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

BEFORE SHRI MAHAVIR SINGH, VP &
SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 1296/Mum/2020
(**निर्धारणवर्ष** / Assessment Year: 2014-15)

M/s My Personal Health Record Express (I) Pvt. Ltd. Gursheesh, 7th floor, 29, Presidency Society, 7th NS Road, JVPD Scheme, Mumbai-400 049	**बनाम**/ Vs.	ITO-10(2)(4), 213, 2nd floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. MUMM39711A		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Nishant Thakkar & Shri Jasmine Amalsadvala, ARs
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Pavan Kumar Beerla, DR

सुनवाईकीतारीख/ **Date of Hearing**	:	17.12.2020
घोषणाकीतारीख / **Date of Pronouncement**	:	

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-17, in short 'Ld. CIT(A)', Mumbai, dated 31.01.2020 for AY 2014-15.

2. The brief facts of the case are, the assessee filed its return of income on 26.11.14 declaring total loss of Rs. 2,63,263/-. Subsequently, the case was selected for scrutiny under CASS and accordingly, notices u/s 143(2) and 142(1) were issued and served on the assessee. In response, AR of the assessee filed the relevant information as called for.

3. Assessee is engaged in the business of software development and allied activities and is a 99.99% subsidiary of My Personal Health Record Express (USA). The assessee has been developing a computer software named 'CONNECT' and this computer software is customized software to be used by its customers which are used for specific purposes and contain secret formula or process. During this year, assessee has declared Gross Revenue of Rs. 19,16,416/- and after accounting for various expenses, it declared net loss of Rs.4,73,311/-.

4. During the assessment proceedings, AO observed that assessee had disclosed the deletion of Intangible Asset Computer Software at Rs,2,01,87,114/- (which is the CONNECT software) in its fixed assets schedule to the balance sheet. When the assessee was asked to explain, the assessee has declared that

assessee company entered into a serve usage agreement with its holding company where the Holding Company had permitted the Indian entity to use its server free of cost during the incubation period. Assessee has accordingly developed the software and later discarded the above software and debited the cost incurred by the assessee company to its holding company to the extent the holding company had reimbursed the cost for developing the above software. For this purpose, assessee has signed Supplementary Agreement with the holding company, which was filed before AO.

5. After considering the submission of the assessee, AO rejected the submissions of the assessee and proceeded the issue with FT & TR authorities and collected the information with regard to opening and closing balances in the books of accounts of holding companies. AO observed that on verification of the details and information as supplied by the USA authorities, it is observed that the Ledger account of the assessee company in its books and Ledger account of the Holding Company in the books of assessee company both indicated identical closing balance of Rs.15.,00,159/-, thereby meaning that the asset was taken over

into the books of holding company. When the show cause notice issued to the assessee to explain the transaction, assessee submitted that all the transactions were properly recorded in the books of holding company and then it was accepted by the assessee that computer software was transferred to the holding company. Based on the above information, AO completed the assessment as below:-

Particulars	Amount (Rs)
Cost of Intangible Asset - Computer software as per Asset Schedule	2,01,87,114
Add: Premium on computer software @ 20% of Cost .	40,37,423
	2,42,24,537
Transfer value	1,27,31,017
Business Profit	1,14,93,520

6. Accordingly, AO brought to tax at Rs. 1,14,93,520/- as business profit in the hands of the assessee.

7. Aggrieved by the above order, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) rejected the contention of the assessee and confirmed the addition made by AO with the following observations:-

4.1 Vide these grounds, the appellant, has agitated against addition of Rs.1,14,93,520/-as short, term capital gain. In the assessment order, the Ld. AO has mentioned that the intangible asset in the form of computer software on which depreciation has been continuously taken by the assessee company. During the assessment proceedings, details related to the deletion of intangible asset were asked. In response, the assessee had mentioned that the asset has been discarded and debited the cost incurred to the US entity i.e. Holding company. Not satisfy with the assessee company contention, the Assessing Officer has made inquiry through the Foreign Tax & Tax Research(FT & TR) Division of Central board of Direct Taxes, New Delhi. On perusal of the information received from the FT & TR, it is observed by the Assessing Officer that assessee has provided wrong details and mentioned that the asset is discarded but actually intangible asset was transferred to the Holding company in USA and the same is thereafter accepted by the assessee. Subsequently many documents were called by the Ld. AO from the assessee to verify the valuation of the intangible asset and the documentary proof which support the assessee contention that the intangible asset was commercially unsuccessful. However, assessee has not: provided any cogent supporting documents to take its stand.

Therefore, the Ld. AO has made addition under the head Short term Capital gain.

4.2 During the appellant proceeding, the appellant furnished a written submission which find place in para-3 of this order. The appellant company has mentioned that the computer software was commercially unsuccessful and that the holding company was indemnifying the appellant for loss based on its agreement with ii and accordingly cost of development was the fair market value of the said software.

4.3 I have considered the submissions of the appellant and perused the material available on record. At the outset, it is observed that the appellant company has not cooperated with the Assessing Officer for providing true and fair particulars and the relevant documentary evidences. Further, it is observed that the appellant company has provided wrong information to the Ld. AO in respect to the computer software that the software had discarded instead of transferred to the Holding company at USA of the appellant company. This clearly questions the genuineness of the contention and the documents provided by the appellant company.

4.4. The case is chronologically analysed and the observations made are mentioned hereunder: -

a) It is seen from the supplementary agreement between the appellant company and the holding company that the agreement is just for mutual understanding and on this agreement neither the appellant company has been liable for any steps nor the Holding company because the agreement is not a registered agreement. Further, no terms and conditions have been mentioned in the agreement related to the cost incurred in respect to the development of the intangible asset and also the time period under the development has been completed. It is observed from the agreement that the-holding company is just providing the finance for the development of the software. These facts put question on reliability on this agreement, which failed to provide true picture related, to transfer of the asset.

b) It is seen from the details furnish by the appellant company that the appellant company has developed computer software in the AY 2012-13 and put to use of the same in the respective assets and also started claiming depreciation on. such asset. This proves that the computer software is developed properly and the same is used by the appellant company for their own purpose. Therefore, the

contention of the appellant is not accepted that the computer software was commercially unsuccessful.

c) Also, the appellant company has not produced any documents which prove that, ihe computer software is not properly developed as per requirements. Without providing any documentary evidences and merely stated in the words that software is not feasible is not acceptable.

d) It is also important to understand that after using the software by the appellant company for two years and stated by the appellant company that the software is commercially unsuccessful. If that was the case then why the software has been transferred to the Holding company? Why the software should not be discarded in the India by the appellant company only? This only proves that there was feasibility and utility of the software, which has helped the holding company for their commercial benefits, that's why the holding company has taken the software from the appellant company.

4.5 In view of above facts and that no further cogent evidences or arguments have been put forth by the appellant during the course of appellate proceedings. It is held that no interference is called for in the decision of assessing officer and accordingly rejected

the claim of the appellant company. Hence, addition as Short Term Capital gain is confirmed. The appeal of the assesse on this ground is dismissed.

8. Now before us, the assessee has preferred the appeal by raising the following grounds of appeal as under:-

1. That the order dated 31.1.2020 passed by the Commissioner of Income-tax Appeals ('C1T (A)') u/s 250 of the Income-tax Act, 1961 ("Act") is bad in law and void ab-initio.

2. Thai the C1T (A) erred in confirming the addition of 1NR 1,14,93,520/- as short-term capital gain to the income of the Appellant on account of transfer of the 'CONNET' computer software by the Appellate to its holding company. My Personal Health Record E-xpress (USA) ***("MPHR US").***

3. The CIT (A) erred in not appreciating that the computer software was transferred to MPHR US at its book written down value being 1NR 1,27,31,017/-, which was less than the tax written down value of the computer software being INK 1,48,19,687/-, and thus the value at which the block had been adjusted resulted in a short-term capital loss to the Appellant.

4. The CIT (A) erred in confirming the action of the AO of substituting the actual sale consideration of

1NR 1,27,31,017/- received by the Appellant for transfer of the software with a notional fair market value of the computer software at INR 2,42,24,537/- which according to the AO should have been received by the Appellant.

5. The CIT (A) erred in confirming the action of the AO in imputing a 20% premium on the gross cost of the computer software for computing its fair market value and capital gains in the hands of Appellant. The CIT (A) failed to appreciate that the computer software had no local market or commercial viability and further, the Appellant was barred from selling the software to a third party and that there was no basis for applying 20% premium on the gross cost which is completely an adhoc number.

6. The CIT (A) failed to appreciate that in the absence of any market or comparability of the software, the correct way to value the software was the cost based approach by adjusting the gross cost with accumulated depreciation and treating the written down value as the fair market value thereof.

7. On the facts and in circumstances of the case and in law. the C1T(A) has erred in dismissing the grounds on initiation of penalty proceedings under section 271(1)(c) of the Act as premature.

8. On the facts and in circumstances of the case and in law, the CIT(A) erred in confirming levy of interest under section 234B of the Act.

The above 'Grounds of Appeals" are all independent and without prejudice to one and another.

The Appellant also craves leave to supplement, to cancel, amend, add and/or otherwise alter or modify, any or all, grounds of the appeal stated hereinabove.

9. Ground no. 1 to 6 are relating to one issue of addition on account of business profit transfer of computer software to its holding company. Ground no. 7 relates to penalty which is premature, therefore this ground of appeal is **dismissed**. Ground no. 8 is on levy of interest u/s 234B, which is also consequential in nature, therefore this ground of appeal is also **dismissed**.

10. With regard to ground no. 1 to 6, Ld. AR brought to our notice the findings of AO and para 4 of Ld. CIT(A) and submitted that assessee has developed this software and capitalized the same in its books of accounts. The assessee was receiving support from its holding companies for development of this software and accordingly, assessee has received

reimbursement of Rs. 1,27,31,017/-. On evaluation of the software, it was found that the software is commercially not viable, accordingly the software was discarded. Since, the software is not commercially viable, the assessee has forwarded the software to its holding company and accordingly, the software was discarded. Ld. AR objected to the fact that the computer software was discarded at the written down value of the computer software, the cost of the same is only Rs. 1,48,19, 687/-. The value at which the asset Block shows is the capital loss to the assessee. He submitted that Ld. AO proceeded to evaluate the software on the original capitalized cost to the assessee i.e. Rs. 2,01,87,114/- and calculated a premium of 20% on ad-hoc basis and treated the total value of Rs. 2,42,24,537/- as the cost of the assets and reduced the cost of reimbursement received by the assessee from its holding company and balance treated as company's profit. He objected to the method adopted by AO and submitted that what is relevant is full value of consideration at the time of transfer of the asset or discard of the asset. In the given case, the value of the asset is only Rs. 1,27,31,017/- and the same was reimbursed by the holding company. Therefore,

when the commercial viablity of the asset is NIL and whatever the cost incurred by the assessee is already reimbursed by the holding company, therefore addition to the unviable software is not justified on the basis of transfer of the software to the holding company. He submitted that the valuation of the software should be based on 'Full value of consideration'. For the purpose of full value of consideration, he relied on the decision of Hon'ble Supreme Court in the case of CIT vrs. George Henderson and Co. Ltd. (1967) 66 ITR 622 (SC).

11. On the other hand, Ld. DR supported the orders passed by the revenue authorities.

12. Considered the rival submissions and material placed on record. We notice that assessee has developed a software 'CONNECT' at the request of its holding company and thus software was developed by the assessee prior to Assessment Year 2011-12 and assessee has capitalized the cost of software in Assessment Year 2011-12 and 2013-14 and claimed depreciation on the above assets. During this Assessment Year, assessee and its holding company had evaluated the software and ascertained

that the software is commercially unviable, accordingly it was claimed by the assessee that it was discarded. Subsequently, the detailed investigation was carried out by the AO. Based on the findings of AO, assessee has accepted that this software was transferred to its holding company and it was discarded by the holding company. It is fact on record that assessee has filed a supplementary agreement which shows that this software was developed on the behest of holding company and holding company has reimbursed the cost of the development of the software. Since the software was discarded, holding company has written off all the cost of the development of the software which was reimbursed by the holding company. Therefore, assessee submitted that software is no more commercially viable whether it is discarded by assessee or by the holding company, does not make any difference.

13. After careful perusal of the records and submission made by the parties, we notice that assessee has developed this software and transferred the same to its holding company, certifying it as commercial unviable and whatever the cost received by the assessee from its holding company as the cost of

writing off of the software. However, it is not clear whether if there is any commercial value to the software which was transferred to the holding company, at present it may not be commercially viable, but it is not clear whether this software will be of use to its holding company in future. Since assessee has invested lot of labour and invested resources to develop software which is used by the customers of the holding company. We notice from the record that assessee has developed this software and utilized the same in its business and claimed the depreciation as well during this intervening period. Therefore, it clearly indicates that software was utilized in the running of the business of the assessee vis-à-vis holding company. Since, there is not record submitted by the assessee or its holding company that the software under consideration is completely discarded. In our considered view, the software which was transferred to the holding company which was used by the assessee in its business, the actual cost of the software was Rs. 2,01,87,114/- and assessee has used the above software in its business and claimed depreciation. What is relevant is the cost of the assets at the time of writing off of the assets in the books of the assessee. The

written down value of the assets at the time of writing off of the assets was Rs. 1,27,31,017/-. Since this assets was developed by the assessee and utilized by the assessee in it business and if at all mark up is applied, it can be applied only to the cost of the assets which was transferred to its holding company. Therefore, even though the AO has applied 20% as ad-hoc premium, in our considered view, normal premium charged on this type of assets are within 10-20% and AO has adopted higher value of the premium. For the sake of justice, in our considered view, premium of 15% may be proper and accordingly, we direct the AO to calculate the premium 15% on the value of assets on the date of transfer i.e. Rs. 1,27,31,017/- and accordingly complete the assessment. Resultantly, the ground no. 1 to 6 raised by the assessee are **partly allowed**.

14. In the net result, the appeal filed by the assessee stands **partly allowed.**

Order pronounced in the open court on 19.02.2021.

Sd/–	***Sd/–***
(Mahavir Singh)	(S. Rifaur Rahman)
Vice President	Accountant Member

मुंबई Mumbai;दिनांकDated : 19.02.2021
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**