* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 18th September, 2012

% *Date of Decision:25th April, 2013*

\+ **ITA 1042/2011**

MARUBENI INDIA PVT. LTD. ..... Appellant
Through: Mr. G.C. Srivastava with Ms Preeti Bhardwaj, Advocates.

versus

DIT ..... Respondent
Through: Shri N. P. Sahni, Sr. Standing Counsel with Mr Ruchesh Sinha, Advocate.

\+ **ITA 1114/2011**

DIT ..... Appellant
Through: Shri N. P. Sahni, Sr. Standing Counsel with Mr Ruchesh Sinha, Advocate.

versus

MARUBENI INDIA PVT. LTD. ..... Respondent
Through: Mr. G.C. Srivastava with Ms Preeti Bhardwaj, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

ITA No.1042/2011 is an appeal by the assessee relating to the assessment year 2002-03 and ITA No.1114/2011 is an appeal by the CIT for the assessment year 2003-04. They arise out of a consolidated order passed by the Income Tax Appellate Tribunal on 18.03.2011.

2. The assessee is a private limited company incorporated in India under the Companies Act, 1956. It is a 100% subsidiary of Marubeni Corporation, Japan ('MCJ', for short). It carries on mainly two types of business – (i) operations consisting of representation service, i.e., to liaise between the business divisions of MCJ and its various suppliers/ customers in India which includes import, export, off shore trade, project management, marketing of finished goods, market research and liaison work; and (ii) trading of a broad range of industrial, agricultural and consumer goods, commodities and natural resources.

3. We may first take up the appeal filed by the assessee in ITA No.1042/2011 relating to the assessment year 2002-03. The assessee filed a return of income on 31.10.2002 declaring "nil" income. It was revised but even in the revised return the income declared was ₹ nil; however, it was explained that the interest on bank deposit earlier treated as business income was being shown as "income from other sources" in the revised return, that the brought forward unabsorbed depreciation was being claimed as depreciation of the current year and that the expenses amounting to ₹11,23,440/- relating to construction project was being withdrawn. The return was scrutinised and an assessment order was passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') determining the total income at ₹2,35,01,470/-. Several additions were made in the assessment order. For the purpose of the present appeal, however, the assessee has proposed the following 7 questions, stated to be substantial questions of law, for our consideration: -

> "*1. Whether the Income Tax Appellate Tribunal, was correct in law, in rejecting the claim of the Appellant that interest income which is Business Income of the Appellant is operating income, disregarding the decision of the ITAT in Assessee's*

own case for Assessment Year 2000-01, upheld by the Hon'ble Supreme Court.

2. Whether the Income Tax Appellate Tribunal, was correct in law, in treating Interest income of ₹1.72 crore as non-operating income.

3. Whether the Income Tax Appellate Tribunal, was correct in law, in holding on an adhoc basis that only 10 percent of the interest income should be allowed as relatable expenses disregarding the actual amount of interest expenses duly quantified and worked out with respect to accounts attributable to earning such income.

4. Whether the Income Tax Appellate Tribunal, was correct in law, in not allowing the benefit of 5% range available to the Appellant under the express provisions contained in Proviso 92C(2) while computing the adjustment on account of transfer pricing.

5. Whether the Income Tax Appellate Tribunal, was correct in law, in considering only current year data and denying the use of data of previous two years in terms of Rule 10B(4) read with section 92(D) of the Act.

6. Whether the Income Tax Appellate Tribunal, was correct in law, in not treating "closure of business" expenses as abnormal expenses disregarding the facts that such expenses were wholly unrelated to the pricing of international transaction which was the issue before the Tribunal, and also because none of the Comparable Companies incurred cost of such or similar nature.

7. Whether, the order of the Income tax Appellate Tribunal is not vitiated in law for non-consideration of relevant material and evidence placed on record and submissions made by the Appellant."

4. The first three questions proposed by the assessee may be now examined. In the course of the assessment proceedings, the assessee's case was referred to the transfer pricing officer ('TPO', for short) as the

international transactions with associated enterprises were more than ₹5 crores. In the report submitted by the TPO under section 92CA (3) of the Act, he proposed an addition of ₹2,60,49,881/- on the ground that the commission and service fees received by the assessee from MCJ did not represent arm's length price. While doing so, the TPO treated the interest income of ₹1.72 crores received by the assessee as non-operating income. Because of this treatment accorded to the interest income, the profits of the companies which were taken for comparison purposes were found to be more than the profits earned by the assessee and accordingly the addition on account of transfer pricing adjustment was made. It was the conclusion of the TPO that the income earned by way of interest by investing the surplus funds of the assessee in interest bearing instruments cannot be used to offset the assured return on costs.

5. The TPO was further of the view that in respect of the services rendered by the assessee, it should be remunerated on a cost-plus basis and the total costs should be made the basis of computing its earnings and not merely the commission and fixed fees paid to it. According to the TPO the commission rates and the fixed fees were determined by extraneous unascertainable factors which had no bearing with the corresponding costs incurred by the assessee. As the commission was paid on the basis of the value of the transactions put through because of the efforts of the assessee, the assessee is artificially made to bear the risks of the market which it was otherwise not meant to bear. In the proceedings before the TPO in its transfer pricing report which it was required to submit by section 92E of the Act, the assessee chose five comparable companies and the average margin came to 8.37%. The TPO computed the arm's length remuneration in the following manner: -

"*Computation of Remuneration at Arm's Length*

Personal Exp	*83,196,155*
Admn. & Other	*119,967,293*
Depreciation	*9,830,666*
Total Cost (A)	*212,994,114*
Cost Plus markup of 8.37% (A)	*230,821,721*
Amount earned as commission and service fees (B)	*204,771,840*
Amount short charged (A-B)	*26,049,881*

The arm's length price in respect of commission and market research service. fees is therefore, determined at ₹221,047,646 as against ₹194,997,765 declared in Form 3CEB."

On this basis the assessing officer made an addition of ₹2,60,49,881/-.

6. The assessee filed an appeal against the aforesaid addition before the CIT (Appeals) and raised several contentions. In particular, it was contended that the approach of the TPO/ AO in treating the interest income as non-operating income was flawed and it was pointed out that the short term interest of ₹1.72 crores received by the assessee was on account of a treasury function which represented its core function and, therefore, ought to have been taken as operating income. It was accordingly submitted that excluding the interest revenue from the computation of the arm's length price was not appropriate since the cost for earning the interest income was built into the operating cost of the assessee. It was also submitted that the demonstrative costs also include interest on account of income tax which was non-operating income and should be excluded from the computation of operating profit.

7. The CIT (Appeals) dealt with the assessee's submissions in detail. He noted that the assessing officer/ TPO had treated the interest income earned by the assessee as non-operating income and after doing so it was found by

them that the profits of the comparable companies were more than the profits of the assessee which require an adjustment to the price. Thereafter, he framed the following issues which according to him arose for adjudication on this point: -

> "*i. Whether the interest income of ₹1.72 crore is part of operating income or not.*
>
> *ii. Whether loss on sale of fixed assets, interest paid to income tax, office closure cost, amount paid to telephone adalat are abnormal costs and are required to be excluded while computing the operating expenses.*
>
> *iii. Whether business promotion expenses disallowed by the A.O and admitted by the appellant should also be excluded while computing the operating expenses.*
>
> *iv. Whether, the appellant is entitled for adjustments to the operating profit, on account of differences in the working capital position and differences in the risks profile, between the appellant and the comparable companies.*
>
> *v. Whether the appellant is entitled to the benefit of ±5% range mentioned in Proviso 92C(2) while computing the Arm's Length Price.*"

8. The submissions of the assessee before the CIT (Appeals) were mainly these. The parking of the surplus funds in interest bearing securities was an integral part of the assessee's operations, that one of the objects of the company was to invest the surplus funds in securities, deposits, units, shares, bonds, debentures, etc. and that according to its memorandum of association these activities were permitted and thus the business model of the assessee envisaged the utilisation of surplus funds from time to time to generate operating revenue. It was, therefore, contended that it was not proper or appropriate to exclude the interest income from the computation of the arm's length price since the costs for earning the interest income was built into

operating costs of the assessee. It was represented that the treasury functions of the assessee included cash management, management of bank accounts, data management, financial planning and foreclosing with cash plus financial management, etc. In the alternative and without prejudice to the contention that the interest income is intrinsically linked to the agency and market research business, it was submitted that if the CIT (Appeals) was not prepared to accept that the interest income was the assessee's operating income, then all costs associated with the earning of such income should be segregated and if that was not done those costs would continue to be part of the agency and market research business which would present an untrue picture of the entire operations.

