

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**(THROUGH VIDEO CONFERENCE)**

**ITA No.6169/Del./2012  
(Assessment Year : 2008-09)**

ST Microelectronics Pvt. Ltd.,  
D – 28, South Extension Part – I,  
New Delhi – 110 049.

vs. DCIT, Circle 9 (1),  
New Delhi.

**(PAN : AAACS3406M)**

**(APPELLANT)**

**(RESPONDENT)**

ASSESSEE BY : Shri Ajay Vohra, Senior Advocate  
Shri Neeraj Jain, Advocate  
Shri Ramit Katyal, CA

REVENUE BY : Shri Anupam Kant Garg, CIT DR

**Date of Hearing : 26.08.2020**

**Date of Order : 28.09.2020**

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

Appellant, ST Microelectronics Pvt. Ltd. (hereinafter referred to as the 'taxpayer') by filing the present appeal sought to set aside the impugned order dated Nil passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961

(for short 'the Act') qua the assessment year 2008-09 on the modified grounds inter alia that :-

***“1. That the impugned order of assessment framed by the assessing officer in pursuance of the directions of the Dispute Resolution Panel (hereinafter referred to as 'DRP') under Section 143(3) read with Section 144C of the Income-tax Act, 1961 (Act), is bad in law, violative of principles of natural justice and void ab-initio.***

***1.1 That the assessing officer erred on facts and in law in passing order under section 143(3) read with Section 144C of the Act at an income of Rs.65,87,47,850 as against returned income of Rs.29,67,61,748.***

***2. That the assessing officer erred on facts and in law in making an adjustment of Rs.33,01,81,949 to the arm's length price of the 'international transactions' of provision of software development services undertaken with the associated enterprise on the basis of order passed by the Transfer Pricing Officer ('TPO')/ Dispute Resolution Panel ('DRP').***

***2.1 That the assessing officer erred on facts and in law in rejecting the use of multiple year data for the purpose of undertaking benchmarking analysis***

***2.2 That the DRP/TPO erred on facts and in law in resorting to cherry picking and considering following companies in the final set of comparable companies allegedly holding them to be functionally comparable to the assessee:***

- (i) Goldstone Technologies Ltd.***
- (ii) Tata Elxsi Limited***
- (iii) Helios & Matheson Information Technology Ltd***
- (iv) Sasken Communications Technologies Ltd.***
- (v) Lanco Global Systems Ltd***
- (vi) Persistent Systems Ltd.***
- (vii) Infosys Technologies Ltd***
- (viii) Kals Information Systems Ltd.***
- (ix) Larsen and Toubro Infotech Ltd ..***

***2.3 That the DRP/TPO erred on facts and in law in not appreciating that the aforesaid companies do not satisfy the test of comparability as provided in rule 10B(2) of the income tax rules and therefore are liable to be rejected from the set of comparable companies.***

***2.4 That the DRP/TPO erred on facts and in law in incorrectly rejecting PSI data systems Ltd. allegedly on the basis***

*of high related party transactions not appreciating that the company has related party transaction of less than 25% sales.*

*2.5 That the DRP/TPO erred on facts and in law in rejecting Indium Software Ltd. on the basis that it is engaged in software testing services and therefore cannot be regarded as an appropriate comparable*

*2.6 That the DRP/TPO erred on facts and in law in rejecting VMF Softech Ltd on the basis that the company was not proposed as comparable by the appellant before the TPO.*

*2.7 That the DRP/TPO erred on facts and in law in rejecting companies on the basis of declining sales not appreciating that decrease in sales is not reflective of the functional profile of a company and is therefore not a relevant criteria for the purpose of examining the functional comparability of a company in terms of Rule 10B(2).*

*2.8 That the DRP/TPO erred on facts and in law in rejecting Maars International Software Ltd. from the set of comparable companies.*

*2.9 That the assessing officer/TPO erred on facts and in law in not allowing appropriate working capital adjustment to account for the differences in the working capital position of the appellant and the comparable companies selected by the TPO*

*2.10 That the assessing officer/TPO erred on facts and in law in not allowing appropriate risk adjustment to account for the differences in the risk profile of the appellant, a low risk captive service provider and the comparable companies selected by the TPO.*

*3. That the assessing officer erred on facts and in law in disallowing expenditure incurred on rent for software licenses of Rs 3,40,08,682 holding such rent to be of capital nature.*

*4. That the assessing officer erred on facts and in law in disallowing expenditure amounting to Rs.1,82,00,680 incurred on training holding such expenditure to be of capital nature.*

*5. That the assessing officer erred on facts and in law in not following the directions of the DRP by not allowing deduction under section 10B of the Act on the enhanced income of the appellant.*

*6. That the assessing officer erred on facts and in law in levying interest under section 234A and 234B of the Act.*

7. *That the facts of the case and in law, the Ld. AO has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.”*

2. Briefly stated the facts necessary for adjudication of the issue at hand are : ST Microelectronics Pvt. Ltd. (STMI, India), the taxpayer, is a subsidiary of ST Microelectronics Pte. Ltd. (ST Singapore) which in turn is a wholly owned subsidiary of ST Microelectronics NV, Netherlands. The taxpayer is into the business of Integrated Circuit Design, CAD Tools and software development for its overseas group concerns. It also provides marketing support services to a group company. The taxpayer is also engaged in software development services related to design implementation and maintenance with respect to Integrated Circuits as required by guidelines/instructions. During the year under assessment, the taxpayer entered into international transactions with its Associated Enterprises (AE) as under :-

<i>S. No.</i>	<i>Nature of transaction</i>	<i>Method used by assessee</i>	<i>Value of transaction (in Rupees)</i>
1.	<i>Provision of Software Development Services</i>	<i>TNMM</i>	<i>3,438,123,129</i>
2.	<i>Provision of Marketing Support Services</i>	<i>TNMM</i>	<i>50,102,358</i>
3.	<i>Import of Equipments</i>	<i>TNMM</i>	<i>23,397,292</i>
4.	<i>Export of Equipments</i>	<i>-</i>	<i>250,371</i>
5.	<i>Distribution of free samples</i>	<i>-</i>	<i>-</i>
6.	<i>Purchase of Shares under ESOP</i>	<i>-</i>	<i>39,147,048</i>
7.	<i>Provision made in respect of ESOP</i>	<i>TNMM</i>	<i>12,665,699</i>
8.	<i>Reimbursement of expenses</i>	<i>CUP</i>	<i>12,872</i>

3. The taxpayer in order to benchmark its international transactions qua provision of software development services and qua provision of marketing support services used Transactional Net Margin Method (TNMM) with Operating Profit/Operating Cost as the Profit Level Indicator (PLI) being the Most Appropriate Method (MAM), computed its own margin at 11.11% as against weighted average arithmetic mean margin of 19 comparables at 11.31% and found its international transactions at arm's length.

4. Ld. Transfer Pricing Officer (TPO) by applying qualitative and quantitative filters finally selected 13 comparables and computed their margin at 23.20% and thereby computed the adjustment of Rs.38,30,91,011/-.

5. The taxpayer carried the matter before the Id. Disputes Resolution Panel (DRP) by way of filing objections who has excluded one comparable and included another comparable in the final list and recomputed the margin of Kals Information Systems Ltd. at 30.88% and consequently margin of comparable company comes down to 21.53%. Ld. TPO after giving effect to the Id. DRP's order revised the adjustment at Rs.33,01,81,949/-. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the Revenue authorities below in the light of the facts and circumstances of the case.

**GROUND NO.1**

7. Ground No.1 is general in nature and does not require specific adjudication.

**GROUNDS NO.2 TO 2.10**

8. Undisputedly, Id. TPO in order to benchmark the international transactions qua software development services accepted TNMM with OP/OC as PLI as the Most Appropriate Method (MAM) applied by the taxpayer. After giving effect to the directions issued by the Id. DRP, final set of comparable companies with mean margin of 21.53% is as under :-

<i>S. No.</i>	<i>Name of the Company</i>	<i>OP/OC (%)</i>
<i>1.</i>	<i>Helios &amp; Matheson Technologies Ltd</i>	<i>36.05</i>
<i>2</i>	<i>Persistent Systems Ltd</i>	<i>27.06</i>
<i>3</i>	<i>Tata Elxsi Ltd</i>	<i>18.98</i>
<i>4</i>	<i>Infosys Technologies Limited</i>	<i>39.84</i>
<i>5</i>	<i>Kals Information Systems Limited</i>	<i>30.88</i>
<i>6</i>	<i>Goldstone Technologies Ltd.</i>	<i>17.56</i>
<i>7</i>	<i>Lanco Global Systems Ltd.</i>	<i>25.97</i>
<i>8</i>	<i>Mindtree Consulting Ltd.</i>	<i>14.13</i>
<i>9</i>	<i>RS Software Ltd</i>	<i>6.29</i>
<i>10</i>	<i>R Systems International Ltd</i>	<i>16.87</i>
<i>11</i>	<i>Sasken Communication Technologies Ltd</i>	<i>20.16</i>
<i>12</i>	<i>Larsen &amp; Toubro Infotech Limited</i>	<i>17.90</i>
<i>13</i>	<i>Prithvi Information Solutions Ltd</i>	<i>8.20</i>
	<i>Mean</i>	<i>21.53</i>

9. Consequently, Id. TPO proposed transfer pricing adjustment on account of provision of software development services as under:-

<i>Particulars</i>	<i>Amount</i>
<b><i>Operating Cost</i></b>	<b><i>3,168,207,308</i></b>
<b><i>Arm's Length margin</i></b>	<b><i>21.53%</i></b>
<b><i>Arm's Length margin</i></b>	<b><i>682115033.4</i></b>
<b><i>Arm's Length price</i></b>	<b><i>3,850,322,341</i></b>
<b><i>Price Charged by assessee</i></b>	<b><i>3,520,140,392</i></b>
<b><i>Difference for which adjustment is required to be made</i></b>	<b><i>330,181,949</i></b>

10. Ld. AR for the taxpayer challenging the impugned order passed by the AO/DRP/TPO now compressed the controversy to the extent of seeking exclusion of five comparables to bring the taxpayer to home viz. *Helios & Matheson Information Technology Ltd., Tata Elxsi Ltd., Infosys Technologies Ltd., Persistent Systems Ltd. and Kals Information Systems Ltd.* We would discuss the suitability of aforesaid comparables vis-à-vis the taxpayer one by one as under.

**HELIOS & MATHESON INFORMATION TECHNOLOGY LTD. (HELIOS & MATHESON)**

11. The taxpayer sought exclusion of Helios & Matheson as a comparable on the grounds inter alia that it is functionally dissimilar; that it has low employee cost and high software services & development expenses; that it is into brand development and on

the ground that this comparable was ordered to be excluded by the Tribunal in **taxpayer's own case in AY 2007-08 in ITA No.4888/Del/2011**, copy available at pages 2128 to 2141 of the case law paper book vol.6.

12. Perusal of the annual report, available at pages 993/997 of the Paper Book Vol.3, shows that Helios & Matheson has income of Rs.213.37 crores from software sales and services but, in the Notes to Accounts to the companies, it is recorded that there is no segmental information available. Furthermore, information given at page 942 of the Paper Book Vol.3 shows that Helios & Matheson is into providing cutting edge solutions in the health care and IT vertical segment.

13. The disclosure made by Helios & Matheson in its financials, available at page 993 of the Paper Book Vol.3, shows that it has incurred Rs.2.83 crores towards staff welfare which amounts to 1.30% of the sales whereas the TPO has applied filter of employee cost less than 25% for selection/rejection of the comparables. At the same time, Helios & Matheson disclosed software services and development expenses to the tune of Rs.120.18 crores which constituted 55% of the revenue of the company. Furthermore, Helios & Matheson has incurred an amount of Rs.6.71 crores

towards Advertisement, Marketing & Promotion (AMP) expenses which is more than 3% of the sales of this company.

14. Ld. DR for the Revenue supported the order passed by the TPO/DRP qua retention of Helios & Matheson and drew our attention to para 8.16 at page 65 on the ground that this comparable has not been objected to by the taxpayer. However, we are of the considered view that since there is no estoppel against the statute if some wrong legal position has been enunciated at any point of the proceedings, the same can be rectified by the taxpayer at any stage. Moreover, the taxpayer has taken specific objection for exclusion of Helios & Matheson before the DRP as is evident from para 11 at page 10 of the DRP order.

15. Coordinate Bench of the Tribunal in **taxpayer's own case in AY 2007-08** (supra) rejected Helios & Matheson by returning following findings :-

*“11. We have heard the rival contentions and gone through the annual report of this company. We noted that though the ld. AR did not controvert the contentions raised by ld. DR, but we find ourselves in agreement with the contentions of the assessee that this company is primarily engaged in sale of software products. It is a settled position that a company engaged in development and sale of software products cannot be compared with a software service provider. This company has been excluded on this basis by the Hon'ble Bombay High Court in CIT vs PTC Software India Pvt Ltd (ITA No 732/2014) and the Delhi Bench of the Tribunal in Toluna India Pvt. Ltd. vs. ACIT (ITA No. 5645/Del/2011) (for the same assessment year i.e. AY 2007-08). Accordingly, we direct the exclusion of this company from the final set of comparables.”*

16. So, in view of the matter, we are of the considered view that on account of functional dissimilarity, Helios & Matheson being into software sales and services with no segmental information is available, on account of low employee cost, high software service & development expenses and has incurred 3% of its sales towards AMP expenses is not a suitable comparable vis-à-vis the taxpayer which is a routine software development service provider working on cost plus model and a risk insulated entity, hence ordered to be excluded.

**TATA ELXSI LTD. (TATA ELXSI)**

17. The taxpayer sought exclusion of Tata Elxsi on ground of functional dissimilarity and having benefit of Tata brand. Perusal of annual report, available at page 1492 of the paper book, shows that it is engaged in specialized and niche domain of software products/services. In the Director's Report of this company, it is also recorded that it is into product design services, innovation design engineering, and visual computing labs. Furthermore, Tata Elxsi is having benefit of a big brand being part of the Tata group.

18. Ld. DR for the Revenue relied upon the orders of the AO/DRP/TPO.

19. Coordinate Bench of the Tribunal in the taxpayer's own case for AY 2007-08 (*supra*) rejected Tata Elxsi as a comparable on the ground of its functional dissimilarity. So, we are of the considered view that Tata Elxsi is not a suitable comparable on account of functional dissimilarity being into software product design services, innovation design engineering and visual computing labs and on account of part of the Tata group having benefits/returns of Tata brand vis-à-vis the taxpayer who is a captive routine software development service provider working on cost plus model as a risk insulated entity, hence ordered to exclude the Tata Elxsi from the final set of comparables.

**INFOSYS TECHNOLOGIES LTD. (INFOSYS)**

20. The taxpayer sought exclusion of Infosys on the grounds inter alia that it is functionally dissimilar; that it has significant brand value and that it has significant high turnover. Ld. AR for the taxpayer further contended that Infosys has been excluded by the ld. CIT (A) in taxpayer's own case for AY 2011-12.

21. Perusal of the functional profile of Infosys, copy of annual report available at pages 1545 – 1696 of Annual Report Paper Book, shows that Infosys is into providing end to end business solution to its clients including consulting, design, custom

application, software reengineering, maintenance, systems integration, etc.. It is also providing financial services, manufacturing, telecommunications, retail, utility, logistics and other industries to its clients. Perusal of the annual report at page 1677 of the paper book shows that Infosys has brand value of Rs.31,863 crores which itself shows the value of intangibles; Infosys is also having high turnover for AY 2008-09 of Rs.15,648 crores, as is evident at page 1611 of the paper book, as against turnover of taxpayer of Rs.343 crores.

22. Ld. DR for the Revenue by relying upon para 8.38 of the TP order contended that subsequent to the Agnity Technology decision, ITAT, Delhi Bench in case of ST Micro – 2011-TII-63-ITAT-DEL-TP has upheld the inclusion of Infosys as a comparable and as such Infosys may be retained as a comparable. However, we are of the considered view that when the Tribunal has accepted Infosys as a comparable vis-à-vis routine software development services provider, decision of Hon'ble Delhi High Court in case of Agnity Technologies was not available, so contention of ld. DR for the Revenue is not tenable as the taxpayer is a routine captive software development service provider working on cost-plus and risk insulated entity and cannot be compared with Infosys.

23. Coordinate Bench of the Tribunal in case of **Agnity India Technologies Pvt. Ltd. vs. ITO in ITA No.3856/Del/2010 order dated 04.11.2010**, copy available at pages 2280 to 2290 of the case laws paper book, ordered to exclude Infosys as a comparable vis-à-vis routine captive software development service provider on account of the fact that Infosys is a giant in the area of development of software assuming all the risks leading to higher profit. Appeal filed by the Revenue in this case before the Hon'ble Delhi High Court has been dismissed.

24. Infosys has also been excluded by the Tribunal in the case of **Tolana India Pvt. Ltd. in ITA No.5645/Del/2011 ((2014) 35 ITR (T) 388 (Delhi))** on the ground of functional dissimilarity with a contract software development service provider.

25. So, in view of the matter, we are of the considered view that Infosys is not a suitable comparable being functionally dissimilar having huge brand value and a giant in the field of software development service assuming all the risks whereas taxpayer is captive routine software development service provider working on cost plus model as a risk insulated entity, hence ordered to be excluded from final set of comparables.

**PERSISTENT SYSTEMS LTD. (PERSISTENT)**

26. The taxpayer sought exclusion of Persistent on the ground of functional dissimilarity being into the business of software products which is incomparable with software development services being rendered by the taxpayer. Perusal of the annual report of Persistent at pages 1235 & 1256 of the paper book shows that it is in the software product development and found the profit & loss account. It is apparent that its revenue comes from sales of software services and products but no bifurcation in the form of segmental information is available. In the annual report, available at pages 1166 & 1173 of the paper book, it is also recorded that Persistent is a leader in product development business and this company has won awards for best shrink wrapped software products.

27. Ld. DR for the Revenue supported the order passed by the TPO/DRP qua retention of Persistent and drew our attention to para 8.16 at page 65 on the ground that this comparable has neither been objected to by the taxpayer. However, we are of the considered view that since there is no estoppel against the statute if some wrong legal position has been enunciated at any time of the proceedings, the same can be rectified by the taxpayer at any stage.

Moreover, the taxpayer has taken specific objection for exclusion of Persistent before the DRP as is evident from para 11 at page 12 of the DRP order.

28. Coordinate Bench of the Tribunal in case of **ST Ericsson India Pvt. Ltd. in ITA No.609/Del/2015** rejected Persistent as a comparable vis-à-vis routine software service development provider on the ground of different business model with no segmental information available and also on the ground that this company has huge intangibles

29. Coordinate Bench of the Tribunal also rejected Persistent in case of **Cash Edge India Pvt. Ltd. vs. ITO in ITO No.64/Del/2015**, copy available at pages 2486 to 2519 of the paper book, on ground of functional dissimilarity and the appeal preferred by the Revenue has been dismissed by the Hon'ble Delhi High Court in **ITA 279/2016 vide order dated 04.05.2016**, copy available at pages 2482 to 2485 of the paper book.

30. So, in view of the matter, we are of the considered view that Persistent is not a suitable comparable being into the business of software products and its revenue are from the sale of software services and products having no segmental information available vis-à-vis the taxpayer, hence ordered to be excluded from the final set of comparables.

**KALS INFORMATION SYSTEMS LTD. (KALS)**

31. The taxpayer sought exclusion of Kals as a comparable on ground of functional dissimilarity, it being into the business of development of software product. When we examine annual report at page 1714 of the annual report paper book, it is specifically recorded that Kals drives its revenue from software services and software products but no segmental information in respect of services and products is available. In Schedule 16 of Note to Financial Statement, it is also recorded that Kals is into development of software and software products since its inception. It is also recorded that Kals having STPI Unit also engaged in software development and software services engaged in development of software & software products and a training centre engaged in training of software professionals on online projects.

32. Coordinate Bench of the Tribunal in case of **Toluna India Pvt. Ltd.** (supra) also rejected Kals as a comparable on account of functional dissimilarity vis-à-vis routine software development service provider and the said decision was not challenged before the Hon'ble High Court.

33. So, in view of the matter, we are of the considered view that Kals being into the business of development of software products

and services with no segmental financials available is not a suitable comparable vis-à-vis the taxpayer who is a captive routine software development service provider working on cost plus model as a risk insulated entity, hence ordered to be excluded.

### **WORKING CAPITAL ADJUSTMENT**

34. TPO/DRP have denied the working capital adjustment to the taxpayer. It is the case of the taxpayer that in AYs 2007-08, 2010-11 to 2013-14 and 2014-15, working capital adjustment to the taxpayer whose business profile has not undergone any change since AY 2007-08, has been given by the Id. DRP and also relied upon the order passed by the coordinate Bench of the Tribunal in the case of **Demag Cranes and Components Pvt. Ltd. vs. DCIT in ITA No.120/PN/2011 order dated 04.01.2012**, copy available at pages 2819 to 2845 of the paper book, wherein working capital adjustment has been granted to arrive at the operating net margins by returning following findings :-

#### ***“Ground 4(a) - Working Capital Adjustment:***

***18. We will take up the issue relating to the ‘working capital’ raised in sub ground 4(a) of the appeal. At the outset, Sri Lohia mentioned that in principle, the TP guidelines advocate in favour of making of adjustments to the unadjusted margins of the tested parties and six comparable on account of ‘working capital’. Referring to the contents of para 7.3.1 of the ‘Directions of the DRP’ dated 14.9.2010, given u/s 144C(5) of the Act, Ld Counsel mentioned that the DRP merely and passively relied on the ‘detailed reasoning for adopting the PLI of the proposed set of comparables at 7.18%’. DRP failed to pass directions on this***

*issue of working capital related adjustments to be made to the margins of the tested parties. Sri Lohia demonstrated the fact of raising of the issue before the DRP and non adjudication of the ground by the DRP and took us through the contents of the impugned orders/directions. On this issue of requirement of making of the working capital adjustments to the margins of the comparable, Ld Counsel for the assessee mentioned that the AO/DRP/TPO have erred in not following the TP guidelines on one side and the existing decisions of the Tribunal directly on this issue. Referring to the decision of the Tribunal in the case of Mentor Graphics (Noida) (P) Ltd. 109 ITD 101, Ld Counsel mentioned that the 'final set of comparables may need to eliminate differences by making adjustments for the following: (a) Working capital.....' (para 27). Further, referring to the decision of Pune bench in the case of E-gain Communication P Ltd reported in 118 ITD 243, Ld Counsel mentioned that when TNMM is applied to a case, 'the differences which are likely to materially affect the price, cost charged or paid in, or the profit in the open market are to be taken into consideration with the idea to make reasonable and accurate adjustment to eliminate the differences having material effect.' If these differences are not eliminated or removed, the comparison becomes unsound and unreliable. Further also, the decision of the Delhi Bench in the case of Sony India P Ltd (114 ITD 448) was cited for the proposition that deduction of 20% is allowable for various differences on account of intangibles, R&D, risk factors, working capital, etc. Referring to contents of the para 132 and 137 of the said decision, Sri Lohia stated that in that case the CIT(A) allowed adjustment to the extent of 10% against the 20% allowed by the TPO. Tribunal upheld the views of the TPO in the mater. Further also, referring to para 13.2 of the order of the Tribunal, Bangalore Bench, in the case of TNT India P Ltd, Ld Counsel mentioned that 'similarly, the working capital adjustments also have to be considered while arriving at the operating net margins.'*

35. So, in view of the matter, we are of the considered view that keeping in view the fact that in taxpayer's own case whose business profile has not undergone any change since AY 2007-08 and the working capital adjustment has since been granted since 2007-08, the taxpayer is entitled for working capital adjustment by following the rule of consistency. So, TPO is directed to verify the

data supplied by the taxpayer and grant working capital adjustment to arrive at the correct operating net margin of taxpayer vis-à-vis comparables.

### **GROUND NO.3**

36. AO treated the purchase of time licences of computer software of Rs.3,40,08,682/- as capital expenditure otherwise claimed by the taxpayer as revenue expenditure. Ld. AR for the taxpayer contended that this issue is already covered in his favour in his own case for **AY 2007-08** (supra) passed by the coordinate Bench of the Tribunal.

37. We have perused the order passed by the coordinate Bench of the Tribunal in **taxpayer's own case for AY 2007-08** (supra) vide which this addition made by the AO treating payment of licences of computer software as capital in nature has been deleted by treating the same as revenue in nature by returning following findings :-

*“27. We have gone through the material placed on record by the assessee. It was submitted that the above expenses are to be regarded as incurred on revenue field as per the test laid down by the Special Bench of Tribunal in the case of Amway India Enterprises, 111 ITD 112 (Del) (SB) in as much as (i) such computer software does not have utility for long duration and hence do not result in enduring benefit and (ii) such software does not constitute a profit earning apparatus and merely enable the appellant to efficiently conduct its business. The aforesaid decision has been affirmed by the Hon'ble Delhi High Court in the case of CIT vs Asahi India Safety Glass Ltd : 346 ITR 329.*

*27.1 It was further submitted that Tribunal while deciding the appeal of the assessee for AY 2006-07 (ITA No 5058/Del/2010) involving identical issue deleted the adjustment made by the assessing officer holding that license fee paid by the appellant is to be treated as revenue in nature.*

*28. We have duly considered the rival submissions Since the issue is covered in favour of the assessee by the order of the Tribunal in the assessee's own case for immediately preceding year, we direct the AO to delete the addition."*

38. So, following the aforesaid decision rendered by the coordinate Bench of the Tribunal, which is based upon the decision rendered by the Special Bench of the Tribunal in case of **Amway India Enterprises, 111 ITD 112 (Del) (SB)** and decision rendered by **Hon'ble Delhi High Court in the case of CIT vs. Asahi India Safety Glass 346 ITR 329**, we are of the considered view that since software licences are different from software which does not become the asset of the taxpayer having no enduring benefits and it can only be used during the period for which fee is paid, so it fails the test of ownership in case of licences, hence we order to treat the amount incurred by the taxpayer for purchase of time licences of computer software as revenue expenditure. So, Ground no.3 is determined in favour of the taxpayer.

#### **GROUND NO.4**

39. AO also treated an amount of Rs.1,82,00680/- as capital expenditure claimed by the taxpayer as revenue expenditure and

added the same to the income of the taxpayer. Ld. AR for the taxpayer contended that when the training expenses incurred by the taxpayer on imparting training to its executor is not part of the enduring benefits as the trained workforce may move out any time, it cannot be treated as capital expenditure and relied upon the decision rendered by the coordinate Bench of the Tribunal in case of sister concern of the taxpayer i.e. **ST Ericsson India Pvt. Ltd. for AY 2010-11 in ITA No.609/Del/2015** and also placed reliance on Hon'ble Delhi High Court in case of **CIT vs. Munjal Showa Ltd. 329 ITR 449**. Operative part of the decision rendered by the Hon'ble High Court is as under :-

*“when the training of the personnel of the assessee was imperative to run the business and is in the nature of technical support to the assessee it will certainly enhance the profit of the company on which it will pay the taxes, such expenditure cannot be treated as capital in nature rather they are revenue in nature.”*

40. So, following the aforesaid decision rendered by Hon'ble Delhi High Court, we are of the considered view that when training imparted by the taxpayer company to its executives, though increased its profitability, is not of any enduring benefit as the trained workforce can move out any time and the taxpayer company pays tax on the enhanced income on account of enhanced efficiency of its trained staff, this has to be treated as revenue in nature. Consequently, AO is directed to treat the training expenses

as revenue in nature. Accordingly, this ground is determined in favour of the taxpayer.

### **GROUND NO.5**

39. AO has failed to follow the directions issued by the Id. DRP and thereby disallowed the deduction claimed by the taxpayer u/s 10B of the Act on the enhanced income of the taxpayer. Ld. DRP while allowing the Ground No.16 raised by the taxpayer passed the following order :-

*“16. In ground no.16, the assessee has made without prejudice, claim that even if the A.O.’s contention is accepted in respect of ground no.14 and 15, deduction u/s 10B of the Act should be enhanced to the extent of the above disallowances as the same increased the income of the EOU undertakings. It was submitted that the courts have settled that the deductions u/s 10B of the Act shall be computed on the assessed income after considering all the disallowances/disallowances made by the assessing officer during the assessment proceedings. In this regard, the assessee relied on the following recent rulings wherein the Hon’ble Tribunals have held that the deduction u/s 10B shall be available on the assessed income after considering the disallowances/ additions made by the assessing officer in the business income :-*

- *ITO v. Sahasra Electronics Private Limited (2010-TOIL-89-ITAT-DEL)*
- *Gemplus Jewellery India Limited (2009-TIOL-212-ITAT-MUM)*

*16.1 We have considered the issue. The AO is directed to recompute the deduction u/s 10B if the AO is satisfied that the nature of additions/disallowances in respect of ground no.14 and 15 above enhance the assessee’s business income which is eligible for deduction u/s 10B of the Income Tax Act, 1961. This ground of objection is disposed off accordingly.”*

40. In view of the matter, we direct the AO to comply with the directions issued by the Id. DRP accordingly.

**GROUND NO.6 & 7**

41. Grounds No.6 & 7 need no specific finding being consequential in nature.

41. Resultantly, the appeal filed by the taxpayer is allowed.

**Order pronounced in open court on this 28<sup>th</sup> day of September, 2020.**

**Sd/-  
(N.K. BILLAIYA)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 28<sup>th</sup> day of September, 2020.  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A).
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**