of the Act and act in terms of the directions of the Tribunal. Since this issue presently pending with the AO / TPO in terms of the directions of hon'ble high court, which is yet to be decided therefore, in terms of the directions given by Hon'ble High Court in ITA No.204/2020 order dated 29.01.2025, we remand this issue to the file of AO to decide the same in the light of decision taken in AY 2008-09. With these directions, Ground of appeal No.5 raised by the assessee is allowed for statistical purposes.

61. In the result, appeal of the assessee is partly allowed.

62. In the final result, appeal of the Revenue in **ITA No.1564/Del/2016 [Assessment Year 2010-11]** is dismissed and appeal of the assessee in **ITA No.1623/Del/2016 [Assessment Year 2010-11]** is partly allowed.

Order pronounced in the open Court on 06.03.2026.

Sd/-	***Sd/-***
(MADHUMITA ROY) **JUDICIAL MEMBER**	**(MANISH AGARWAL)** **ACCOUNTANT MEMBER**

Date- 06.03.2026
Amit Kumar, Sr.P.S

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI