IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
Ms. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.5199/Mum/2019
(Assessment year: 2014-15)

M/s Tata Consultancy Services Limited, 9th Floor, Nirmal Building Nariman Point, Mumbai-400 021 **PAN : AAACR4849R**	vs	Deputy Commissioner of Income-tax LTU-1, Mumbai, 29th Floor, Centre One, World Trade Centre Cuffe Parade, Mumbai-400 005
APPELLANT		**RESPONDENT**

I.T.A. No.5904/Mum/2019
(Assessment year: 2014-15)

Assistant Commissioner of Income-tax LTU-1, Mumbai, 29th Floor, Centre One, World Trade Centre Cuffe Parade, Mumbai-400 005	vs	M/s Tata Consultancy Services Limited, 9th Floor, Nirmal Building Nariman Point, Mumbai-400 021 **PAN : AAACR4849R**
APPELLANT		**RESPONDENT**

Present for the Assessee	Shri R.D. Khona, CA
Present for the Department	Shri Prakash Kishinchandani

Date of hearing	31/08/2023
Date of pronouncement	15/09/2023

O R D E R

Per Padmavathy S (AM):

These cross appeals are against the order of the Commissioner of Income-tax (Appeals)-58, Mumbai [in short, 'the CIT(A)'] dated 28/06/2019 for assessment year 2014-15.

2. The grounds raised by the assessee and the revenue with respect to various issues are as given below:-

<u>Assessee</u>

- *Disallowance of subscription to Clayton Christensen Institute (CCI) and to the royal hospital for women Foundation treating the same as in the nature of donation –* ***Grounds 1 (1.1 to 1.2)***
- *Advertisement expenditure –* ***Ground 2 (2.1)***
- *Disallowance of MAT credit to be carried forward –* ***Ground 3 (3.1)***
- *Disallowance of claim of deduction under section 10AA in respect of interest income –* ***Grounds 4 (4.1 & 4.2)***
- *Foreign tax credit as per the provisions of section 90(1)(a)(ii) of the Act* ***Ground 5 (5.1)***
- *Transfer pricing adjustment -* ***Ground 6 (6.1.1 to 6.1.6)***
- *Provision of software and consultancy services -* ***Ground 7 (7.1 to 7.6)***
- *Granting of loans to AE -* ***Grounds 8 (8.1 & 8.2)***
- *Provision of guarantee to AEs –* ***Grounds 9 (9.1 to 9.4)***
- *General –* ***Grounds 10 & 11***

<u>Revenue</u>

- *Allowing deduction to State taxes paid overseas –* ***Ground 1***
- *Allowing expenses disallowed by the Assessing Officer under section 40(a)(i) on account of non deduction of tax under section 19 –****Ground 2***
- *Deleting the disallowance made under section 14A –* ***Ground 3***
- *Allowing payment to Tata Sons Ltd towards brand equity subscription as revenue in nature –* ***Grounds 4 & 5***
- *Allowing commission paid to non resident agents disallowed by the AO under section 40(a)(ia) –* ***Ground 6***

- *Deleting the disallowance of year-end provisions made under section 40(a)(ia) –* ***Ground 7***
- *Allowing foreign tax credit in respect of income pertaining to section 10A/10AA eligible units in India –* ***Ground 8***
- *Restricting the TP adjustment made on account of provision of softwares and consultancy services by relying on CIT(A)'s order in assessee's case –* ***Ground 9***
- *Provision of performance guarantee and lease guarantee* ***Ground 10***
- *Deleting the adjustment made on account of receipt of brand royalty from AE –* ***Ground 11.***

3. The assessee is a company engaged in business of export of computer software providing e-solutions, BPO activities and other management consultancy activity. The assessee filed the return of income for assessment year 2014-15 on 28/11/2014 declaring a total income of Rs.13450,10,54,480/- and the book profits under section 115JB of the Income-tax Act, 1961 (in short, 'the Act) declared at Rs.12725,88,06,235/- The case was selected for scrutiny and the statutory notices duly served on the assessee. A reference was made to the Transfer Pricing Officer (TPO, in short) in order to compute the arm's length price of the international transactions, the assessee had with its Associated Enterprises (AEs). The TPO made an overall TP adjustment of Rs.1945.16 crores towards provision of software, technical & consultancy services, towards interest chargeable from AE, towards corporate guarantee and receipt of brand royalty. The Assessing Officer passed the final assessment order incorporating the TP adjustment. The Assessing Officer also made various adjustments on the corporate tax brand to arrive at the assessed income of Rs.18752,53,99,510/-. The assessee preferred appeal before the CIT(A), who gave partial relief to the assessee. Against the order of the CIT(A), both the assessee and the revenue are in appeal before us.

4. We will first consider the corporate tax issues raised by the assessee and the revenue.

I.T.A. No.5199/Mum/2019 – Assessee's appeal

Disallowance of subscription to Clayton Christensen Institute (CCI) and Royal Hospital for Women Foundation – Ground 1

5. During the course of assessment, the Assessing Officer noticed that assessee has debited a sum of Rs.23,41,64,199/- as donation and in the computation, assessee has added only Rs.20,27,39,220/-. The Assessing Officer called on the assessee to explain why the difference of Rs.3,14,24,979/- should not be added back to the income of the assessee. The assessee submitted that during the year, the assessee has started a joint research programme on Disruptive Innovation with CCI of USA. The purpose of the programme was to enable company employees to develop the management theories and application of this amongst others for future growth of company. As per the terms of the programme, the company employees will undergo intensive training at CCI and later on do the research. The research will be published by the Institute and the report will be developed for the company to address its questions and enable its future growth. The assessee submitted that during the year a sum of Rs.3,00,31,600/- have been paid to CCI towards this research programme and since it is incurred for the purpose of business, the same is claimed as a deduction under section 37(1) of the Act.

6. With regard to the payment made to Royal Hospital for Women Foundation amounting to Rs.12,92,516/-, the assessee submitted that this is paid towards sponsorship and not donation and hence is allowable under section 37(1) of the Act. The Assessing Officer did not accept the submissions of the assessee and

proceeded to make the disallowance towards the same. On appeal, the CIT(A) held that impugned amount being classified by the assessee as donation is not an item eligible for deduction under section 37(1). The CIT(A) appeals further held that the MOU between the assessee and CCI is signed after the relevant financial year and therefore it was not established that the payment CCI is wholly and exclusively for the purpose of business. With regard payment to Royal Hospital the CIT(A) held that the same is for the Annual Dinner and therefore could not for the purpose of business of the assessee. Accordingly the CIT(A) upheld the disallowance.

7. The Ld.AR before us reiterated the submissions made before the lower authority. The Ld.AR further submitted that the payment to CCI is incurred purely for development of certain skills of the employees and accordingly in the nature of normal business expenditure which is allowable under section 37(1) of the Act. The Ld.AR in this respect drew our attention to the MOU entered into with CCI (page 1 of paper book) and the details of fellowship programme (page 5 of paper book) to substantiate that the expenditure incurred for the research programme is towards the future growth of the company and, therefore, should be allowed as a deduction. The Ld.AR also drew out attention to the resolution passed in the Board Meeting of the company approving the payment of research programme (page 10 of the paper book) in this regard.

8. With regard to the sponsorship paid to the Royal Hospital for Women Foundation, the Ld.AR submitted that the Royal Hospital is the eminent hospital in UK and sponsoring the event of the hospital got business feasibility and publicity.

The Ld.AR further submitted that the assessee is catering to many clients from healthcare industry and, therefore, the sponsorship at the annual dinner programme of the hospital helps in assessee's business and, therefore, should be allowed as a deduction. The Ld.AR also submitted that mere accounting of the payment under the donation account, does not change the real nature of the expenditure. The Ld.AR in this regard relied on the following decisions:-

- *Shri Venkata Satyanarayan Rice Mill Contractors Co.VsCIT (89 Taxman 92)(SC)*
- *Mysore Kirloskar Ltd Vs CIT – 30 Taxman 467(KarnatakaHC)*
- *CIT vs Williamson Tea (Assam) Ltd* (38 Taxmann.com 154)(HC Gauhati)*
- *Kanhaiyalal Dudheria vs JCIT (113 Taxmann.com 217)(HC Karnataka)*

9. The Ld.DR, on the other hand, vehemently argued that the assessee itself has accounted the impugned payments as donation and, therefore, the same cannot be treated as an allowable expenditure under section 37(1). The Ld.DR further submitted that the MOU entered into between the assessee and the CCI are dated beyond financial year relevant to the assessment year under consideration, that is, 08/06/2017 and 26/06/2017. The Ld.DR also submitted that the assessee did not produce any documentary evidence such as invoice in support of the payment and, therefore, the same cannot be allowed. With regard to the payment to Royal Hospital, the Ld.DR submitted that the payment is made towards sponsoring of a dinner and that since the hospital is located outside India, the claim of the assessee that the expenditure is incurred towards public welfare cannot be accepted for the reason that the beneficiaries are not in India. The Ld.DR also submitted that the onus is on the assessee to establish that there is a commercial expediency towards the payment which has not been established in the given case. With regard to the reliance placed by the Ld.AR in the case of Mysore Kirloskar Ltd (supra), the Ld.DR submitted that in that case, the payments were made to government agency

and therefore, the same cannot be compared with the payments made by the assessee to private units. Accordingly, the Ld.DR submitted that the payments are not to be allowed as a deduction.

10. The Ld.AR, to counter the contention that the MOU is signed after the date relevant to the year under consideration, drew our attention to the Board resolution approving the payment was during the financial year and, therefore, on that basis, the payments were made and accordingly claimed as deduction.

11. We heard the parties and perused the material on record. The assessee has made a payment of Rs.3,00,31,600/- to CCI as approved by the Board vide resolution dated 16/01/2014. On perusal of the MOU entered into between the assessee and CCI, we notice that as part of the research programme towards which, the impugned payment is made by the assessee, the employees of the assessee would undergo training in the theory of disruptive innovation. It is further noticed that under the fellowship programme CCI trains the employees of assessee which as per the programme, would help in the future growth of business of the assessee. We, therefore, see merit in the contention of the Ld.AR that though the amount is paid under the head ‘donation’, the actual nature of payment is towards the research programme which would benefit the assessee in long term and the same should be allowed as a deduction under section 37(1). Accordingly in our considered view the payment to CCI towards research program is incurred for the purpose of assessee's business and therefore should be allowed as a deduction under section 37(1).

11.1 With regard to the payment made to Royal Hospital For Women, the Ld.AR drew our attention to the copy of the letter received from the Royal Hospital For Women thanking the payment of documentation by the assessee. On perusal of the same we notice that the amount is paid towards sponsoring the luggage prize at their annual dinner. However, nothing has been brought on record by the assessee to substantiate the claim that sponsoring the prize at the dinner would help the business of the assessee. For the purpose of claiming deduction under section 37(1), it is important for the assessee to establish that the expenditure is incurred wholly and exclusively for the purpose of business, which, in our opinion, is not established by the assessee with respect to the payment made to Royal Hospital For Women. In view of the same, we hold that the amount of Rs.12,92,516/- paid towards sponsoring of prize at the dinner of the Royal Hospital For Women Foundation cannot be held to be incurred for the purpose of the business of the assessee. Accordingly, we uphold the order of the CIT(A) to this extent. This ground raised by the assessee is partly allowed.

Advertisement expenditure – Ground 2

12. The Ld.AR in this regard submitted that the expenditure in respect of advertisement in newspaper / magazine is routinely incurred for the ongoing business of the assessee and is not in the nature of any brand building. The Ld.AR further submitted that the assessee does not derive any enduring benefit by incurring the said expenditure and, therefore, should be allowed as revenue expenditure. The Ld.AR submitted additional evidence supporting the claim of the expenditure before the bench and prayed for admission of the additional evidence.

The Ld.DR strongly objected to the admission of the additional evidence and supported the order of the lower authority.

13. We heard the parties and perused the material on record. We notice that the issue of allowability of advertisement expenditure came up before the co-ordinate bench in assessee's case for A.Ys. 2009-10, 2010-11, 2012-13 & 2013-14. It is further noticed that the co-ordinate bench has been remitting the issue back to the Assessing Officer for the reason that the assessee has submitted the additional evidence before the Tribunal for the first time and the same is not examined by the lower authorities. The relevant observation of the Hon'ble Tribunal in the order for AY 2012-13 (ITA No.797/Mum/2018 dated 11.04.2022) is extracted as below:-

> *"4.1. We have heard rival submissions and perused the materials available on record. At the outset both the parties before us agreed that this issue is already covered by the Co-ordinate Bench decision of this Tribunal in assessee"s own case for A.Y.2009-10 in ITA No.5713/Mum/2016 dated 30/10/2019 wherein it was held as under:-*
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> > *"23. We have considered rival submissions and perused the material on record. We have also carefully examined the case laws cited before us. On a detailed analysis of facts on record, we have noted that the reasoning of the Assessing Officer that the expenditure was incurred for brand building is without any basis. It is to be noted, before the Departmental Authorities the assessee had demonstrated that in no way it is connected with development of Tata brand. The details of expenditure incurred clearly demonstrate that they were basically for the purpose of advertising assessee's products in print media or through seminar, conferences, etc. As rightly observed by learned Commissioner (Appeals), the Assessing Officer has brought no material on record to establish that the expenditure is for brand building. As observed earlier, the expenditure relates to advertisement in newspaper, magazine, events, seminars, conferences, exhibitions, etc. Thus, the nature of expenditure incurred by the assessee clearly indicates that it was for promoting its own business. Further, considering the turnover of the assessee, the expenditure incurred on advertisement does not appear to be unusually high. That being the case, the expenditure incurred on advertisement cannot be treated to be in the nature of capital expenditure and amortized over a period of five years. To that extent, we agree with the decision of learned Commissioner (Appeals) on the issue. However, as*

> *regards experience certainty expenditure amounting to ₹ 5.28 crore, it appears that learned Commissioner (Appeals) has held it to be of capital nature on the basis that the assessee itself admitted so. However, before us, leaned Sr. Counsel for the assessee has vehemently argued that no such admission was made by the assessee before learned Commissioner (Appeals) and under a misconception, learned Commissioner (Appeals) has come to such conclusion. The leaned Sr. Counsel submitted, the experience certainty campaign was also for the purpose of advertisement only and in this context, he has furnished before us the details of such expenditure through additional evidences. Since, the additional evidences furnished by the assessee will have a crucial bearing in determining the nature of expenditure, we are inclined to admit the additional evidences. However, considering the fact that these evidences were not furnished before the Departmental Authorities, to afford a fair opportunity to the Department to verify the authenticity of assessee's claim vis-a-vis the additional evidences furnished before us, we restore the issue to the Assessing Officer for de novo adjudication after providing reasonable opportunity of being heard to the assessee. We make it clear, our aforesaid direction is only with regard to the experience certainty expenditure of ₹ 5.28 crore. The decision of learned Commissioner (Appeals) on this issue is modified to this extent only."*

4.2. We find that assessee had furnished the additional evidences for the A.Y.2012-13 in respect of the aforesaid issue vide letter dated 30/12/2019 before us. Respectfully following the aforesaid decision in assessee"s own case, the ground No.2 raised by the assessee and ground No.4 raised by the Revenue for A.Y.2012-13 are disposed of in the above mentioned terms."

14. The assessee for the year under consideration also has submitted the additional evidence for the first time before Tribunal. Therefore respectfully following the above decision of the co-ordinate bench in assesse's own case, we remit the issue back to the Assessing Officer with similar direction with regard to the additional evidences submitted by the assesse. This ground is allowed for statistical purpose.

15. **Ground 3** is with regard to the carry forward of MAT credit was not pressed by the Ld.AR during the course of hearing and, therefore, the same is dismissed as not pressed.

Claim of deduction under section 10AA in respect of interest income – Ground 4

16. The Assessing Officer during the course of assessment noticed that the assessee has earned interest income of Rs.1280.07 crores out of which, an amount of Rs.733.24 is attributable to SEZ units. The assessee, during the course of assessment proceedings, revised its claim of deduction under section 10AA by including the interest income to the profits eligible or deduction under section 10AA. The Assessing Officer did not allow the claim of the assessee for the reason that a new claim cannot be made without filing the revised return of income by relying on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd vs CIT 284ITR 323 (SC). The CIT(A) upheld the decision of the Assessing Officer for the same reason.

17. The Ld.AR before us submitted that the assessee has not made a new claim towards deduction under section 10AA but has merely recomputed profits eligible for deduction and, therefore, the contention that the same is required to b made only through a revised return, is not correct. On merits, the Ld.AR submitted that the assessee has shown the interest income as part of business income, which fact has not been disputed by the Assessing Officer. The Ld.AR drew our attention to the relevant provisions of section 10AA where though the sections provides that the profits derived from the undertaking is eligible for deduction, the method of computation of eligible profits as provided in sub section (7) of section 10AA provides that it is the profits of the eligible business that needs to be considered for the purpose of computing the deduction under section 10AA. Accordingly, the Ld.AR submitted that interest income which is part of the business income of the

assessee should also be considered for the purpose of deduction under section 10AA of the Act. The Ld.AR relied on the following decisions:-

- *CIT vs Symantee Software India P Ltd - Appeal No.1534 of 2012 judgment dated 12th December, 2014*
- *CIT vs Hewlett Packard Global Soft Ltd 87 taxmann.com 64 (ITAT Mumbai)*
- *Tech Mahindra Business Services Ltd vs DCIT 130 taxmann.com 250 (ITAT, Kolkata)*

18. The Ld.DR, on the other hand, submitted that the interest on deposits cannot be claimed to be eligible for deduction under section 10AA since the same is not derived from the business of the undertaking. The Ld.DR further submitted that though the Assessing Officer has not disputed including the interest income as part of profits from business, in reality, the nature of income is that it should be taxed under the head "Income from other sources". Therefore, the Ld.DR submitted that the provisions of sub section (7) of section 10AA with regard to the computation cannot be applied in assessee's case.

19. We heard the parties and perused the material on record. The lower authorities have denied the benefit of deduction under section 10AA on the interest income earned by the assessee for the reason that the claim is not made through filing the revised return. In Goetze (India) Ltd.(supra) the Hon'ble Supreme Court held that the assessee can make a claim for deduction, which has not been claimed in the return, only by filing a revised return within the time allowed. In assessee's case, we notice that the assessee, in the computation of income has claimed the deduction under section 10AA without including the interest income to the profits of the business and has only revised the amount of deduction before the lower authorities by including the interest income. Therefore, we see merit in the contention of the Ld.AR that this is not a fresh claim, but a re-computation of the deduction already claimed while filing the return of income. Be that as may, the

powers of the Tribunal are not impinged in entertaining claim not made in return of income or revised return of income.

20. Before proceeding on merits, we will look at the relevant provisions of section 10AA, which reads as below:-

"10AA. ****

(7) For the purposes of sub-section (1), the profits derived from the export of articles or things or services (including computer software) ***shall be the amount which bears to the profits of the business of the undertaking,*** *being the Unit, the same proportion as the export turnover in respect of such articles or things or services bears to the total turnover of the business carried on by the undertaking:*

Provided *that the provisions of this sub-section as amended by section 6 of the Finance (No. 2) Act, 2009 (33 of 2009) shall have effect for the assessment year beginning on the 1st day of April, 2006 and subsequent assessment years."*

(emphasis supplied)

21. Plain reading of the computation mechanism as provided in subsection (7) of section 10AA leads to the conclusion that for the purpose of deduction under section 10AA, it is the profits of the business that needs to be considered. In assessee's case we notice that the Assessing Officer had not disputed the fact that the interest on deposits being part of profits from business of the assessee and therefore there is merit in the contention that while computing the deduction as per subsection (7) of section 10AA, the same is to included as part of the profits of the business.

22. We in this regard notice that in the Full Bench decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Hewlett Packard Global Soft Ltd (87 Taxmann.com 182) considered similar issue in the context of deduction under section 10A/10B of the Act where it is held that –

35. The Scheme of Deductions under Chapter VI-A in Sections 80-HH, 80-HHC, 80-IB, etc from the 'Gross Total Income of the Undertaking', which may arise from different

specified activities in these provisions and other incomes may exclude interest income from the ambit of Deductions under these provisions, but exemption under Section 10-A and 10-B of the Act encompasses the entire income derived from the business of export of such eligible Undertakings including interest income derived from the temporary parking of funds by such Undertakings in Banks or even Staff loans. The dedicated nature of business or their special geographical locations in STPI or SEZs. etc. makes them a special category of assessees entitled to the incentive in the form of 100% Deduction under Section 10-A or 10-B of the Act, rather than it being a special character of income entitled to Deduction from Gross Total Income under Chapter VI-A under Section 80-HH, etc. The computation of income entitled to exemption under Section 10-A or 10-B of the Act is done at the prior stage of computation of Income from Profits and Gains of Business as per Sections 28 to 44 under Part-D of Chapter IV before 'Gross Total Income' as defined under Section 80-B(5) is computed and after which the consideration of various Deductions under Chapter VI-A in Section 80HH etc. comes into picture. Therefore analogy of Chapter VI Deductions cannot be telescoped or imported in Section 10-A or 10-B of the Act. The words 'derived by an Undertaking' in Section 10-A or 10-B are different from 'derived from' employed in Section 80-HH etc. Therefore all Profits and Gains of the Undertaking including the incidental income by way of interest on Bank Deposits or Staff loans would be entitled to 100% exemption or deduction under Section 10-A and 10-B of the Act. Such interest income arises in the ordinary course of export business of the Undertaking even though not as a direct result of export but from the Bank Deposits etc., and is therefore eligible for 100% deduction.

36. We have to take a purposive interpretation of the Scheme of the Act for the exemption under Section 10-A/ 10-B of the Act and for the object of granting such incentive to the special class of assessees selected by the Parliament, the play-in-the-joints is allowed to the Legislature and the liberal interpretation of the exemption provisions to make a purposive interpretation, was also propounded by Hon'ble Supreme Court in the following cases:-

> *I] In Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay, [(1992) 3 SCC 78], the Hon'ble Supreme Court held that:-*
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> > *"5. … ..Since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it. But that turned out to be the, unintended, consequence of construing the clause literally, as was done by the High Court for which it cannot be blamed, as the provision is susceptible of such construction if the purpose behind its enactment, the objective it sought to achieve and the mischief it intended to control is lost sight of. One way of reading it is that the clause excludes any undertaking formed by transfer to it of any building, plant or machinery used previously in any other business. No objection could have been taken to such reading but when the result of reading in such plain and simple manner is analyzed then it appears that literal construction would not be proper. …"*

II] In R.K. Garg v. Union of India, [(1981) 4 SCC 675] = [1982 SCC (Tax) 30 p.690], the Hon'ble Apex Court has held as under:-

> *"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style: "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events ³ self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability." The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."*

37. On the above legal position discussed by us, we are of the opinion that the Respondent assessee was entitled to 100% exemption or deduction under Section 10-A of the Act in respect of the interest income earned by it on the deposits made by it with the Banks in the ordinary course of its business and also interest earned by it from the staff loans and such interest income would not be taxable as 'Income from other Sources' under Section 56 of the Act. The incidental activity of parking of Surplus Funds with the Banks or advancing of staff loans by such special category of assessees covered under Section 10-A or 10-B of the Act is integral part of their export business activity and a business decision taken in view of the commercial expediency and the interest income earned incidentally cannot be de-linked from its profits and gains derived by the Undertaking engaged in the export of

> *Articles as envisaged under Section 10-A or Section 10-B of the Act and cannot be taxed separately under Section 56 of the Act.*
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> *38. We therefore affirm and agree with the view expressed by the first Division Bench of this Court in the case of M/s. Motorola India Electronics (P) Ltd.(supra) and we do not agree with the view taken by the subsequent Division Bench on 10/04/2014 in the present case.*

23. We further notice that a similar view is expressed by the Jurisdictional High Court in the case of Symantee Software India P Ltd (supra) while considering the deduction under section 10A of the Act. It is relevant to mention here that the manner of computing deduction under section 10A as per the provisions of subsection (4) of the said section is similar to subsection (7) of section 10AA and therefore the ratio of the above decisions rendered in the context of deduction under section 10A would equally be applicable to deduction claimed under section 10AA. Accordingly respectfully following the above decision of the jurisdictional High Court and also the Full Bench of the Hon'ble Karnataka High Court, we hold that interest income is also to be considered for the purpose of arriving at the profits eligible for deduction under section 10AA. The Assessing Officer is directed to re-compute the deduction under section 10AA accordingly. The ground no.4 of the appeal is thus allowed.

Foreign Tax credit in respect of income – Ground 5

24. The Ld.AR submitted that foreign tax credit should be provided for taxes paid in overseas jurisdiction in respect of section 10AA eligible income in India as per the tax credit provisions of respective DTAA. The Ld.AR further submitted that the correct legal position is that where a specific provision is made in DTAA, such provision will prevail over the general provisions contained in the Act. The Ld.AR further submitted that this is an issue of recurring nature in assessee's own

case from A.Ys 2009-10 onwards and that the co-ordinate bench has been consistently holding the issue in favour of the assessee.

25. The Ld.DR relied on the order of the lower authorities.

26. We heard the parties and perused the materials on record. We notice that the co-ordinate bench in assessee's own case for AY 2012-13 (supra) has considered the similar issue and held that –

> *"5.1. We have heard rival submissions and perused the materials available on record. We have heard rival submissions and perused the materials available on record. At the outset both the parties before us agreed that this issue is already covered by the Co-ordinate Bench decision of this Tribunal in assessee"s own case for A.Y.2009-10 in ITA No.5713/Mum/2016 dated 30/10/2019 wherein it was held as under:-*
>
> > *"26. In ground no.6, corresponding to ground no.7 of Revenue's appeal, the assessee has claimed foreign tax credit in respect of income pertaining to section 10A/10AA of the Act eligible units in India.*
> > *27. Brief facts are, in the course of assessment proceedings the assessee furnished countrywise statement of tax paid in support of its claim of tax credit under section 90 and 91 of the Act amounting to ₹ 93,48,94,709. It was contended by the assessee that the tax paid on income charged to tax outside India and in India would be eligible for deduction in terms of the applicable tax treaties as well as under section 91 of the Act. The Assessing Officer after examining the claim of the assessee and verifying the details allowed tax credit in respect of tax paid overseas on the income which was not only offered to tax abroad but was also subjected to tax in India to the extent not exceeding the rate of tax payable in India. However, in respect of income subjected to tax abroad but exempt from payment of tax in India, he did not grant relief either under section 90 or 91 of the Act. The assessee challenged the aforesaid decision of the Assessing Officer before the first appellate authority.*
> > *28. Learned Commissioner (Appeals), after considering the submissions of the assessee and taking note of the decision of the Hon'ble Karnataka High Court in Wipro Ltd. v/s DCIT, [2015] 62 taxmann.com 26 (Kar.) bifurcated the foreign tax credit into three parts i.e., tax paid in USA, tax paid in other DTAA countries and tax paid in non-DTAA countries. Thereafter, he directed the Assessing Officer to allow tax credit in respect of tax paid in USA even on the income which is exempt from tax in India under section 10A / 10AA of the Act. However, in respect of tax paid in other DTAA and non- DTAA countries, learned Commissioner (Appeals) held that no tax credit will be available in respect of income which is exempt from tax in*

India under section 10A / 10AA of the Act. While the assessee has challenged the decision of learned Commissioner (Appeals) on non-grant of tax credit in respect of taxes paid in other DTAA countries and non-DTAA countries, the Department is aggrieved with the decision of learned Commissioner (Appeals) in granting tax credit in respect of taxes paid in USA. Since, the grounds raised by the assessee and Revenue, as noted above, are on a common issue, we dispose of both the grounds together.

29. The leaned Sr. Counsel for the assessee submitted, as per section 90(1)(a)(ii) of the Act, the Central Government may enter into an agreement with any country outside India for granting relief in respect of Income Tax chargeable under the Act and under the corresponding law in force in that country, as the case may be, to promote mutual economic relationship, trade and investment. Thus, he submitted, section 90 of the Act empowers the Central Government to enter into DTAA with the Government of any other country for granting relief in respect of cases where income tax is chargeable. He submitted, section 10A/10AA grants deduction from eligible income from the total profit. However, such income is chargeable to tax in India as per the provisions of section 4 and 5 of the Act. He submitted, the exemption under section 10A / 10AA of the Act is for a specified period and after expiry of that period such income would otherwise be chargeable to tax. Referring to article 25 of Indo-U.S. DTAA, the leaned Sr. Counsel submitted, the condition mandated in the treaty is that if any income derived and tax paid in USA on such income then tax relief / credit shall be granted in India of such tax paid in USA. He submitted, the aforesaid article does not speak of any income tax being paid by the resident assessee under the Indian Income Tax Act as a condition precedent for claiming the benefit of tax credit under DTAA. He submitted, like article 25(2)(a) of India-USA DTAA, similar clause also appear in various other tax treaties concluded by the Government of India with foreign countries from which the assessee has received income under section 10A / 10AA of the Act till assessment year 2009-10, such as, Denmark, Finland, Hungary, Norway, Oman, South Africa, Saudi Arabia, Taiwan. In this context, he drew our attention to the relevant clauses of the DTAAs with the above noted countries. Thus, he submitted, tax credit has to be provided for taxes paid in overseas jurisdiction in respect of section 10A/10AA eligible income in India as per the provisions of respective DTAAs. He submitted, even under MAT computation, the assessee should be allowed full credit for taxes paid overseas in respect of section 10A/10AA eligible income. In support of his contention, the learned Sr. Counsel put strong reliance upon the decision of the Hon'ble Karnataka High Court in Wipro Ltd. (supra).The learned Sr. Counsel submitted, when no decision of the Hon'ble Jurisdictional High Court is available on the issue and the only decision of a High Court which is available is that of the Hon'ble Karnataka High Court, even though, the decision is of a non-jurisdictional High Court, however, this being the only

decision available on the issue, it will be binding when there is no contrary decision of another High Court is available. For such proposition, he relied upon the following decisions:-

i) CIT v/s Smt. Nirmalabai K. Davekar, [1990] 186 ITR 242 (Bom.) Tata Consultancy Services Ltd.

ii) CIT v/s Highway Construction Co. Pvt. Ltd., [1996] 217 ITR 234 (Gauhati); and

iii) CIT v/s Maganlal Mohanlal Panchan (HUF), [1994] 210 ITR 580 (Guj.).

30. The learned Departmental Representative strongly relying upon the observations of the Assessing Officer submitted, since all income of section 10A/10AA eligible units are exempt and not subjected to tax in India, the assessee would not get tax credit for taxes paid on such income in overseas countries, except, USA.

31. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. As could be seen, while the Assessing Officer has disallowed assessee's claim of foreign tax credit in respect of income exempt under section 10A/10AA of the Act on the reasoning that only such income which is subjected to tax in both the countries would qualify for tax credit, learned Commissioner (Appeals) has restricted the relief of foreign tax credit only in respect of tax paid in USA even in respect of income which is exempt under section 10A/10AA of the Act. The learned Commissioner (Appeals) has come to such conclusion by following the decision of the Hon'ble Karnataka High Court in Wipro Ltd. (supra). The reasoning of the learned Commissioner (Appeals) on the issue is, as per the decision of Hon'ble Karnataka High Court in Wipro Ltd. (supra), the foreign tax credit benefit under section 90(1)(a)(ii) of the Act would only be applicable under Indo-US DTAA and would not be applicable to other DTAA countries and non-DTAA countries. On a careful reading of the decision of the Hon'ble Karnataka High Court in Wipro Ltd. (supra), it is noted, while dealing with identical issue the Hon'ble Court held that in the cases covered under section 90(1)(a)(ii) of the Act, it is not the case of income being subjected to tax or the assessee has paid tax on the income. The provision applies to a case where the income of the assessee is eligible to tax under the Act as well as in the corresponding law in force in the other country. The Court observed, though, income tax is chargeable under the Act, it is open to the Parliament to grant exemption under the Act from payment of tax for any specified period, normally, to incentivize the assessee the to carry on manufacturing activities or providing services. The Court thereafter referring to the treaty provisions with USA held that it is not the requirement of law that the assessee before he claims credit under the Indo-US convention or under the provision of the Act must pay tax in India on such income. The Court observed, as per the embargo placed in the DTAA, the assessee is entitled to

such tax credit only in respect of that income which is taxed in USA. In similar context, the Court also referred to the tax treaty with Canada where the provisions does not allow credit for tax paid in Canada if the income is not subjected to tax in India. With regard to country's with which India does not have any agreement for avoidance of double taxation, the Court observed that as per section 91 of the Act, the assessee would be eligible to avail tax credit. Thus, on a careful reading of the aforesaid judgment of the Hon'ble Karnataka High Court, it becomes clear that where the respective tax treaty provides for benefit for foreign tax paid even in respect of income on which the assessee has not paid tax in India, still, it would be eligible for tax credit under section 90 of the Act. Like Article 25 of the Indo-USA treaty, treaties with various other countries such as Indo-Denmark, Indo-Hungary, Indo-Norway, Indo-Oman, Indo-US, Indo Saudi Arabia, Indo-Taiwan also have similar provision providing for benefit of foreign tax credit even in respect of income not subjected to tax in India. However, Indo-Canada and Indo-Finland treaties do not provide for such benefit unless the income is subjected to tax in both the countries. Therefore, the foreign tax credit would be available to the assessee in all cases except the foreign tax paid in Finland and Canada. The Assessing Officer is directed to grant credit accordingly."

5.2 In respect of this issue we find that the list of countries involved in or the year under consideration are as under:-

i) USA
ii) Denmark
iii) Finland
iv) Hungary
v) Norway
vi) Oman
vii) South Africa
(viii) Saudi Arabia
(ix) Taiwan

5.3. In view of the above mentioned decision, credit for foreign tax paid shall be eligible only for nine countries listed above. Respectfully following the aforesaid decision for the A.Y.2009-10 in assessee"s own case, the ground No.3 raised by the assessee and ground No.8 raised by the Revenue are disposed of in the above mentioned terms."

27. For the year under consideration, the Ld.AR brought to our attention that the list of countries involved for the year under consideration from which we notice that the countries listed are same as considered in the above decision of the coordinate bench. Therefore, respectfully following the above decision of the co-

ordinate bench, we hold that the foreign tax paid shall be eligible for the 9 countries as listed in the order of the co-ordinate bench. This ground of the assessee is allowed.

28. The assessee submitted two additional grounds with regard to the claim for deduction of education cess and deduction under section 10AA on commercial profit instead of ‘income from business or profession’.

29. The Ld.AR did not press for the admission of additional ground with regard to the education cess and, therefore, the same is not admitted for adjudication. The second additional grounds with regard to deduction under section 10AA should be on commercial profit instead of ‘income from business or profession’, the same does not require examination of new facts otherwise than on record and purely a legal issue. Therefore, placing reliance on the judgment of the Hon’ble apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), the additional grounds for substantial cause and justice is taken on record and we proceed to dispose of the same on merits.

30. The Ld.AR submitted that language of section 80HH and section 10AA are pari material inasmuch as both the sections provides that "in computing the total income of the assessee, deduction shall be allowed on certain percentage of profits and gains derived from ………………". The meaning of the term “Profits and gains” derived is expounded by the Hon’ble Supreme Court in the case of Vijay Industries Ltd 103 taxmann.com 454 (SC) that the same refers to profits which are commercial profits without deducting depreciation and investment allowance as

per the Act. The Ld.AR further submitted that the similar view is expressed by the co-ordinate bench of the Tribunal in the case of Reliance Industries Ltd (ITA 7299/Mum/2017 and also in assessee's own case for A.Y. 2012-13 and 2013-14.

31. The Ld.DR. on the other hand, relied on the order of the lower authorities.

32. We heard the parties and perused the materials on record. We notice that the co-ordinate bench has considered similar issue in assessee's own case for A.Y. 2012-13 (supra) wherein it is held that –

> *"6.3. In respect of claim of deduction u/s.10AA of the Act on commercial profit, the ld. AR before us placed reliance on the provisions of Section 80HH of the Act and also argued that the language of Section 80HH and Section 10AA are pari materia in as much as both the sections provide that in computing the total income of the assessee, deduction shall be allowed at certain percentage of profits and gains derived from business. The expression "profits and gains" derived was subject matter of adjudication by the Hon"ble Supreme Court in the case of Vijay Industries Ltd., reported in 103 taxmann.com 454 wherein the Hon"ble Apex Court observed that the profits and gains referred to commercial profits without deducting depreciation and investment allowance as per the Act. Since this aspect was not raised by the assessee before the lower authorities, accordingly, the lower authorities did not have an occasion to give their finding on the same. Hence, in the interest of justice and fair play, we deem it fit and appropriate to remand this issue raised in the additional ground to the file of the ld. AO for denovo adjudication in the light of the decision of the Hon"ble Apex Court in Vijay Industries Ltd., referred to supra and decide the controversy in accordance with law. Accordingly, the additional ground raised by the assessee in respect of claim of deduction u/s.10A of commercial profits is allowed for statistical purposes".*

33. Respectfully following the decision of the co-ordinate bench, we remand the issue to the file of the Assessing Officer for de novo consideration of the issue keeping in mind the decision of the Hon'ble Supreme Court in the case of Vijay Industries Ltd (supra). This ground is allowed for statistical purpose.

34. Ground Nos. 6 to 9 raised by the assessee pertain to the Transfer Pricing adjustments. These grounds are taken up along with the grounds in revenue's appeal which are adjudicated in the later part of this order. Ground Nos.10 and 11 are general not warranting any separate adjudication.

I.T.A. No.5904/Mum/2019 – Revenue's Appeal

State taxes paid in overseas countries – Ground 1

35. In the computation of income of the assessee, the Assessing Officer noticed that the assessee has claimed a deduction of Rs.17,13,82,113/- in respect of state taxes paid overseas. In this regard, the assessee submitted that the state taxes paid in the USA cannot be disallowed under the provisions of section 40(a)(ii) for the reason that the Explanation inserted with effect from April 1, 2006 provides that the taxes which are eligible for relief under sections 90 or 91 are not eligible for deduction, which otherwise would mean that as per provisions of section 40(a)(ii) r.w.s. 2(43) deduction for those taxes paid overseas which are not eligible for any relief as per provisions of section 90 or 91 is allowable. The Assessing Officer did not accept the submissions of the assessee and held that state taxes paid cannot be claimed as a deduction. The CIT(A) held that amendment brought to section 40(a)(ii) clearly shows the legislative intent that state taxes paid overseas can be claimed as a deduction. Accordingly, the CIT(A) held that state taxes paid in USA is not eligible for relief under section 90 / 91 and, therefore, directed the Assessing Officer to factually verify and give relief to the assessee.

36. The Ld.DR, in this regard submitted that section 40 contains various provisions with regard to deductions that are not allowable. Therefore, the CIT(A) erred in giving directions to allow the deduction under section 40(a)(ii). However,

the Ld.DR argued that the benevolent provisions of the Act should be interpreted strictly and accordingly, the deduction claimed by the assessee cannot be allowed.

37. The Ld.AR, on the other hand, reiterated that section 40(a)(ii) read with section 2(43) of the Act prohibits only those taxes, which are allowable as credit under section 90 / 91. Therefore, the state tax for which no credit is allowable under section 90 / 91 should be allowed as a deduction. The Ld.AR also submitted that this is the recurring issue in assessee's own case from A.Y. 2009-10 where the co-ordinate bench of the Tribunal is consistently holding the issue in favour of the assessee.

38. We heard the parties and perused the material on record. The deduction claimed towards state taxes paid in the USA has been a recurring issue in assesse's own case for AY 2012-13 (supra) where it has been held that –

> *"3. We have heard rival submissions and perused the materials available on record. At the outset both the parties before us agreed that this issue is already covered by the Co-ordinate Bench decision of this Tribunal in assessee"s own case for A.Y.2009-10 in ITA No.5713/Mum/2016 dated 30/10/2019 wherein it was held as under:-*
>
> > *"6. We have considered the rival submissions and perused the material on record. From the stage of the assessment proceeding itself, it is the claim of the assessee that the term "tax", as defined under section 2(43) of the Act would only include taxes chargeable under the Indian Income Tax Act. It is the further case of the assessee that since in respect of the State taxes paid overseas, the assessee is not eligible to claim relief under section 90 or 91 of the Act, it will not be covered under section 40(a)(ii) of the Act. On a perusal of provisions of sub-section (43) of section 2 of the Act, it becomes clear that the term "tax" has been defined to mean any tax paid under the provisions of the Act. Section 40(a)(ii) of the Act says that any rate or taxes levied on the profits or gain in any business or profession would not be allowable as deduction. Explanation-1 to section 40(a)(ii) of the Act inserted by the Finance Act, 2006, w.e.f. 1st April 2006, further clarifies that any sum eligible for relief of tax either under section 90 or 91 of the Act would not be allowable as deduction under section 40(a)(ii) of the Act. It is the say of the assessee that the tax eligible for relief under section 90 of the*

> *Act are only those taxes which are levied by Federal / Central Government and not by any local authority of State, City or County. Thus, it is ineligible for any relief under section 90 of the Act. The aforesaid submissions of leaned Sr. Counsel for the assessee, prima facie, is acceptable if one has to strictly go by the meaning of "tax", defined under section 2(43) of the Act, as it only refers to tax paid under the provisions of the Act. It is also worth mentioning, the State taxes paid by the assessee in DTAA countries are not eligible for relief under section 90 of the Act. Therefore, the issue which arises is, whether it can be allowed as deduction under section 37 of the Act. No doubt, in assessee's own case in assessment year 2005-06, the Tribunal in the order referred to above following its own decision in DCIT v/s Tata Sons Ltd., [2011] 43 SOT 27 (Mum.), has held that the State taxes paid overseas cannot be allowed as deduction in view of the provisions of section 40(a)(ii) of the Act. However, the aforesaid legal position has substantially changed after the decision of the Hon'ble Jurisdictional High Court in Reliance Infrastructure Ltd. (supra). While interpreting the provisions of section 2(43) of the Act, vis-a- vis section 40(a)(ii) of the Act, the Hon'ble Court held that the tax which has been paid abroad would not be covered within the meaning of section 40(a)(ii) of the Act, since, the meaning of the word "tax" as defined under section 2(43) of the Act would mean only the tax chargeable under the Act. Thus, as per the aforesaid decision of the Hon'ble Jurisdictional High Court, taxes levied overseas which are not eligible for relief either under section 90 or 91 of the Act, would not come within the purview of section 40(a)(ii) of the Act. It is the specific plea of the assessee that the State tax is not covered either under Indo-US or Indo-Canada tax treaty, hence, not eligible for any relief under section 90 of the Act. Pertinently, unlike section 91 read with Explanation-(iv), section 90 does not provide for inclusion of tax levied by any State/ local authority of that country within the expression 'income tax'. In view of the aforesaid, we direct the Assessing Officer to verify whether the State taxes paid by the assessee overseas are eligible for any relief under section 90 of the Act and if it is not found to be so, assessee's claim of deduction should be allowed. In view of our decision above, no separate adjudication of grounds no.1.2 is required."*

3.1. Respectfully following the same, the ground No.1 raised by the assessee for A.Y.2012-13 is disposed of in the above mentioned terms."

39. Respectfully following the decision of the co-ordinate bench, we see no reason to interfere with the decision of the CIT(A). The ground of the revenue is dismissed.

Expenditure on imported software disallowed by the Assessing Officer under section 40(a)(i) – Ground 2

40. During the course of hearing, the Assessing Officer called on the assessee to furnish the details of software expenses particularly local and imported, whether utilized for internal use or included in project. The assessee, in this regard, made a detailed submission categorizing the software for internal use that are purchased domestically and imported software and also software, which are used for resale. The Assessing Officer treated the software purchased for internal use as being capital in nature and allowed depreciation on the same. With regard to the software for resale, the Assessing Officer disallowed the same for the reason that the assessee has not deducted any tax on the software imported. The CIT(A) deleted the disallowance made by the Assessing Officer.

41. The Ld.DR relied on the order of the Assessing Officer. The Ld.DR further submitted that the CIT(A) has followed the decision in the earlier years and has not given any independent finding. The Ld.DR further contended that the royalty is embedded in the software imported and, therefore, tax could have been deducted on the same.

42. The Ld.AR, on the other hand, submitted that the payment made by the assessee towards purchase of software is for acquiring of copyrighted article and not for transfer of any right in a copyright. Accordingly, it cannot be concluded as royalty under the provisions of section 9(1)(vi) of the Act and, therefore, not taxable. The Ld.AR accordingly submitted that no disallowance under section 40(a)(i) is warranted since provisions of section 195 do not apply. The Ld.AR further submitted that even under the applicable DTAA, the payment for purchase

of software cannot be regarded as royalty since the definition of royalty under the DTAA is narrower than the definition in the Act. With regard to the software for trading purposes, the Ld.AR submitted that the assessee does not obtain any licence from the seller and only earns margin on trading or reselling of such software. Therefore, the Ld.AR submitted that the same cannot be treated as royalty and no disallowance under section 40(a)(i) could be made. The Ld.AR relied on the decision of the co-ordinate bench in assessee's own case for A.Y. 2012-13 in this regard.

43. We heard the parties and perused the material on record. We notice that this issue has been a matter of adjudication by the co-ordinate bench in assessee's own case for A.Y. 2012-13 and A.Y. 2013-14 where it is held that –

> *7.1. We have heard rival submissions and perused the materials available on record. We find that the very same issue was subject matter of adjudication by this Tribunal in assessee"s own case for A.Y.2009-10 in ITA No.5713/Mum/2016 dated 30/10/2019. The facts recorded in the order passed by this Tribunal for A.Y.2009-10 and the adjudication of the same by the lower authorities is reproduced below as the same facts are prevailing in this year also except with variance in figures and yet another exception is that agreement copies were duly filed by the assessee during the year under consideration before the lower authorities.*
>
> *"8. Brief facts are, during the assessment proceedings, the Assessing Officer noticing that the assessee has claimed expenditure incurred in respect of purchase of software called upon the assessee to furnish the necessary details. On verifying the details furnished by the assessee, he found that the assessee had purchased software for its internal use amounting to ₹ 47,36,54,498, and for trading purpose amounting to ₹ 31,03,03,823. After perusing the details, the Assessing Officer was of the view that the amount paid towards acquiring software brought along with support service is in the nature of royalty as per section 9(i)(vi) of the Act. In this context, he referred to Explanation-3 to section 9(1)(vi) of the Act as well as CBDT Circular no.621 dated 9th December 2019. Having held so, the Assessing Officer observed that since the assessee had not deducted tax at source while making payment for purchases of software both for internal use as well as for trading purpose, the amount paid is liable for disallowance under section 40(a)(i) of the Act. Accordingly, he disallowed the entire amount of ₹ 78,39,58,321. The assessee challenged the aforesaid*

> *disallowance before the first appellate authority. 9. Learned Commissioner (Appeals) following the order passed by the Tribunal in assessee's own case for the assessment year 2005-06, held that the expenditure incurred on software products acquired for internal use is a capital expenditure, hence, the assessee is entitled to depreciation thereon. However, in respect of payment made towards software products acquired for re-sale / trading purpose, learned Commissioner (Appeals) agreed with the Assessing Officer that it is in the nature of royalty, hence, the assessee was required to deduct tax at source."*

7.2. We find that the ld. AR argued that the amendment brought out by the Finance Act, 2012 will not have any retrospective effect based on the principle of "impossibility of performance", since assessee cannot be expected to deduct tax at source in respect of transactions effected in earlier years. This argument has to be dismissed as the year under consideration is A.Y.2012-13 where amendment has been brought.

7.3. The ld. AR further argued that even under the applicable DTAA, the payment for purchase of software cannot be regarded as „royalty", since the definition of „royalty" under DTAA is narrower than the definition in the Act. The ld. AR without prejudice, in respect of purchase of software for trading purpose, argued that assessee does not obtain any license from the seller and only earns margin on trading or re-selling of such software. Accordingly, he submitted that the same cannot be treated as „royalty" and no disallowance u/s.40(a)(i) of the Act could be made on the same. He also drew attention of the Bench to certain clauses in the resetting agreement entered into between assessee and Microsoft Regional Sales Corporation and submitted that assessee is only a re-seller of the software product and assessee was not entitled to make any alterations to the software in order to make copies thereon. Finally, the ld. AR also submitted on without prejudice basis that in any case, provisions of Section 40(a)(i) of the Act would not be made applicable to allowance of depreciation on imported software if the same is treated as capital in nature.

7.4. Per contra, the ld. DR vehemently relied on the orders of the lower authorities.

7.5. We find ultimately that this issue has been restored to the file of the ld. AO by this Tribunal in A.Y.2009-10 by making certain observations. We find that while rendering this decision and also for the decision of A.Y.2010-11 in ITA No.974/Mum/2018 dated 18/08/2020, the decision of the Hon"ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd., vs. CIT reported in 432 ITR 471 was not rendered. Now, we find that the issue in dispute before us has been fully settled by the aforesaid decision of the Hon"ble Apex Court in favour of the assessee by holding as under:-

> *"By virtue of section 90 of the Income-tax Act, 1961, once a Double Taxation Avoidance Agreement applies, the provisions of the Act can only apply to the extent that they are more beneficial to the assessee and not otherwise. Further, by Explanation 4 to section 90, Parliament has clarified*

that where any term is defined in a DTAA, the definition contained in the DTAA is to be looke4 at. It is only where there is no such definition that the definition in the Ad can then be applied.

UNION OF INDLA V. AZADI BACHAO ANDOLAN [7003] 763 1TR 706 (SC) relied on.

The expression "copyright" has not been defined separately in the definitions section of the Copyright Act, 1957, yet, section 14 makes it clear that "copyright means the "exclusive right", subject to the provisions of the Act, to do or authorise the doing of certain acts "in respect of a work". In the case of computer programmes, section 14(b) specifically speaks of two sets of acts: the seven ads enumerated in clause (a) and the eighth act of selling or giving on commercial rental or offering for sale or for commercial rental any copy of the computer programme. All the seven acts set out in clause (a) delineate how the exclusive right with the owner of the copyright may be parted with. In essence, such right is referred to as copyright, and includes the right to reproduce the work in any material form, issue copies of the work to the pub tic, perform the work in public or make translations or adaptations of the work. The definition of an "in fringing copy" contained in section 2(m) of the 1957 Act, in relation to a computer programme, i. e., a literary work, means reproduction of the work. Thus, the right to reproduce a computer programme and exploit the reproduction by way of safe, transfer, licence, etc., is at the heart of the exclusive right. Section 14(b)(ii) of the 1957 Act was amended twice, first in 1994 and then again in 1999, with effect from January 15, 2000. What is conspicuous in the provision after the amendment is the absence of the phrase "regardless of whether such copy has been sold or given on hire on earlier occasions". This is a statutory recognition of the doctrine of first sale or principle of exhaustion.

Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts. Cop right is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied.

Importantly, by virtue of section 16 of the 1957 Act no copyright exists in India outside the provisions of the 1957 Act or any other special law for the time being in force.

The making of copies or adaptation of a computer programme in order to utilise the programme for the purpose for which it was supplied, or to make backup copies as a temporary protection against kiss, destruction or damage so as to be able to utilise the computer programme for the purpose for which it was supplied, does not constitute an act of infringement copyright under section 52(1)(aa) of the 1957 Act. Section 52(l)(ad) is independent of section 52(1)(aa) of the 1957 Act, and states that the making

of copies of a computer programme from a personally legally obtained copy of non-commercial personal use would not amount to an infringement of copyright. Section 52(1)(ad) of the 1957 Act cannot be read to negate the effect of section 52(1)(aa), since it deals with a subject matter that is separate and distinct from that contained in section 52(1)(aa) of the 1957 Act.

There is an important difference between the right to reproduce and the right to use computer software. Whereas the former would amount to parting with a copyright by the owner thereof, the latter would not. When, under a non-exclusive licence, an end -user gets the right to use computer software in the form of a compact disk, the end-user only receives a right to use the software and nothing mare. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the 1957 Act read with .cubclauses (i) to (vii) of clause (a) thereof Thus. the conclusion that when computer software is licensed for use under an end-user licence agreement, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an end-user licence agreement cannot be construed as the licence spoken of in section 30 of the 1957 Act, as such end-user licence agreement only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in section 14(a) and (b) of the 1957 Act

The ownership of copyright in a work is different from the ownership of the Physical material in which the copyrighted work may happen to be embedded. Any ruling on the more expansive language contained in the Explanations to section 9(vi) of the Income-tax Act, 1961 would have to be ignored if it is wider and less beneficial to the assessee than the definition cont wined in the DTAA, in terms of section 90(2) of the Act read with Explanation 4 there-to.. and article 3(2) of the DTAA Further, the expression copyright" has to be understood in the context of the statute which deals with it, it being acc4Tted that municipal laws which apply in the contracting States must be applie4 unless there is any repugnancy to the terms of the DTAA. By no stretch of imagination, can the payment for such computer software amount to royalty within the meaning of article 12 of the DTA A or section 9(i)(vi) of the Act.

DASSAULT SYSTEMS K. K., In re [70101 32 ITR 175 (AAR), GEOQUEST SSTEMS B. V., In re 120101 327 ITR 1 (AAR), DIT v. ERICSSON A. B. 120121 343 ITR 470 (Delhi), DIT v. Nokia NETWORKS OY [2013] 358 ITR 259 (Delhi), D1T V. INFRASOFT LTD. [2014] 3 ITR-OL 333 (Delhi) and CIT v. Z'I'E CORPORATION [2017] 392 ITR 80 (Delhi) approved.

STATE BANK OF INDIA V. COLLECTOR OF CUSTOMS (2000) 1 SCC 727 relied on.

Royalty, under section 90)(vi) of the Act, means the transfer of all or any rights, including the g-ranting of a licence, in respect of any copyright in a literary work. Under article 3(2) of the Double Taxation Avoidance

Agreement between India and Singapore, the definition of the term "royalties", shall have the meaning assigned to it by the DTAA, meaning thereby that the expression "royalty, when occurring in section 9 of the Act, has to be construed with reference to article 12 of the DTAA. This position is also clarified by CBDT Circular No. 333 dated April 2, 19822 . Thus, by virtue of article 12(3) of the DTAA, royalties are payments of any kind received as consideration for "the use of; or the right to use, any copyright" of a literary work, which includes a computer programme or software.

When article 12 of the DTAA defines the term "royalties" in paragraph (3) thereof, it does so stating that such definition is exhaustive : it uses the expression "means". Secondly, the term "royalties" refer to payments of any kind that are received as a considerate ion for the use of or the right to use any copyright in a literary work. The definition contained in Explanation 2 to section 90(1)(vi) of the Act, is wider in at least three respects it speaks of "consideration", but also includes a lump-sum consideration which would not amount to income of the recipient chargeable under the head "capital gains"; when it speaks of the transfer of "all or any rights", it expressly includes the granting of a licence in respect thereof; and it states that such transfer must be "in respect of" any copyright of any literary work. However, even where such transfer is 'in respect of" copyright, the transfer of all or any rights in relation to copyright is a sine qua non under Explanation2 to section 9(1)(vi) of the Act. in short, there must be transfer by way of licence or otherwise, of all or any of the rights mentioned in section 14(b) read with section 14(a) of the 1957 Act.

Indian tax laws use the expression "in respect of" as synonymous with the expression "on" the expression "in respect of", when used in a taxation statute, is only synonymous with the words "on" or "attributable to". This accords with the meaning to be given to the expression "in respect of" contained in Explanation 2(v) to section 9(1)(vi) of the income-tax Act, 1961 and would not in any manner make the expression otiose.

STATE OF MADRAS V. SWASTIX TOBACCO FACTORY [1966] AIR 1966 SC 1000; [1966] 3 SCR 79 relied on.

While Explanation 2(v) to section 90Xvi) of the Ad, when it speaks of "all of any rights...in respect of copyright" is more expansive than the DTAA provision, which speaks of the "use of or the right to use" any copyright, when it comes Jo the expression "use of, or the right to use", the same position would obtain under Explanation 2(v) to section 9(1)(vi)of the Ad, inasmuch as, there must, under the licence granted or sale made; be a transfer of any of the rights contained in section 14(a) or (b) of the 1957 Act, for Explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of royalties" in the DTAAs and the definition of "royalty in Explanation 2(v) to section 90(vi) of the Act.

Even f the ambit of " royalty " were considered only under the Act, the definition of royalty in Explanation 2(v) to section 9 (1)(vi) of the Act would

make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression 'including the granting of' a licence" in clause (v) of Explanation 2(v) to section 9(i)(vi) of the Act, would necessarily mean a licence in which transfer is made of an interest in rights "in respect of' copyright, namely, that there is a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a) of the 1957 Act. To this extent, there will be no difference between the position, under the DTAA and Explanation 2 to section 9(i)(vi)of the Act.
Explanation 4 to section 9(1)(vi) of the Act was inserted retrospectively to expand the scope of Explanation 2(v). In any case, Explanation 2(v) contains the expression, "the transfer of all or any rights" which is an expression that would subsume "any right, property or information" and is wider than the expression "any right, property or information".
CBDT Circular No. 152 dated November 27, 19741 cannot apply to explain a position that existed even before section 9(1)(vi) was actually inserted in the Act by the Finance Act, 1976. In so far as section 9(1)(vi) of the Act relates to computer software Explanation 3 thereto refers to computer software for the first time with effect from April 1, 1991, when it was introduced, which was then amended by the Finance Act, 2000. Quite clearly, Explanation 4 cannot apply to any right for the use of or the right to use computer software before the term "computer software" was inserted in the statute. Likewise, even qua section 2(o) of the 1957 Act, the term "computer software' was introduced for the first time in the definition literary work, and defined under section 2(ffc) only in 1994. It is equally Ludicrous for the amendment which also inserted Explanation 6 to section 9(i)(vi) of the Act, to apply with effect from June 1, 1976, when technology relating to transmission by a satellite, optic fibre or other similar technology was only regulated by Parliament for the first time through the Cable Television Networks (Regulation) Act, 1995, much after 1976. For all these reasons, it is clear that Explanation 4 to section 9(1)(vi) of the Act is no clarificatory of the position as of June 1, 1976, but in fact, expands that posit ion to include what is stated therein, by the Finance Act, 2012. Notification No, 21 of 2C'12 dated June 13, 2012 being issued after Explanation 4 was inserted could not be invoked to assert that Explanation 4 clarifies the legal position as it always stood. It is only when the non-resident is liable to pay income-tax in India on income deemed to arise in India and no deduction of tax at Source is made under section 195(1) of the Income-tax Act, 1961 or such person has, after applying section 195(2) of the Act, not deducted such proportion of tax as is required, that the consequences of a failure to deduct and pay, reflected in section 201 of the Act, follow by virtue of which the resident-payee is deemed an "assessee in default", and thus, is made liable to pay tax, interest and penalty thereon. Section 194E of the Act belongs to a set of various provisions which deal

with tax deduction at source, without any reference to chargeability to tax under the Act of the non-resident assessee. This section is similar to sections 193 and 194 of the Act by which deductions have to be made without any reference to the chargeability of a sum received by a non-resident assessee under the Act. On the other hand, at the heart of section 195 of the Act is the fact that deductions can only be made if the non-resident assessee is liable to pay tax under the provisions of the Act in the first place.
GE INDIA TECHNOLOGY CENTRE (P.) LTD. V. CIT 120101 327 ITR 456 (SC) explained.

PILOM v. CIT 120201425 ITR 312 (SC) explained and distinguished.
The "person" spoken Of in section 195(1) of the Art is liable to make the necessary deductions only if the non-resident is liable to pay tax as an asses-see under the Act, and not otherwise. The tax deductor must take into consideration the effect of the DTAA provisions. Thus the charging and machinery provisions contained in sections 9 and 195 of the Act are interlinked. The person liable to deduct tax is only liable to deduct tax first and foremost if the nonresident person is liable to pay tax, and second, if he is so liable, he is liable to deduct tax depending on the rate mentioned in the DTAA.
GE INDIA TECHNOLOGY CENTRE (R) LTD. v. CIT [20101 327 ITR 456 (SC) and VODAFONE INTERNATIONAL HOLDINGS B. V. V. UNION OF LNDJA [20121 341 ITR 1 (SC) relied on.

The argument based on article 30 of the Double Taxation Avoidance Agreement between India and the United States of America that the DTAA's provisions in these cases would not apply at all, inasmuch as the provisions relatable to deduction of tax at source under section 195 of the Act do not refer to tax at all, but are deductions that are to be made before assessments to tax are made, would Lead to absurd consequences. Article 30 cannot be read out of context. The logic behind article 30 of the DTA.4 is for reasons connected with the municipal taxation laws of the United States of America and has nothing to do with Indian municipal law governing the liability of persons to deduct tax at source under section 195 of the Income-tax Act. This is reinforced by the fact that the OECD Commentary on articles 30 and 31 acknowledges the fact that the "entry into force" provisions, unlike the rest of the provisions in the OECD Mode! Tax Convention on Income and on Capital, depend on the domestic laws of contracting States. Persons are not obligated to do the impossible, i.e., to apply a provision of a statute when it was not actually and factually on the statute book. Thus the "person" mentioned in section. 195 of the Act cannot be expected to do the impossible, namely, to apply the expanded definition of "royalty" inserted by Explanation 4 to section 9(1 Xvi) of the Act, Or the assessment years. at a time when such Explanation was not actually and factually in the statute.

CIT v. NGC NETWORKS (INDIA) Pvt Ltd, 120211432 ITR 326 (Born) approved.
After the 1999 amendment of section 141))(ii) of the 1957 Act, what is conspicuous by its absence is the phrase "regardless of whether such copy has been sold or given on hint on earlier occasions ". This is a statutory recognition of the doctrine of first sale or principle of exhaustion. The doctrine of first sale or principle of exhaustion is dependent, in the first place, upon legislation which either recognises or refuses to recognise the doctrine (thereby continuing to vest distribution rights in the copyright owner, even beyond the first sale of the copyrighted work). The language of section 14(b) of the 1957 Act makes it clear that it is the exclusive right of the owner to sell or to give on commercial rental or offer for sale or for commercial rental any copy of the computer programme". Thus, a distributor who purchases computer software in material form and resells it to an end-user cannot be said to be within the scope of the provision. The safe or commercial rental spoken of in section 14(b)(ii) of the 1957 Act is of "any copy of a computer programme", making it clear that the section would only apply to the making of copies of the computer programme and then selling them, i.e., reproduction thereof for sale or commercial rental, The object of section 14(b)(ii) in. the context of a computer programme, is to interdict reproduction of the computer programme and consequent transfer of the reproduced computer programme to subsequent acquirers or end-users. Thus, any sale by the author of a computer software to a distributor for onward sale to an end-user, cannot possibly be hit by the provision. Further, the distributor cannot use the computer software at all and has to pass on the software, as shrink-wrapped by the owner, to the end-user for a consideration., the distributor's profit margin being that of an intermediary, who merely resells the same product to the end-user.

WARNER BROS. ENTERTAINMENT INC. V. SANTOSH V. G. [20091 SCC OnLine Del 835 approved.

Double Taxation Avoidance Agreements entered into by India with other contracting States have to be interpreted liberally with a view to implement the true intention of the parties. The Agreements have, as their starting point, either the OECD Model Tax Convention on Income and Capital or the United Nations Model Double Taxation Convention between Developed and Developing Countries in so far as the taxation of royalty for parting with copyright is concerned. The OECD Model Tax Convention speaks of the importance of the OECD Commentary. The term "royalties" is defined in all the DTAAS in a manner either identical with or similar to the definition con tamed in article 12 of the OECD Model Tax Convention. The OECD Commentary on royalty payments under article 12 states that in a

transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transact ion for tax purposes. Payments in these types of transactions would be dealt with as business profits.
From the positions taken by India (in the capacity of an OECD non-member) with regard to article 12 of the OECD Model Tax Convention and the OECD Commentary, which use the language "reserves the right to" and "is of the view that some of the payments referred to may constitute royalties", it is not at all clear what exactly the nature of these positions is. This is in contrast with the categorical language used by India in its positions taken with respect to other aspects ("India does not agree to"). Mere positions taken with respect to the OECD Commentary do not alter the DTAA 's provisions, unless the latter are actually amended by way of bilateral renegotiation. The OECD Commentary on article 12 of the OECD Model Tax Convention incorporated in the DTAM will continue to have persuasive value as to the interpretation of the term "royalties" contained therein,

DIT v. NEW SKIES SATELLITE BV 120161382 ITR 114 (Delhi) approved.

Persons who deduct tax at source and assessees in the nations governed by a DTAA have a right to know exactly where they stand in respect of the provisions that govern them. Such persons and assessees can place reliance upon the OECD Commentary for provisions of the OECD Model Tax Convention, which are used without any substantial change by bilateral DTAAs, in the absence of judgments of municipal courts clarifyiing them, or in the event of conflicting municipal decisions. From this point of view also, the OECD Commentary is significant, as the contracting States to which the persons deducting tax and the assessees belong, can conclude business transactions on the basis that they are to be taxed either on income by way of royalties for parting with copyright, or income derived from licence agreements which is then taxed as business profits depending on the existence of a permanent establishment in the contracting State.
The HPC Report 2003 and the E-Commerce Report 2016 submitted to the Government of India are recommendatory reports expressing the views of the committee members, which the Government of India may accept or reject. When it comes to DTAA provisions, even if the position put forth in these reports were to be accepted, a DTAA would have to be bilaterally amended before any such recommendation can become law in force for the purposes of the Act.
On appeals arising in four categories of cases (a) cases in which computer software was purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer; (b) cases where resident

Indian companies were distributors or resellers, purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling it to resident Indian end- users (c) cases where the distributor was a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resold it to resident Indian distributors or end-users; and d) cases where the computer software was affixed onto hard ware and sold as an integrated unit or equipment by foreign, nonresident suppliers to resident Indian distributors or end-users, on the question. whether amounts paid in/ the persons resident in India to nonresident, foreign-n software suppliers, amounted to royalty, and whether it constituted taxable income deemed to accrue in India under section 9(I)(vi) of the Income-tax Act, 1961 thereby making it incumbent upon all such persons to deduct tax at source and pay such tax deductible at source under section. 195 of the Act;

Held, (i) that in all these cases, the licence" that was granted under the enduser licence agreement, was not a licence in terms of section 30 of the 1957 Act, which transferred an interest in all or an of the rights contained in sections 14(a) and 14(b) of the 1957 Act, but a licence" which imposed restrictions or conditions for the use of computer software. Thus, none of the end user licence agreements was referable to section 30 of the 1957 Act, inasmuch as section 30 'that Act spoke of granting an interest in any of the rights mentioned in sections 14(a) and 14(b) of that Act. The end-user licence agreements did not grant any such right or interest, least of all a right or interest to reproduce the computer software, In fact, such reproduction was expressly interdicted, and it was also expressly stated that no vestige of copyright was at all transferred, either to the distributor or to the end-user. What was "licensed" by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or directly supplied to the resident enduser, was in fact the sale of a physical object which contained an embedded computer programme, and was therefore, a sale of goods The distributors resold shrink-wrapped copies of the computer programmes already put in circulation &y foreign, non-resident suppliers and manufacturers, since they had been sold and imported into India via distribution agreements and they were thus not hit by section 14(a)(ii) of the 1957 Act, The end-user licence agreements conveyed title to the material object embedded with a copy of the computer software to the distributors or end-users. The distribution of copyrighted computer software, on the facts, would not constitute the grant of an interest in cop, right under section 14(b)(i0 of the 1957 Act, thus necessitating the deduction of tax at source under section 195 of the Income-tax Act,1961.

TATA CONSULTANCY SERVICES V. STATE OF ANDHRA PRADESH [2004] 271 ITR 401 (SC); [2004] 137 SIC 620 (SC) relied on.

(ii) That given the definition of "royalties' contained in article 12 of the DTAAs there was no obligation on the persons mentioned in section 195 of

the Act to deduct tax at source, as the distribution agreements and end-user licence agreements did not create any interest or right in such distributors or end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Act which deal with royalty, not being more beneficial to the assessees, had no application in the facts of these cases. The amounts paid by resident Indian end-users or distributors to non-resident computer software manufacturers or suppliers, as consideration for the resale or use of the computer software through end-user licence agreements or distribution agreements, was not royalty for the use of copyright in the computer software, and did not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Act were not liable to' deduct any tax at source under section 195 of the Act.
Decision of the Delhi High Court in CIT v. ALCATEL LUCENT CANADA [2015] 372 ITR 476 (1.)(Delhi) affirmed.
Decisions of the Karnataka High Court in CIT v. SAMSUNG ELECTRONICS Co. Ltd. 12012J 345 ITR 494 (Karn) and CIT v. SUNRAY COMPUTERS P. LTD. [2012] 348 ITR 196 (Karn) and ruling of the Authority for Advance Rulings in CITRIX SYSTEMS ASIA PACIFIC Pry. LTD., In re (2012] 343 ITR 1 (AAR) reversed. The real nature of the transaction must be looked at upon reading the agreement as a whole. 7.6. In view of the above, the ground No.1 raised by the Revenue is hereby dismissed.
The real nature of the transaction must be looked at upon reading the agreement as a whole.

7.6 In view of the above, the ground No.1 raised by the Revenue is hereby dismissed."

44. Respectfully following the above decision of the coordinate bench the ground of the revenue is dismissed.

45. Since we have dismissed the revenue's ground for the reason that the purchase of software entitles the assessee only the right to use the copyrighted article and not any right in the copyright, therefore, the alternate submissions made by the Ld.AR with regard to section 40(a)(i) not applicable to depreciation on software treated as capital in nature has become academic and does not warrant any separate adjudication.

Disallowance under section 14A – Ground 3

46. The assessee, in the return of income, has claimed an amount of Rs.28,56,30,503/- as dividend income exempt under section 10(34) of the Act. The assessee has also made a *suo motu* disallowance of Rs.11,81,705/-. The Assessing Officer held that the assessee has not worked out any expenditure relatable to earning the exempt income and that it is difficult to believe that such a meager expense is incurred for earning the huge exempt income. Accordingly, the Assessing Officer held that he is not satisfied with regard to the disallowance of the claim of expenditure and proceeded to make a disallowance under section 14A read with rule 8D of I.T. Rules, 1962. The CIT(A) deleted the disallowance.

47. The Ld.DR submitted that the assessee did not file any working with regard to the *suo motu* disallowance and, therefore, the Assessing Officer was not satisfied with the *suo motu* disallowance made by the assessee. The Ld.DR therefore, submitted that the Assessing Officer has correctly invoked the provisions of section 14A read with rule 8D of I.T. Rules, 1962.

48. The Ld.AR drew our attention to the assessment order in which the Assessing Officer himself has reproduced the submissions made by the assessee with regard to the *suo motu* disallowance made by the assessee. Therefore, the Ld.AR agued that the Assessing Officer's recording of satisfaction is not tenable since the Assessing Officer has not brought out any finding with regard to why he is not satisfied with the correctness of the claim. The Ld.AR further submitted that merley by stating that the Assessing Officer is not satisfied with regard to the correctness of the *suo motu* disallowance, does not amount to recording of satisfaction. Accordingly, the Ld.AR submitted that the Assessing Officer has made the disallowance under section 14A without recording satisfaction and,

therefore, the CIT(A) has correctly deleted the disallowance. The Ld.AR also submitted that in assessee's own case for A.Y. 2012-13, the co-ordinate bench has considered the similar issue and held the issue in favour of the assessee for the reason that the Assessing Officer has not recorded satisfaction.

49. We heard the parties and perused the material on record. We notice that the same issue is considered by the co-ordinate bench in assessee's own case for A.Y. 2012-13 (supra) where it has been held that -

"8.1. We find that assessee had claimed an amount of Rs.53,70,92,090/- as dividend income exempt u/s.10(34) of the Act. The assessee made voluntary disallowance of expenses of Rs.51,58,068/- in the return of income. The ld. AO merely observed that he was not satisfied with regard to the correctness of the claim of expenditure made by the assessee and directly applied the computation mechanism provided in Rule 8D(2) of the Income Tax Rules and made disallowance as under:-

(i)	*Under Rule 8D(2)(i) -*	*Rs.51,58,068/-*
(ii)	*Under Rule 8D(2)(ii) -*	*Rs.85,38,991/-*
(iii)	*Under Rule 8D(2)(iii) -*	*Rs.14,58,97,513/-*
	Total	*Rs.15,95,94,572/-*
Less voluntary disallowance made by the assessee -		*Rs. 51,58,068/-*
		===========
	Amount disallowed u/s.14A	*Rs.15,44,36,504/-*
		===========

8.2. We find that assessee had duly given the basis of its voluntary disallowance of Rs.51,58,068/- before the ld. AO together with explanation thereon. The assessee had also submitted before the ld. AO that it has sufficient interest free funds in its kitty for making investments and accordingly, in view of the decision of the Hon"ble Jurisdictional High Court in the case of Reliance Utilities and Power Limited reported in 313 ITR 340, no disallowance of interest need to be made for the purpose of earning exempt income. The assessee also gave an explanation with regard to the details of various interest paid by it together with the purpose of borrowing and its utilization for the purpose of business and categorically stated that the same were not related for investment activity of the assessee. None of these submissions were even addressed by the ld. AO and the ld. AO without recording any satisfaction as to how the disallowance made by the assessee voluntarily in the return of income u/s.14A of the Act amounting to Rs.51,58,068/- was incorrect, erred in directly proceeding to make disallowance under Rule

> *8D(2) of the Rules. We find that it is the duty of the ld. AO to record objective satisfaction with cogent reasons as to why the voluntary disallowance made by the assessee is incorrect having regard to the accounts of the assessee. Without recording such objective satisfaction with cogent reasons, the ld. AO cannot proceed directly to apply the computation mechanism provided in Rule 8D(2) of the Income Tax Rules and make disallowance u/s.14A of the Act. This issue is also addressed by the decision of the Hon"ble Apex Court in the case of Maxopp Investments reported in 402 ITR 640. Hence, the disallowance made by the ld. AO u/s.14A of the Act has been rightly deleted by the ld. CIT(A) for want of recording of objective satisfaction with cogent reasons. Accordingly, the ground Nos. 2 & 3 raised by the Revenue for the A.Y.2012-13 are hereby dismissed."*

50. For the year under consideration, we notice that the assessee has made a very detailed submission before the Assessing Officer with regard to the *suo motu* disallowance (refer para 6.2 on pages 41 to 44 of assessment order). The Assessing Officer, in his finding, has simply stated that he is not satisfied with the correctness of the claim of expenditure since the amount disallowed by the assessee is very meager. It is the settled position that the Assessing Officer cannot invoke the provisions of disallowance under section 14A read with rule 8D without recording any cogent reasons as to why he is not satisfied with the correctness of the claim of the assessee. Mere recording that the amounts being meager compared to the exempt income earned, cannot be construed as recording of satisfaction. Therefore, respectfully following the ratio laid down by the co-ordinate bench in assessee's own case, we hold that the CIT(A) has correctly deleted the addition made by the Assessing Officer for want of recording of objective satisfaction with cogent reasons. This ground of the revenue is dismissed.

<u>Advertisement Expenses (Brand building expenses) – Ground 4</u>

51. The Assessing Officer noticed that the assessee has incurred a substantial amount of Rs.125.59 crores towards advertising which is in the nature of promotional and publicity activities. The Assessing Officer held that these

expenses are more in the nature of brand building expenses and called on the assessee to file the details and the reason as to why the same cannot be treated as capital in nature. The assessee filed the details of the expenses stating that these expenses are incurred towards advertisement in newspaper, marketing of its products, etc. which is incurred in the normal course of business and is incurred routinely every year. Therefore, the assessee submitted that it cannot be treated as capital in nature. The assessee relied on various judicial pronouncements in this regard. However, the Assessing Officer did not accept the submissions of the assessee and held the expenses are capital in nature and after allowing the depreciation on the same, made an addition of Rs.123,14,33,933/-. On further appeal, the CIT(A) deleted the addition by relying on his own orders for A.Y2008-09, 2008-09 & 2009-10 in assessee's own case.

53. The Ld.DR relied on the order of the Assessing Officer.

52. The Ld.AR submitted that since the expenditure incurred are towards advertising and marketing is a routine expenditure and, therefore, should be allowed as revenue expenditure. The Ld.AR drew our attention to the fact that the same issue arose for A.Y. 2009-10 in assessee's own case and the co-ordinate bench has held the issue in favour of the assessee.

53. We heard the parties and perused the material on record. We notice that this ground is same as Ground No.2 contended by the assessee with regard to advertisement expenses in which the CIT(A) granted partial relief to the assessee. While adjudicating the ground raised by the assessee we have remitted the issue back to the Assessing Officer for a denovo adjudication based on the details that are submitted by the assessee. Since the issue contended by the revenue is same this ground of the revenue is disposed of in the same terms.

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Disallowance of payment towards Tata brand equity subscription – Ground 5

54. The Assessing Officer noticed that during the year under consideration, the assessee has paid Rs.76,95,471/- to Tata Sons Ltd towards Tata Brand Equity & Designs Promotion as per the agreement entered into between Tata Sons Ltd and the assessee. The Assessing Officer noticed that as per the terms of the agreement, the assessee is allowed to use Tata brand name and the logo. The Assessing Officer called on the assesee to justify as to why the payment made to Tata Sons Ltd should be treated as revenue expenditure. The assessee submitted that under the agreement entered into with Tata Sons Ltd, the assessee is under contractual obligation to make payment towards subscription fee. In consideration of the subscription fees a whole lot of shareable resources of the Tata group is made available to the assessee and provides assistance in accessing the network of domestic and international business contracts using the business name. The assessee submitted that TDS under section 194J is made on payments made to Tata Sons Ltd. The Assessing Officer held that the payment is for the overall brand building of the assessee company and accordingly, the same is in the nature of capital expenditure which is an intangible asset. The Assessing Officer allowed depreciation @25% on the payments and accordingly made a disallowance of R.29,34,75,023/-. On further appeal, the CIT(A) deleted the addition.

55. The Ld.DR relied on the order of the Assessing Officer.

56. The Ld.AR submitted that the expenditure in respect of payment towards brand equity is the business expenditure for the reason that the subscription fees paid is for the purpose of carrying out normal business activity of the company and that tax under section 194J has been deducted on the payment. The Ld.AR further

submitted that the Tata brand is owned by Tata Sons Ltd and the payment is required to be made annually by all subscribers of the Tata group and, therefore, should be allowed as a deduction. During the course of hearing the ld AR drew our attention to the Trade Mark registered in the name of Tata Sons Ltd., (page 370 to 372 of paper book) and also the terms of the agreement entered into between the assessee and Tata Sons Ltd (Page 375 of paper book). The Ld.AR also submitted that the issue is covered by the decision of the co-ordinate bench in assessee's own case for A.Y. 2012-13.

57. We notice that the co-ordinate bench in assessee's own for AY 2012-13 (supra) case has considered the same issue and held that –

> *9.1. We have heard rival submissions and perused the materials available on record. We find that assessee had incurred an expenditure in respect of payment towards Tata brand equity and claimed the same as „business expenditure" u/s37(1) of the Act. The assessee had made payment towards subscription fee for carrying out normal business activities of the company. The assessee submitted that the Tata brand always belong to Tata Sons and accordingly, the assessee has made payment to Tata Sons after due deduction of tax at source u/s.194J of the Act. The assessee also submitted that this payment is required to be made annually by all the subscribee"s to Tata Sons towards subscription on the basis of their profitability. There is no question of capitalizing this expenditure as it is a recurring payment by the assessee. The ld. DR vehemently relied on the order of the ld. AO.*
>
> *9.2. We find that this Tribunal in assessee"s group concern"s case of Tata Autocomp Systems Ltd., vs. ACIT in IT (TP)A No.7596/Mum/2012 for A.Y.2008-09 dated 12/06/2013 had addressed very same issue. The decision rendered thereon shall apply mutatis mutandis to this appeal except with variance in figures. The relevant operative portion of the Tribunal order dated 12/06/2013 referred to supra is reproduced hereunder:-*
>
> > *2. The issue raised in ground No. 1 relates to the disallowance of ₹ 32,42,666/- made by the A.O. on account of payment made by the assessee to M/s Tata Sons Ltd. on account of subscription towards "TATA" brand equity and business promotion scheme. 3. The assessee in the present case is a company which is engaged in the business of providing services to the global automotive industries. The return of income for the year under consideration was filed by it on 30-9-2008 declaring total income of ₹*

51,05,63,935/- which was subsequently revised to ₹ 52,34,36,910/-. In the profit and loss filed along with the said return, an amount of ₹ 32,42,666/- was debited by the assessee on account of subscription paid to Tata Sons Ltd. towards TATA brand equity and promotion scheme. While justifying its claim for the said payment, the following submissions were mainly made on behalf of the assessee before the A.O:-

- *"By entering into the agreement, the assessee became entitle to use and associated itself with TATA name, marks and marketing Indica for the company's products and services.*

- *The Tata Sons Ltd., protects and enforces the collective image and goodwill of the Tata Group, organize corporate identity, coordinate major campaign involving promotion and development of Tata name, engage the service of specialist and professional consultants for energizing and enhancing the overall Tata brand etc.*

- *By entering into the agreement, Tata Sons Ltd. had granted non exclusive and on assignable subscription to use TATA name and marketing Indica.*

- *The assessee justified the payment stating that the main goal to formulate the scheme was to justify a diverse and diffuse enterprise and make it capable of facing the challenge from international brand names, post liberalization.*

- *The assessee company has derived huge benefits in the form of increase sales and also other operational efficiencies.*

- *In the past assessment years the similar payment has been allowed as deduction. The Assessee relied on the decision in the case of Radhasoami Satsang Vs. CIT (1992)193 ITR 321(SC)".*

4. The A.O. did not find merit in the above submissions made by the assessee on this issue for the following reasons given in the assessment order:-

- *"The assessee company was incorporated on 17.10.1995 with the name¬ Tata Autocomp Systems Ltd. Therefore, the assessee company had been using the name TATA since then. It is not a case where prior permission was required to use the "TATA" name at the time of incorporation.*

- *The aforesaid arrangement of payment of subscription towards brand¬ equity was entered only on 04.06.2001 i.e. more than five years after the*

incorporation. By using TATA word in its name since then itself gives the assessee right to use TATA brand.

- *Further, it is seen that the major holding (74%) of the assessee¬ company is with Tata Industries Ltd. Tata Motors Ltd, and Tata Sons Ltd. All these three companies have been using the name TATA since long.*

- *As regards assessee's submission that the similar claim had been¬ allowed in past, it may be noted that this particular issue was never examined in past. Further, perpetuity of a mistake cannot be allowed to continue. Since, this issue had never been examined in past and had been allowed without any verification, with due respect to the ratio of the decision in the case of Radhasoami Satsang Vs. CIT (1992) 193 ITR 321 (SC), it is submitted that the same is not applicable to the present case.*

- *The similar issue is involved in the case of Tata Chemical Ltd. a group¬ company of the Tata Group wherein, DRP have confirmed the proposed addition on the ground of disallowance of brand equity subscription.*

For the reasons given above, the A.O. proposed disallowance of ₹ 32,42,666/- on account of subscription paid by the assessee to Tata Sons Ltd. in the draft assessment order against which objection was filed by the assessee before the DRP. The DRP found the objection of the assessee to be unsustainable keeping in view that a similar issue was being agitated by the Department at various appellate forums. Consequently, final disallowance of ₹ 32,42,666/- was made by the A.O. on this issue.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. The ld. counsel for the assessee, at the outset, has invited our attention to the copy of relevant agreement entered into by the assessee company with Tata Sons Ltd. on 4th June, 2001 placed at assessee's paper book page No. 207 to 225 in order to point out the obligation of Tata Sons to look after the entire brand of TATA group. The said obligation being relevant in the present context are extracted below from page No. 210 and 212 of the assessee's paper book:-

"a) To protect and promote the interests generally of the Subscriber both in India and abroad. To this end, the Subscriber hereby authorizes the Proprietor to act on its behalf in protecting and enforcing the collective image and goodwill of the Group and preventing any newly developed mark or symbol from being usurped and/or diluted in any way.

b) To organize periodically as may be deemed necessary corporate identity and brand promotional activities and campaigns through various media including electronic /telecommunication/satellite communication media

(e.g. TATA Website) etc. printing and publishing of promotional material and such other activities as in the opinion of the Board of Directors of the Proprietor Company, will enhance the TATA Brand Equity and correspondingly benefit the business of the Subscriber.
c) To co-ordinate major campaigns involving the promotion and development of the Business Name Marks and Marketing Indica.
d) to engage the services of specialist agencies both National and International as the need may be to energise and enhance the Overall TATA Brand Equity which eventually could result in a greater market share for the products and services of the Subscriber and help in the preservation and vindication of the trust and confidence reposed by customers, business associates, stockholders and the society in general.
e) To engage profession consultants for conducting industry/organizational studies/research for the formulation of Group business strategies and policies that would assist the subscribing companies to emerge as business leaders in the evolving markets.
f) For the attainment of the overall objectives of the TATA Brand Equity & Business Promotion Scheme and interacting closely with the participating TATA Companies in a certainly coordinated manner, engage and set up a team of senior personnel and/or advisors/consultants and/or specialists firms as well as provide them with the necessary supporting staff and facilities to perform their functions.
g) To take steps to make available a pool of sharable resources of the TATA Group including managerial talent trained in TATA values to the Subscriber.
h) To provide necessary guidance to the Subscriber in order to ensure appraise the performance of the Subscriber in various areas of its activity and to guide and assist the Subscriber in the attainment of higher standards of quality of its products, services and management.
i) To adopt the JRD Quality Value and/or other such process as a means of appraise the performance of the Subscriber in various areas of its activity and
to guide and assist the Subscriber in the attainment of higher standards of quality of its products. Services and management.
j) To provide such support and assistance to the Subscriber as the Board of Directors of the Proprietor Company may consider necessary in certain circumstances including securing the support of Group companies to the extent and in a manner permissible under the prevalent laws.
k) to encourage support to the Subscriber's business from Group companies subject to the availability of products and services of a desirable quality at competitive rates.
l) to undertake activities which in the opinion of the Board of Directors of the Proprietor Company are essential for the purpose of promoting, developing, maintaining, managing and legally protecting the Business

Name, the Marks and Marketing Indica in India and abroad and thereby endeavor to promote the business of the Subscriber to achieve greater profitability and enhancement of stakeholder value.
m) To undertake measures to preserve the stability of the management of the Subscriber in order to protect the larger interests of its stakeholders.
n) To provide resources for availing services in the areas of

1. *Financial and Strategic Management.*
2. *Legal and Economic matters.*
3. *Management Develop0ment and Human Resources.*
4. *Corporate Communications.*
5. *Community Services.*

o) For the purposes of promoting the business of the Subscriber to provide assistance in accessing the network of domestic and international business contacts and availing the services of the domestic and overseas offices of the Proprietor and the Group Companies.
p) To institutionalise mechanisms to share and propagate best management practices amongst the Subscribing companies.
q) To manage and supervise the implementation of the Scheme and ensure compliance with the terms of this Agreement and the Code".

The ld. counsel for the assessee has also invited our attention to the relevant portion of the agreement dtd 4th June, 2001 at page 218 containing subscription clause whereby the assessee was obliged to pay the subscription at the stipulated rate to Tata Sons Ltd. for the services rendered in connection with maintaining and promoting the entire brand and image of TATA group.

6. As further submitted by the ld. counsel for the assessee, M/s Rallis India Ltd., another company belonging to TATA group had also entered into a similar agreement with M/s Tata Sons and the subscription paid as per the said agreement towards TATA brand equity and business promotion scheme was disallowed by the A.O. The ld. CIT(A), however, allowed the same and the Tribunal vide its order dtd. 30-8-2011 passed in ITA No. 5701/Mum/2008 for A.Y. 2004-05 upheld the order of the ld. CIT(A) on this issue. The copy of the said order is placed on record at page 1 to 21 of the compilation of the judgments filed by the ld. counsel for the assessee and a perusal of the same shows that a similar issue was decided by the Tribunal in favour of the assessee by agreeing with the view of the ld. CIT(A) that the payment in question not only permitted the use of TATA name but also gave an opportunity to the assessee to inform the business world that it was having the back up of excellence, with a code of conduct and a promise of quality. It was held that the fact that the TATA group was already having an

> *infrastructure and brand equity was well established and by making such a contribution, the assessee company was benefited in its day-to-day business. The Tribunal also found that a similar issue was decided in favour of the assessee in case of Harrisons Malayalam reported in 19 SOT 363 wherein the payment made for acquiring non-exclusive licence to use the logo for the purpose of business was held to be allowable u/s 37(1) of the Act being the expenditure wholly and exclusively incurred for the purpose of business. It is pertinent to note that in the case of Tata Steel, another company belonging to TATA group, a similar subscription paid by the assessee company to Tata Sons Ltd. was proposed to be disallowed by the A.O. in the draft assessment order for A.Y. 2008-09 and when the assessee objected to the said disallowance before the DRP by relying on the decision of the Tribunal in the case of Rallis India Ltd. (supra), the DRP directed the A.O. to allow the said expenditure after verifying as to whether the department has accepted the said decision of the Tribunal. On verification, the A.O. found that no appeal was filed by the department against the order of the Tribunal passed in the case of Rallis India Ltd. giving relief to the assessee on the issue of brand equity subscription and accordingly he allowed similar subscription paid by Tata Steel Ltd. in the final assessment completed u/s 143(3) r.w.s. 144-C of the Act vide order dtd. 27-11-2010. It is thus clear that this issue is squarely covered in favour of the assessee by the decision of the co-ordinate Bench of this Tribunal in the case of Rallis India Ltd. which has also been accepted by the department. Respectfully following the said decision of the Tribunal, we delete the disallowance made by the A.O. on account of subscription paid by the assessee to Tata Sons Ltd. towards brand equity and promotion scheme and allow ground No. 1 of assessee's appeal.*

9.3. Respectfully following the same, we find no infirmity in the order of the ld. CIT(A) allowing the said expenditure as a Revenue expenditure. Accordingly, the ground No.5 raised by the Revenue for the A.Y.2012-13 is dismissed."

58. The nature of payment made by the assessee being identical to payment made during AY 2012-13, we are of the considered view that the above decision of the co-ordinate bench is applicable for the year under consideration also. Accordingly, we see no reason to interfere with the decision of the CIT(A). This ground of the revenue is dismissed.

Commission to non residents under section 40(a)(i) – Ground 6

59. During the course of assessment, the Assessing Officer noticed that assessee has claimed commission expenses of Rs.25.33 crores paid to non-residents on which tax was not deducted at source. The Assessing Officer held that the payment attracts TDS under section 195 of the Act and since the assessee has not deducted tax at source and the same is to be disallowed under section 40(a)(ia) of the Act. The CIT(A) deleted the disallowance.

60. The Ld.DR submitted that the payments made to non residents outside India, is income that accrues and arises in India and, therefore, tax should have been deducted at source under section 195 of the Act. Accordingly the ld DR submitted that the disallowance under section 40(a)(i) is warranted on the commission expenses.

61. The Ld.AR, on the other hand, submitted that since the non resident agents operate from outside India, no part of their income arises in India. The payment is remitted directly abroad and, therefore, the same cannot be held to have been received by or on behalf of the non resident agents in India. The payment is not covered by any of the deeming provisions under section 9 as it is not in the nature of interest, royalty or fees for technical services. The Ld.AR also submitted that the CBDT circular No.786/2000 clarified that where the non resident agent operates outside the country and the payments to them are made directly abroad, such payments were held to be not taxable in India. The Ld.AR further drew our attention to the fact that the same issue has been considered by the co-ordinate bench and held in favour of the assessee from A.Y. 2009-10.

62. We heard the parties and perused the material on record. We notice that the co-ordinate bench in assessee's own case for A.Y. 2012-13 has considered the similar issue and held that –

"10.1. We have heard rival submissions and perused the materials available on record. We find that assessee always submitted that it had made payment of commission to non-resident agents who are operating outside India. It was specifically submitted that no part of the agents" income arises in India. The payments are remitted directly abroad. The payments are not covered by any of the deeming provisions u/s.9 of the Act and the same is not in the nature of interest, royalty, fees for technical services etc., Accordingly, it was pleaded that the payment of commission to non-resident agents are not chargeable to tax in India u/s.5 r.w.s. 9 of the Act in the hands of the non-residents and hence, there is no obligation on the part of the assessee to deduct tax at source in terms of Section 195(1) of the Act.

10.2. We find that this issue was the subject matter of adjudication in assessee"s own case for A.Y.2009-10 in IT(TP)A No.5823/Mum/2016 dated 30/10/2019 wherein it was held as under:-

> *"5. We have considered rival submissions and perused the material on record. The facts on record clearly reveal that commission has been paid to non-resident agents located in their respective countries towards services rendered by them in those countries in relation to obtaining export contracts for the assessee. No material has been brought on record by the Assessing Officer to demonstrate that the non-resident agents either have any business connection in India or have PE in India so as to bring the commission payment within the tax net. The factual finding recorded by learned Commissioner (Appeals) that the nonresident agents have rendered the services in their respective countries and do not have either any business connection in India or any PE in India has not been controverted by the Revenue. Further, the nature of payment viz. commission has also not been disputed by the Revenue. That being the case, since the commission paid to the non-resident agents is not chargeable to tax in India at their hands, there is no necessity for the assessee to withhold tax under section 195(1) of the Act on such payment. Accordingly, we uphold the decision of learned Commissioner (Appeals) on this issue.*

10.3. Respectfully following the same, the ground No.6 raised by the Revenue for A.Y.2012-13 is dismissed."

63. The nature of payment being similar for the year under consideration, respectfully following the above decision of the co-ordinate bench, we hold that the CIT(A) has correctly deleted the disallowance. The ground raised by the revenue in this regard is dismissed.

Year-end Provision – Ground 7

64. The Assessing Officer noticed that the assessee has made a provision of Rs.265,56,77,983/- towards various expenses on which no tax was deducted at source. The assessee submitted before the Assessing Officer that the provision towards expenses for the year-end are made on estimate basis and the company is not in a position to identify the parties / creditors to whom the payment is to be made at the time of making the provision. The assessee further submitted that the provisions which are made on estimated basis are reversed in the month of April i.e. in the subsequent financial year and that when the payments are made based on actual invoices, tax is deducted at source as per the provisions of the Act. The Assessing Officer did not accept the submissions of the assessee and held that the provision of the Act pertaining to deduction of tax at source require the payer to deduct tax at source at the time of payment or credit whichever is earlier and that if the amount is credited to a suspense account or any other account of whatever name called, even then, is called for deduction of tax at source. Since in assessee's case not tax is deducted at source, the Assessing Officer made the disallowance under section 40(a)(ia) towards the entire provision made by the assessee. The CIT(A) by relying on his own decision for the earlier assessment year, deleted the disallowance made by the Assessing Officer.

65. The Ld.DR submitted that the claim of the assessee that the payees / parties are not identifiable while making the provision is not acceptable since assessee being a huge corporate entity would have proper internal systems to record each and every transaction. The Ld.DR further submitted that the provisions are claimed to be made on estimate basis in order to suppress profits and that the submissions of the assessee that correct amount is not known at the time of making the provision is superficial. Accordingly, the Ld.DR vehemently submitted that the Assessing Officer has correctly made the disallowance under section 40(a)(ia).

66. The Ld.AR, on the other hand, submitted that the provision is made in the books of account by the assessee as per the global accounting standards and accounting policy consistently followed. Since the company has not accepted and acknowledged the debt to the vendor, but merely provided amounts in the books of account to comply with the global accounting standards, it does not give rise to any income in the hands of the vendors. The assessee, at the time of making the provision would not even know under which specific section of the TDS provisions, the tax needs to be deducted. The Ld.AR further submitted that mere entries in the books of account do not establish the accrual of income in the hands of the payees and that the payments are reversed in the beginning of the subsequent financial year. The Ld.AR submitted that applicable tax is deducted at source at the time of payment against the invoices raised by the vendors. The Ld.AR relied on various judicial pronouncements and also the decision of the co-ordinate bench in assessee's own case for A.Y. 2013-14 in this regard.

67. We heard the parties and perused the material on record. We notice that the co-ordinate bench, while considering the similar issue for A.Y. 2013-14 in assessee's own case has held that –

"18.1. We have heard rival submissions and perused the materials available on record. We find that assessee had made certain provisions for expenses at the end of the year for which deduction of tax at source has not been made. The ld. AO disallowed the same for nondeduction of tax at source invoking the provisions of Section 40(a)(ia) of the Act both under normal provisions of the Act as well as under the computation of book profits u/s.115JB of the Act. We find that the ld. CIT(A) had deleted the said disallowance by observing as under:-

> *"This is a matter arising for the first time in the case of assessee and has three parts, I, II and III. The Assessing Officer deals with the same in para 14 of assessment order. The genesis of the disallowance under section 40(a)(ia)1 is remark in Audit Report under section 44AB which is as under: In the opinion of the company , year-end provisions of expenses which are reversed in the subsequent year are not liable for deduction of tax at source as such provisions are made only for the purpose of preparation of annual financial statements in accordance with applicable accounting principles/standards*
>
> *16. I first take up the part I on the matter of disallowance u/s 40(a)(ia). The Assessing Officer called for explanation of the assessee who stated inter alia that*
> *a. Entry concerned is made as per accounting standards and policy*
> *b. The person concerned to whom sum is payable is not identifiable from the entry*
> *c. Tax deduction at source is effected when the person to whom sum payable is identified and thereafter Form 16A is issued.*
> *d. Certain case decision is cited*
> *The Assessing Officer overruled the assessee and reasons recorded by him included the following:*
> *A. Even when sum is credited to suspense account tax deduction at source is to be made*
> *B. Bangalore ITAT in case of IBM India Pvt Ltd [TS-305-ITAT-2015(Bang] has stated that even when sum is credited to suspense account tax deduction at source is to be effected and this included provision*
>
> *17. The matter is examined. The primary requirement to effect disallowance under section 40(a)(ia) is by identifying a default in complying with provision relating to TDS. The explanation before Assessing officer is that provision is created in books in accordance with accounting principle and reversed next year. This is a consistent method of accounting followed by the assessee. Here a provision created by book entry is disallowed by invoking section 40(a)(ia). If at all Assessing Officer had to make a disallowance under section 40(a)(ia) the entry(ies) must be split up by identifying (a) to whom payable (b) whether the sum credited is one where*

tax is deductible at source (c) under which section tax is deductible at source and (d) whether same exceeds threshold limits specified In section. Identification of violation in respect of specific entry or a set of entries in tax deduction at source was a fundamental exercise keeping in view provisions of XVll-B was the first step before invoking section 40(a)(ia). This exercise is not carried out. As no default in deduction of tax at source is recorded, the question of disallowance does not arise. Hence on this count assessee succeeds on part I of the ground.

18. Part II is the disallowance of whole of the sum created as provisions. The Assessing Officer disallowed the same after recording reasons that",... Even then assessee cannot be a/lowed the deduction of provisions u/s 37 as in such situation provision is nothing but an ac/hoc provision, liability for which has ether not accured or cannot be ascertained ant thus the provision cannot be said to have been laid out or expended wholly and exclusively for the purposes of business". The written submission does not contain a specific comment on this part. In course of hearing, the appellant stated that this is a consistent method where income and expenses are accounted for following the principle of accrual and that this consistent method is disturbed without adequate recording of reasons or analysing facts.

19. I find from the assessment order that the views of appellant is not considered. The decision is taken without examining relevant facts. Verification of annual reports of the company reveal no significant change in accounting policy. The Assessing Officer has made a disallowance merely because provision is created. The disallowance without examining the nature of provision by itself renders it wrong. There are admissible and inadmissible provisions. The disallowance made sans valid reasons has no locus stand/. The heading of the disallowance and the computation statement mentions the same as disallowance under section 40(a)(i)2 which leaves doubt as to whether there is an unambiguous finding regarding eligibility under section 37. As an emphatic finding which is reason based is not; present in the assessment order, the alternate disallowance under section 37 is also held not in order,

20. Part III of the ground is against adding the same in computation of Book Profit under section 115JB. I had deleted the substantive addition on both counts. Keeping in view this decision, the Assessing Officer is directed to recompute book profit under section 115JB.

21. In view of discussion above, he Assessing Officer is directed to delete the addition of Rs 2,6551677,983.Parts I, II and III of the ground is disposed of accordingly."

18.2. We find that provision has been made in the books by the assessee as per the standard accounting practices followed by it and that since the accounts of the company are closed within short period after the end of the year, before which the data or invoice from the concerned vendor was not available with the assessee whereas the services had already been provided by the vendor to the assessee. In respect of these items, the assessee had made provision for expenses in its books as per the applicable accounting standard and as per the generally accepted accounting principles on accrual basis. Since the concerned vendor account is not credited by the assessee they are not identifiable for want of bills, the assessee has credited provision for expenses and had not deducted tax at source for the same, as according to the assessee, only when the party name is identifiable, the provisions of 40(a)(ia) of the Act would come into operation. Accordingly, it pleaded that no liability of TDS could be fastened on the assessee when the payee is not identifiable. We further find that the very same issue has been the subject matter of adjudication of this Tribunal in the case of Mahindra and Mahindra Ltd., vs DCIT in ITA No.8597/Mum/2010 for A.Y.2006-07 dated 2006-07 dated 06/06/2012 wherein this ground has been adjudicated as under:-

> *"19.Next ground of appeal is about addition made under section 40a(ia) in respect of year-end provision of Rs.4,25,52,623/-.AO on pages 104 (para23) has discussed the issue as under- "It has been stated by auditors in note for clause 17(f) and auntie 7 (b) of form 3 CD audit report, that company is not detecting the TDS on year end provision as they are of the view that the liability of deducting TDS arises in subsequent year when Bill of the party is booked." 19.1.After considering the submissions made by the appellant AO held that same was not acceptable because expenses under consideration was liable to TDS and were squarely covered by the provisions of chapter XVIIB of the Act. He was of the view that once the assessee was debating the P&L account, it automatically was crediting the party account based on matching principle. 19.2.Before us ,AR submitted that amount in question was year-end accounting provision to book, expenditure incurred, but in respect of which there was no obligation to either pay or to deduct tax at source is because no income had accrued to the payee, that no order had been passed under section 201 of the act holding, the appellant to be an assessee in default. Therefore, no disallowance could be made under section 40a(ia). He referred to page number 265 of the paper-book that gives details of provision on which TDS was not paid. As per the AR bills for the said expenditure were not received during the year under consideration. As per the AR, the appellant company would make year-end provisions based on services rendered by various lenders/professionals. These provisions represented cost of various activities carried out by the company during the relevant financial period. Since, the company was following the Mercantile system of accounting it was required to account for such expenses, even though the concerned parties had not submitted their bills or such bills were*

pending for approval based on the internal system. At that point of time, since bills from the contractors had not been raised though that was owed by the company in favour of any specific party. Such a debt would be owed only on receipt of the bills and after it had been passed following the procedure. Only at that point of time relationship of debtor and creditor was established and was also an obligation to pay that would amount within the agreed period of time. The obligation, to deduct tax at source from the account of a specific party arose only at the time the bill was passed not before that. Citing the example of audit fees the AR submitted that obligation to pay the fees to the statutory auditors arises only after they complete the statutory audit.He relied upon the decisions of GE India Technology Centre Private Ltd.(327 ITR 456) and Industrial Development Bank of India(107 ITD45) in this regard. DR submitted that work was already carried out for the assessee, that appellant should have deducted tax source. He further submitted that once the amount was debited to profit and loss account provisions of section 40(a)(ia) were applicable. 19.3.We find that the AO has not examined the issue about year-end payments.There is a difference between the payments that are made during the year and the payments made at the fag-end of the year.In our humble opinion in 2nd category of payments tax has been detected in the subsequent year when Bills are booked. In this regard we have also considered the amendment made to Sec.40(a)(ia) by the finance act,2008, with retrospective effect from 1.4.2005.We have also perused the case laws relied upon by the AR.Principles discussed in the said judgement is also support our view that provisions of tax deducted at source were not applicable in case consideration. Ground number 19 is decided in favour of the assessee."

18.3. Respectfully following the same, we find no infirmity in the order of the ld. CIT(A) granting relief to the assessee. Accordingly, the ground No.8 raised by the Revenue is dismissed."

68. The facts of the issue for the year under consideration is identical, and therefore, respectfully following the above decision of the co-ordinate bench, we dismiss the ground raised by the revenue and uphold the order of the CIT(A).

Foreign tax credit in respect of income pertaining to section 10A/10AA – Ground 8.

69. This ground arises out of the partial relief given by the assessee towards Foreign Tax Credit claimed by the assessee and the issue contended is same as in

Ground 5 of assessee's appeal. Therefore our decision in the Ground 5 of assessee's appeal would be mutatis mutandis applicable to revenue's ground also. Accordingly this ground is disposed of in the same terms mentioned in the earlier part of this order while adjudicating ground 5 of assessee's appeal.

Transfer Pricing Adjustments

70. As regards the TP adjustment, both the assessee and the revenue raised grounds as detailed in the earlier part of this order. Since the grounds raised by both parties are against the same adjustment for the purpose of adjudication the grounds raised by the assessee and the revenue are considered together. Ground 6 of assessee's appeal is general and does not warrant any adjudication.

TP adjustment on provision of software and consultancy services – Ground 7 of assessee and Ground 9 of revenue

71. The assessee is a leading global information technology consulting services and outsourcing company having worldwide presence for more than 20 years. The assessee carries out overseas operations through a web of foreign subsidiaries, which act as marketing and sales support companies of the assessee. The assessee has entered into the following international and specified domestic transactions for the year under consideration. During the year under consideration, the assessee has entered into various international transactions and specified domestic transactions. With regard to the software consultancy services provided to the AE, the assessee in the transfer pricing study has agregated the transactions with AE for the purpose of benchmarking. The assessee applied Transaction Net Margin Method (TNMM) as the most appropriate method and the assessee has taken itself as a tested party.

The assessee submitted that it had rendered software development, technical and consultancy services to its Associated Enterprises (AEs) on the basis of specific requests received from them by it. The assessee also submitted that the charges for the services rendered were determined on the basis of mutual negotiation between the parties. The assessee gave a complete description of functions performed, assets employed and risks assumed (FAR analysis) while rendering this provision of software, technical and consultancy services. The assessee chose the following the comparables in the TP study:-

Sr.No.	**Name of company**	**Average NPI**
1	Infosys Ltd	39.76%
2	Larsen & Toubro Infotech Ltd	24.69%
3	Mindtree Ltd	1784%
4	Persistent Systems Ltd	28.94%
5	Vakrangee Softwares Ltd	14.96%
6	Wipro Ltd	21.95%
7	IBM India Pvt Ltd	10.98%
8	Yahoo Software Development India Pvt Ltd	23.37%
9	HCLInfosystems Ltd	20.09%
	Mean	**22.51%**

72. The assessee has corroborated the above with peer group- analysis and internal TNMM as detailed below:

(Rs.in crore)				
Name of the company	Operating income	Operating expenses	Operating profit	OP/TC
Infosys Ltd	44,341	32,696	11,645	35.62%
H C L Technologies Ltd	16,497	9,665	6,832	70.68%
Tech Mahindra Ltd	16,295	13,136	3,159	24.05%
Cognizant Technology Solutions India Pvt Ltd	19,740	12,177	7,563	62.11%
Wipro Ltd	38,757	30,386	8,471	27.55%
TCS India	**64,673**	**44,220**	**20,453**	**46.25%**

73. On the basis of above comparisons carried out, the assessee has considered its transactions 3with AE to be at arm's length. The TPO held that AE is the least complicated entity and, therefore, should be considered as the tested party. The TPO selected companies based in US and used the same set of comparables as were used in assessee‟s own case for A.Y.2006-07 where the TPO updated the margins of the year under consideration. The excluded payments made by AEs to assessee as pass-through cost. The TPO also computed the margins from the consolidated financials of the said comparable companies instead of looking into stand alone financials. The assessee submitted that the said comparable companies have got significant related party transactions and there is a huge difference in the scale of operations and hence not comparable with that of the assessee. However the TPO did not accept the submissions of the assessee and arrived at a TP adjustment of Rs.745,55,81,840/-. On further appeal, the CIT(A) following his own orders for earlier assessment years upheld the action of the ld. TPO in taking AE as the tested party but held that the method adopted by TPO as incorrect. The CIT(A) further held that GP/sales is the appropriate PLI. Further the ld. CIT(A) analysed each of the comparable companies and provided detailed reasons for either inclusion or exclusion thereon.

74. The ld AR submitted before us that all the aspects of this TP adjustment has been duly considered by this Tribunal in assessee's own case for A.Y.2012-13 (supra). The ld DR relied on the orders of the TPO

75. We heard the parties. The relevant observations of the Tribunal in assessee‟s own case for A.Y.2012-13 (supra) are extracted below -

> *"12. The ground No.5 raised by the assessee is with regard to transfer pricing adjustment made in respect of provision of software consultancy services. The*

ground No.9 raised by the Revenue for the A.Y.2012-13 is also challenging the transfer pricing adjustment made in respect of provision of software consultancy services in respect of partial relief granted by the ld. CIT(A). Hence, both the grounds are taken up together as identical issue is involved.

12.1. We have heard rival submissions and perused the materials available on record. We find that assessee is a leading global information technology consulting services and outsourcing company having worldwide persons for more than 20 years providing consultancy services, developing and maintaining products for customers covering on all matters pertaining to implementation of computer software and hardware system, management of data processing and information systems and data communication systems. Assessee carries out its overseas operations through a web of foreign subsidiaries which act as marketing and sales support companies of assessee. The subsidiaries served as a hub in the realization of the international projects. Client service is carried out by the assessee in India.

12.2. In respect of provision of software, technical and consultancy services, the assessee in its Transfer Pricing Study Report (TPSR) had benchmarked the said transaction by selecting itself as a tested party by adopting Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with Operating Profit / Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for benchmarking the receipts from the said services. The assessee submitted that it had rendered software development, technical and consultancy services to its Associated Enterprises (AEs) on the basis of specific requests received from them by it. The assessee also submitted that the charges for the services rendered were determined on the basis of mutual negotiation between the parties. The assessee gave a complete description of functions performed, assets employed and risks assumed (FAR analysis) while rendering this provision of software, technical and consultancy services. These facts are brought out in detail by the assessee in its TPSR as well as in the order of the ld. TPO vide pages 5-8 of the order. The assessee selected comparable companies wherein the arithmetic mean margin was arrived at 11.28%. The assessee"s margin for provision of IT services was 34.99%. The assessee in its TP study report mentioned that the margins earned by AE were better than that earned from AEs and non-AEs collectively and accordingly, the transactions were at arm"s length.

12.3. The assessee also made a comparable analysis in the TP study report to justify that its margin are better than the peers i.e. Wipro, Infosys, HCL Technologies, Patni Computers etc., to state that its transactions are at arm"s length. The ld. TPO used the same set of comparables as were used by him in assessee"s own case for A.Y.2006-07 and considered the AEs as the tested party. The ld. TPO selected companies based in US and considered the same set of US companies as comparable to all other AEs operating in different geographic

region. The ld. TPO also computed the margins from the consolidated financials of the said comparable companies instead of looking into stand alone financials. The assessee state that the said comparable companies have got significant related party transactions and there is a huge difference in the scale of operations and hence not comparable with that of the assessee. However, these provisions were not considered and ultimately, the ld. TPO processed to make an adjustment of Rs.946,91,61,694/- and made an upward adjustment thereon.

12.4. The ld. CIT(A) upheld the action of the ld. TPO in taking AE as the tested party. Further the ld. CIT(A) analysed each of the comparable companies and provided detailed reasons for either inclusion or exclusion thereon. The ld. TPO was also provided an opportunity to perform the comparable selected by the ld. CIT(A). Both the parties before us agreed that all the aspects of this TP adjustment has been duly considered by this Tribunal in assessee"s own case for A.Y.2009-10 in ITA No.5713/Mum/2016 and IT(TP)A No.5823/Mum/2016 dated 30/10/2019.

> *"20. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. From the grounds raised by the Revenue, the following three issues arise for consideration - (i) what should be the appropriate PLI; (ii) whether cost of outsourcing / sub-contracting to the TCS should be considered for computing the margin; and (iii) whether the alternative benchmarking furnished by the assessee by treating the AEs as tested party with comparables in the same geographical locations is acceptable. On a careful perusal of the facts on record as well as submissions of the learned Counsel for the parties in the course of hearing as well as in the written note, we are of the view that the decision of learned Commissioner (Appeals) on the aforesaid issues are unassailable. As regards the issue of appropriate PLI, we are of the view that considering the nature of activity performed by the assessee as well as the AEs, it cannot be said that the A.Es are not bearing any risk. Rather the facts on record reveal that the AEs performed the role of risk bearing distributors. It is well brought out by learned Commissioner (Appeals) in his order that the AEs are bearing credit risk and risk of default by client. In fact, the assessee through proper evidences has demonstrated instances where the credit risk with reference to part cancellation of contract has been borne by the AEs without compensation from the assessee. The documentary evidences in this regard furnished by the assessee were thoroughly examined not only by learned Commissioner (Appeals) but they were also produced before us. Thus, from the aforesaid facts, it becomes clear that significant marketing functions are being performed and distribution and marketing risk are being taken by the AEs. On examination of the financials of the subsidiaries it is revealed that some subsidiaries are still making loss at net level which signifies that some risk*

is being borne by the AEs. It has further been brought on record that the manpower base of AEs performed various functions relating to marketing as well as client co-ordination. The AEs have developed sufficient competency to handle the marketing work independently. The entire contract related work is performed by the AEs, though, in cooperation with the assessee. Thus, it is quite natural that for being a sufficiently motivated work force, the AEs are compensated at return on sales and not merely on value added costs. Therefore, learned Commissioner (Appeals) was justified in directing the Transfer Pricing Officer to adopt the PLI of gross margin on sales. As regards consideration by the Transfer Pricing Officer, the outsourcing / subcontracting cost to assessee as a pass through cost, learned Commissioner (Appeals) was absolutely correct in observing that the decision of the Transfer Pricing Officer to exclude such costs while computing the margin of the AEs is incorrect. When similar cost incurred by the comparables were not excluded while computing their margin, a different treatment cannot be given to such costs in case of the AEs. Certainly, the aforesaid approach of the Transfer Pricing Officer has resulted in distorting the correct PLI of the AEs. In the aforesaid context, the observations of learned Commissioner (Appeals) are appreciable, wherein, he has observed that the PLI of the AEs and PLI of comparables have not been computed on similar lines by the Transfer Pricing Officer, hence, comparability condition fails. It is further relevant to observe, the alternative benchmarking furnished by the assessee before the Transfer Pricing Officer by considering the AEs in different geographic locations as tested parties with the comparables selected on the basis of the respective geographic locations furnished before the Transfer Pricing Officer were not properly considered. However, in course of appeal proceedings, the learned Commissioner (Appeals) examined them in detail and after a detailed analysis approved some comparables selected by the assessee and also added some new comparables. Whereas, the comparable selected by the Transfer Pricing Officer were not on the basis of any detailed search process. At least, no such analysis is either forthcoming from the order of the Transfer Pricing Officer or could be brought to our notice by learned Departmental Representative. On the contrary, on a thorough and careful reading of the impugned order of learned Commissioner (Appeals), we are of the view that learned Commissioner (Appeals) has taken pains to examine in detail the alternative benchmarking done by the assessee with foreign comparables and after detailed analysis has shortlisted the final comparables to be considered for comparability analysis. No convincing argument or evidence has been brought on record by the learned Departmental Representative to persuade us to disturb the finding of learned Commissioner (Appeals) on these issues. In view of the aforesaid, we do not find any merit in the grounds raised by the Revenue on the issues. Accordingly, grounds are dismissed.

12.5. Hence, the ground No.5 raised by the assessee and ground No.9 raised by the Revenue are disposed off in the above mentioned terms.

76. Respectfully following the above decision of the coordinate bench, we see no reason to interfere with the decision of the CIT(A) and the grounds of the assessee and revenue are disposed of accordingly.

Provision of loans to AE – Assessee's Ground 8

77. The TPO noticed that the assessee had given loan to its AE in the prior years primarily for acquisition of downstream subsidiary by the AE. The details of loan are as given below:-

AE	Currency	Amount as on 01.04.2013	Amount as on 31.03.2014
TCS FNS Australia	AUD	9341185	8141185
TCS Morocco	USD	3663835	3410485

78. The asessee submitted that these loans are advances to AEs for the purpose of benefit of assessee itself and hence are cash equity in nature. The asessee also contended that there are business and commercial rationale for providing these loans. The assessee charged interest @5% on the loan given to TCS FNS Australia. With regard to the loan given to TCS Morocco, the assessee submitted that the loan was extended for the purpose of working capital requirement and that the business of TCS Morocco was in the process of liquidation during the relevant year and has been liquidated as on 31/05/2014. The TPO did not accept the submissions of the assessee and arrived at interest rate of 9.35% towards loan to TCS FNS Australia and 6.77% towards loan to TCS Morocco based on the LIBOR rate. Accordingly, the TPO arrived at an adjustment towards interest on outstanding loan to the extent of Rs.3,64,57,102/-. On further appeal, the CIT(A)

held that the TPO has rightly charged interest on the loans extended to AEs. The CIT(A) further directed the TPO to charge interest at LIBOR (12 months average) plus 300 bps.

79. We in this regard notice that this is a recurring issue and the coordinate bench in assessee's own case for AY 2012-13 has held as under on the same issue

13.7. We find that this issue has already been addressed by this Tribunal in assessee"s own case in ITA No.5713/Mum/2016 and IT(TP)A No.5823/Mum/2016 for A.Y.2009-10 dated 30/10/2019 wherein this issue was restored to the file of the ld. AO for denovo adjudication by observing as under:-

> *"37. We have considered rival submissions and perused the material on record. We have also carefully gone through the case law cited before us. Notably, right from the stage of transfer pricing proceeding itself the assessee has taken a stand that loans and advances to the AEs are in the nature of quasi equity, hence, cannot be treated as loan simpliciter. It is relevant to observe, the transfer pricing adjustment made on account of interest is in respect of loans advanced to four overseas AEs. From the details available on record, it is noticed that major portion of loans advanced to TCS Ibero America, is for acquisition of downstream subsidiary and about 20% of the advance was for working capital. Money advanced to TCS FNS Pty. Ltd., Australia, was purely for acquisition of downstream subsidiary. Similarly, advance to TCS Asia Pacific Pty. Ltd., is for acquisition of downstream subsidiary. Only the advance made to TCS Morocco is for working capital requirement. It is further noted, major part of advances made to TCS Ibero America, TCS FNS Pty. Ltd. and TCS Morocco have been converted to equity subsequently. It is also a fact on record that before learned Commissioner (Appeals), the assessee has filed a detailed written submission on 27th March 2014, elaborately discussing the nature of advance made to the AEs and the purpose for which such advances were made. It was submitted by the assessee that the advances made to the AEs were as a part of business strategy and not simply to help the AEs with capital infusion. The assessee has advanced detailed argument stating that advances made to the AEs is a shareholder activity and not advancement of loan. In this context, the assessee has referred to OECD Transfer Pricing Guidelines as well as UK and Australian Regulations. It is evident from the impugned order of the learned Commissioner (Appeals), though, he sketchily referred to some of the submissions made by the assessee, however, he has not at all dealt with them in an effective manner. The learned Commissioner (Appeals), though, has observed that the loans*

> *advanced were not merely for downstream acquisition but for a variety of purpose including working capital requirement and other business uses, however, he has not elaborated as to for what other purpose loans were advanced. Without properly dealing with the factual aspect of the issue, learned Commissioner (Appeals) has jumped to the legal aspect and has held that the amount advanced by the assessee is in the nature of loan and has to be benchmarked as such. After considering the submissions of the parties and examining the material on record, we are convinced that various submissions made by the assessee before learned Commissioner (Appeals) have not at all been dealt with. The primary contention of the assessee that the advance made to the AEs is in the nature of quasi equity and falls within shareholder's activity has not been properly addressed by the Departmental Authorities keeping in view the ratio laid down in the relevant case laws. It also requires deliberation whether it can be considered as an international transaction under section 92B r/w Explanation-1(c). Since, the aforesaid legal and factual aspects have not been considered properly, we are inclined to restore the issue to the file of the Assessing Officer for de novo adjudication after due opportunity of being heard to the assessee. The Assessing Officer must examine all relevant facts to find out the exact nature of the advances made to the AEs. He should also examine the applicability of the ratio laid down in the case of DLF Hotel Holdings Ltd. (supra) and any other case laws which may be cited before him. The assessee must be afforded reasonable opportunity of being heard. Ground is allowed for statistical purposes."*

13.8. Respectfully following the same, the ground No.6 raised by the assessee is allowed for statistical purposes.

80. For the year under consideration also we notice that the lower authorities have not considered the submissions of the assessee that extending the loan is part of shareholder activity. Therefore respectfully following the above decision of the coordinate bench we remit the issue back to the Assessing Officer / TPO for denovo adjudication after giving a reasonable opportunity of being heard to the assessee. This ground is accordingly allowed for statistical purposes.

Provision of guarantee to AEs – Ground 9 of assessee's appeal and Ground 10 of revenue's appeal

81. The TPO noticed that the assessee has provided gurantees to third parties / bank on behalf of its AE. These guarantees include performance guarantee, corporate guarantee as well as financial guarantee. The assessee submitted that the performance guarantees of the assessee are in the nature of shareholder activity and is for the benefit of assessee and there is no explicit benefit for the AE. The assessee further submitted that without prejudice, if there is an adjustment, the same should be restricted to the insurance premium that the assessee pass for performance default or at best, a nominal mark up on the amount paid to the bank for such activity, may be charged. With regard to the financial guarantee also, the assessee submitted that the same is in the nature of shareholder activity. The TPO did not accept the submissions of the assessee and applied average of bankers' rate based on State Bank of India's rates to charge a guarantee commission @1.5%. Accordingly, the TPO arrived at a TP adjustment of Rs.8,90,17,092/-. On further appeal the CIT(A) with respect to performance guarantee followed its own order for A.Y.2009-10 and held that charges should be levied only on the component of services performed by the AE. With respect to lease guarantee which is similar to performance guarantee the CIT(A) by following its order for A.Y.2012-13 in assessee‟s own case held that charges should be levied only on the portion of lease premises, occupied by the AE.

82. We heard the parties and notice that the similar issue has been considered by the coordinate bench in assessee's own case for AY 2012-13 (supra) where it is held that -

14. The ground No.7 raised by the assessee is challenging the transfer pricing adjustment made in respect of provision of guarantee. The ground Nos. 10-12 raised by the Revenue for A.Y.2012-13 are also in respect of transfer pricing adjustment made in respect of provision of guarantees in respect of partial relief given by the ld. CIT(A).

14.1.We have heard rival submissions and perused the materials available on record. We find that assessee during the year under consideration had provided guarantees in the nature of performance, financials and lease for or on behalf of its various AEs.

14.2. The assessee submitted that with respect to performance guarantee, part of the activity was performed by the assessee itself while the remaining services were rendered by the AEs. Accordingly, the ld. CIT(A) appreciated this fact and by following its own order for A.Y.2009-10 held that charges should be levied only on the component of services performed by the AE.

14.3. With respect to lease guarantee which is similar to performance guarantee, the ld. CIT(A) by following its order for A.Y.2012-13 in assessee"s own case held that charges should be levied only on the portion of lease premises, occupied by the AE. The details of guarantees given i.e performance, financial and others are tabulated in page 32 of the order of the ld. TPO. The ld. TPO made transfer pricing adjustment in respect of guarantee services amounting to Rs.28,74,94,665/- in his order. We find that the entire gamut of this issue has already been addressed by this Tribunal in assessee"s own case in A.Y.2009-10 in ITA No.5713/Mum/2016 and IT(TP)A No.5823/Mum/2016 dated 30/10/2019 wherein it was held as under:-

"43. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. Insofar as the contention of learned Sr. Counsel for the assessee that provision of guarantee is not an international transaction as per section 92B of the Act, we are unable to accept such contention. In our considered opinion, after introduction of Explanation-(i)(c) to section 92B of the Act, with retrospective effect from 1st April 2002, provision of guarantee to AEs has to be considered as an international transaction. Different Benches of the Tribunal have also expressed similar view on the issue. Therefore, we hold that the provision of guarantee to the AEs is an international transaction. In fact, the aforesaid view has been expressed by the Co-ordinate Bench in WNS Global Services Pvt. Ltd. (supra). Therefore, following the aforesaid decision of the Co- ordinate Bench and the decision of the Hon'ble Jurisdictional High Court in Everest Canto Cylinders Ltd. (supra), we direct the Assessing Officer to charge guarantee commission @ 0.5% per annum both on performance / lease guarantee as well as financial guarantee."

> *14.4. Respectfully following the same, ground No.7 raised by the assessee and ground Nos.10-12 raised by the Revenue for A.Y.2012- 13 are partly allowed.*

83. Respectfully following the above decision of the coordinate bench we hold the provision of guarantee as an international transaction and direct the assessing officer to charge guarantee commission at the rate of 0.5% following the decision of the Hon'ble jurisdictional High Court.

Adjustment made towards receipt of brand royalty from AE – Ground 11 of revenue's appeal

84. The TPO was of the view that the assessee has been recognized as one of the big 4 in the information technology for A.Y. 2013-14 and is a very powerful brand and the value of brand has been quantified at 8.2 billion USD as per the annual report. The assessee submitted before the TPO that the brand legally owned by the Tata Sons Limited and so the assessee has no right to charge for fees for the brand.

85. The assessee also submitted that the revenue sharing model it follows with the AE also includes the brand royalty remuneration and no additional fees or royalty is needed. The TPO did not accept the submissions of the assessee. The TPO held that the assessee is the actual value contributor and maintains, practices and evidences the value of the brand through its service delivery credentials. Accordingly, the TPO was of the view that it is the assessee, who is entitled for appropriate return for the brand value. The TPO applied 2.9% royalty on the revenue earned by AEs using TCS services to arrive at an adjustment of Rs.1187.06 crores. On further appeal, the CIT(A) deleted the TP adjustments made towards the provision for software an consultancy and adjustment made towards brand royalty fees.

86. The ld AR submitted that the coordinate bench in assessee's own case for AY 2012-13 (supra) has allowed the fees paid by the assessee to Tata and Sons Ltd as deduction under section 37(1), thereby accepting the submission that the brand is not owned by the assessee. The ld AR further presented same line of arguments to submit that the TPO is not correct in making any TP adjustment towards the notional fees on the brand that is not owned by the assessee, which the TPO held as to be received by the assessee.

87. The ld DR relied on the order of TPO

88. We heard the parties and perused the material on record. We have in the earlier part of this order already held that the fee paid by the assessee towards the brand to Tata and Sons Ltd. is not capital in nature for the reason that the brand is not owned by the assessee. Accordingly there cannot be any royalty that needs to be charged on the brand since assessee is not the owner of the brand and there cannot be any TP adjustment towards the amount that ought to have been received by the assessee towards brand royalty. We therefore see no infirmity in the order of the CIT(A). This ground of the revenue is dismissed.

89. In result assessee's appeal in I.T.A. No.5199/Mum/2019 and revenue appeal in I.T.A. No.5904/Mum/2019 are partly allowed.

Order pronounced in the open court on 15/09/2023

Sd/- **sd/-**

(VIKAS AWASTHY)	**PADMAVATHY S.**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt :15th September, 2023
Pavanan

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai