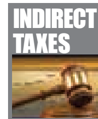
at the time of sale of the vehicle enters into a backup contract with its dealers spread across the country, as a result whereof, the latter are obliged to provide services to the vehicles that satisfies the conditions of warranty against the service coupons. ITAT held that the payments made by the assessee to its dealers for providing free services in lieu of service coupons were not in the nature of any reimbursement of expenditure incurred by such dealers, and were in fact in the nature of payment of consideration pursuant to a contract, as per which the dealer provides such services to the ultimate customers. However, ITAT held that second proviso to Section 40(a)(ia) brought by Finance Act, 2012 was applicable retrospectively, as per which where the payee has already paid the tax, the same would discharge the assessee from the obligation to deduct the same. ITAT, therefore, remitted the matter back to AO to verify compliance of conditions of this second proviso.

(CRL.P: 868/2014), LD/68/07, Golden Gate Properties Ltd. Vs. Deputy Commissioner of Income Tax , 26/04/ 2019

Assessee failed to deposit the TDS deducted to the account of Central Government within the prescribed time-limit. Liability of TDS was admitted by the assessee and TDS was remitted only subsequent to survey conducted by the Department. Prosecution can be initiated without determining the liability in an adjudication proceeding under section 201 and without quantifying the penalty under section 221. High Court held that prosecution under section 276B is not controlled either by Section 201(1A) or Section 221. High Court upheld launch of prosecution proceedings against the assessee.

[SLP (CIVIL) Diary No(s). 10049/2019], LD/68/08, Pricipal Commissioner of Income Tax Vs. Tops Security Limited, 08/04/ 2019

Supreme Court dismissed Revenue's Special Leave petition vide which Revenue challenged Bombay High Court judgement wherein the High Court upheld deletion of disallowance of Section 43B for unpaid service tax. As per High Court, unpaid service tax relates to consideration amount not received from the parties to whom services were rendered. When services are rendered, the liability to pay the service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise. Revenue's stand that once services are rendered, liability to pay service tax accrues and hence Section 43B disallowance is warranted was rejected by the High Court.



GST

(2019-TIOL-141-AAR-GST), LD/68/09, M/s Kindorama Healthcare Pvt. Ltd, 12/04/2019

AAR held that the supply of medicines, consumables, surgical items, items such as needles, reagents etc. used in laboratory, room rent used in the course of providing health care services to in-patients and patients admitted for a day procedure such as IVF for diagnosis or treatments, is naturally bundled and would be considered as 'composite supply', thereby eligible for exemption under the category 'health care services1 under SI No. 74 of Notification no. 12/2017-CT(R)

Facts:

The applicant renders medical services. The patients coming to applicant for routine checkup or clinical visits are regarded as out-patients, whereas the patients who are admitted in applicant's hospital for treatment/day procedures are regarded as in-patients. The applicant offers the consolidated package to in-patients including the value of consumables/medicines etc. incidental and forming part of the health care services provided. The inpatients are provided with facilities for accommodation, medicines, consumables, implants, dietary foods including surgical procedures required for the treatment. The applicant sought present ruling as to whether the supply of medicines, consumables, surgical items, items such as needles, reagents etc, used in laboratory, room rent used in the course of providing health care services to in-patients and patients admitted for a day procedure such as IVF for diagnosis or treatments which are naturally bundled and are provided in conjunction with each other, would be considered as "Composite Supply" and eligible for exemption under the category 'health care services' under SI No. 74 of Notification no.12/2017-CT(R) dated 28th June, 2017.

Held:

The AAR noted that during the period of admission in the hospital, the patient is under continuous monitoring of the doctors, the nursing staff and the administration; and dosage of medication is all under the control of the doctor and the nursing staff. The entire treatment protocol is documented and recorded. The invoice/bill raised for the treatment as an inpatient is a single bill charging for all the facilities/services utilized for the treatment in the hospital including room rent, nursing care charges, laboratory, consumables, medicines, equipment charges, doctor's fee, etc. Thus, it is clear that in case of an inpatient, the hospital has provided a bundle of supplies which is classifiable under health care services. Accordingly, AAR held that the provision of services of supply of medicines, consumables, surgical items, items such as needles, reagents etc. used in laboratory, room rent used in the course of providing health care services to in-patients and patients admitted for a day procedure such as IVF for diagnosis or treatments is a composite supply as defined in Section 2 (30) of the CGST Act, 2017 and the tax liability has to be determined in accordance with Section 8 of the CGST Act, 2017. The provision of health care services being the principal supply and the other supplies being dependent on the provision of health care services can only be considered as services ancillary to the provision of health care services. Thus, the entire bundle of service supplied by applicant to inpatients is classifiable under 'healthcare services' is eligible for exemption under S.No.74 of Notification No.12/2017-CT(R).

Note:

Similar rulings are pronounced in *2019-TIOL-146-AAR-GST – M/s Starcare Hospital Kozhikode Private Limited* and *2019-TIOL-143-AAR-GST M/s. Kinder Womens Hospital and Fertility Centre Private Limited.*

(2019-TIOL-1556-CESTAT-CHD), LD/68/10, Commissioner Of Goods and Service Tax Gurgaon-II vs. Orange Business Solutions Pvt. Ltd., 05/04/2019

Tribunal held that back office services rendered by Indian entity to various customers on behalf of and direction of another foreign entity cannot be said to be in the nature of 'intermediary service' and thus Rule 9(c) of PoPS Rules, 2012 cannot be applied to determine place of provision of such services.

Facts:

The Orange Group of entities has shared service centers at 4 locations- India, Mauritius, Brazil and Egypt which cater to Orange group entities globally for back office support. The service centers are referred to as 'Global Customer Service Centre (GCSC). In India, the respondent is GCSC providing back office support services. The internal arrangement among Orange Group is such that the administration is done through the entity namely M/s. Equant Network Services International Limited i.e. ENSIL, whereby the GCSC execute a contract with ENSIL for provision of services. The consideration of such services is also paid by ENSIL. In India, the respondent is engaged in the activity of computer networking service which is an application running at the network application layer and above, that provides data storage, manipulation, presentation, communication or other capability which is often implemented using a client-server or peer-to-architecture based on application layer network protocols. On behalf of and on direction of ESNIL, respondent renders these services to other Orange Group companies and respondent has no separate contract with the customers of Orange Group Entities.

Revenue contended that services provided by respondent falls under category of 'intermediary services' in terms of Rule 2(f) of Place of Provision of Services Rules, 2012 (PoPS Rules, 2012) and the place of provision of such services would be India in terms of Rule 9(c) of PoPS Rules, 2012. Consequently, revenue took a view that respondent did not fulfil the condition (d) of Rule 6(A) of Service Tax Rules, 1994 and rejected refund claim filed by the appellant under Rule 5 of CENVAT Credit Rules, 2004 for refund of unutilised CENVAT credit. Whereas, the first appellate authority sanctioned the refund claim holding that respondent cannot be said to be 'intermediary'. Being aggrieved, revenue has filed present appeal.

Held:

Tribunal observed that the activity of the appellant is routine back office process outsourcings activities and is completely based on instructions/ guidelines provided by ENSIL in this regard. There is no arrangement or facilitation of the main service

between two parties by a third person under the category of computer networking services. Tribunal held that each mandate where there are two or more than two companies are involved would not automatically be termed as 'intermediary' merely on the ground of involvement of two or more companies. To be intermediary, the criteria laid down in the definition of 'intermediary' u/r 2(f) of PoPS Rules, 2012 must be followed. Tribunal noted that, the activity of the appellant is routine back office process outsourcings activities and are completely based on instructions/guidelines provided by ENSIL/AEs in this regard. The Department has not produced any evidence as to why providing of back office process outsourcing should be treated as intermediary. Consequently, tribunal upheld the order of first appellate authority that the respondent cannot be said to be 'intermediary' and thus, entitled to consequential relief.

Service Tax

(2019-TIOL-1575-CESTAT-MUM) LD/68/11, M/s National Health And Education Society Vs. Commissioner of Service Tax-III), 29/05/2019

The arrangement between hospitals and professional doctors wherein the doctors are engaged by hospitals to provide treatment to patients coming to/admitted in hospital for getting healthcare services and the fees to doctors are paid by hospital by applying pre-determined ratio on total amounts charged by hospital to patients towards health care services, cannot be regarded as provision of 'infrastructure support service' by hospital to doctors and thus, no service tax liability would be applicable thereon under category of 'business support services'.

Facts:

The appellants run hospitals for providing healthcare and other related services to their patients. The patients of the hospitals are normally treated by the resident doctors and also by panel/non-panel doctors engaged by hospitals. The appellants provide consulting rooms required by the panel/non-panel doctors for treating their (doctor's) patients in the out-patient department and receive consideration from the doctors for permitting them the use of consulting room on hourly basis. The appellants discharge service tax liability in such cases under the taxable category of 'Business Support Services' on the consideration received from the doctors. In some cases, such panel/non-panel doctors also treated the patients of the hospital in which case, they were paid professional fees by the Hospital on certain pre-determined percentage of fees charged by the hospital to the patients. In such case, as the medical services were provided by the Hospital directly to the patients through panel/non-panel doctors in the hospitals, the appellants hospitals did not pay service tax, on the ground that the consideration for healthcare services are directly received by them from the patients and hence exempt. The department alleged that, in such cases, the fees retained by the Hospital after making the payment to the said doctors, is a consideration received by the Hospital for providing infrastructure support services to the doctors. The lower adjudicating authorities confirmed demands raised by impugned SCN. Being aggrieved, appellant hospitals filed present appeals.

Appellant submitted that the patients coming for treatment are privy to the contract only with the appellants-hospitals and not with the doctors. Also, the entire amount billed and received from the patients are the income of the hospitals alone and the amount paid as per the agreed terms to the doctors are reflected as 'expenditure' in the books of accounts of the appellants, on which tax at source is deducted as 'Fees for professional for Technical Services' under section 194J of the Income Tax Act. Further, appellant submitted that the issue involved in present appeals is no more res integra in light of decision of co-ordinate bench of Hon'ble Tribunal in case of *Sir Ganga Ram Hospital Vs. CCE, Delhi-I- 2018-TIOL-352-CESTAT-DEL.*

On the other hand, department contended that the decision in *Sir Ganga Ram Hospital (Supra)* would not be applicable in present case, as in Sir Gangaram's case, the contract clearly brings out that the relationship between the appellants-hospitals and doctors was that of master and servant; whereas, in the present cases, the relationship between the doctors and hospitals is a business relationship, where the doctors are not paid any money by the hospitals, but are required to pay the hospitals for every facility used by them

or their patients. Referring to the terms of contracts involved in present cases, Revenue categorised the transactions into three parts, one is between the doctor and the patients, the other one is between the hospital and the patients and the third one is between the hospital and the doctors and thus placing reliance on the contractual norms, the Revenue contended that the services should be categorised as BSS/Support Service and not under the category of Health Care Services, as held by the co-ordinate Bench.

Held:

Hon'ble Mumbai Tribunal noted that admittedly the appellant-hospitals did not charge any amount to the doctors at all. There is no payment by the doctors to the hospital and therefore, no consideration is received by the hospitals from the consultant doctors. Tribunal observed that there is no privity of contract between the doctors and the patients and the patients are under no obligation to pay any amount to the doctors. The billed amount paid by the patients is reflected as the income of the hospitals alone in the books of accounts and the doctors are paid for the amount as per the contractual norms, on which the hospitals deduct the tax at source under the income tax statute. The alleged service provider is undoubtedly the hospitals/ institutions; the service rendered is to the patients; remuneration is received by the hospitals/institutions and is paid by the patients. Understandably, the services rendered by the hospitals/institutions are at best medical services to the patients and by no stretch of imagination 'Business Support Services'. Tribunal held that it is immaterial that the hospitals are paying a portion of the remuneration received to the doctors for the services rendered by them to the hospitals.

Further, as regards department's contention that the hospitals/institutions are rendering 'Business Support Services' to the doctors, the Tribunal held that in such a case, the hospitals should have charged the doctors for the services rendered to them. One cannot take a long drown conclusion that a portion of the doctors' fee paid by patients is retained by the hospitals/institutions and such retention should be treated as consideration paid to the hospitals. Tribunal categorically observed that none of the agreements indicate any such arrangements between the hospitals and doctors. Therefore, tribunal held that in absence of any consideration being received, no service tax is required to be paid by the hospitals.

As regards revenue's contention of non-applicability of ratio laid down in decision of *Sir Ganga Ram Hospital (Supra)* to present case, Hon'ble Tribunal observed that the conditions in the contracts in both the cases are identical. It was held that since, upon analysis of the contractual norms, the Tribunal in the case of *Sir Ganga Ram Hospital (supra)* has held that service tax cannot be levied on the transactions made between the hospitals and the doctors, the present adjudged demands confirmed on the hospitals cannot be sustained. Further, as revenue has not filed any appeal against the order of the Tribunal passed in the case of *Sir Ganga Ram Hospital (supra),* Hon'ble Tribunal opined that the said order has attained finality and the findings recorded therein cannot be disturbed for deciding identical issues, involved in the present cases differently. Thereby, the Tribunal allowed present appeals by setting aside impugned demand on hospitals under the category of 'business support services'.

(2019-TIOL-150-SC-ST), LD/68/12, Commissioner of Service Tax, Mumbai-II Vs. Greenwich Meridian Logistics (P) Ltd., 01/04/2019

The appeal filed by the revenue against decision of Hon'ble Mumbai Tribunal in case of M/s Greenwich Meridian Logistics (P) Ltd., holding that no service tax can be demanded under category of 'business auxiliary services' on freight surplus earned by freight forwarders on account of difference in purchase and selling price of cargo space, is dismissed by Hon'ble Supreme Court on ground of delay, without deciding question of law in the appeal.

Facts:

The assessee-respondent booked cargo space in shipping lines and thereafter, allotted the cargo space to their customers. Revenue demanded service tax on freight surplus (i.e. profit from purchase and sale of cargo space), under category of 'business auxiliary services'. In the appeal proceedings, *GREENWICH MERIDIAN LOGISTICS (I) PVT. LTD. vs. COMMR. OF S.T., MUMBAI 2017 (49) S.T.R. 233 (Tri. - Mumbai),* Hon'ble Mumbai tribunal held that since the transaction of buying and selling 'cargo space'

were undertaken by the respondent assessee on principal to principal basis, such freight surplus cannot be treated as 'commission' and thus, not liable to service tax under 'business auxiliary services'. Being aggrieved, revenue filed present appeal before Hon'ble Supreme Court.

Held:

The appeal filed by the revenue is dismissed by the Hon'ble Supreme Court on the ground of delay.

(2019-TIOL-1388-CESTAT-DEL), LD/68/13, M/s Subway Systems India Pvt. Ltd. Vs. Commissioner Service Tax Delhi – II, 22/03/2019

When the franchisor collected from franchisees, an advertisement fee in 'Franchise Advertisement Fund', computed as certain percentage of sales turnover of franchisee, Tribunal held that the franchisor cannot be said to be acting as 'pure agent' in respect of such advertisement fees, especially when the franchisor is simultaneously getting benefit out of the advertisements made by franchisee from such advertisement fees and thus such amount is chargeable to service tax under category of 'franchisee services'.

Facts:

The appellant, an Indian subsidiary, entered into master license agreement with its foreign holding company for developing franchise and service sandwich shops to be known as franchisees of appellant. In terms of said agreements, each franchisee was liable to pay weekly royalty and an amount equal to 8% of their total gross sales and an advertising fee equal to 4.5% of their total gross sales. Further, the appellant had to pay royalty amount @ 35% to the holding company, of all fee and royalties derived from each and every sandwich shop that is the franchise in India. Department initiated show cause proceedings against appellant as appellant did not pay service tax liability in respect of an amount received equal to 4.5% of the weekly gross sales towards the contribution referred to as Subway Franchise Advertisement Fund Trust (SFAFT). Appellant submitted that said contribution to SFAFT was collected by the appellant acting merely as a pure agent without providing any service and thus such contribution do not qualify as received towards a 'franchise service'. Further, appellant submitted that the utilisation of amount collected in SFAFT is monitored by the franchise themselves and there is no control of the appellant upon the said amount.

Held:

Hon'ble Tribunal noted that the advertising fee is 4.5% of amount of collected out of weekly gross sales i.e. this value is not at all the expense incurred by the franchise for advertising his own outlet but this is the amount out of his income from the sales passed on to the appellant service provider as agreed under franchisee agreement. The said amount is given by the franchisees to appellant to be used for the process identified by the appellant to advertise the subway brand/trade name. Therefore, tribunal held that it is not simplicitor an advertising service, but is very much the part of the franchise service, by the appellant to the franchisees and qualifies to be consideration received for services provided.

Further, Tribunal held that the argument of appellant to be acting merely as a pure agent is also held not sustainable because appellant being the franchisor is simultaneously getting benefit out of the advertisements. More so, the money fixed for advertisement was not the expenditure separately either on the part of franchiser or on the part of the franchise but is very much the part of the franchise fee given to franchiser in compliance of the terms of the franchise agreement between the two. As regards contention of appellant that it is merely acting as 'pure agent' and thus, reliance placed by the appellant on ratio laid down by Hon'ble Supreme Court in case of *Intercontinental Consultants & Technocrafts Pvt. Ltd. vs. Union of India - 2013 (29) S.T.R. 9 (Del.)* holding that for valuation of taxable service only consideration which is paid as quid pro quo can be brought to the charge, Tribunal held that appellant cannot be said to be acting as 'pure agent' as because appellant being the franchiser is simultaneously getting benefit out of the advertisements. More so, the money fixed for advertisement was not the expenditure separately either on the part of franchiser or on the part of the franchise but is very much the part of the franchise fee given to franchiser in compliance of the terms of the franchise agreement between the two.

Consequently, Hon'ble Tribunal upheld impugned demand and dismissed appeal filed by the appellant.

(2019-TIOL-1601-CESTAT-BANG), LD/68/14, M/S TPL Developers Vs. Commissioner of Central Tax, 15/02/2019

Tribunal held that prior to 01.04.2016, i.e. before insertion of explanation 3 to Rule 6(1) of CCR, 2004, the assesse is not required to reverse CENVAT credit in respect of those output services which were taxable at the time of availment of such credit and subsequently became exempt services.

Facts:

The appellant is engaged in providing services of construction of residential complex. In one of the residential projects undertaken by appellant, the received completion certificate on 28.10.2014. As regards two flats sold prior to receipt of completion certificate, appellant discharged service tax liability on entire consideration received and for the remaining three flats sold after getting completion certificate, appellant was not liable to pay service tax. However, while taking CENVAT credit, appellant availed CENVAT credit from 01.10.2013 to 2015 for all the five flats i.e. including three flats sold after completion certificate. Department alleged that appellant is not entitled to take CENVAT credit in respect of three flats sold after OC, as it amounts to sale of immovable property.

Appellant submitted that Rule 6(1) of CENVAT Credit Rules, 2004 was amended from 01.04.2016 by inserting explanation 3 to provide that exempted services, for the purpose of reversal of CENVAT credit or restricting the availment of CENVAT credit,

includes an activity which is "not a service" as defined under Section 65B (44) of the Finance Act, 1994. Appellant submitted that since the period under dispute is prior to 01.04.2016, there is no need for reversal of CENVAT credit in respect of three flats sold after date of OC as alleged by revenue. The appellant also relied on decision in *M/s. Alembic Ltd. Vs. CCE, Vadodara-I, 2018 (10) TMI 1557- CESTAT Ahmedabad = 2019-TIOL-358-CESTAT-AHM.*

Held:

Tribunal held that prior to 01.04.2016, there was no provision in CENVAT Credit Rules, 2004 *pari materia* explanation 3 to Rule 6(1), requiring reversal of CENVAT credit. Tribunal also held that the services provided by the appellant during the relevant period up to the date of obtaining the OC would not qualify as exempted services and therefore, the provisions of Rule 6 will not be applicable. Tribunal noted that in case of *M/s Alembic Ltd. (Supra)*, division bench of Hon'ble Gujarat Tribunal held that from Rule 11(4) of CCR, 2004 it can be seen that even if an output service provider avails the credit and output service becomes exempted, in such case the credit only in respect of 'inputs' lying in stock or is contained in taxable service is required to be paid; whereas there is no provision for payment of CENVAT credit equivalent to the 'input services' used in respect of exempted service. Therefore, the CENVAT credit availed in respect of input service is not required to be paid back under any circumstances. Accordingly, Tribunal had held that the appellants were not legally required to reverse any credit which was availed by them during the period 2010 till obtaining Completion Certificate, i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable property on account of receipt of Completion Certificate and on which no Service Tax would be paid in future. Therefore, in present case, tribunal held that the appellant's case is squarely covered by ration laid down in the case of *M/s Alembic Ltd. (Supra)* and set aside impugned demand by allowing present appeal.

Customs

[W.P.(C) 11210/2018 & CM APPL. 43547/2018 (stay)], LD/68/15, Vedanta Limited Vs. Union of India & Ors, 22/05/ 2019

Assessee is seeking a direction to CBIC to clarify the procedure that has to be followed for availing the benefit of Notification No 25/2001-Customs dated March 1, 2001 which exempted Gold and Silver produced out of Copper Anode Slime (CAS) after export of such CAS out of India for toll smelting and toll processing, from custom duty upon their import into India. Limitation period under Notification was about to expire and despite several correspondences from the assesse, no clarification regarding procedure to be followed was received from Revenue. High Court asked assesse to satisfy the Revenue that Copper Anode Slime which was exported already contained gold/

silver and that gold/silver imported was in fact extracted from such Copper Anode Slime. Subject to the assessee ensuring that the actual import of the gold/ silver extracted from Copper Anode Slime that was exported in October 2017 was now completed within 60 days from today and in any event not later than July 31, 2019. High Court directed the Revenue to take decision on whether the assessee is to be granted exemption in terms of Notification 25/2001.

(W.P.No.37808 of 2006 and M.P.No.1 of 2006LD/68/16), Commissioner of Central Excise Vs. Kanishk Steel Industries Limited, 26/03/2019)

Assessee was unsure about the method of valuation of its products for purposes of calculating the differential duty on sales from their depots. Assessee requested the Superintendent of Central Excise, to advise as to such method. The Superintendent of Central Excise did not respond to this request for advice despite several reminders. Revenue's notice alleged that assessee had cleared goods from its depot without requesting for provisions assessment. Assessee filed application under section 32E before the Customs and Central Excise Settlement Commission. Revenue submitted that assessee differential duty was paid belatedly and the department was informed belatedly, hence, it was justified in invoking the extended period of limitation. Therefore, the Revenue requested the Settlement Commission to reject the application filed by the assessee. Settlement commission quashed invocation of extended period demanding differential duly in respect of depot sales. As per settlement commission, all the facts were duly pleaded before it, and it had carefully analysed the same before concluding that it was not a case of suppression of facts with intent to evade excise duty. High Court ruled in favour of the assesse noting that there was no infirmity in order of settlement commission.

Transfer Pricing

(I.T.A. No. 873/Kol/2017), LD/68/17, Deputy Commissioner of Income Tax Vs. M/s Emami Ltd., 03/06/ 2019

Working capital adjustment, if any needed, must be made with reference to the international cost of funds, rather than to the interest rate charged on the loans advanced to the AEs; Margin enjoyed by the assessee in respect of exports to AEs is within the permissible limit of +/-5%. CIT(A) had taken into consideration the cost of goods exported as the base and had made appropriate working capital adjustment in relation to the cost of goods exported, which was affirmed by ITAT.

The assessee sold toiletries to its subsidiary AEs, *Emami Dubai* and *Emami UK*. The assessee benchmarked the sales by applying internal Cost Plus method. Transfer Pricing Officer (TPO) noted that the assessee had allowed significant credit period to its AEs of 180 days in comparison to non-AEs of 30 days or less. TPO made working capital adjustment @ 8% p.a. on the sales value with reference to the credit period granted to the AEs & non-AEs. TPO arrived at adjusted gross margin of 23% & -22% in respect of the sales made to *Emami Dubai* and *Emami UK* respectively and corresponding ALP i.e. adjusted gross margin of the non-AEs worked out to 29% and 20%.

ITAT found that assessee had made borrowings in foreign currency, which carried interest rate of L+1%. Thus cost of funds blocked in working capital due to the extended credit period granted to the AEs in comparison to the non-AEs was 2.2% and not 8% as held by the TPO. ITAT, therefore, observed that margins enjoyed by the assessee in respect of exports to AEs compared favourably and was within the permissible limit of +/-5%. ITAT held that TP adjustment made by the TPO on account of working capital adjustment was factually unwarranted. Taking into consideration the cost of goods exported as the base and making appropriate working capital adjustment in relation to the cost of goods exported, the CIT(A) had found that margins enjoyed by the assessee in expo rts to AEs and non-AEs was within the permissible range of +/- 5% and therefore TP adjustment was held as untenable. The Revenue was unable to controvert this finding of CIT(A) and so ITAT found no reason to interfere with the order of the CIT(A) and thus dismissed Revenue's appeal.