9. These submissions were considered by the CIT (Appeals) in detail who held that it was a universal practice followed under transfer pricing regulations to exclude interest from the operating revenue for computing the net profit from the operating activity except where the earning of interest itself was the main activity. In this view he held that the interest income cannot be considered as the assessee's operating income. He also found that the interest income in the present case was not so interwoven with the international transaction that it cannot be separated. He also held that the commission rates and the fees by which the assessee was remunerated were in no way related to the interest earnings of the assessee. According to the CIT (Appeals) while evaluating the arm's length price, what was required to be seen was the return on costs; if interest is included as part of the operating revenue, it would amount to computing the return on investment which would be wholly inappropriate. It is also irrelevant, according to the CIT (Appeals) that the interest income was treated as business income in the assessment order. For these reasons, the CIT (Appeals) held that for the purpose of determining the arm's length price in respect of the controlled transaction of

the assessee, the interest income of ₹1.72 crores was to be considered as non-operating income. He thus endorsed the decision of the TPO/AO.

10. The assessee carried the matter in further appeal before the Income Tax Appellate Tribunal. After considering the rival contentions and examining the facts, the Tribunal agreed with the income tax authorities, recording the following findings: -

(a) The purpose of the exercise before the TPO is to determine the arm's length price of the transactions of the assessee with its associates by comparing the same with un-controlled, comparable transactions and in doing so he has to consider all the components of the operating income from which the costs incurred in earning such income have to be deducted;

(b) It was not sufficient to decide whether the interest income fell to be assessed as business income or as income under the residual head for the purpose of making the assessment; it was further necessary to find out whether the interest income forms part of the operating income of the assessee;

(c) The business profile of the assessee, which has been brought out by the income tax authorities and particularly the CIT (Appeals) shows that the earning of interest income was only the result of investment of the surplus funds and was not a primary income-generating activity;

(d) The nature of the services provided by the assessee to its holding company i.e. MCJ and other associate concerns was to render marketing support services and facilitation by providing information

on a periodic basis, which activity was altogether a different activity from the activity which generated interest income;

(e) The TPO and the CIT (Appeals) were right in, therefore, segregating the stream of interest income from the other services rendered by the assessee which were its core activities;

(f) If interest is included as part of the operating income that would result in an inappropriate Profit-Level Indicator (PLI) in the case of a service provider, such as the assessee;

(g) Therefore, neither the interest income nor the interest expenditure would be a relevant consideration in the determination of the arm's length price.

11. On the basis of the above findings, the Tribunal took the view that neither the interest income of ₹1.72 crores nor the interest expenditure of ₹1.22 crores can be taken into consideration in the computation of the arm's length price.

12. The assessee has framed the first three questions against the aforesaid findings of the Tribunal. It was fairly admitted on behalf of assessee that question No.3 did not arise out of the order of the Tribunal. So far as the first two questions are concerned, we are satisfied that essentially they are questions of fact and do not give rise to any substantial questions of law. Whether a particular activity of the assessee i.e. the interest generating activity in this case, should be taken into consideration in the determination of the ALP is a question which needs to be decided considering the nature of the business of the assessee, which is referred to as "business model" in the transfer-pricing jargon. The Tribunal has rightly noted that the fact that the

memorandum of association gave powers to the assessee to earn interest by making investments is relevant only for the purpose of determining the appropriate head of income under section 14 of the Income Tax Act, 1961 under which the interest would fall to be assessed. It has been rightly observed by the Tribunal that such a consideration is not relevant for the purpose of determining the operating income of an assessee for the purposes of transfer pricing regulations. Moreover, the Tribunal has also found as a fact that the interest arose out of investment of surplus funds which were not immediately required for the core business of the assessee. The Tribunal's view that in such circumstances the interest income cannot be considered to be its operating income is essentially a question of fact to be gathered from the nature of the assessee's business and its business profile. All these factors have been rightly kept in view by the Tribunal. We are, therefore, of the opinion that the first three questions are not substantial questions of law meriting scrutiny of this Court.

13. So far as the fourth question proposed by the assessee is concerned, the controversy arises this way. It was the assessee's contention that in determining the ALP, it was denied the benefit of the proviso to section 92C(2). The proviso as it existed at the material time, read as under: -

> "***Provided*** *that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices, or, at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding five per cent of such arithmetical mean.*"

14. The arithmetic mean of the PLI of the five comparable cases was 9.33%. If the benefit of $\pm$ 5% is allowed on this figure then the arithmetic mean would be 14.8% and 3.8% respectively. The contention of the assessee

was, therefore, that if the benefit of this way of reading the proviso is given, there would be no need to make any adjustment to the price shown by it. The contention of the revenue on the other hand was that the variation of 5% of the arithmetic mean is not a standard deduction. The Tribunal held, agreeing with the revenue, that the effect of the proviso was only that the transfer price shown by the assessee was not to be disturbed if it was within ± 5% the arithmetic mean of the comparable prices. Applying this interpretation to the proviso, it was found by the Tribunal as a fact that the assessee's case did not fall within the variation. On this aspect the Tribunal noted that the CIT (Appeals) has discussed the matter elaborately and agreed with the view taken by him.

15. This controversy need not detain us any more, as it has been put at rest by the amendment made to section 92C by the insertion of sub-section (2A) by the Finance Act, 2012 with retrospective effect from 01.04.2002. The said sub-section is as under: -

> "*(2A) Where the first proviso to sub-section (2) as it stood before its amendment by the Finance (No.2) Act, 2009 (33 of 2009), is applicable in respect of an international transaction for an assessment year and the variation between the arithmetical mean referred to in the said proviso and the price at which such transaction has actually been undertaken exceeds five per cent of the arithmetical mean, then, the assessee shall not be entitled to exercise the option as referred to in the said proviso.*"

Having regard to the amendment made with retrospective effect from the assessment year 2002-03, which is the year before us, no substantial question of law can be said to arise. Accordingly, the fourth question proposed by the assessee in its appeal does not arise out of the order of the Tribunal.

16. As regards question No.5 the contention of the assessee is that the data relating to the earlier two years was available when the matter relating to the applicability of the arm's length price was being considered by the TPO and therefore, he ought to have considered that date also in arriving at the ALP. Our attention was drawn to sub-rule (4) of Rule 10B of the Income Tax Rules, 1962 and the proviso thereto. The sub-rule and the proviso are as below :-

> *"(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into :*
>
> *Provided that data relating to a period not being more than two years prior to such financial year may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared."*

The argument is that considering the nature of the powers of the transfer pricing officer under Section 92C of the Act, particularly, Clause (c) of sub-section (3), the TPO ought to have considered the data relating to the earlier two years. It would perhaps have been appropriate for us to consider the submission of the assessee in normal circumstances, but from paragraph 23 of the order of the Tribunal we find that the assessee did not press this point before the Tribunal, leading to the rejection of the ground. Para 23 of the order of the Tribunal reads as under :-

> *"23. The next item disputed by the assessee in ground No.8 is that Learned CIT(Appeals) has erred in using the current year data for comparable purposes and not relying on the date of preceding two years. The learned counsel for the assessee did not press this ground of appeal on the ground that Special Bench's decision of the ITAT in the case of Aztectech Software & Technology is against the assessee. This is against the assessee. This decision is reported in 107 ITD 141 and it has been reaffirmed in the case of Mentorgraphic (109 ITD page 101). Hence, this ground of appeal is rejected."*

In the light of the above we do not consider it appropriate to entertain question No.5 which also does not arise out of the order of the Tribunal.

17. Question No.6 relates to the finding of the Tribunal that the expenses relating to the closure of the business were abnormal expenses and cannot be considered relevant while arriving at the ALP in respect of the international transaction. It also refers to the finding of the Tribunal that none of the comparable companies had incurred such expenses. The assessee had paid compensation for closure of its units, including the Delhi and Chennai offices, in an amount of ₹68,97,992/-. The assessee sought inclusion of the compensation in the operating costs, on the footing that the closure of the units does not benefit the associated enterprise. It was further submitted by the assessee that its Indian business was being run as a totally independent unit with authority to the management in India to take decisions regarding closure of the offices in India. According to the assessee, the associated enterprise is not allowed to interfere in such decisions which are administrative in nature. The payment of compensation for closure of the Indian units was an abnormal item of expense and therefore, ought to have been excluded from the operating costs while arriving at the ALP of the international transaction. The case made out by the income tax department was that since the assessee is a captive unit of its associated enterprise, it was actually the latter which undertook the entire risk, that the associated enterprise was paying the assessee at the rate of cost plus 10% that if the Indian units are closed then the operating costs would correspondingly be reduced and therefore, the compensation paid would form part of the operating costs and would thus be relevant for arriving at the ALP.

18. The aforesaid issues were considered by the Tribunal. It noted that despite a specific direction issued by the CIT(Appeals), the assessee was

unable to adduce any documentary evidence to show that the decision to close the Indian units was taken by the assessee independently and without being influenced by the associated enterprise. The Tribunal thus appears to have doubted the assessee's claim that it was an independent decision, taken without consulting the associated enterprise, to close down the Indian offices. The Tribunal further agreed that the stand taken by the revenue authorities that the closure of the Indian branches would correspondingly reduce the costs of the associated enterprise and therefore, it would be relevant item for consideration in the matter of arriving at the appropriate ALP. The Tribunal opined that transfer pricing is not an exact science and it is difficult to arrive at the ALP with any amount of certainty or definiteness; an element of guess work was always a part of the process. The Tribunal agreed with the assessee that the compensation received on account of closure of the Indian units may be a regular phenomenon but held that by closing down certain branches in India the assessee had actually reduced the costs of associated enterprise. It is according to the Tribunal meant that the closure of the branches had direct link with the international transaction. For these reasons the Tribunal held that the revenue was right in upholding that the costs of closure are not to be excluded from computing the operating expenses.

19. The contention of the counsel for the assessee before us is that the assessee was being compensated by way of a commission of fees by the associated enterprise and not on cost plus basis as erroneously held by the Tribunal. It was submitted that in this context, the compensation paid in connection with the closure of the Indian units represents abnormal costs which have to be excluded for determining the ALP. Counsel also posed the question whether the closure of the Indian units would benefit the associated enterprise and answered the same in the negative, and submitted that in such a

case, the abnormal or external costs should not be taken into consideration while arriving at the ALP.

20. It may not be possible to lay down a formula that would be applicable universally to determine whether a particular expenditure or cost incurred by the assessee is a normal or abnormal item of expense, in cases relating to transfer pricing. If as held by the Tribunal, the assessee is compensated for its service on the basis of cost plus 10% then again the question may arise as to whether the compensation paid for closure of the Indian units can be considered to be normal or abnormal cost, because the compensation would directly depend or vary according to the quantum of the costs. In such case it would be relevant to consider whether the compensation paid for closure of the Indian units would amount to normal or abnormal expense. But as rightly pointed out by the counsel for the assessee, the assessee is being compensated by a fee or commission which has no connection with the costs incurred. This has been referred to even in the assessment order at paragraph 6.3 as follows:-

> *"For the agency and market support services, MIPL has received two kinds of remuneration :*
>
> *a. handling commission – which varies from transaction to transaction and depends on the product, volume etc.; (during the proceedings the assessee was asked to give transaction wise break up of commission received but inability in this regard was expressed as it was stated that the transactions were numerous and could not collated);*
>
> *b. Services fees – fixed fees for rendering marketing support in form of market survey etc."*

The CIT (Appeals) proceeded to decide the issue on the basis that the assessee was unable to produce any document to show the circumstances under which the decision to close the offices was taken. He also assumed that the relevance of the closure of the Indian units and the payment of compensation

both would hinge upon as to whose decision it was to close down the Indian units. He held that the decision was taken at the behest of the associated enterprises and therefore, for transfer-pricing purposes the assessee must be compensated by them and accordingly the costs of closure are not to be excluded for computing the operating expenses. The decision of the CIT(Appeals) was endorsed by the Tribunal which noted that since MCJ was paying the assessee on the basis of cost plus 10%, the a closure of the Indian units would automatically reduce the costs of the associated enterprise and therefore, would be a relevant issue for inclusion in the operating costs. In arriving at such a decision, it seems to us that the revenue authorities and the Tribunal failed to keep in mind that even according to the assessing officer, the assessee was being compensated for its agency and market support service by way of handling commission and fixed service fee. It seems rather remote that considering the nature of the remuneration received by the assessee from its associated enterprise, the payment of compensation on closure of the Indian offices would have any impact on the transfer pricing issue or in the fixing of the ALP. It therefore, appears to us that having regard to the nature and manner in which the assessee is remunerated for its services, the payment of compensation to the Indian units on their closure would represent abnormal costs which have to be excluded in the determination of the ALP. In our view, the income tax authorities as well as the Tribunal have erred in holding to the contrary. We accordingly, answer the question No.6 in the negative, in favour of the assessee and against the revenue.

21. Question No.7 is general in nature, challenging the decision of the Tribunal on the ground of non-consideration of relevant material and evidence placed before it. This question is answered against the assessee.

22. In ITA 1114/2011 the revenue has proposed the following questions as substantial questions of law: -

> "*1. Whether on the facts and circumstances of case, the order of the Income Tax Appellate Tribunal is not perverse, as it has merely upheld the order of the CIT(A) on the issue pertaining to the attribution of the allocation of overhead expenses of ₹1,21,75804/- to trading of goods segment vis-a-vis attributing it to agency support services, as held by the TPO?*
>
> *2. Whether on the facts and circumstances of case, the Income Tax Appellate Tribunal was correct in law in holding that the amount of ₹1,21,75804/- should be all allocated to trading of goods segment?*

23. The Assessee has two segments, one pertaining to trading and the other pertaining to the services. In the course of the transfer pricing analysis, it was noticed by the TPO that the assessee, while computing the operating profit margin has considered the total operating expenditure at only ₹15,72,33,860/-, as against the total operating expenditure of ₹18,52,26,882/- shown in the audited profit and loss account. This difference was sought to be reconciled by the assessee and from the reconciliation it was noticed by the TPO that the difference of ₹2,82,50,502/- was claimed by the assessee against the revenues from the trading segment. When the TPO called for the details of the trading segment the assessee filed the same from which it was noticed that direct cost of ₹1,61,16,786/- and indirect costs of ₹1,21,75,804/- were claimed in the trading segment against the revenue by way of sales. It may be noted that the aggregate of these two figures accounts for the difference between the operating expenditure as shown in the audited profit and loss account and as considered by the assessee for the purpose of the transfer pricing study.

24. On a perusal of the figures relating to the trading segment, the TPO was of opinion that the direct costs of ₹1,61,16,786/- were nothing but indirect expenses pertaining to the trading transactions such as salary, travelling, communication, entertainment, staff welfare, taxes and fees, donation, warranty, rent, bed debts, repairs and maintenance, depreciation, etc. In other words, it was the view of the TPO that the figure of ₹1,61,16,786/- exhausted the entire costs relating to the trading segment – both direct and indirect – and there was no justification at all for further claiming indirect costs of ₹1,21,75,804/- on proportionate basis. In this view of the matter the TPO and the assessing officer concluded that the figure of ₹1,61,16,786/- which was claimed to be direct costs are actually inclusive of indirect costs also and, therefore, no separate deduction from the cost-base need be given for the figure of ₹1,21,75,804/- claimed separately as indirect costs, for the purpose of calculating the ALP of the commission income. The arm's length remuneration was accordingly computed at ₹17,36,71,139/- and in arriving at this figure, deduction was given only for the expenses of ₹1,61,16,786/- and no deduction was given in respect of the amount of ₹1,21,75,804/-.

25. Aggrieved, the assessee contested the adjustment in appeal before the CIT (Appeals). It was submitted by the assessee before the CIT (Appeals) that it was maintaining segment accounts for the trading and commission income, particularly the projects which are part of the trading segment, that apart from direct costs incurred on a project there were indirect costs also which are incurred on the overall supervision of the projects and such costs cannot be directly identified and allocated necessitating an allocation on the basis of the income. Accepting the submission of the assessee, the CIT (Appeals) directed it to furnish the basis and break-up of the computation and allocation of the indirect or overhead expenses to the trading segment. The

assessee furnished a statement in the manner required by the CIT (Appeals) and the same is as follows: -

Details of Projects Expenses FY 2002-03 Particulars	*Purulia Project Site Expenses (Rs)*	*Tisco Project*
Total Income of the Department Commission income from related parties .....(A)	*915,842*	*2,725,159*
Gross profit from trading activities (unrelated party) ----(B)	*4,088,444*	*20,066,010*
Total ----------(c)	*5,004,286*	*22,791,169*
Total cost of the department (regional offices)		
Jamshedpur		*8,514,581*
Kolkatta	*13,582,962*	*1,715,237*
Mumbai	*336,580*	*4,444,462*
New Delhi	*1,300,363*	*600,652*
Total costs ------(D)	*15,219,905*	*15,274,932*
Total Direct expenses/ site expenses -----(E)	*7,601,935*	*8,514,581*
Grand Total (direct expenses)	*16,116,516*	
Computation of indirect expenses		
Total cost	*15,219,905*	*15,274,932*
Direct costs	*7,601,935*	*8,514,581*
Total indirect costs -----(F)	*7,617,970*	*6,760,351*
Total allocable expenses		
*Commission segment ----A/C * F)*	*1,394,176*	*808,341*
*Trading Segment -----(B/C * F)*	*6,223,794*	*5,952,010*

26. The CIT (Appeals) accepted the above statement and directed the assessing officer to exclude the amount of ₹1,21,75,804/- from the commission segment. He thus allowed the appeal of the assessee on this point.

27. The revenue carried the matter in appeal before the Income Tax Appellate Tribunal. The Tribunal noted that after excluding the aforesaid amount, the arm's length remuneration came to ₹16,31,25,719/- which is less than the actual revenue of ₹16,38,07,933/- and, therefore, no adjustment was required to be made. As to the correctness of the decision of the CIT (Appeals), the Tribunal adverted to the assessee's contention that the two projects – TISCO and Purulia – had nothing to do with the agency support services rendered by the assessee to its associated enterprises and, therefore, the expenses amounting to ₹1,21,75,804/- are not to be considered while determining the arm's length remuneration. Eventually the Tribunal held, agreeing with the assessee, as under: -

> "*34. On due consideration of the findings of the Learned CIT (Appeals), we are of the view that these expenses have no relation with the international transactions of the assessee, therefore, they cannot be considered while computing the ALP of the assessee. Learned CIT (Appeals) has examined the other aspects in details. We have considered those issues also i.e. whether last year data has no taken into consideration or multiple years' data. We have considered this issue while dealing with the determination of the ALP in assessment year 2002-2003. Similarly, we have considered the issue in respect of business promotion expenses etc. discussed by the learned CIT (Appeals) on page no 47 & 48 of the impugned order. On an analysis of the Learned CIT (Appeals)'s order we do not find any reason to interface in it on the issue of determination of transfer pricing in assessment year 2003-04.*"

28. The grievance of the revenue mainly is that neither the CIT (Appeals) nor the Tribunal has given any reasons in support of their respective conclusions. It was submitted that when the CIT (Appeals) had obtained a statement from the assessee, he ought to have called for a remand report from the assessing officer or the transfer pricing officer before acting upon the same. On the other hand, learned counsel for the assessee submitted that it

was open to the CIT (Appeals) while exercising his appellate powers to call for further information from the assessee and since the information called for was to be supplied only on the basis of the figures of income/ expenditure which are already on record and were scrutinised by the transfer pricing officer, he could act upon the same and was under no statutory duty to call for a remand report from the assessing officer or the TPO. It was further argued that the figures supplied by the assessee which showed that the indirect expenses of ₹1,21,75,804/- were bifurcated between two projects on the basis of the income which was a reasonable way of apportioning the overheads and, therefore, neither the CIT (Appeals) nor the Tribunal committed any error in accepting the same. It was further contended for the assessee that the decision of the Tribunal is a pure decision of fact and did not give rise to any question of law.

29. On a careful consideration of the facts and the rival contentions, we are inclined to agree with the learned counsel for the assessee that no question of law or substantial question of law arises out of the decision of the Tribunal on this point. The discussion made above shows that the dispute related only to the allocation of overhead/ indirect expenses between two segments of the assessee's business. It is nobody's case that the expenses were not incurred. It is also not the case of the revenue before the Tribunal or before us that the bifurcation of the indirect expenses on the basis of revenues is not an appropriate "allocation key". The decision of both the CIT (Appeals) and the Income Tax Appellate Tribunal, is based on the undisputed figures submitted by the assessee. These figures have also been scrutinised by the transfer pricing officer. There is, therefore, no perversity in the decision of the Tribunal because it is based on the evidence embedded in the books of accounts themselves. The charge of perversity raised by the revenue seems to us to be unjustified. There was evidence upon which the Tribunal could come

to the conclusion which it did. In this view of the matter we hold that no substantial question of law arises from the order of the Tribunal. The proposed questions are accordingly not entertained.

30. In the result the appeal of the revenue in ITA No.1114/2011 is dismissed, whereas the appeal of the assessee in ITA No.1042/2011 is allowed in part. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

APRIL 25, 2013
hs/vld