

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

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

AND

SMT BEENA PILLAI, JUDICIAL MEMBER

Appeal No.	Appellant	Respondent	Assessment Year
IT(TP)A No. 230/Bang/2014	M/s. Biocon Ltd., 20 th KM, Hosur Road, Electronic City, Bangalore – 560100. PAN: AAACB7461R	The Deputy Commissioner of Income Tax, LTU, Bangalore.	2009-10
IT(TP)A No. 557/Bang/2016		The Joint Commissioner of Income Tax, LTU, Bangalore.	2011-12
IT(TP)A No. 558/Bang/2016	The Joint Commissioner of Income Tax, LTU, Bangalore.	M/s. Biocon Ltd., 20 th KM, Hosur Road, Electronic City, Bangalore – 560100. PAN: AAACB7461R	2011-12
C.O. No. 20/Bang/2017 (in IT(TP)A No. 558/Bang/2016)	M/s. Biocon Ltd., 20 th KM, Hosur Road, Electronic City, Bangalore – 560100. PAN: AAACB7461R	The Joint Commissioner of Income Tax, LTU, Bangalore.	2011-12

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Shri Muzaffar Hussain, CIT (DR)

Date of Hearing :	02.09.2021
Date of Pronouncement :	12.11.2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

2. These are group of cases for assessment years 2009-10 to 2011-12 having common issues. For assessment year 2011-12, both assessee as well as revenue are in appeal. Assessee has also preferred a cross objection in appeal filed by revenue for assessment year 2011-12 which is in support of decision of the Ld.AO in final assessment order.

2.1 Both sides submit that by and large all issues are common with assessment year 2009-10. Therefore we first deal with the issues raised by assessee for assessment year 2009-10.

Assessment year 2009-10

2.2 Present appeal is filed by assessee against order dated 30/01/2014 passed by the Ld.DCIT Large Tax payers unit, Bangalore on following grounds of appeal:

“Based on the facts and circumstances of the case, the Appellant respectfully submits its grounds of appeal.

Order being bad in law

1. That on the facts and in the circumstances of the case and in law, the order passed by the Learned Deputy Commissioner of Income-tax-LTU Bangalore ("AO") under section 143(3) read with section 144C(5) of the Act is erroneous and bad in law.

2. That on the facts and in circumstances of the case and in law, the learned AO / DRP have erred in assessing the returned income of Nil at Rs 722,220,653.

Transfer Pricing

3. *The Honourable Dispute Resolution Panel ("DRP") has erred in law and on facts in upholding the adjustment to the arm's length price made by the learned Additional Commissioner of Income-tax (Transfer Pricing — I) ("the TPO")/AO to the income of the appellant, based on the order, purportedly under section 92CA of the Act, passed by the TPO.*

4. *General transfer pricing adjustment related grounds*

4.1 *The Honorable DRP has erred in law and on facts, in upholding the adjustment made by the learned TPO to the ALP of the international transaction entered into by the Appellant with its AE.*

4.2 *The learned TPO / AO has grossly erred in not giving effect to the directions u/s 144C (5) of the Act date December 12, 2013 given by the Honorable DRP.*

4.3 *The Honorable DRP / TPO has erred in law and on facts in rejecting the appellant's contention of non-applicability of transfer pricing provisions to the transaction of loan granted to the associated enterprises.*

4.4 *The learned AO/TPO has erred in law and on facts by imposing tax on an income which has not been received by the assessee in the subject AY.*

4.5 *The Honourable DRP has disregarded the decision of the apex court in the case of SA Builders Ltd. vs. CIT and Anr [2006] 288 ITR 1 where on the principle of commercial expediency it was held that if no interest is charged on interest free loans to sister concerns, there is no income to be charged as notional income on accrual basis.*

4.6 *The Honorable DRP / TPO has erred in re-characterizing the nature of loan given by the appellant and in the process ignoring the contractual nature of the arrangement.*

4.7 *The Honorable DRP / TPO has erred in ignoring the terms of the loan which is based on commercial expediency and the business need of the appellant and its associated enterprises.*

4.8 *The Honorable DRP has erred, in law and on facts, by upholding the adjustment of Rs 203,295,392 to the income of the assessee consequent to incorrectly computing the arm's length price in respect of the international transaction undertaken by the assessee with its AEs.*

4.9 *Without prejudice to our arguments above, the Honorable DRP has erred in law and on facts by holding the transaction of the*

granting of loan by the Appellant to its subsidiary not to be at arm's length.

4.10 The Honorable DRP and the TPO has erred in law and on facts in rejecting the Transfer Pricing ("TP") documentation which has been prepared by the Appellant in the manner as contemplated under the relevant provisions of the Act and the Income-tax Rules, 1962 ("the Rules").

4.11 The learned AO/TPO has erred in law and on facts in using the information sought from CRISIL under section 133(6) of the Act, since such information from CRISIL was addressed to Additional Commissioner of Income-tax ("ACIT"), New Delhi in response to the notice issued by the ACIT, New Delhi who has no jurisdiction over the appellant and hence such information does not constitute valid information obtained under section 133(6) of the Act

5. Rejection of moratorium period

5.1 Without prejudice to our earlier grounds, the Honorable DRP has erred in law and on facts by considering the loan granted by the assessee to its subsidiary of Rs 1,416,692,000 as an interest free loan and disregarding the fact that there is a moratorium period of 11 months and that subsequently higher interest has been charged to compensate for the absence of interest in the first year.

5.2 Without prejudice to our earlier grounds, the Honorable DRP has failed to consider the average interest earned by the appellant during the tenure of the loan to verify the arms' length nature of the transaction.

6. Rejection of benchmarking analysis carried out by the appellant

6.1 The Honorable DRP has erred in law and on facts in rejecting the contention of the appellant to substantiate the arms' length nature of international transaction.

6.2 The Honorable DRP has erred in law and on facts in upholding the rejection of the CUP methodology by the AO / TPO employed by the Appellant for the purpose of substantiating the arms' length nature of transaction.

7. Fresh benchmarking analysis

7.1 The Honorable DRP has erred in law and on facts in holding that the comparable interest rate shall be basic interest rate charged as increased by risk premium on account of the unsecured

nature of loan, thereby continually disregarding the fact that the holding company does not face any default risk from its subsidiary.

7.2 The Honorable DRP has erred in law and on facts in directing the AO / TPO to carry out fresh benchmarking analysis from the Loan Connector database for companies having a BBB rating

7.3 The Honorable DRP has failed to appreciate that the yield on BBB rated bonds is not comparable to the Appellant's loan to its AE as such rating assigned by the Honorable DRP is without substantial basis.

7.4 The Honorable DRP has erred in law and on facts in arbitrarily directing the AO / TPO to add 100 basis points to the arms' length interest rate determined from Loan Connector to factor in country and foreign exchange risk.

7.5 The Honorable DRP has erred in not considering that fact that the Appellant had earned an exchange gain of Rs 170,294,540 in respect of the subject loan advanced to its subsidiary and that the same ought to be reckoned in determining the arms' length interest rate and adjustment.

Corporate Tax Grounds

8. Treatment of notional loss on forward contracts

8.1 The learned AO / DRP have erred in law and on facts in disallowing an amount of Rs 229,548,325 representing unrealized foreign exchange loss.

8.2 The learned AO / DRP have erred in law and in facts in disregarding the decision of the Supreme Court in the case of Woodward Governor India Vs CIT, wherein it was held that unrealized marked to market loss was a deductible expense as per section 37(1) of the Act.

8.3 The learned AO / DRP have erred in law and in fact in disallowing the foreign exchange losses by merely relying upon the CBDT instruction No 3 of 2010 dated March 23, 2010, and without examining any facts in details.

8.4 The learned AO / DRP have erred in law and in facts in holding the transactions entered into by the Appellant to be in the nature of speculative transaction under section 43(5) of the Act without calling for and examining any facts so as to make an informed decision.

8.5 The learned AO / DRP have erred on facts by contending that the Appellant has failed to furnish the copies of forward contracts without

appreciating the fact that the learned AO had not specifically called for submission of the same.

8.6 The learned AO / DRP have erred in law in disallowing the foreign exchange loss on account of absence of forward contracts and where the written submissions made by the Appellant in this regard have been completely disregarded.

8.7 The learned AO / DRP have erred in law and on fact in not appreciating that the Appellant has entered into forward contracts in its ordinary course of business.

8.8 The learned AO / DRP have erred in law and on fact in concluding that the forward contracts entered into by the Appellant were not in relation to its export receivables as at March 31, 2009.

8.9 The learned AO / DRP have erred in law and on facts in relying upon the decision of the Supreme Court in the case of CIT Vs Joseph John (67 ITR 74) and holding that the subject transaction is speculative, since the facts of that case are entirely different from the facts of present case.

8.10 The learned AO / DRP have erred in law and on facts in relying upon the decision of Andhra Pradesh High Court in the case of MG Brothers Vs CIT (154 ITR 695) wherein it was held that loss on forward contracts was in the nature of speculation loss.

8.11 The learned AO / DRP have erred in law and on facts in characterizing the activity of the Appellant to safeguard itself from future changes in the forex market to mean a separate business of speculation.

8.12 The learned AO / DRP have erred in law in characterizing the loss suffered by the Appellant to mean loss from speculative activities and confining the set-off of such loss only against future profits from speculation.

8.13 The learned AO / DRP have erred in law by disallowing the notional loss suffered by the Appellant on account of forward contracts while computing the total profits liable to tax, whereas, in all preceding years when the Appellant recorded a notional gain on such contracts and offered the same to tax, the same was never disallowed by the AO.

8.14 The learned AO / DRP have not abided by the principles of natural justice by taking contrary stand-points on the same type of transaction ie notional loss on forward contracts have been

disallowed in computing the total income chargeable to tax whereas notional gain on such contracts have been taxed.

8.15 The learned AO / DRP failed to appreciate that the Appellant has been consistent and definite in recording accounting entries in the books of accounts in respect of losses and gains.

8.16 The learned AO / DRP failed to appreciate that the method adopted by the Appellant for accounting entries in the books of accounts both in respect of losses and gains is in accordance with the Generally Accepted Accounting Practices.

8.17 The learned AO / DRP have erred in law by disregarding the provisions of section 145(1) of the IT Act, which require the computation of income under heads 'profits and gains of business or profession' to be in accordance with the method of accounting regularly employed by an Assessee

8.18 The learned AO / DRP failed to appreciate that the method of accounting adopted by the Appellant is reasonable and in line with Industry practice

9. Expenditure on Computer Software

9.1 The learned AO has erred in law and on fact by disallowing the revenue expenditure incurred by the Appellant on purchase of application software under section 40(a)(ia) of the IT Act.

9.2 The learned AO has erred in law and on fact by not following the directions of the Honorable DRP in entirety and concluding that no tax has been deducted at source by the Appellant on software expenses without calling for and examining details in this regard.

9.3 The learned AO has erred in law by not granting the Appellant an opportunity of furnishing details in respect of taxes deducted at source as per the directions issued by the Honorable DRP.

9.4 The learned AO/ DRP have erred in law by holding that all software payments are in the nature of royalty in light of the retrospective amendment to section 9(1)(vi) of the IT Act introduced vide Finance Act 2012.

9.5 The learned AO / DRP have erred in law by disregarding the principle upheld by the Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd. vs. Director of IT

[(2007) 288 ITR 408 (SC)] which held that a retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The above principle has also been upheld by various Tribunal decisions viz by Agra Bench of the Income-tax Appellate Tribunal ("ITAT") in the case of DCIT vs Virola International [I.T.A. No.256/Agra12013], the Hyderabad bench in the case of Infotech Enterprises Limited vs Addln CIT [ITA.No.115/Hyd/2011], Mum bai Bench of the ITAT in Channel Guide India Ltd. [TS-662-ITAT-2012(Mum)] and Sonata information Technology vs. DCIT-LTU [ITA No.1507/Mum/20121.

10. Social welfare expense

10.1 The learned AO / DRP have erred in law and in facts in disallowing the social welfare expenses amounting to Rs 1,000,000 incurred by the Appellant. The learned AO / DRP have erred in law and in facts in disregarding the submissions of the Appellant and holding that the expenditure incurred on social welfare is not incurred for the purpose of business.

10.2 The learned AO / DRP have erred in not appreciating that the expenses incurred by the Appellant in connection with traffic would ease the day-to-day hardship of its employees and thus is in nexus to the business of the Appellant.

Other grounds

11. That the Learned AO has erred in facts and law in allowing the credit of tax deducted at source amounting to Rs 30,853,217 as against Rs 45,393,798 claimed by the Appellant in its Return of income.

12. The learned AO has erred in law and on fact by not complying with the directions of the DRP in relation to re-computing the relief under section 10AA and 10B of the IT Act on account of the various additions made to the profits from business of the Appellant (other than the transfer pricing addition).

13. That the Learned AO erred in facts and in law, in initiating penalty proceedings u/s 271(1)(c) of the IT Act in the absence of any concealment or furnishing of inaccurate particulars.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds, at any time before or at the time of hearing of the appeal, Each of the above grounds is independent and without prejudice to the other grounds preferred by the Appellant."

Brief facts of the case are as under:

3. The assessee is a company engaged in the business of manufacture of enzymes and pharmaceutical ingredients. It filed its return of income for year under consideration on 30/09/2009 as NIL under normal provisions of the Act, and book profits of Rs.72,22,20,635/- as per provisions of 115JB of the Act. The case was selected for scrutiny and notice under section 143(2) was issued. Ld.AO called upon assessee to file various details to verify the claim observed by the Ld.AO that assessee had advanced loan to Biocon SA, incorporated in Switzerland. A reference was accordingly made under section 92CA of the act to the Ld.TPO to determine the arms length of the transaction.

3.1 Based on the submissions/information and explanations filed by the assessee, during transfer pricing proceedings, the Ld.TPO an adjustment relating to loan advanced to AE(sister concern) at Rs.20,32,95,392/-. The Ld.AO while passing the Draft assessment order made following addition/disallowance:

Notional forex loss	:	Rs.22,95,48,325/-
Software expenses capitalised	:	Rs.1,99,17,446/-
Less: Depreciation allowed	:	Rs.(1,19.50,467)
TP Adjustment	:	Rs.20,32,95,392/-

Aggrieved by the additions proposed by the Ld.AO, assessee filed objections before the DRP.

3.2 The DRP held that software expenses tantamount to royalty i.e. covered by explanation 4 to section 9(1)(vi) of the Act and are subject to TDS u/s 194J. The DRP directed the AO to examine

whether the TDS has been deducted on the above-mentioned expenses.

3.3 The DRP accepted assessee's without prejudice contention regarding the use of LIBOR plus 100 basis points applicable for foreign exchange risk and appropriate mark-up applicable for borrower with BBB as the credit rating situated in the country of the borrowing entity i.e. Switzerland should be considered for benchmarking of the interest income (if any). Accordingly, the DRP directed the Ld.TPO to identify such arrangement from the "loan connector" database for determination of arm's length price. However, the Ld.TPO mentioned that since there was no access to the database available with him, he was unable to give effect to directions of the DRP.

4. On receipt of the DRP direction, the Ld.AO passed final assessment order. The AO passed the Final Assessment Order u/s. 143(3) r.w.s. 144C(13) of the Act disallowing the expenses as per the draft order along with software expenses amounting to Rs. 1,99,17,446 by holding that the TDS has not been deducted on the software expenses.

Pursuant to the same, a rectification application u/s. 154 was filed by the taxpayer, as the AO/TPO had not complied with DRP directions in relation to recomputing the ALP.

Aggrieved by the order of the LdAO, assessee is in appeal before us.

Ground No.1-2 are general in nature. Therefore do not require any adjudication.

5. Ground no.3-7: relates to transfer pricing adjustment related to loan given by assessee to its subsidiary AE in Switzerland. During the FY 2008-09, the taxpayer advanced loan to its subsidiary, Biocon SA, incorporated in Switzerland. It was submitted that the loan was advanced during the first year of operation of subsidiary i.e. 2008 (the company did not have any significant business activity/income flows at such time). The terms of loan agreement are as under. Copy of the agreement is placed at pages 144-151 of paper book.

- a. The loan was advanced in foreign currency (Euro)
- b. Funds were provided for the purpose of financing investment by subsidiary in Axicorp GmbH and also to finance the operating activities of the company
- c. The term of the loan was 3 years and 4 months - April 30, 2008 to August 8, 2011
- d. Interest terms-
 - Moratorium of 11 months from May 2008 to March 2009, i.e., no interest was payable during the first year of operation (i.e., during F.Y 2008-09) in order to avoid undue hardship to the subsidiary
 - Post which, interest rate of 3% pa or LIBOR during the term of loan plus 1% whichever is higher was chargeable for the period from April 2009 to August 2011

5.1 For the relevant AY, the Ld. AO/DRP/TPO made addition to income in the hands of assessee on account of interest to be earned on the loan upto 31st March, 2009.

Before us, the Ld.AR submitted that there is no accrual of income in the hands of the assessee, and therefore transfer pricing provisions u/s 92(c) of the Act are not applicable. He submitted that only real income can be taxed under the provisions of the Act and not any hypothetical or notional income which has not

accrued and will never accrue to the Taxpayer. The Ld.AR emphasized that, in the instant case, as there is no ultimate collection of interest during the moratorium period, and therefore there cannot be recognition of income on that account.

5.2 The Ld.AR further submitted that for benchmarking purpose, the income from entire loan arrangement over the tenure of the loan needs to be considered, this is also in accordance with the proviso to Rule 10D(4) of the Income tax Rules, 1962.

He submitted that even after considering the moratorium period, the effective interest rate on the loan works out to 2.08 percent per annum, which is higher than the weighted average LIBOR for the duration of the loan.

5.3 Without prejudice to the above arguments, the Ld.AR submitted that the arm's length rate of interest to be considered, if any, should be as per LIBOR and not based on the domestic interest rate as applied by the Ld.TPO.

