

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(TP)A No. 2521/Bang/2017
Assessment Year : 2012-13

Fulcrum Fund Services (India) Private Limited, Flat No. 102, Aradhana Apartments, Srinivagilu, 2 nd Main Road, S.T. Bed Layout, Koramangala, BANGALORE [PAN: AABCF 1230B]	Vs.	Income Tax Officer, Ward-3(1)(1), BANGALORE
APPELLANT		RESPONDENT

Appellant by	:	Shri Sharath Rao, CA
Respondent by	:	Shri R.N. Siddappaji, Addl.CIT

Date of hearing	:	08-04-2019
Date of Pronouncement	:	12-04-2019

ORDER

Per N V Vasudevan, Vice President :

This is an appeal by the assessee against the order dated 03-10-2017 of the Commissioner of Income Tax (Appeals)-3, Bengaluru, relating to Assessment Year 2012-13.

2. Ground Nos. 1 to 14 raised by the assessee in its appeal are with regard to correctness of the determination of Arm's Length Price

(ALP) in respect of an international transaction of rendering Information and Technology Enabled Services (ITES) by the assessee to its Associated Enterprise (AE). It is not in dispute that the transaction of rendering ITES, in the form of providing back office support for Hedge Fund related financial services to its group companies, is an international transaction and income arising from such transaction has to be determined having regard to the ALP as laid down in Section 92 of the Income Tax Act, 1961 (Act). It is also not in dispute between the assessee and the Revenue that the Profit Level Indicator (PLI) chosen for the purpose of comparing the assessee's profit margin with the comparable companies was Operating Profit on Operating Cost. The assessee's Operating Profit on Operating Cost was 20.53%, which was arrived at the following manner:

<i>Particulars</i>	<i>Amount Rs.</i>
<i>Total Income</i>	<i>28,56,75,746</i>
<i>Less: Other Income</i>	<i>95,30,269</i>
<i>Operating Income</i>	<i>27,61,45,477</i>
<i>Expenditure</i>	<i>23,45,44,482</i>
<i>Less: Provision for doubtful debts & advances</i>	<i>(4,65,764)</i>
<i>Less: Loss on sale of fixed asset</i>	<i>58,91,765</i>
<i>Operating Expenses</i>	<i>22,91,18,481</i>
<i>Operating Profit</i>	<i>4,70,26,996</i>
<i>OP/OC</i>	<i>20.53%</i>

3. The most appropriate method adopted by the assessee and the Revenue for the purpose of determining ALP was the Transactional

Net Margin Method (TNMM). The assessee had chosen 04 comparable companies and based on the Arithmetic Average Mean, profit margin of those 04 companies which was arrived at 17.46% concluded that the assessee's profit margin being higher than that of the comparable companies, the price received by the assessee in the international transaction was at arm's length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the Assessing Officer, rejected all the 04 comparable companies chosen by the assessee. He chose a set of 10 comparable companies, whose Arithmetic Mean, was 28.11% which was arrived at as follows:

<i>Sl. No.</i>	<i>Name of the case</i>	<i>Operating Income</i>	<i>Operating Cost</i>	<i>OP/OC</i>
1	<i>Accentia Technologies Ltd.,</i>	<i>126,38,02,000</i>	<i>112,89,16,000</i>	<i>11.75</i>
2	<i>Universal Print Systems Ltd (Seg)(BPO)</i>	<i>6,17,67,000</i>	<i>3,87,49,000</i>	<i>52.46</i>
3	<i>Informed Technologies India Ltd.,</i>	<i>1,96,36,431</i>	<i>1,82,45,770</i>	<i>6.08</i>
4	<i>Infosys BPO Ltd.,</i>	<i>1316,75,11,974</i>	<i>962,91,06,964</i>	<i>36.30</i>
5	<i>Jindal Intellicom Ltd.,</i>	<i>30,27,51,875</i>	<i>30,29,02,990</i>	<i>-0.05</i>
6	<i>Microgenetic systems Ltd</i>	<i>1,29,93,217</i>	<i>1,08,63,390</i>	<i>19.61</i>
7	<i>TCS E-Serve Ltd.,</i>	<i>15,78,44,000</i>	<i>9,64,28,000</i>	<i>63.69</i>
8	<i>BNR Udyog Ltd (Seg)(Medical Transcription)</i>	<i>1,47,04,000</i>	<i>97,87,000</i>	<i>41.58</i>
9	<i>Excel Infoways Ltd (Seg)(IT/BVPO)</i>	<i>790,96,95,000</i>	<i>559,06,04,000</i>	<i>29.79</i>
10	<i>e4e Healthcare Services Pvt Limited</i>	<i>89,50,04,209</i>	<i>74,59,23,078</i>	<i>19.85</i>
	<i>Average PLI</i>			<i>28.11%</i>

4.1. Based on the above comparable companies and their profit mean and after giving working capital adjustment of (-)3.25%, the TPO arrived at an addition to be made to the total income on account of determination of ALP at a sum of Rs. 2,48,24,560/-, which was arrived at in the following manner:

12.4. Computation of Arm's Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. Please see Annexure B for details of computation of PLI of the comparables. Based on this, the arm's length price of the services rendered by the taxpayer to its AE(s) is computed as under:

IT ENABLED SERVICES

<i>Arm's Length Mean Margin on cost</i>	<i>28.11%</i>
<i>Less: Working Capital Adjustment</i>	<i>-3.25%</i>
<i>(As per Annex.C)</i>	
<i>Adjusted margin</i>	<i>31.36%</i>
<i>Operating Cost</i>	<i>2291,18,481</i>
<i>Arms Length Price (ALP)</i>	<i>3009,70,037</i>
<i>131.36% of Operating Cost</i>	
<i>Price Received</i>	<i>2761,45,477</i>
<i>Shortfall being adjustment u/s. 92CA:</i>	<i>248,24,560</i>
<i>5% of price received</i>	<i>138,07,274</i>
<i>Since the shortfall is exceeding 5% of the International Transaction, adjustment is made</i>	

The above shortfall of Rs. 248,24,560/- is treated as transfer pricing adjustment u/s.92CA in respect of ITES segment of the taxpayer's international transactions".

4.2. Aggrieved by the aforesaid addition made by the Assessing Officer, consequent to determination of ALP, the assessee filed an appeal before the CIT(A).

5. The CIT(A) upheld the order of TPO regarding choosing of comparable companies.

5.1. With regard to allowing negative working capital adjustment, the CIT(A) held that the negative working capital adjustment done by the TPO was not proper. As a result, the Arithmetic Average Mean on profit margins, which was arrived at TPO at 31.36% stood reduced to 28.11% [28.11 + (-)3.25%, towards negative working capital = 31.36%].

5.2. Aggrieved by the order of Ld.CIT(A) in upholding the comparables chosen by the TPO, assessee has preferred an appeal before the Tribunal.

6. At the time of hearing of the appeal, Ld.counsel for the Assessee pressed for adjudication of only Ground No. 5, which reads as under:

Gr.No. 5: The learned AO/learned TPO/Hon'ble CIT(A) erred in not applying the upper limit on turnover while selecting the comparable companies.

7. As far as Ground No. 5 is concerned, the same is with reference to application of the turnover filter. The TPO while choosing comparable companies, applied a filter whereby he excluded companies, whose turnover was less than Rs. 1 Crore, as companies which have to be regarded as small, compared to the turnover of the assessee, which was Rs. 27.61 Crores. The assessee's contentions for the CIT(A) was that - *when a lower turnover limit is applied for*

selecting companies, higher turnover limit or upper limit should also be applied. This argument was rejected by the TPO for the reason that in a decision rendered by the ITAT, Bangalore Bench in the case of Societe General Global Solution Centre P. Ltd., Vs. DCIT in IT(TP) Appeal No. 1188/Bang/2011, order dt. 22-04-2016, it was held that – *turnover is not a relevant criteria by following the decision rendered by the ITAT, Mumbai in the case of Willis Processing Services (I) (P) Ltd., Vs. DCIT (2013) [30 taxmann.com 350] (Mum-Trib).* The CIT(A) also placed reliance on the decision of the ITAT, Mumbai rendered in the case of Symantec Software Solutions (P) Ltd., Vs. ACIT (2011) [11 taxmann.com 264] (Mumbai), wherein it was held that *when the assessee is not able to make out a case as to how high or low turnover has influenced operating margin, then, a comparable cannot be rejected solely on the basis of high turnover.*

7.1. Ld. Counsel for the assessee brought to our notice a decision rendered by the ITAT, Bangalore Bench in the case of DCIT Vs. M/s. Northern Operating Services in IT(TP)A No. 101/Bang/2016 for the AY. 2011-12, dt. 15-02-2019, wherein the Hon'ble Tribunal after noticing several conflicting decisions on the point of application of turnover filter, came to the conclusion that *high turnover or low turnover is a relevant criterion for excluding companies as comparable companies.*

7.2. Ld. DR relied on the order of the Ld.CIT(A).

7.3. We have given a careful consideration to the rival submissions. The Bangalore Bench of the ITAT had an occasion to deal with an identical issue in the case of DCIT Vs. M/s. Northern Operating Services (supra), wherein the Tribunal came to the conclusion that – *turnover was relevant criteria in choosing comparable companies and that a company, whose turnover is more than Rs. 200 Crores, cannot be compared with the company, whose turnover is less than Rs. 200 Crores.* In Coming to the aforesaid conclusion, the Tribunal relied on the decision rendered by the ITAT, Bangalore Bench in the case of Autodesk India P. Ltd., Vs. DCIT (2018) [96 taxmann.com 263] (Bangalore-Trib) reviewing all the conflicting decisions on the point, and concluding that the application of turnover filter still holds good and has not been in any manner diluted by the decision of Hon'ble Karnataka High Court in the case of M/s. Acusis Software (I) Pvt. Ltd., Vs. ITO in ITA No. 223/2017, dt. 14-08-2018, following the relevant observations of the Tribunal, held as under:

“11. Aggrieved by the aforesaid addition made by the AO, the assessee filed objections before the DRP. In its objections, the assessee pointed out that the TPO applied the following filters in the TP study:-

“Companies whose ITeS service income < 1 cr. were excluded

“By taking companies whose income is less than Rs.1 crore, the analysis may not lead to a proper comparability as these companies may not be representing the industry trend. Moreover their low cost/sales base makes their results unreliable.”

12. *The assessee submitted that the TPO having chosen lower turnover filter ought to have excluded companies whose turnover was less than Rs.200 crores. The assessee submitted that in the software industry, there was classification of three categories viz., (i) companies with less than*

Rs.200 crores being categorised as small companies, (ii) companies with more than 200 crores, but less than 2000 crores being categorised as medium companies; and (iii) companies with above Rs.2000 crores being categorised as large size companies. The assessee pleaded that companies with less than Rs.200 crores turnover should be excluded as assessee's turnover was in the range of Rs.328 crores being a medium size company.

13. On the above objection, the DRP accepted the stand of the assessee observing as follows:-

“3.1 One of the objections of the assessee is that the TPO has not considered the turnover and size of the comparables selected by it. Similar objection was raised by the assessee for AY 2010-11 before DRP and in its order DRP had followed the decision of Hon'ble Bangalore ITAT in the case of Genisys Integrating Systems (ITA No. 1231(Bang)/2010) where a guideline in the matter of turnover filter was suggested and that the categorization of software companies in the Dun & Brad Street Study be adopted as a method of classification of companies by size. According to this study, 3 categories of firms were identified i.e. small with turnover less than Rs.200 crore, 'medium' with turnover Rs.200 to Rs.2000 crore and 'large' with turnover greater than Rs.2,000 crore. On this issue a detailed finding has been given by the TPO in his order, justifying that there is no correlation between high turnover and profit margins of a company. Further, the ITAT Mumbai in the case of the Capgemini India Pvt Ltd vs ACIT (ITA No. 7861/Mum/2011 for AY 2007-08) had held that the concept of economy of scale cannot be applied to service delivering companies and that there is no empirical evidence to suggest that margins are related to turnover. However, following the decision of the jurisdictional ITAT, the objection of the assessee is accepted. The taxpayer company would fall in the category of a 'medium' sized firm, as per the Dun & Brad Street categorization. Companies with a turnover lower than Rs 200 crore and higher than Rs. 2000 crores, therefore, should be excluded from the comparability analysis.”

14. Aggrieved by the aforesaid order of DRP, the revenue has raised ground Nos.3 & 4 before the Tribunal.

15. The Id. DR submitted that the Hon'ble High Court of Karnataka in the case of M/s. Acusis Software (I) P. Ltd. V. ITO in ITA No.223/2017, judgment dated 14.08.2018, has taken the view that if the turnover of a comparable company is less or more than 10 times the turnover of the assessee, then it cannot be considered as a comparable company. The Id. DR drew our attention to the turnover of 10 comparable companies which is as follows:-

Sl.no	Name of the case	Operating income	Operating cost	OP/OC
1	Accentia Technologies Ltd.	1,069,026,524	82,93,91,898	28.89%
2	Acropetal Technologies	494,399,332	389706574	26.86%
3	Cosmic Global Ltd.	62,496,615	5,69,15,360	9.81%
4	e4e Healthcare(capitaline)	613,160,587	54,56,25,872	12.38%
5	I C R A Online Ltd.(seg)	156,691,000	11,67,49,267	34.21%
6	Jeevan scientific technology Ltd	1,721,400,000	1,00,86,52,592	70.66%
7	Infosys B P O Ltd.	11,291,147,909	9,57,73,24,546	17.89%
8	Jindal Intellicom (capitaline)	390,358,799	35,12,69,641	11.13%
9	Mindtree Ltd (seg)	5,653,000,000	5,10,39,05,999	10.76%
10	iGate Global solutions Ltd	11,845,540,000	9,47,11,65,000	25.07%
Average Margin				24.77%

He submitted that if such criterion is applied, then that would be the proper basis for excluding companies for the purpose of comparability based on turnover.

16. The Id. Counsel for the assessee, on the other hand, submitted that the Hon'ble High Court of Karnataka in the case of Acusis Software (I) P. Ltd. (supra) merely dismissed the appeal of assessee on the ground that no substantial question of law arises for consideration. In particular, he drew our attention to the following paragraphs of the judgment of Hon'ble High Court:-

“14. The findings of the learned Tribunal as regards the comparable namely, **Mercury Outsourcing Management Ltd.**, which too have been excluded by the Tribunal are quoted below for ready reference:-

“(ii) Mercury Outsourcing Management Ltd.

13.1 The learned Authorised Representative has submitted that the TPO has rejected this company on

the similar reasoning of diminishing revenue and abnormal cost.

13.2 On the other hand, the learned DR has submitted that this company is incurring persistent losses and further **the turnover of this company is less than Rs.1 Crore and therefore it does not satisfy the filter of turnover applied by the TPO.**

13.3 We have considered the rival submissions as well as the relevant material on record. At the outset, we note that turnover of **this company in the ITES segment is only Rs.45.33 lakhs** which in any case does not satisfy any filter of turnover in comparison to the **assessee's turnover more than Rs.27 Crores**. Even if we apply the tolerance range of turnover of 10 times on both sides of the assessee's turnover then the company which is having less than Rs. 2.7 Crores of turnover will be outside the said range of 10 times. Accordingly, we are of the view that this company which is having only Rs. 45.33 lakhs turnover cannot be considered as a good comparable to the assessee”.

15. From the aforesaid findings of the learned Tribunal, we are satisfied that the reasons assigned by the learned Tribunal in excluding the aforesaid company as comparable is also reasonable and the same deserves to be accepted by us. It is analysed by the learned Tribunal in extenso which arrived at a decision that the company which is having only Rs.45.33 lakhs turnover cannot be considered as comparable to the Assessee-company whose turnover is more than Rs.27 Crores.

16. The decision of the learned Tribunal in the other cases referred to by the learned counsel for the Appellant-Assessee would not render the findings of the learned Tribunal in the present case nugatory or perverse for the reason that analyzing of the comparables may be in a different context and the same need not be blindly or generally adopted in all cases, irrespective of the context or the circumstances calling upon for the inclusion/exclusion of the comparables which absolutely is a decision to be taken by the learned Tribunal as last fact finding

authority. This view is supported by our judgment dated 25.08.2018 on Softbrands case (supra), which we find it appropriate to quote hereunder to its relevant extent:-”

17. He submitted that the question of law which the assessee sought to raise before the Hon'ble High Court was justification for excluding Mercury Outsourcing Management Ltd. as a comparable company. It is in that context that the aforesaid decision was rendered by the Hon'ble High Court. He pointed out that the Tribunal in excluding Mercury Outsourcing Management Ltd., had taken a view that its turnover was small compared to the assessee's turnover and therefore not comparable, even if the tolerance range of turnover of 10 times on both the sides of assessee's turnover is applied. There is no positive finding by the Tribunal that the company can be excluded for the purpose of comparability on the basis of turnover, only if the turnover is 10 times on both the sides of assessee's turnover. On the conclusions of the Tribunal, the Hon'ble High Court only held that it is reasonable and deserves to be accepted. In para 16, the Hon'ble High Court has clearly observed that the decisions rendered in other cases referred to by the Id. Counsel for the assessee would not render the findings of the Tribunal in the case before the High Court as negatory or perverse for the reason that analysing of the comparables may be in a different context. The same need not be blindly or generally adopted in all the cases, irrespective of the context or circumstances calling for exclusion/inclusion of the comparables. The finding in each case is therefore a finding of fact. He pointed out that the Tribunal in the case of Autodesk (I) P. Ltd. v. DCIT [2018] 96 taxmann.com 263 [Bang. Trib.] after analysing the entire cases on the point, came to the conclusion that the decision rendered by the Tribunal in the case of Genesis Integrated Systems (I) P. Ltd. [2012] 53 SOT 159 lays down the correct law on the application of turnover filter and that decision has to be followed. He pointed out that the DRP in the present case has followed the ruling in the case of Genesis Integrated Systems (I) P. Ltd. (supra) and therefore the order of DRP has to be upheld.

18. We have given a careful consideration to the rival submissions and are of the view that as rightly submitted by the Id. Counsel for the assessee, the decision rendered by the Hon'ble High Court of Karnataka in the case of Acusis Software (I) P. Ltd. (supra) does not positively say that for a company to be excluded on the basis of high turnover, the tolerance range of turnover of 10 times on both the sides of assessee's turnover has to be seen. Even the Tribunal in the order against which the appeal was filed, did not proceed on application of turnover filter with any such condition. Therefore, it is not correct to say that for application of turnover filter, tolerance range of turnover of 10 times on both the sides of

assessee's turnover has been laid down by the Hon'ble High Court. The Hon'ble High Court held that the order of Tribunal is correct and calls for no interference and further held that no question of law arose for consideration. The decision rendered in the case of Autodesk (I) P. Ltd. (supra) of the Tribunal after analysing every conflicting views has ultimately concluded that the law laid down in the case of Genesis Integrated Systems (I) P. Ltd. (supra) has to be followed. The following were the relevant observations of the Tribunal:-

“17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on

comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genesis Integrating (supra).”

19. *In the given facts and circumstances of the case, we find no grounds to interfere with the order of DRP on this issue. Consequently, ground Nos.4 & 5 raised by the revenue are dismissed as without any merit”.*

7.3.1. The sum and substance of the conclusion of the ITAT in the passage quoted above is that the decision rendered by the Tribunal in the case of Genesis Integrated Systems (I) P. Ltd. (2012) [53 SOT 159] lays down the correct law on the application of turnover filter and that decision has to be followed. In the decision rendered in the case of Genesis Integrates Systems (I) Pvt.Ltd., it has been held that companies with turnover of above Rs.200 crores cannot be compared with companies with turnover of less than Rs.200 Crores. In view of the aforesaid decision of the Tribunal, we hold that the CIT(A) erred in not accepting the claim of assessee for excluding of companies, whose turnovers were more than Rs. 200 Crores and those companies remain un-comparable with assessee, because assessee’s turnover was only Rs. 27.61 Crores. The 02 companies which would stand excluded by the application of turnover filter from the set of 10 set of companies chosen by the TPO are – (i) M/s. Infosys BPO Limited, whose turnover is Rs.1312 Crores and (ii) TCS E-Serve Limited, whose turnover is Rs.1578.40 Crores. Accordingly, we hold that the aforesaid two companies should be removed from the list of comparable companies.

The TPO is directed to compute the average Arithmetic Mean profit of the comparable companies chosen by the TPO, after excluding the aforesaid two companies.

7.4. In the result, Ground No. 5 raised by assessee is allowed.

8. Ground No. 15, raised by the assessee in the appeal reads as follows:

Gr.No.15: Disallowance of provision for professional fees – Rs. 8,11,455

The learned AO/learned CIT(Appeals) has erred in disallowing Rs. 8,11,455 being payment towards professional fees considering the same as contingent and on account of non-deduction of taxes at source on such payments.

The learned CIT(Appeals) has erred in upholding the action of the AO by mentioning that no specific ground was raised by the appellant. The learned CIT(Appeals) ought to have appreciated that appellant in its ground of appeal no 2.2 raised before CIT(Appeals) had clearly mentioned that learned AO erred in not appreciating the fact that liability towards professional fees was created based on past year's experience. However, since the exact amount was not ascertained at the end of the year, the appellant was under the bonafide belief that tax on the same is not deductible.

The learned AO/learned CIT(Appeals) has erred in not appreciating the fact that the appellant had provided for liability towards professional fees amounting to Rs. 8,11,455 based on the past years' experience and therefore the same was not contingent in nature.

Further, the learned AO/learned CIT(Appeals) has erred in not appreciating the fact that the same has been reversed in the books of account in the subsequent year with actual amount and appropriate taxes on the same was duly deducted and deposited. Hence, the year-end provision made for professional fees should not be added back in the computation of income.

8.1. As far as Ground No. 15 is concerned, the facts are – Assessing Officer noticed that the assessee has paid a sum of Rs. 8,11,455/- towards Professional Fees, on which TDS had not been deducted. Assessing Officer wanted to disallow the aforesaid payment on the ground that the said sum cannot be claimed as expenditure for failure to deduct TDS and as per the provisions of Section 40(a) of the Act.

8.2. The assessee filed a reply in response pointing out that the amount claimed by way of Professional Fee was a provision and therefore, no TDS was made. Thereupon, the Assessing Officer held that while computing income from business, expenses which are purely contingent in nature and which are mere provisions, cannot be allowed as a deduction. Accordingly the sum of Rs. 8,11,455/- was disallowed and added to the income of assessee.

8.3. Before the CIT(A), the assessee contended that the provisions of Section 40(a) cannot be invoked, where the assessee has merely made a provision in the books of account. This argument was rejected by the CIT(A) by following the decision of the Bangalore Bench of ITAT in the case of M/s. Bosch Limited Vs. ITO in ITA No. 1583/Bang/2014, dt. 01-03-2016, wherein it was held that – *even in respect of a provision made in the books of account, TDS has to be effected.* On the question whether the expenditure was contingent in nature, CIT(A) found no material to show that the liability-in-question has crystallised. He therefore upheld the order of Assessing Officer.

8.4. Ld. Counsel for the assessee reiterated the contentions as appearing in the grounds of appeal (No.15) raised before the Tribunal on this issue. These contentions in the grounds of appeal are identical to the contentions put forth before the CIT(A).

8.5. We are of the view that in the absence of material to show that the liability-in-question was not contingent and had crystallised, this Tribunal has no other option to uphold the order of the CIT(A). Accordingly, the order of CIT(A) is upheld and Ground No. 15 raised by the assessee is dismissed.

9. Ground No. 16, raised by the assessee in the appeal reads as follows:

Gr.No.16: Disallowance of forex loss

The learned AO/learned CIT(Appeals) has erred in disallowing the forex loss amounting to Rs. 43,40,156 treating it as a prior period expenditure.

The learned AO/learned CIT(Appeals) erred in not appreciating the fact that the forex loss was on account of change in accounting method for accounting of forex gain/loss arising on account of inter-company foreign currency Receivables/Payables.

The learned AO/learned CIT(Appeals) erred in not appreciating that change in accounting policy was based on the auditors opinion and therefore if forex loss is disallowed in subsequent year due to change in accounting policy, the appellant would be put to undue hardship and taxes on the same would be unjust.

9.1. As far as Ground No. 16 is concerned, the 'Forex Loss' which was disallowed by the Assessing Officer is admittedly a Forex Loss relating to AY. 2011-12. The only reason why it was claimed as

deduction in AY. 2012-13 is that new auditors were appointed and they expressed the opinion that Forex Loss worth Rs. 43,40,156/- which ought to have been claimed as loss in AY. 2011-12 was omitted to be claimed and therefore should be claimed in the AY. 2012-13.

9.2. This claim was rightly rejected by the Assessing Officer on the basis that prior period losses cannot be allowed as a deduction in a case where the assessee follows Mercantile Systems of Accounting. It is only loss which accrues and arises to an assessee for the period relevant to the previous year relevant to the AY. 2012-13 that can be allowed as a deduction. We are of the view that no fault can be found in the order of CIT(A). Consequently, Ground No. 16 raised by assessee is dismissed.

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

Pronounced in the open court on this 12th day of April, 2019

Sd/-
(JASON P. BOAZ)
ACCOUNTANT MEMBER

Sd/-
(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 12th April, 2019.

/TNMM/

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore