IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE "A" BENCH, BANGALORE

Before Shri George George K., Vice President
and
Ms. Padmavathy S., Accountant Member

IT(TP)A No. 625/Bang/2020 (Assessment Year: 2015-16)		
Samsung R&D Institute India - Bangalore Pvt. Ltd. 2870, Phoenix Building Bagmane Constellation Business Park, Outer Ring Road, Doddanekundi Circle Marathahalli Post Bangalore 560037 PAN – AAICS6290F	vs.	JCIT, Special Range - 6 80 ft. Road, BMTC Building Koramangala Bangalore 560005
(Appellant)		(Respondent)

IT(TP)A No. 641/Bang/2020 (Assessment Year: 2015-16)		
JCIT, Special Range - 6 80 ft. Road, BMTC Building Koramangala Bangalore 560005	vs.	Samsung R&D Institute India - Bangalore Pvt. Ltd. 2870, Phoenix Building Bagmane Constellation Business Park, Outer Ring Road, Doddanekundi Circle Marathahalli Post Bangalore 560037
(Appellant)		(Respondent)

Assessee by:	Shri T. Suryanarayana, Sr. Adv
Revenue by:	Shri R.N. Siddappaji, CIT-DR

Date of hearing:	16.10.2024
Date of pronouncement:	22.10.2024

O R D E R

Per: Padmavathy S., A.M.

These cross appeals by the assessee and the Revenue are against the order of the Commissioner of Income Tax (Appeals)-10 Bangalore [CIT(A)] dated 31.02.2020 for Assessment Year (AY) 2015-16.

2. The assessee is a wholly owned subsidiary of Samsung Electronics Company Ltd. Korea (SECL) and is engaged in providing software development services to SECL and other subsidiaries. The assessee is compensated on cost plus mark up basis for the services provided. The software development services carried out by the assessee are based on specific requirements of SECL and its subsidiaries (AEs) in relation to specific Samsung projects such as telecom systems, home and office appliances, computer systems, mobile devices and networking and other similar products. The assessee filed the return of income for AY 2015-16 on 30.11.2015 declaring a total income of Rs. 238,85,10,090/-. Since the assessee had international transactions with its AEs, a reference was made by the Assessing Officer (AO) to the Transfer Pricing Officer (TPO) to determine the arm's length price of the international transactions the assessee had with its AEs. The TPO passed an order u/s. 92CA of the Income Tax Act, 1961 (the Act) on 26.10.2018 proposing a TP adjustment of Rs. 1,86,94,215/- towards software development services rendered by the assessee to its AEs and the AO passed the assessment order incorporating the TP adjustments. The AO besides the TP adjustments made a disallowance of Rs. 18,20,990/- u/s. 40(a)(i) of the Act on the depreciation claimed by the assessee on computer software for the reason that the assessee did not deduct tax at source on the payments made towards purchase of software. The AO also made an addition of Rs. 7,37,33,056/- u/s. 28(iv) of the Act towards the value of equipments given by the AEs free of

cost to the assessee for the purpose of software development and testing. Aggrieved, assessee preferred appeal before the CIT(A).

3. The CIT(A) gave partial relief to the assessee towards TP adjustment and confirmed the disallowance made u/s. 40(a)(i) and the addition made u/s. 28(iv) of the Act. Both the assessee and the Revenue are in appeal before the Tribunal against the order of the CIT(A).

4. During the pendency of the appeal before the Tribunal the assessee filed an application for resolution of transfer pricing dispute under Mutual Agreement Procedure (MAP) with the competent authorities of India and Korea. The competent authorities agreed to resolve the transfer pricing dispute and the same was communicated to the assessee vide letter dated 04.12.2023. Post the assessee's acceptance of the resolution the AO passed an order giving effect to the MAP resolution. The assessee vide letter filed before the Tribunal dated 12.02.2024 filed revised ground contending the disallowance and addition made by the AO relating to non transfer pricing matter. The assessee vide the said letter had also raised a ground stating that the AO has not passed the order giving effect to the MAP resolution. During the course of hearing the learned A.R. submitted that the AO has since passed the order giving effect to MAP resolution the said ground is not pressed.

5. On a perusal of the appeal filed by the Revenue we notice that the grounds raised by the Revenue are with regard to the relief given by the CIT(A) towards transfer pricing adjustment. Since the assessee has accepted the resolution under MAP and that the AO has passed an order giving effect, the grounds raised by the Revenue have become in fructuous. Accordingly the appeal of the Revenue is dismissed.

6. The issues contended through the surviving grounds in the appeal filed by the assessee pertains to: -

i) Disallowance u/s. 40(a)(i) of the depreciation claim by the assessee on computer software.

ii) Addition made u/s. 28(iv) of the Act.

Disallowance u/s. 40(a)(i) of the Act

7. We have heard the rival contentions and perused the material on record. It is brought to our notice that the CIT(A) has upheld the disallowance made by the AO by relying on his decision in assessee's own case for AY 2014-15 and that the said order of the CIT(A) for AY 2014-15 was reversed by the coordinate bench of the Tribunal. In this regard we noticed that the coordinate bench in assessee's own case for AYs 2011-12 to 2014-15 vide order dated 30.05.2024 has considered the issue of disallowance u/s. 40(a)(i) towards depreciation on computer software for the reason that the assessee has not deducted tax at source on computer software and held that : -

> *"13. Under section 40(a)(i) any interest (not being interest on loan issued for public before 1/4/1938), royalty fee for technical services or sum chargeable under this Act which is payable outside India or inside India to a non-resident not being a company or to a foreign company on which tax is deductible at source and such tax has not been deducted or, after deduction, has not been paid during the previous year or in the subsequent before the expiry of the time prescribed under sub-section (1) of section 200 shall not be allowed as deduction while computing the income chargeable under the head "Profit and gains of business or profession".*
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> *13.1 There is a difference between the expenditure and other kind of deduction. The other kind of deduction which includes any loss incidental to carrying on the business, bad debts etc., which are deductible items itself not because an expenditure was laid out and consequentially any sum has gone out; on the contrary the expenditure results a certain sums payable and goes out of the business of the assessee. Thus, in our view, section 40 refers to the outgoing amount chargeable under the act, and subject to TDS under Chapter XVII-B.*
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> *14. On the contrary, depreciation is a statutory deduction and after the insertion of Explanation 5 to sec. 32, it is obligatory on the part of the*

assessing officer to allow the deduction of depreciation on the eligible asset, irrespective of any claim made by the assessee. Therefore, depreciation is a mandatory deduction on the asset which is wholly or partly owned by the assessee and used for the purpose of business or profession which means the depreciation is a deduction for an asset owned by the assessee and used for the purpose of business and not for incurring of any expenditure.

15. The above view was expressed by Hon'ble Mumbai Tribunal in case of SKOL Breweries Ltd. Vs. ACIT reported in (2013) 29 taxmann.com 111.

16. Hon'ble Karnataka High Court while determining identical issue in case of PCIT vs. Tally Solutions Pvt. Ltd. (supra) has analysed this aspect in great detail as under:

> *"10. Thus, from close scrutiny of Section 40(a)(i) of the Act, it is axiomatic that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, Section 40 refers to the outgoing amount chargeable under this At and subject to TDS under Chapter XVII-B. The deduction under Section 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of depreciation. Section 40(a)(i) and (ia) of the Act provides for disallowance only in respect of expenditure, which is revenue in nature, therefore, the provision does not apply to a case of the assessee whose claim is for depreciation, which is not in the nature of expenditure but an allowance. The depreciation is not an outgoing expenditure and therefore, provisions of Section 40(a)(i) and (ia) of the Act are not applicable. In the absence of any requirement of law for making deduction of tax out of expenditure, which has been capitalized and no amount was claimed as revenue expenditure, no disallowance under Section 40(a)(i) and (ia) of the Act would be made. It is also pertinent to note that depreciation is a statutory deduction available to the assessee on a asset, which is wholly or partly owned by the assessee and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability. The Commissioner of Income Tax (Appeals) has held that the payment has been made by the assessee for an outright purchase of Intellectual Property Rights and not towards royalty and therefore, the provision of Section 40(a)(ia) of the Act is not attracted in respect of a claim for depreciation. The aforesaid finding has rightly been affirmed by the tribunal. The findings recorded by the Commissioner of Income Tax (Appeals) as well as the tribunal cannot be termed as perverse.*

In view of preceding analysis, the substantial question of law framed by a bench of this court is answered against the revenue and in favour of the assessee."

17. We note that identical is the situation in the present case of assessee, wherein, provisions of section 9(1)(vi) Explanation 2 was invoked in respect of the payment made towards purchase of software that was capitalised on which depreciation u/s. 32 was claimed.

18. We therefore note that the objections of the Ld.DR that the facts in case of PCIT vs. Tally Solutions Pvt. Ltd. (supra) is distinguishable and stands rejected.

19. Coming to the argument of the Ld.DR that the nature of software purchased by the assessee needs to be analysed. We note that on this issue, Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT reported in (2021) 125 taxmann.com 42 wherein Hon'ble Court in para 100 held as under:

"100. Also, any ruling on the more expansive language contained in the explanations to Section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, 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 accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA."

20. We shall also refer to section 90(2) of the Act that reads as under:

"90(2) where the Central Government has entered into an Agreement with the Government of any other country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation then in relation to the assessee to whom such agreement applies, the provisions of this Act, shall apply to the extent they are more beneficial to that assessee."

21. Hon'ble Supreme Court held that, only if some right to use, without the right to commercially exploit the intellectual property in respect of a patent, invention, model, design, secret formula, process, copyright, literary or scientific work, are transferred, it cannot be regarded as royalty. There is nothing on record brought by the revenue in support of this argument. We therefore do not find any force in the argument advanced by the Ld.DR on this issue and the same stands rejected.

Accordingly, the issues raised in the grounds 3-6 for A.Ys. 2011-12 to 2013-14 and ground nos. 3-5 for A.Y. 2014-15 of assessee's appeal stands allowed."

8. For the year under consideration also the AO has made disallowance of the depreciation claimed by the assessee u/s. 40(a)(i) for the reason that the assessee has failed to deduct tax at source on the capitalised software. These facts being identical to the facts pertaining to AY 2014-15 we are of the considered view that the ratio laid down in the above decision of the coordinate bench is applicable for the year under consideration also. Accordingly, respectfully following the said decision of the coordinate bench we hold that no disallowance u/s. 40(a)(i) can be made towards depreciation on computer software on the ground that no TDS was deducted on the payments made towards computer software. The grounds raised by the assessee in this regard are thus allowed.

Addition made u/s. 28(iv) of the Act

9. During the course of assessment the AO noticed that the assessee has received assets free of cost from AEs located outside India to whom the assessee is providing software development services. The assets received free of cost included testing board, cameras, accessories and testing equipments etc. The assessee submitted before the AO that the assessee is a capive service provider and for providing these services the assessee receives some of the assets free of cost so that the development of software and the subsequent testing can be carried out as per the requirements of SECL and other AEs. The assessee further submited that the equipments are imported free of cost for the purpose of real time testing and calibration of software on the actual hardware and compatibility of software modules vis-a-vis the existing hardware and recommending changes to the hardware thereof. The assessee also submits a detailed note before the AO explaining how the various assets imported free of cost have been used for testing the software developed by the assessee. The assessee accordingly submitted that no addition can be made u/s. 28(iv) of the

Act towards import of assets free of cost since the assessee is not deriving any benefit from the import of assets free of cost. The AO, however, did not accept the submission of the assessee and held that : -

> *"4.6. In the instant case, the assets received from clients and put to use in business are benefits arising from business. The assessee has quoted few case laws to state that this is a capital receipt and should not be taxed u/s. 28(iv). None of the case laws quoted by the assessee discuss facts similar to the assessee's case. However, many judgements by the Hon'ble ITAT support the stand taken by the AO. For instance, in the case of Priyanka Chopra, the Mumbai bench of ITAT stated that where the assessee received a watch worth Rs. 40 lakhs as gift from company for which she had undertaken advertisements and promotional activities on remuneration basis, income tax authorities were justified in making addition of said gift to assessee's income as perquisite under section 28(iv). The watch received by Smt Priyanka Chopra was a capital asset; yet it was a benefit to her arising from her profession.*
>
> *4.6.1 In the case of Servall Engineering Works, the Chennai bench of Hon'ble ITAT held that where assessee could not furnish any details regarding so-called advance said to be received from various parties against supplies made to them nor could produce any material regarding expenditure incurred in executing any such order, addition was to be made. In the instant case, the assessee failed to furnish relevant material/documents to demonstrate the actual nature of assets received free of cost.*
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> *4.7 Consequently, the goods received free of cost from clients (who are also Associated Enterprises) are being adjudged as benefit arising from business and added u/s. 28(iv) of IT Act."*

10. On further appeal the CIT(A) upheld the addition made by the AO by holding that: -

> *"17.1 Having considered the submissions, and on perusal of the details filed, it is noted that various computer hardware assets have been received free of cost during the Financial Year 2014-15. Though it was claimed that the assets have been received on free of cost basis from its AEs, the Appellant failed to submit any documentation to understand the terms and conditions of such unusual arrangement, if any. During the appeal proceeding, the appellant was specifically asked to show how such free of cost assets have been disclosed in the audited financials of its AEs and in its own books. However, the appellant could not produce such documents for verifications Some stray information filed indicate that few assets have been returned back to the AE, whereas majority of these free of cost assets have been destroyed during the year*

and afterwards. It is also noted that as per the Intercompany invoices, payment has to be made within 30 days. This is contrary to the contention that they have been sent on free of cost basis. Hence, I concur with the reasoning of the Ld AO that these are perquisites / benefits arising to the Appellant during business u/s 28(i)(iv) of the IT Act. The Appellant raised a plea that as these assets are capital in nature, hence it is not taxable u/s 28(i)(iv). I am unable to accept such a plea, as there is nothing on record to take a view that these assets were held as capital. A plain reading of Section 28(i)(iv) read with section 2(24) would show that there is no bar in receiving benefit/perquisite in the form of an asset. The requirement of the section 28(i)(iv) is that it should be a benefit or perquisite, whether convertible into money or not, which requirement is satisfied in the facts of the case. It is also noted that the ratio laid down by the Apex court decision in the case of CIT vs. TV Sundaram lyengar & Sons (222 ITR 344) and the High Court's decisions in Solid Containers Ltd vs. DCIT (308 ITR 417), Logitronics Pvt. Ltd vs. CIT (333 ITR 386), would squarely apply to the facts of this case. Therefore, I am inclined to uphold the view of the Ld. Assessing officer and accordingly the impugned disallowance is upheld. Ground dismissed."

11. The ld AR argued that -

No 'benefit' to the Assessee.

(i) The equipments are given to the Assessee by the AE's, so that the software developed is compatible with the products developed by the AEs. If the software developed is not compatible with the product of the AE, the AE would be facing the risks associated thereto. Therefore, there is no benefit arising to the Assessee.

(ii) It is submitted that under Section 28(iv) of the Act, the 'benefit' accrued has to result in some kind of perquisite to the Assessee and if there is no perquisite arising to the Assessee, the provisions of Section 28(iv) of the Act cannot be invoked. Reliance in this regard is placed on the decision of the Mumbai Bench of this Hon'ble Tribunal in the case of ***David Dhawan v. Deputy Commissioner of Income-tax (Reported in [2005] 2 SOT 311 (Mum.)) (para 9 at pages 4-5)****. It is submitted that there is no perquisite arising to the Assessee from the AEs providing the equipments.*

(iii) It is undisputed that the Assessee is a captive service provider and the only customers of the Assessee are its AEs (please see pages 2-3 of the assessment order). That being the case, there can be no allegation of the Assessee benefitting from the equipments by utilizing it in its business otherwise.

(iv) Moreover, it is submitted that the Assessing Officer has not specifically pointed out as to what benefit is being derived by the Assessee. In para 4.4 of the order, the Assessing Officer has only made out a vague allegation that the purpose of giving the assets free of cost is for the Assessee to avoid income tax/customs cost, which is wholly erroneous and baseless. The equipments being brought in for rendering services which are export, customs duty is not leviable. Further, there is no income-tax being avoided as a result of the equipments being made available free of cost. It is submitted that at the threshold, it is for the Assessing Officer to demonstrate what benefit is being derived by the Assessee, and in the absence thereof, no addition can be made under Section 28(iv) of the Act.

'Benefit' should be in the nature of income.

(v) It is submitted that section 28(iv) of the Act is intended to stand attracted to cases where there is circumvention of income by receiving the same in other forms. Reliance in this regard is placed on the decision of the Mumbai Bench of this Hon'ble Tribunal in the case of ***Helios Food Improvers (P.) Ltd. v. Deputy Commissioner of Income-tax (Order dated 28.02.2007 passed by the Mumbai Bench of this Hon'ble Tribunal in ITA No. 1748/Mum/2003) (para 16 at page 6).***

(vi) It is submitted that in the present case, a transaction between the Assessee and its AE would be an international transaction, which is required to be undertaken at arm's length. Therefore, there cannot be an allegation of the Assessee accepting income in other forms, as the same would be in contravention of the transfer pricing provisions.

(vii) In any event, since the Assessee is compensated at a cost plus mark up in respect of the software development services rendered by it, there cannot be an allegation of the above manner.

The benefit, if any should be irretrievable:

(viii) It is submitted that the benefit or perquisite contemplated under the section means an irretrievable benefit arising to an assessee. In this regard, reference may be made to the decisions of the Mumbai Bench of this Hon'ble Tribunal in the cases of Helios Food (supra) (para 16 at page 6); and Rupee Finance & Management (P.) Ltd. v. Assistant Commissioner of Income-tax (Order dated 05.02.2007 passed by the Mumbai Bench of this Hon'ble Tribunal in ITA No. 3264/Mum/2006) (paras 8.3-8.4 at pages 11-12).

(ix) In the present case, the equipments made available to the Assessee are largely either returned to the AEs/ destroyed by the Assessee, and thus does not

represent any irretrievable benefit being given to the Assessee. The details of the return/destruction are available at pages 119 182 of the paperbook. The Assessee has also filed additional evidence, furnishing further documents demonstrating the same.

(x) Further reliance is placed on the Circular No. 12/2022 dated 16.02.2022 issued by the Central Board of Direct Taxes, providing guidelines for removal of difficulties under Section 194R(2) of the Act. In the context of whether tax at source under Section 194R is required to be deducted (i.e., on benefit / perquisite arising to an assessee) in a case where a product of a manufacturing company is given to a social media influencer for promotion of the product on social media, the CBDT has inter alia clarified that "if the product is returned to the manufacturing company after using for the purpose of rendering service, then it will not be treated as a benefit/perquisite for the purposes of section 194R of the Act. However, if the product is retained then it will be in the nature of benefit/perquisite and tax is required to be deducted accordingly under section 194R of the Act."

12. The ld DR on other hand vehemently argued that the assessee has derived indirect benefit from the import of assets free of cost and hence the provisions of section 28(iv) would get attracted. The ld DR further submitted that considering that the assessee is billing the AEs at cost plus mark up basis, had these assets been bought by incurring cost then the income which is directly linked to the cost would be more to that extent. Therefore the ld DR argued that the income foregone by the assessee by importing the assets free of cost would attract the provisions of section 28(iv) of the Act. The ld DR further argued that these assets have been used in the business of the assessee for testing the software developed and there is definitely a benefit to the assessee which is deriving income from export of such software.

13. We heard the parties and perused the material on record. The Assessee is a captive services provider undertaking software development services exclusively for its AEs. The software development is carried out by the Assessee based on the specific requirements of the AEs, in relation to the

products offered by the Group, such as telecom systems, home and office appliances, computer systems, mobile devices, networking and other similar products. For providing these services, certain articles such as network equipments, printers and accessories, SD cards and data storages are given to the assessee by its AEs for the purpose of testing and calibration of software on to the actual hardware and to check the compatibility of software modules vis-a-vis the existing hardware. These assets are given by the AEs free of cost since the software cannot be tested in third party equipments and as per the submissions of the assessee these assets are either returned are destroyed. It is also submitted that since these assets are testing equipments they cannot be used for the purpose of business by the assessee other than for testing the software. The revenue's contention is that these assets are used for the purpose of the business of the assessee and therefore the assessee is deriving benefit which is to be taxed under section 28(iv) of the Act.

14. It is apposite now to look at the provisions of section 28(iv) before proceeding further –

> ***Profits and gains of business or profession.***
> ***28.*** *The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—*
> *(i) to (iii)* ***
> *(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession*

15. From the plain reading of the section it is clear that if a benefit in the nature of income is arising from business the same shall be taxable under the head profits and gains from business or profession. Therefore the limited question before us is whether import of assets free of cost for testing purposes is a benefit in the nature of income arising from the business of software

development to the assessee. It is relevant to note here the following observations of the Mumbai Bench of the Tribunal in the case of Helios Food Improvers (P.) Ltd. vs DCIT (ITA No.1748/Mum/2003 dated 28.02.2007

> *"16. ****** Further, the words "benefit" or "perquisite" have been used in this sub-section, which have to be read together and would draw colour from each other. Normally, the term "perquisite" denotes meeting out of an obligation of one person by another person either directly or indirectly or provision of some facility or amenity by one person to another person and from the very beginning, the person providing such facilities or concessions knows that whatever is being done is irretrievable to him as it has been granted to a person as a privilege or right of that person. In this view of the matter, the word "benefit" has also to be interpreted in the same manner i.e. at the time of execution of the business transaction, the one party should give to the other party some irretrievable benefit or advantage. ***** We are further of the opinion that provisions of Section 28(iv) can be applied in a number of situations but the bottom-line or crucial fact would always be circumvention of income by taking or receiving income in other forms.***"*

16. Therefore the test for a benefit to be taxed under section 28(iv) as laid down in the above decision is that the benefit should irretrievable and that the benefit is received with an intention to circumvent income. For example a person is selling a product at a discounted price and is getting a gift or other benefit from the purchaser then the value of such gift or benefit is to be treated as business income under section 28(iv) since the benefit received has a direct nexus to the discounted price which is shown as the business income. In the case law relied on by the revenue in the case of Priyanka Chopra (supra) there was a direct nexus to professional services rendered by the said assessee being brand Ambassador of NDTV Toyota Greenathon and the car received by the assessee and therefore the Tribunal held that receipt of car is to be taxed as business income under section 28(iv). Further the benefit extended should be irretrievable in nature i.e. the benefit should be made available to the recipient to be enjoyed / used permanently.

17. In the light of the above legal position, we will now look at the facts in assessee's case here. The assessee received certain equipments free of cost for the purpose of testing the compatibility of the software developed by the assessee in those equipments. It is an undisputed fact that these equipments are either returned or destroyed once the testing is completed (refer relevant observations of the CIT(A) in this regard). Accordingly there is no dispute that the impugned assets are not made available to the assessee permanently to give any benefit of enduring nature as the assets are either returned or destroyed. Further considering the nature of asset and the purpose for which it is imported, there is merit in the contention that these assets in isolation cannot be used for any purpose to derive any benefit since these are testing equipments or prototypes. Now coming to the issue of whether the import of assets free of cost is resulting in a benefit in the nature of income to the assessee, it is relevant to check if the impugned transaction would have otherwise resulted in a benefit in the nature of income to the assessee. The assessee is in the business of providing software development services to its AEs only. The arm's length pricing of the said services have already been tested by the TPO and the dispute on the pricing is resolved through MAP with the competent authorities of India and Korea wherein the cost of indirect benefits received by the assessee should have been embedded while arriving at the margin. Therefore it cannot be alleged that the price charged towards the software development services is reduced/adjusted by the assessee against the benefit of assets imported free of cost to justify addition under section 28(iv) and that the revenue has not brought anything on record to substantiate such a contention. Even assuming that there is nexus between the price charged towards rendering of services and import of assets free of cost the addition in our view could be done through a TP adjustment towards price charged for software development and in assessee's case the price is already agreed under

MAP. Therefore there is no justification for making the addition under section 28(iv) again on the ground that had there been a cost paid towards import of these assets the same would have resulted in increased income to the assessee since the billing is done on cost plus basis.

18. In view of these discussion we are of the view that the AO is not correct in making addition under section 28(iv) of the Act given that the assets imported free of cost for testing purposes are either returned or destroyed by the assessee and that the pricing towards software development services rendered are agreed under MAP.

19. In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 22nd October, 2024.

Sd/-	Sd/-
(George George K.)	**(Padmavathy S.)**
Vice President	**Accountant Member**

Bengaluru, Dated: 22nd October, 2024
n.p.

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT, concerned*
4. *The DR, ITAT, Bangalore*
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By Order

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Assistant Registrar
ITAT, Bangalore