5.4 In support of the above arguments, the Ld.AR placed reliance on following decisions:

- Goodyear South Asia Tyres (P.) Ltd vs. ACIT [2015] 53 taxmann.com 169 (Pune-Trib.)*
- PMP Auto Components (P) Ltd vs DCIT [2014] 50 taxmann.com 272 (Mumbai -Trib.)*
- RBI Circular on Moratorium dated 1 September 2001*
- OECD TP Guideline, 2017 (para 1.116, Page 76)¹*
- OECD TP guidelines on Financial transaction (para 10.34 and para 10.35)²*

-Rule 10D(4) of Income Tax rules³

-CBDT circular no. 3/ 2017

On a without prejudice basis, the rate of interest to be considered

-CIT vs Cotton Naturals (I) (P) Ltd [2015] 55 taxmann.com 523

-Advanta India Limited [2015] 64 taxmann.com 251

*-Sami Labs Limited v DCIT ([2016] 66 taxmann.com
55/(1358/Bang/2011)*

(Bangalore Tribunal)

-VVF Ltd v DCIT ITA 673/Mum/06

-Subex Ltd IT(TP)A No.223/Bang/2014J⁴

6. The Ld.CIT DR on the contrary, submitted that for 11 months interest has to be charged as per the agreement. It is submitted that assessee ignored geographical and economic conditions which determine the interest chargeable. He submitted that internal CUP is to be applied under such circumstances. The Ld.CIT DR also emphasised that adjustments needs to be made for no security was offered by the related party. He thus supported CUP applied by the Ld.TPO.

We have perused the submissions advanced by both sides based on records placed before us.

7. The DRP on this issue after considering the submissions advanced by assessee and the findings by the Ld.TPO, observed as under:

“C.2 We have considered the submissions of the assessee and the contentions raised by the TPO in his order. We have also gone through various case laws submitted by the assessee on this issue and the case law relied upon by the transfer pricing officer. On perusal of the facts of the case and the judicial pronouncements, we are of the opinion that the international transaction relating to charge of interest on the grant of loans by the assessee to its associate

enterprise should be benchmarked using LIBOR as the base rate. However, we are not convinced by the submission of the assessee that the LIBOR rate only should be considered for the purpose of determination of arm's length interest rate. The contention of the assessee that it did not have any default risk on account of its control over the AE is also fallacious. We are in agreement with the observations made by the TPO that mere relationship is not sufficient to determine the existence of default risk. Even though at a group level, from a outsider's perspective, there may not be difference between the subsidiary and the parent, the same is not so when the entities are examined on a standalone basis, which incidentally is the prime requirement of transfer pricing provisions. Further, from perusal of the judgement delivered by honourable Mumbai tribunal in the case of Aurionpro Solutions Ltd in I.T.A. No. 7872/Mum/2011, we find that the honourable tribunal has upheld the benchmarking at the rate of LIBOR +2%, wherein 2% represents the credit risk spread. Similarly in the case of Aithent, Technologies Pvt Ltd Vs ITO in ITA No.364 7/D e1/2 00 7 , the honourable tribunal has held that for the purpose of determination of the arms length interest rate various factors such as credit rating of the associate enterprise etc are required to be taken into account. The relevant portion of the judgement is reproduced below for convenience:

“7.....In line with the reasoning in the aforesaid decision in Perot Systems ISI(India) Ltd. (supra), we are of the opinion that CUP method is the most appropriate method in order to ascertain arms length price of the aforesaid international transaction by taking into account prices at which similar transactions with other unrelated parties. For that purpose assessment of the credit quality of the borrower and estimation of a credit rating, evaluation of the terms of the loan e.g period of loan, the amount, the currency, interest rate basis , and any additional input such as convertibility and finally estimation of arm's length terms for the loan based upon the key comparability factors and internal and/or external comparable transactions are relevant. None of these inputs have anything to do with the costs; they only refer to prevailing prices in similar unrelated transactions instead of adopting the prices at which the transactions have been actually entered in such cases, the hypothetical arms length prices, at which these associated enterprises, but for their relationship, would have entered into the same transaction, are taken into account. Whether the funds are advanced out of interest bearing funds or interest free advances or are commercially expedient for the assessee or not, is wholly irrelevant in this context. The transaction in the present case is of lending money, in foreign currency, to its foreign subsidiary. The comparable transaction therefore should be of foreign currency lending by unrelated parties. The Id. AR relied on decision of Chennai Bench in Al/s Shiva Industries & Holdings Ltd (supra and suggested to adopt LIBOR rates. However, we find that though

Chennai Bench referred to LIBOR rates of 4.42%, since the assessee charged interest @6%, no further addition was made.

7.1 Since in the instant case, neither the assessee nor the TPO/AO and the Id. CIT(A) have examined the applicability of CUP method as the most appropriate method in order to determine ALP of the international transaction of interest free foreign currency loan to its subsidiary by the assessee, we consider it fair and appropriate to vacate the findings of the Id.CIT(A) and restore the matter to the file of the AO for fresh adjudication with the directions to recompute the ALP of the aforesaid international transaction in the light of our aforesaid observations, following CUP method, keeping in view various judicial pronouncements, including those referred to above and of course, after allowing sufficient opportunity to the assessee."

C.3 Therefore, in line with the judgement mentioned above it is required to be seen as to what should be the credit spread which is required to be taken into account over and above LIBOR to determine the arms length interest rate. In this regard the following factors are important to note, which the TPO has mentioned in the TP order:

1. The loan which is granted is unsecured in nature.
2. The interest rate to be charged on the transaction is taken to be equivalent to the yield on "BBB" rated corporate bonds.

8.3.1 The assessee has also objected to the determination of credit rating of the AE at BBB by the TPO. In this regard we find that the apart from raising an objection in this regard the assessee has not given any credit rating of the associate enterprise to this panel. In order to determine the comparable uncontrolled price of the interest rate, "Loan Connector" can be taken into account. Loan connector is a database in which the data pertaining to all the major loan transactions across the world are captured. The transactions pertaining to the period under consideration i.e. FY 2008-09 should be considered and out of these transactions, the transactions pertaining to the AE geography can be taken into account in which the loan granted was unsecured in nature, the base rate for interest was LIBOR and the rating of the entity receiving the loan as BBB, determined by the TPO. The Assessing officer is directed to carry out such a search process from the database and determine the average credit risk spread on the loan transactions actually undertaken. Further looking at the fact that there had been severe fluctuations in the foreign exchange and the foreign exchange risk has been substantial and the assessee has granted loans in foreign currency, a 100 basis point increase on account of country and foreign exchange risk is found to be normal and should be added to the above margin: Consequently the corresponding adjustment may be made as per law and we direct accordingly."

Further in respect of applicability of CUP the DRP held as under:

“D.2 We have considered the submissions of the assessee and the details submitted by the assessee before the panel. In respect of the quotation received from EISBC Bank, it is seen that two e-mails are provided which are dated 12.07.2012. In the mail the quotation from the bank is solicited with the broad terms as enumerated above. From the e-mails provided, it is not clear as to what were the details provided to the bank and what were the details considered by the bank before deciding upon the interest rate provided in the quotation. As we have already highlighted above and as it has been discussed elaborately by the TPO in her order at page 15(Discussion on para 83 of taxation policy TP92/11 issued by Australian Taxation Office) and in the judgement delivered in the case of Aithent Technologies Pvt Ltd, the determination of interest rate is dependent on several factors which inter alia include period of loan, the amount, the currency, interest rate basis, and any additional input such as convertibility, nature an purpose of loan, market conditions, security for the loan, guarantee, credit rating of the borrower etc. From perusal of the details submitted nothing can be inferred about the critical assumptions made by the bank while granting the quotation, which are an important constituent of the determination of interest rate. It is further seen, as already mentioned above, the interest rate quotation is sought in 2012 while the transaction pertains to FY 2008-09. The market conditions prevailing in the two periods of time are bound to be different and consequently the quotation submitted by the assessee cannot be considered to be an appropriate CUP. The contention of the assessee to consider the transaction at arm's-length on the basis of this quotation is therefore rejected.

D.3 Similarly in the case of the other facility agreement provided before the panel, there are no details regarding the comparability of the-conditions between the transaction under examination and the facility agreement provided before this panel. From the details provided, it is not even clear as to when the facility agreement was executed and what were the main conditions while entering into this agreement. In the absence of such critical factors, the rate of interest charged on this facility agreement also can't be considered as a valid CUP. The contention of the assessee to consider the transaction at arm's-length on the basis of this facility agreement is also therefore rejected

D.4 In respect of the transaction with the third party bank in Germany, the assessee has submitted documents evidencing the rate of interest charged. Again as in the above transactions, no details in respect of the various factors of comparability in respect of the transaction under examination and the transaction is sought to be provided as comparable by the assessee has been given. On the

contrary, from the limited data provided by tile assessee, it can be seen that the transaction pertains to a short term funding, which is clear from the period of charge of interest. On the other hand the transaction under examination is a long term working capital loan. There can be no comparability of a long term working capital loan is a short term funding placed on the borrower. It is further seen that the period of the funding is August 2010 and July 2010 while the international transaction pertains to FY 2008-09. The market conditions prevailing in the two periods of time are bound to be different and consequently the rate of interest submitted by the assessee cannot be considered to be an appropriate CUP. The contention of the assessee to consider the transaction at arm's-length on the basis of this rate is therefore rejected."

8. We note that the Ld.AO while passing the impugned order, did not comply with the directions of DRP. The assessee filed application under section 154 of the Act in respect of the same, which is still pending.

8.1 The Ld.AR placed reliance of the decision of *Hon'ble Pune Tribunal* in case of *Goodyear South Asia Tyres (P.).Ltd vs.ACIT(supra)* in support of his argument that the no interest could be computed on loan during the moratorium period being 11 months from May 2008-March 2009.

The copy of the loan agreement between assessee and its subsidiary AE is placed at page 151 of paper book. Clause 3 of the agreement reads as under:

3. Interest: The loan would carry interest of 3% p.a. or 1% over LIBOR(London interbank offered rate) whichever is higher. Interest would be payable on all outstanding amount due after an initial moratorium period of about 11 months ending March 31 2009. Interest shall be paid annually.

The duration of loan as per Clause 4 of the Loan agreement is as under:

4. Duration: The amount will be repayable on demand.

8.2 We note that in case of *Goodyear South Asia Tyres (P.).Ltd vs.ACIT(supra)*, it was the assessee who took ECB from its AE. In the present facts of the case the assessee before us gave loan to its subsidiary AE. Further in that case the *Hon'ble Pune Tribunal* was considering the dispute relating to the rate of interest to charged on the loan taken by assessee therein.

9. Assessee also placed reliance on RBI Circular on moratorium dated 01/07/2015, placed at page 799-801 of paper book. We note that the exemption of interest during moratorium period is applicable to specific loans mentioned in para 4.2.12, that reads as under:

“4.2.12 Loans with moratorium for payment of interest

i. In the case of bank finance given for industrial projects or for agricultural plantations etc. where moratorium is available for payment of interest, payment of interest becomes 'due' only after the moratorium or gestation period is over. Therefore, such amounts of interest do not become overdue and hence do not become NPA, with reference to the date of debit of interest. They become overdue after due date for payment of interest, if uncollected.

ii. In the case of housing loan or similar advances granted to staff members where interest is payable after recovery of principal, interest need not be considered as overdue from the first quarter onwards. Such loans/advances should be classified as NPA only when there is a default in repayment of instalment of principal or payment of interest on the respective due dates.”

10. For all the above reasons we do not agree with the argument of the Ld.AR that no interest could be chargeable during the moratorium period.

10.1 The Finance Act, 2012 inserted *Explanation to Section 92B*, with retrospective effect from 1.4.2002 and sub-clause (c) of clause (i) of this Explanation provides that:

*(i) the expression "international transaction" shall include—
.....(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;....'*

11. We note that expression '*debt arising during the course of business*' refers to trading debt arising from sale of goods or services rendered in course of carrying on business. Once any debt arising during course of business is an international transaction, any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged.

11.1 As internal CUP has been rightly rejected by the DRP, the transaction has to be benchmarked by using an appropriate method as per Rule 10B of income tax Rules.

11.2 Alternatively, it has been argued that working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables and lones and advances to international transaction would amount to double taxation. *Hon'ble Delhi Tribunal* in case of *Orange Business Services India Solutions (P.) Ltd. v. Dy. CIT* reported in (2018) 91 *taxmann.com* 286 has observed that:

"There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which would have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee would have to be studied. It went on to hold that, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflected an international transaction intended to benefit the AE in some way. Similar matter once again came up for consideration before the Hon'ble Delhi High Court in Avenue Asia Advisors Pvt. Ltd. v. DCIT [2017] 398 ITR 120 (Del). Following the earlier decision in Kusum Healthcare (supra), it was observed that there are several factors which need to be considered before holding that every receivable is an international transaction and it requires an assessment on the working capital of the assessee. Applying the decision in Kusum Health Care (supra), the Hon'ble High Court directed the TPO to study the impact of the receivables appearing in the accounts of the assessee; looking into the various factors as to the reasons why the same are shown as receivables and also as to whether the said transactions can be characterized as international transactions."

11.3 In view of the above, we deem it appropriate to set aside the impugned order on this issue and remit the matter to the file of the Ld.AO/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee should be allowed reasonable opportunity of being heard in such fresh proceedings.

Accordingly Ground 3-7 stands allowed for statistical purposes.

Ground no.8:

12. The Ld.AO while passing the Draft assessment order observed that, assessee debited Rs.101,74,50,000/- as Mark to market (MTM) foreign exchange loss. The assessee was called upon to furnish the details/settled loss and notional loss and allowability of the claim. From the details filed vide letter dated

22/01/2013, the Ld.AO was of the view that assessee entered into speculative transaction and booked the expenditure as MTM losses on notional basis.

12.1 In the reply filed by assessee dated 18/03/2014 before the Ld.AO. The Ld.AO on examination of reply furnished by assessee held that assessee entered into speculative transaction and booked the expenditure as Marked to Market losses on notional basis. It was submitted that such gain/loss comprised of following:

- Realised foreign exchange loss amounting to Rs.78,79,01,700/- relating to forward contract on export receivables;
- Unrealised Foreign exchange loss amounting to Rs.22,95,48,325/-

12.2 The Ld.AO disallowed the unrealised foreign exchange loss amounting to Rs.22,95,48,325/- by relying of the decision of *Hon'ble Supreme Court* in case of *Woodward Governor India vs CIT* reported in 179 taxman 362 and Circular no.3 of 2010 dated 23/03/2010. The Ld.AO also relied on following decisions

- *Hon'ble Supreme Court* in case of *CIT vs Joseph John* reported in 67 ITR 74;
- *Hon'ble Andhra Pradesh High Court* in case of *MG Bros vs CIT* reported in 154 ITR 695

12.3 Ld.AO made addition of Rs.27,95,73,000/- as notional loss arising from Mark to market transaction which was debited to P&L account like assessee.

Aggrieved by the order of Ld.AO, assessee filed objection before the DRP.

12.4 The DRP upheld the addition of the Ld.AO and held the transaction to be speculative. The DRP rejected the contention of assessee that the transaction is hedging. On receipt of the DRP direction, the Ld.AO passed the final assessment order making addition in the hands of assessee of Rs.27,95,73,000/- as notional loss arising from Mark to market transaction.

Aggrieved by the order of Ld.AO, assessee is in appeal before us now.

12.5 Before us the Ld.AR submitted that the forex loss was on account of outstanding forward foreign currency contracts considering the value of foreign currency as on the reporting date and as per the requirement laid out under Accounting Standard 11, by the Institute of chartered accountants of India has notified by Central Government under section 211 (3C) of the Companies Act, 1956. It is submitted by the Ld.AR that it is an allowable business expenditure by placing reliance on order of *Hon'ble Supreme Court* in case of *CIT vs Woodward Governor India Pvt.Ltd.*, reported in 179 taxman 326. It has been submitted that as per Accounting Standard 11 assessee was required to reinstate the loan amount on the closing date of the balance sheet. He placed reliance on the decision of *Hon'ble Supreme Court* in case of *Sutlej cotton Mills Ltd. vs CIT* reported in (1979) 116 ITR 1 wherein *Hon'ble Supreme Court* is observed as under:

“Whether the loss suffered by the assessee was a trading loss or not would depend on the answer to the question, whether the loss was in respect of a trading asset or a capital asset. In the former case, it would be a trading loss but not so in the latter. The test may also be formulated in another way by asking the question whether the loss was in respect of circulating capital or in respect of a fixed capital.”

The court further observed that:

“if the amount in foreign currencies utilised or intended to be utilised in the course of the business or for trading purposes or for effecting a transaction on revenue account, is loss arising from the depreciation in its value on account of alteration in the rate of exchange would be a trading loss, but if the amount is held as a capital asset, the loss arising from depreciation would be a capital loss. This is clearly borne out by the decided cases which we shall presently discuss.”

12.6 The Ld.AR also relied on following decisions:

- *Decision of coordinate bench in case of Honeywell Technology Solutions Lab vs ACIT in ITA No.977/Bang/2015 vide order dated 12/07/2019*
- *Decision of coordinate bench in case of DCIT vs. Syngene International Ltd., in ITA No.867 to 871/Bang/2014*
- *Decision of Hon’ble Mumbai Tribunal in case of Inventurus Knowledge Services Vs. ITO in ITA No.5922/Mum/2013*
- *Decision of Hon’ble Gujrat High Court in case of Friends & Friends Shipping Vs. CIT reported in 25 taxmann.com 553*

On the contrary, the Ld.CIT.DR placed reliance on observations of the Ld.AO/DRP and submitted that the unrealised foreign exchange loss are notional and has been rightly disallowed as speculative in nature.

We have perused submissions advanced by both sides in light of records placed before us.

12.7 We note that total receivables were Rs.3,10,17,13,000/- out of which Foreign receivables were Rs.1,62,98,00,900/-. Assessee hedged a sum amounting to Rs.1,22,28,00,000/-. Assessee debited as exceptional item (net of tax) in the Profit and loss account. The details are placed at page 112 & 133 of paper book. It is submitted that, these loss arise due to the trading transaction and that, in view of the ratio of *Hon'ble Supreme Court* in case of *Woodward Governor (supra)* assessee had an option of measuring its export receivables at exchange rate of U.S. dollar as on the last date of financial year.

12.8 It is submitted by the Ld.AR that assessee in the present facts of the case entered into forward contracts with banks to hedge the foreign exchange fluctuation risk arising in regular course of business from existing sale as well as highly probable forecast transactions. He submitted that foreign exchange forward contract creates a binding obligation and the losses are not contingent for notional liability. It has been stated that in case of foreign exchange forward contract, the value is derived from exchange of different currencies at a forward rate and not an export receivables/sale contract of the assessee. It is submitted that irrespective of whether such forward contract is entered into for outstanding debts or for future sales, the liability pertains is certain and quantifiable liability. The Ld.AR thus submitted that loss reported is on account of restatement and is an existing liability.

12.9 The authorities below were of the opinion that assessee entered into forward contract with banks at predetermined exchange rate of foreign currency to safeguard its receivables from any fluctuation in foreign exchange. It was observed by the authorities below that, by entering into such forward contracts, assessee hedged its receivables and immuned itself from effect of any change in exchange rate of foreign currency. It was observed that whatever may be the foreign exchange rate as on date of receipt of exports, whether it is higher or lower than the contract rate, assessee was certain of receiving the contract rate under the forward contract. However, by revaluing these forward contracts as on 31/03/2010, assessee made claim of loss, not only on the basis of revaluation of its foreign exchange receivables but also on the basis of forward contracts. Such additional loss was denied by the authorities below by placing reliance on the CBDT instruction No.3/2010.

12.10 It is submitted that an identical issue has been remanded by coordinate bench of this Tribunal in assessee's own case in ITA no.74/Bang/2019 for assessment year 2010-11 by observing as under:

“5.6.Reliance is also placed on Special Bench of Mumbai Tribunal in case of DCIT vs Bank of Bahrain and Kuwait ,reported in (2010) 41 SOT 290 took the view that, forward contract entered into by assessee to sell foreign currency at an agreed price on a future date falling beyond last date of accounting period that is before the date of maturity of forward contract, such loss is an allowable deduction. Subsequently in DCIT vs Bank of America NT and SA, reported in (2011) 47 SO T124, the Hon'ble

Mumbai Tribunal relying on the Special Bench decision in case of Bank of Baharin and Kuwait (supra) held that revaluation of forward securities contract are being made consistently.

5.7 On account of such revaluation, profits are offered to tax and taxed and by the same token, loss, if any, is also to be allowed. Placing reliance on the decision of Hon'ble Supreme Court in case of CIT vs Woodward Governor India Pvt.Ltd., reported in (2009) 312 ITR 254, it has been submitted that loss suffered by the assessee on account of forest derivatives as on the date of balance-sheet is an item of expenditure under section 37(1) of the Act. Hon'ble Supreme Court while considering this issue observed that the expression "any expenditure" has been used in section 37 of the Act to cover both "expenses incurred" as well as an amount which is really a loss even though such amount has not gone out from the pocket of the assessee. Hon'ble Court held that the unrealised loss due to foreign exchange fluctuation on the last date of accounting year in respect of loans taken for revenue purposes was allowed as deduction under section 37 of the Act.

5.8 On perusal of the decision of Special Bench in case of Quality Engineering and Software Technologies Pvt.Ltd vs DCIT (supra), we note that provision for losses incurred on derivative contracts was held to be an allowable expenditure this Tribunal in that case held that, assessee therein entered into forward contract in order to protect its interest against fluctuation in foreign currency in respect of consideration for export proceeds and that there was an actual contract for sale of merchandise, which cannot be termed as speculative transactions.

5.9 In all the grounds considered and argued by both the sides hereinabove, we note that the issue revolves around allowability of losses on account of restatement of exchange losses on forward contracts, option premiums and restatement of losses and bank balances as on the last date of the balance sheet. From the submissions

filed by assessee and the details of foreign exchange losses reproduced hereinabove reveals that the forward contracts entered into by assessee are for the purpose of protecting against loss which has an excess to assessee's business. This position has not been denied by the authorities below. The various decisions relied by both sides supports the claim of assessee. However we note that the details of forward contracts and the nexes with its business being capital or revenue have not been submitted by the assessee before the Ld.AO.

5.10 We refer to the consistent view taken by coordinate bench of this Tribunal in following cases:

- 1. Acer India Pvt.Ltd vs ACIT in IT(TP)A No. 458/Bang/2016 dated 18/02/2020*

"17.2 We have perused submissions advanced by both sides in light of records placed before us.

It has been submitted that assessee has been consistently recognising gains/losses arising out of forward contracts, and has been offering income if any to tax arising from such contracts in accordance with accounting standard 11. It has been submitted that, assessee retains outstanding forward contract creditors/ payable s, Balance and loss/gain is recognised as expenses/income in the profit and loss, account at the year end. Further there is no dispute that such contracts have been entered into by assessee in order to protect its interest against fluctuation in foreign currency in respect of consideration for export proceeds which are revenue in nature. Thus, in our view consequent effect of this accounting treatment is to recognise exchange fluctuation gain or loss in the profit and loss account as on the valuation date. Hon'ble Supreme Court in case of CIT vs Woodward Governor India (P) Ltd., reported in (2009) 312 ITR 254 held that, a transaction in

which a legal liability has been incurred before it is actually disbursed would be regarded as revenue in nature.

In the facts of present case assessee incurred foreign exchange loss far year under consideration towards trading activities, and therefore it is directly attributable to business of assessee, which is an allowable expenditure"

2. *DCIT vs M/s Coffee Day Global Ltd. in ITA No.3040 & 3041/Bang/2018 dated 24/02/2020.*

"10.8 We have heard the rival submissions and perused the record. The Supreme Court in the case of Sutlej Cotton Mills Ltd. vs. CIT reported in (1979) 116 ITR 1 held as under:

"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee of account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature"

The ratio of the above decision is whether the gain or loss should be brought to tax or allowed as deduction depends upon whether the foreign currency transactions were carried on account of capital or revenue items. If the foreign 'currency transactions are undertaken on capital account, the gain made out of such transaction is outside ambit of taxation, of course subject to the application of provisions of section 43A of the Act. If the transactions undertaken are on account of revenue items, the gain is clearly taxable and so the loss also is clearly allowable. In the present case, in the assessment year 2013-2014, Rs.18.12 crore represent the notional forex loss that is reinstatement of loan as on 31st March by marking to marketing rate and the balance amount is incurred on actual payment made during the year. In the assessment year 2014-2015, Rs.25.55 crore represent notional forex loss as above and balance amount is incurred on actual payment during the year. The Assessing Officer except making bald assertion that the transactions were undertaken on account of capital items no evidence was brought on record to establish that the foreign currency transactions were undertaken on capital items. The Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 had already held that the actual payment was not a condition precedent for making adjustment in respect of foreign currency transactions at the end of the closing year. We are, therefore, unable to concur or

agree with the view of the Assessing Officer that liability could arise only when the contract would have matured as such a stand is totally divorced from the accounting principles and is in variance with the principle upheld by the Apex Court in the case of Woodward Governor -India Pvt. Ltd. (supra). It is also not in dispute that assessee is following the mercantile system of accounting consistently. The foreign exchange loss is due to the reinstatement of the accounts at the end of the financial year as well as loss incurred on account of exchange fluctuation on repayment of borrowings is similar to the interest expenditure and it is to be allowed as revenue expenditure u/s 37 of the I.T.Act, as per the accounting standard approved by the Institute of Chartered Accountants of India. Hence, we do not find any infirmity in the finding of the CIT(A) on this issue and confirm the same. This ground of appeals of the Revenue is dismissed.”

3. *ABB global industries and services private limited vs DCIT in ITA No. 1488/B a NG/2017 by order dated 31/12/2020*

“10. We have considered the rival submissions. A perusal of the order of the AD shows that the AD called upon the assessee to justify the allowability of the losses on account of exchange loss on forward contracts. The assessee gave two submissions dated 8.1.2014 and 23.1.2014, copies of which are placed at page nos. 26-27 & 28-34 respectively. In both the submissions, the details of forward contracts has not been mentioned.

11. As far as law on the issue is concerned, it is very clear that the forward contracts entered into for the purpose of protecting against loss and which has a nexus to the business of the assessee and which are on revenue account have to be allowed as a deduction. The decision cited on behalf of Id. counsel for the assessee supports the claim made in this regard. We, however, find that the details of forward contracts and nexus with the business of the assessee have not been submitted by assessee before the AO. We therefore are of the view that while upholding the principle that losses on account of exchange fluctuation on forward covered contracts are allowable as a deduction, we hold that the factual details in this regard should be examined by the AO and for the purpose we set aside the order of CIT(Appeals)

and remand the issue to the AO for fresh consideration. The assessee has to show the nature of forward contracts and its nexus with the business of assessee and also the fact that such contracts are on revenue account and not on capital account.”

5.11 *We are therefore remitting issues back to the Ld.AO for examining the factual details in this regards.*

5.12 *At the outset, it has also been submitted by the Ld.AR that the losses are within the limits of the receivables as far as the mark to market losses are concerned. Assessee is directed to file all relevant documents/forward contracts to establish the nexes with the business of assessee and also the fact that such contracts are on account of revenue and not on capital.*

Hon’ble Karnataka High Court in case of CIT vs Wipro Finance Ltd. reported in 351 ITR 153 following the decision of Hon’ble Supreme Court in case of CIT vs Woodward Governor (India) Pvt.Ltd., (supra) held as under:

“4. The view taken by the Supreme Court in this judgment is to the fact that while even notional loss can be claimed by way of a business loss as to a deductible item in computing the income of the assessee for the year, as it is a computation on notional basis, it is made dependent on the manner of conduct of the assessee is in respect of the earlier assessment period and particularly as to the assessee has been following this uniformly over the period of years and the test being when there was a notional gain as to whether it had been offered for tax etc. The Supreme Court took the view that such claim can be entertained subject to fulfilment of the following 6 conditions:

- (i) whether the system of accounting followed by assessee is the Mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received;*
- (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fides;*
- (iii) whether the assessee has given the same treatment to losses claimed to have accrued and the gains that may have accrued to it;*

(iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains;

(v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards;

(vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

5. In the wake of the judgment of the Supreme Court, it is now submitted that while the view of the tribunal that the assessee can claim such deduction has to be affirmed, the matter does not end with that, but such claim will have to be examined in the light of the fulfilment of the conditions as indicated by the Supreme Court for which purpose, the matter may have to go back to the assessing officer, who has to apply these tests to the claim made by the assessee and then either admit the claim or rejected depending upon the assessee being in a position to satisfy the fulfilment of the conditions.

6. In the view of joint submission made by both Council, the question is apparently answered in favour of the revenue and in sense that though the view of the tribunal is to be affirmed on the principle that being further made subject to the fulfilment of the conditions, the matter has to go back to the assessing officer for examination. In this view of the matter the appeal is allowed in these terms. The claim of the assessee to be re-examined by the assessing officer and respect of the assessment year applying the test of fulfilment of the 6 conditions mentioned above. The assessing officer to issue notice to the assessee, fixing the date of hearing the assessee or its counsel and then pass orders.”

5.13 We note that the authorities below have not verified the forward contracts entered into for purpose of protecting against losses and whether it has nexes to the business of assessee which are on revenue account. As observed by coordinate bench of this Tribunal in case of DCIT vs M/s Coffee Day Global Ltd. (supra), that;

“If it is found that the foreign currency transactions are undertaken on capital account, the gain/loss made out of such transaction is outside the ambit of taxation, of course subject to application of provisions of section 43A of the Act. If the transaction undertaken are on account of revenue items, the gain is clearly taxable and so the losses clearly allowable.”

5.14 *Similar view has been taken by Hon’ble Cochin Bench in case of Baby Memorial Hospital vs ACIT in ITA No. 420/Coch/2019 by order dated 08/11/2019.*

5.15 *In view of the above discussion and the ratio laid down by Hon’ble Karnataka High Court in case of CIT vs Wipro Finance Ltd. (supra), we direct the Ld.AO to examine and decide the issue pertaining to forex loss on loan restatement, forex loss on forward exchange contract, and forex loss on restatement of bank balances and expenditure on option premium. The assessee has to show the nature of forward contract and its nexes with the business of assessee and also the fact that such contracts are on revenue account and not on capital account. We direct the Ld. AO to verify all the details and consider the claim of assessee in accordance with law.*

12.11 Ld.AR submitted that facts in year under consideration are similar to assessment year 2010-11. The Ld.AR submitted that assessee follows mercantile system of accounting and income and expenditure are recorded at the time of their accrual or incurrence. He thus submitted that, income has accrued during the previous year whether it is received during the previous year is immaterial or during the year preceding or following the previous year. Similarly, expenditure is recorded on accrual basis even if it becomes due during the previous year, irrespective of the fact whether it is during the previous year or not.

12.12 Placing reliance on the Accounting Standard 11 and the requirement of compliances under section 211(3A) of Companies Act 1956, it was submitted that assessee is required to make

provision towards all known liabilities and losses, even though the amount cannot be determined with certainty. Under section 145 (2) of the Act, recognition of mark to market losses as on last date of the financial year is to be satisfied as per Accounting Standard 1, relating to disclosure of accounting policies. Reliance is also placed on Accounting Standard 30, wherein companies are required to account for Mark to market losses in their books despite the fact that the contract has not yet matured as on the balance sheet date.

Accordingly grounds 8 stands allowed for statistical purposes.

13. Ground No.9: This ground is raised by assessee challenging the disallowance of expenditure incurred on purchase of application software under section 40(a)(ia) of the Act.

It is submitted that, in the instant case, the expense incurred by assessee pertains to application software and maintenance charges of recurring nature (i.e., no enduring benefit is available in respect of such repairs and maintenance). Further, it is submitted that the expenditure incurred does not result in bringing into existence any new asset or an advantage or benefit of an enduring nature to assessee.

The Ld.CIT DR relied on orders passed by authorities below.

13.1 We have perused the submissions advanced by both sides in light of records placed before us.

We note from the Draft assessment order that assessee has capitalized Rs.32,03,354/- and has added back the same to total income for year under consideration. The Ld.AO has listed the expenditure incurred by assessee towards purchase of application software. By holding that these have created an enduring benefit to assessee, the entire expenditure was disallowed. The Ld.AO however granted depreciation @ 60% on the purchase price.

13.2 We note that the Ld.AO has not verified the nature of software and has simply disallowed ignoring the fact that assessee has *suo moto* disallowed Rs.32,03,354/-. We direct the Ld.AO to analyse the expenditure incurred by assessee towards purchase of software based on the principles laid down by *Hon'ble Supreme court* in case of *Engineering Analysis Center of Excellence Pvt. Ltd. vs. CIT* reported in (2021) 125 taxmann.com 42.

Needless to say that proper opportunity of being heard must be granted to assessee.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

14. Ground no.10: This ground is raised by assessee is in respect of disallowance of expenses incurred on social welfare. The Ld.AO disallowed the expenses by holding that assessee did not produce 80G certificate in respect of the payment made to Bangalore City Connect Foundation (BCCF).

The DRP upheld the addition made by the Ld.AO.

Assessee is in appeal against the disallowance made by the Ld.AO in the final assessment order.

Aggrieved by the order of the Ld.AO, assessee is in appeal before us.

The Ld.AR submitted that expenses were incurred towards contribution made by assessee to Bangalore City Connect Foundation ("BCCF") for the betterment of roads and traffic conditions within its vicinity. He submitted that BCCF is a registered non-profit organization that creates a platform to unite urban stakeholders outside the government to collectively engage on urban management issues. The Ld.AR submitted that one of the key issues addressed by BCCF was relating to management of traffic in association with the Bangalore traffic police where it appoints & places traffic wardens in traffic clusters to ensure the smooth flow of traffic in Hosur Road. In line with the objective of BCCF, it was submitted that assessee contributed towards management of traffic around Hosur Road in Bangalore being the surrounding area of assessee's office and the expenses have been incurred to ease traffic congestion in Hosur road so that assessee's employees can reach office on time. The Ld.AR thus submitted that the expenditure is incurred in relation to the business of the assessee and hence is allowable as deduction while computing the taxable income of the Company.

The Ld.AR relied on decision of *Hon'ble Karnataka High Court* in case of *CIT vs. Infosys Technologies* reported in 360 ITR 714.

14.1 On the contrary the Ld.CIT DR relied on orders passed by authorities below.

We have perused the submissions advanced by both sides based on the records placed before us.

14.2 Assessee incurred expenditure towards ease of traffic congestion in Hosur road where the company is situated so that the employees of the assessee could reach office on time. Further it is noted that the expenditure is incurred by way of donation made to BCCF, that to look into the management of urban issues. Admittedly, the nature of payment has not been disputed by the authorities below. The Ld.AO disallows the expenditure as assessee did not produce 80G certificate.

Identical payment was considered by *Hon'ble Karnataka High Court* in case of *CIT vs.Infosys Technologies(supra)*. The *Hon'ble Court* observed and held as under:

“25. Therefore in the instant case, admittedly the assessee is having their establishment at Bannerghata Circle. Nearly about 500 employees are working in the said Unit. There was severe traffic congestion. Employees had to wait for longer time to reach the office. It seriously affected the business of the assessee, resulting in delay in completing the project. In order to facilitate its employees to reach their establishment safely and early, the assessee has installed traffic signals at Bannerghata Circle. Though it is the responsibility of the State and in particular, the Police Department either to install the traffic signal or control the traffic, the fact remains that in the absence of traffic signal or traffic police being positioned at Circles, the traffic congestion is a regular phenomenon. It seriously affects the free movement of public and in the instant case, the employees of the assessee. The assessee also has corporate social responsibility. In this background, in order to discharge their corporate social responsibility which also facilitates their business if the employees were to reach the place early, they thought of incurring the expenditure for installing the traffic signal at Bannerghata Circle. This expenditure is laid out or expended wholly and exclusively for the purpose of business. Therefore, the said expenditure incurred is allowable as deduction under Section 37(1) of the Act. That is precisely what the Tribunal has held. The said

finding is in accordance with law and based of legal evidence. Therefore no case for interference is made out. Hence the said substantial question of law is answered in favour of the assessee and against the Revenue.”

Respectfully following the above view, we direct the Ld.AO to allow the expenditure incurred by assessee towards BCCF.

Accordingly this ground raised by assessee stands allowed.

15. Ground no. 11 is raised by assessee seeking direction to grant credit of tax deducted at source.

We direct the Ld.AO to call for relevant details and after verify the same. The claim of assessee shall be then granted in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

16. Ground No 12 is in respect of the denial of relief under section 10AA and 10B of the Act, on the enhanced income. There is no dispute regarding the nature of income earned by assessee being from export of services.

16.1 At the outset it has been submitted that an order under section 154 of the act was passed wherein the mistake was rectified in respect of computation of deduction under section 10AA and 10B of the act. However we note that the quantum of deduction available to assessee is consequential to the verification of Ground nos.8.

We accordingly direct the Ld.AO to consider the enhanced income if any for purpose of computing deduction under section 10AA and 10B of the Act.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

17. Ground No.13 is consequential in nature and therefore do not require any adjudication.

18. Additional ground raised by assessee.

The Ld.AR submitted that following additional grounds have been raised by application dated 5/10/2020:

“14. Deduction of Rs. 23,83,328 with respect to education cess and secondary and higher education cess paid under the Income tax Act, 1961

14.1. Based on the facts and circumstances of the case and in law, the Appellant prays that the education cess and secondary and higher education cess on income tax (including dividend distribution tax) and fringe benefit tax paid for the year under consideration ought to be allowed as a deduction while computing the total income.

15. Relief under section 10AA and 10B of the Act with respect to interest income earned

15.1. That on the facts and circumstances of the case and in law, the Appellant prays that the relief under section 10AA and 10B of the Act needs to be allowed on the interest income earned from bank deposits, intercorporate loans etc., basis the full bench ruling of the Hon'ble Jurisdictional High Court in the case of CIT v Hewlett Packard Global Soft Ltd (403 ITR 453) which has held that incidental income by way of interest on bank deposits or staff loans would be entitled to hundred percent deduction under section 10A and 10B of the Act.

The Appellant craves, leave to add, alter, delete or modify all or any of the above grounds of appeal.”

It has been submitted that the above grounds emanates from the assessment records and no new records needs to be verified for adjudicating these issues. The Ld.AR placed reliance on the decision of *Hon'ble Supreme Court* in case of *NTPC Ltd. vs.CIT* reported in (1998) 229 ITR 688.

18.1 The Ld.AR submitted that Ground No.14 is a fundamental issue which is necessary to be considered for purpose of computing the taxable income in the hands of assessee. It is also submitted that Ground No.15 is consequential to Ground No.8 raised in the main appeal.

18.2 On the contrary the Ld.CIT.DR submitted that these issues were not raised by assessee for the authorities below and hence deserves to be rejected.

We have perused the submissions advanced by both sides in light of records placed before us.

18.3 We note that the additional grounds are necessary and there is no need of investigating into any new facts for adjudicating these issues. More so they are consequential to the main grounds raised by assessee and therefore we admit these grounds.

Accordingly the application for additional grounds raised by assessee stands admitted.

19. Ground No.14 is in respect of deduction of education cess.

It has been submitted that assessee did not raise this ground out of abundant caution and had not considered education cess paid on income tax as business deduction by considering cess to be part of tax levied on profits which needs to be disallowed under section 40(a)(i) of the Act.

19.1 The Ld.AR submitted that this issue now stands squarely covered by the decision of *Hon'ble Bombay High Court* in case of *Sesa Goa Ltd. vs JCIT* reported in *ITA No.17 of 2013 dated 28/02/2020* as well as decision of *Hon'ble Rajasthan High Court*

in case of *Chambal Fertilisers Ltd.& Anr. vs JCIT* in ITA no.52/2018 by order dated 31/07/2018. In these decisions it has been held that education cess is not disallowable under section 40(a)(i) of the Act. It has been submitted that this view has been taken by *Hon'ble Courts* by relying on Circular No.91/58/66-ITJ(19) dated 18/05/1967 wherein it has been held that only taxes paid has to be disallowed under section 40(a)(i) of the Act and not education cess.

19.2 No contrary precedent has been brought to our notice by the revenue. We therefore direct the Ld.AO to consider the education cess paid to be eligible as deduction.

Accordingly this ground raised by assessee stands allowed.

20. Ground No.15 is for claiming relief under section 10AA and 10B of the act with respect to interest income earned.

It has been submitted that assessee had not claimed relief under section 10AA and 10B of the act with respect to interest income earned on deposits with bank and intercorporate loan.

20.1 However he submitted that this issue as been decided by a full bench of *Hon'ble Karnataka High Court* in case of *CIT vs Hewlett-Packard Global Soft Ltd.* reported in (2018) 403 ITR 453, wherein it has been held that incidental income by way of interest on bank deposits or staff loan would be entitled to 100% deduction under section 10A and 10B of the Act.

We have perused submissions advanced by both sides in the light of the records placed before us.

20.2 Coordinate bench of this Tribunal in case of *Ocwen Financial Solutions Pvt.Ltd vs ACIT* in ITA No.153/Bang/2017 by order dated 12/07/2021 as under:

“11. We heard rival contentions and perused the record. We have also gone through the decision rendered in the case of Hewlett Packard Global Soft Ltd (supra). As observed by the AO, the facts prevailing in the above said case were related to “incidental income” by way of interest income on the temporarily parked funds in Banks/ interest on staff loans. Hence the said income was intricately linked to the business of the undertaking, which is eligible for deduction u/s 10A of the Act.

12. In the instant case, the bank deposits have been made for availing bank guarantees to be given in favour of Income tax department and Customs department. So far as, the bank guarantees given in favour of income tax department is concerned, we agree with the view of the AO that the liability towards income tax arises upon the assessee, which owns eligible undertakings. The income tax liability arises upon the assessee on the profits already generated by the undertaking. Hence, the deposits made for availing such bank guarantees, in our view, cannot be linked with the business carried on by the undertakings. Hence we agree with the view of the tax authorities that the interest income earned on bank deposits made for securing bank guarantees in favour of income tax department cannot be considered as “business income” of the eligible undertaking. Accordingly, the same has been rightly assessed under the head Income from other sources.

13. We have noticed that the bank guarantees have been given in favour of Customs department also. It is stated that the deposits to the extent of Rs.42,92,970/- was made for availing duty benefits under Customs Act. There should not any dispute that the transactions under the Customs Act could be linked to a particular undertaking, in which case, the interest income earned on the above said bank deposits could be linked to any particular “eligible undertaking”. Since transactions under Customs Act are related to import/export activities carried on by the undertakings, we are of the view that the decision rendered by Hon’ble jurisdictional Karnataka High Court in the case of Hewlett Packard Global Soft Ltd (supra) can be applied on it. Accordingly, the interest income shall normally form part of business income of the undertaking. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess interest income from bank deposits for availing duty benefits under Customs Act as business income of the relevant undertaking. The assessee is directed to link the bank deposits with

specific undertaking so that the AO could work out deduction u/s 10A accordingly.”

We see that this issue needs to be verified by the Ld.AO in accordance with law keeping in view the principles laid down by *Hon’ble jurisdictional High Court*.

20.3 We direct assessee to file requisite details to establish nexes which shall be verified and considered by the Ld.AO in accordance with law. Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee for assessment year 2009-10 stands allowed as indicated herein above.

Assessment year 2011-12

21. Both assessee and revenue has filed appeal against order dated 25/01/2016 passed by Ld.JCIT, Large Tax Payers Unit, Bangalore on following grounds of appeal:

ITA 558/Bang/2016(Revenue Appeal)

“1. The Hon’ble DRP has erred in directing the TPO to make downward adjustment to the said margin of 35 basis points charged by the bank to the borrower to make it comparable to the loan given by Biocon to Biocon SA.

2. The appellant craves leave to raise additional ground at the time of hearing of the appeal.”

21.1 It has been submitted by both sides that identical issue with regards to transfer pricing adjustment made in respect interest on transaction of loan by assessee to its subsidiary AE in Switzerland. It is submitted that this issue has been considered

herein above for assessment year 2009-10 in Ground No.3-7. Therefore the view taken in relation to the issue in assessment year 2009-10 would apply *mutatis mutandis* in this year too.

Accordingly the issue raised by revenue stands allowed for statistical purposes.

CO No. 20/Bang/2017:

22. Assessee filed cross objection in the appeal filed by revenue. As we have remanded the issue to Ld.AO/TPO, the assessee's cross objection becomes infructuous.

Accordingly the cross objection filed by assessee stands dismissed as infructuous.

ITA No.557/Bang/2016:-

23. Grounds raised by assessee are as under:

“Based on the facts and circumstances of the case, the Appellant respectfully submits its grounds of appeal.

Order being bad in law

1. That on the facts and in the circumstances of the case and in law, the order passed by the Learned Joint Commissioner of Income-tax-LTU Bangalore ("Ld AO") under section 143(3) read with section 144C of the Act is erroneous and bad in law

2. That on the facts and in circumstances of the case and in law, the Ld AO has erred in assessing the returned income of Nil at Rs 1,555,916,134

Disallowance of sales promotion expenses

3. The Ld AO has erred in law and on facts in disallowing the sales promotion expense amounting to Rs 300,602,40

4. The Ld AO has erred in law in relying on the circular issued by the Central Board of Direct Taxes - Circular No. 5/2012 [F. No. 225/142/2012-ITA.II], dated August 1, 2012 (hereinafter referred to as "CDBT Circular") without examining any facts in details and disregarding the fact that the CDBT Circular was not applicable for the AY under consideration (i.e. AY 2011-12) as it was introduced with effect from August 1,2012.(i.e. assessment year 2013-2014 onwards)

5. The Ld AO erred in fact by stating that requisite details were not furnished by the appellant during the course of proceedings. The appellant furnished the break -up of the sales promotion expenses and the respective ledger accounts vide submissions dated December 12, 2014 and March 6, 2015.

6. The Ld AO has erred in law and on fact in not appreciating that the sales promotion expenditure incurred by the Appellant was in its ordinary course of business and hence duly allowed under section 37 of the Act.

Other grounds

7. That the Ld AO erred in facts and in law, in initiating penalty proceedings under section 271(1)(c) of the Act in the absence of any concealment or furnishing of inaccurate particulars

8. The Ld AO erred in law and in facts in not considering the MAT credit available from earlier years, in determining the final tax liability of the Appellant

9. The Ld AO has erred in law and in fact in computing the interest under section 234D of the Act at Rs 31,589,744

10. The Ld AO erred in law and in fact in raising a demand of Rs 179,281,756 (including interest under section 234D of the Act) as per the notice issued under section 154 of the Act

Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds, at any time before or at the time of hearing of the appeal. Each of the above grounds is independent and without prejudice to the other grounds preferred by the Appellant.”

Brief Facts are as under:

24. During the course of assessment it was noticed that the assessee has debited Rs.34,43,15,000/- as Sales Promotion Expense. In this regard assessee was asked to furnish the complete breakup and bills and vouchers relating to it. In this regard assessee submitted the details vide letter dated 12.12.2014 whereby they expressed their inability to

furnish all the bills and vouchers pertaining to this payment and agreed to a disallowance of Rs 3,00,60,240.

24.1 The Ld.AO has recorded the fact that assessee has not raised this issue before the DRP. However based on the addition made in the impugned order, the assessee has raised this issue before this *Tribunal*.

24.2 Assessee has also raised the ground as additional grounds vide application dated 30/11/2018, that reads as under:

“On the facts and in the circumstances of the case and in law:

6A. The Learned Assessing Officer ("the Ld AO") has erred in law and on facts in disallowing the sales promotion expense amounting to Rs 300,602,400.

6B. The Ld AO has erred in law in relying on the circular issued by the Central Board of Direct Taxes - Circular No. 5/2012 [F. No. 225/142/2012-ITA.II], dated August 1, 2012 (hereinafter referred to as "CDBT Circular") without examining any facts in detail and disregarding the fact that the CDBT Circular was not applicable for the AY under consideration (i.e. AY 2011-12) as it was introduced with effect from August 1, 2012.(i.e. assessment year 2013-2014 onwards)

6C. The Ld AO erred in fact by stating that requisite details were not furnished by the appellant during the course of proceedings. The appellant furnished the break -up of the sales promotion expenses and the respective ledger accounts vide submissions dated December 12, 2014 and March 6, 2015.

6D. The Ld AO has erred in law and on fact in not appreciating that the sales promotion expenditure incurred by the Appellant was in its ordinary course of business and hence duly allowed under section 37 of the Act.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.”

We have perused the submissions advanced by both sides in light of records placed before us.

24.3 We note that the additional grounds are necessary to compute the correct taxable income in the hands of assessee. The additional evidence filed are necessary to adjudicate the claim of assessee.

Accordingly the application for additional grounds raised and additional evidences filed by assessee stands admitted.

24.4 Authorities below did not have any occasion to verify the evidence in respect of the claim. Assessee before us has filed additional evidence which needs verification by the Ld.AO. We therefore remit the issue back to ld.AO to verify the additional evidences filed by assessee and to consider the claim of assessee in accordance with law.

Accordingly Ground 3-6 and additional grounds 1-3 stands allowed for statistical purposes.

Ground No.7,9,10 are consequential in nature. Therefore do not require adjudication.

25. Ground 8 is regarding MAT credit not granted to assessee. We direct the Ld.AO to grant MAT credit available to assessee in accordance with law.

Accordingly Ground 8 stands allowed for statistical purposes.

Additional ground raised by assessee.

26. The Ld.AR submitted that following additional grounds have been raised by application dated 5/10/2020:

“7. Deduction of Rs. 1,47,62,656 with respect to education cess and secondary and higher education cess paid under the Income tax Act, 1961

7.1. Based on the facts and circumstances of the case and in law, the Appellant prays that the education cess and secondary and higher

education cess on income tax (including dividend distribution tax) paid for the year under consideration ought to be allowed as a deduction while computing the total income.

8. Relief under section 10AA and 10B of the Act with respect to interest income earned

8.1. That on the facts and circumstances of the case and in law, the Appellant prays that the relief under section 10AA and 10B of the Act needs to be allowed on the interest income earned from bank deposits intercorporate loans etc., basis the full bench ruling of the Hon'ble Jurisdictional High Court in the case of CIT v Hewlett Packard Global Soft Ltd (403 ITR 453) which has held that incidental income by way of interest on bank deposits or staff loans would be entitled to hundred percent deduction under section 10A and 10B of the Act.

The Appellant craves, leave to add, alter, delete or modify all or any of the above grounds of appeal.”

26.1 It has been submitted that the above grounds emanates from the assessment records and no new records needs to be verified for adjudicating these issues. The Ld.AR placed reliance on the decision of *Hon'ble Supreme Court* in case of *NTPC Ltd. vs.CIT* reported in (1998) 229 ITR 688.

The Ld.AR submitted that Ground No.7 is a fundamental issue which is necessary to be considered for purpose of computing the taxable income in the hands of assessee. It is also submitted that Ground No.8 is consequential to Ground No.1 raised in the appeal filed by revenue.

On the contrary the Ld.CIT.DR submitted that these issues were not raised by assessee for the authorities below and hence deserves to be rejected.

We have perused the submissions advanced by both sides in light of records placed before us.

26.2 We note that the additional grounds are necessary and there is no need of investigating into any new facts for

adjudicating these issues. More so they are consequential to the main grounds raised by assessee and therefore we admit these grounds.

Accordingly the application for additional grounds raised by assessee stands admitted.

27. Ground No.7 is in respect of deduction of education cess.

It has been submitted that assessee did not raise this ground out of abundant caution and had not considered education cess paid on income tax as business deduction by considering cess to be part of tax levied on profits which needs to be disallowed under section 40(a)(i) of the Act.

27.1 The Ld.AR submitted that this issue now stands squarely covered by the decision of *Hon'ble Bombay High Court* in case of *Sesa Goa Ltd. vs JCIT* reported in *ITA No.17 of 2013 dated 28/02/2020* as well as decision of *Hon'ble Rajasthan High Court* in case of *Chambal Fertilisers Ltd.& Anr. vs JCIT* in *ITA no.52/2018 by order dated 31/07/2018*. In these decisions it has been held that education cess is not disallowable under section 40(a)(i) of the Act. It has been submitted that this view has been taken by *Hon'ble Courts* by relying on Circular No.91/58/66-ITJ(19) dated 18/05/1967 wherein it has been held that only taxes paid has to be disallowed under section 40(a)(i) of the Act and not education cess.

27.2 No contrary precedent has been brought to our notice by the revenue. We therefore direct the Ld.AO to consider the education cess paid to be eligible as deduction.

Accordingly this ground raised by assessee stands allowed.

28. Ground No.8 is for claiming relief under section 10AA and 10B of the act with respect to interest income earned.

It has been submitted that assessee had not claimed relief under section 10AA and 10B of the act with respect to interest income earned on deposits with bank and intercorporate loan.

However he submitted that this issue as been decided by a full bench of *Hon'ble Karnataka High Court* in case of *CIT vs Hewlett-Packard Global Soft Ltd.* reported in (2018) 403 ITR 453, wherein it has been held that incidental income by way of interest on bank deposits or staff loan would be entitled to 100% deduction under section 10A and 10B of the Act.

We have perused submissions advanced by both sides in the light of the records placed before us.

29. Coordinate bench of this *Tribunal* in case of *Ocwen Financial Solutions Pvt.Ltd vs ACIT* in *ITA No.153/Bang/2017* by order dated 12/07/2021 as under:

“11. We heard rival contentions and perused the record. We have also gone through the decision rendered in the case of *Hewlett Packard Global Soft Ltd (supra)*. As observed by the AO, the facts prevailing in the above said case were related to “incidental income” by way of interest income on the temporarily parked funds in Banks/ interest on staff loans. Hence the said income was intricately linked to the business of the undertaking, which is eligible for deduction u/s 10A of the Act.

12. In the instant case, the bank deposits have been made for availing bank guarantees to be given in favour of Income tax department and Customs department. So far as, the bank guarantees given in favour of income tax department is concerned, we agree with the view of the AO that the liability towards income tax arises upon the assessee, which owns eligible undertakings. The income tax liability arises upon the assessee on the profits already generated by the undertaking. Hence, the deposits made for availing such bank guarantees, in our view, cannot be linked with the business carried on by the undertakings. Hence we agree with the view of the tax authorities that the interest income earned on

bank deposits made for securing bank guarantees in favour of income tax department cannot be considered as “business income” of the eligible undertaking. Accordingly, the same has been rightly assessed under the head Income from other sources.

13. We have noticed that the bank guarantees have been given in favour of Customs department also. It is stated that the deposits to the extent of Rs.42,92,970/- was made for availing duty benefits under Customs Act. There should not any dispute that the transactions under the Customs Act could be linked to a particular undertaking, in which case, the interest income earned on the above said bank deposits could be linked to any particular “eligible undertaking”. Since transactions under Customs Act are related to import/export activities carried on by the undertakings, we are of the view that the decision rendered by Hon’ble jurisdictional Karnataka High Court in the case of Hewlett Packard Global Soft Ltd (supra) can be applied on it. Accordingly, the interest income shall normally form part of business income of the undertaking. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess interest income from bank deposits for availing duty benefits under Customs Act as business income of the relevant undertaking. The assessee is directed to link the bank deposits with specific undertaking so that the AO could work out deduction u/s 10A accordingly.”

We see that this issue needs to be verified by the Ld.AO in accordance with law keeping in view the principles laid down by Hon’ble jurisdictional High Court.

30. We direct assessee to file requisite details to establish nexus which shall be verified and considered by the Ld.AO in accordance with law. Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee for assessment year 2009-10 and 2011-12 stand allowed as indicated herein above. Appeal filed by revenue for assessment year 2011-12

**stands allowed for statistical purposes. Cross objection filed
by assessee stands dismissed as infructuous.**

Order pronounced in open court on 12th November, 2021.

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Dated: 12th November, 2021.
/MS/

Copy to

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore