IN THE INCOME TAX APPELLATE TRIBUNAL
"C"BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.694/Bang/2019
Assessment Year:2011-12

Deputy Commissioner of Income-tax Circle-7(1)(1) Bangalore	**Vs.**	M/s. Timken Engineering & Research India Pvt. Ltd. Sy.No.(S)39(P) 42(P), Electronic City Phase-II Doddathogur Village Begur Hobli Taluk Bangalore 560 100 **PAN NO : AABCT2265L**
APPELLANT		**RESPONDENT**

ITA No.517/Bang/2019
Assessment Year: 2011-12

M/s. Timken Engineering & Research India Pvt. Ltd. Bangalore 560 100	**Vs.**	Deputy Commissioner of Income-tax Circle-5(1)(1) Bangalore
APPELLANT		**RESPONDENT**

C.O. No.48/Bang/2019 (Arising out of ITA No.694/Bang/2019)
Assessment Year: 2011-12

M/s. Timken Engineering & Research India Pvt. Ltd. Bangalore 560 100	**Vs.**	Deputy Commissioner of Income-tax Circle-7(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Sri Aliasghar Rampurawala, A.R.
Respondent by	**:**	Sri Pradeep Kumar, D.R.

Date of Hearing	**:**	06.01.2022
Date of Pronouncement	**:**	31.01.2022

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The cross appeals filed by the parties and the cross objection filed by the assessee are directed against the order dated 5.2.2019 passed by Ld. CIT(A)-7 and they relate to the assessment year 2011-12.

2. The assessee has filed grounds of appeal and additional grounds of appeal. At the time of hearing, the assessee pressed only ground Nos.1 to 7 (in the original grounds of appeal and 9 (in additional grounds). Accordingly, the remaining grounds are dismissed as not pressed.

3. The grounds of appeal filed by the revenue relate to the relief granted in respect of addition relating to transfer pricing adjustment in Software development services. Besides the same, the revenue has also raised a ground challenging the direction given by Ld CIT(A) to grant depreciation on software purchases.

4. In the cross objection and additional Cross objection, the assessee has raised certain grounds relating to Transfer pricing adjustment.

5. The Ld. A.R. submitted that the assessee is a wholly owned subsidiary of the Timken company, USA. It is engaged in the following business activities:-

(a) Provision of contract routine back-office engineering support services,

(b) Software development services &

(c) IT enabled services.

He submitted that the assessee is being compensated on a cost-plus basis for undertaking above services. The Ld. A.R. submitted that the TPO made transfer pricing adjustment in respect of all the 3 segments mentioned above. The Ld. CIT(A) deleted the transfer pricing adjustment made in respect of software development services and hence, the revenue has filed the appeal challenging the order of Ld. CIT(A). The assessee has raised grounds relating to transfer pricing adjustment made in respect of engineering support services and information technology enabled services. Besides the above, the assessee has also raised grounds on certain corporate issues also.

6. With regard to the transfer pricing adjustment made in respect of all the 3 segments mentioned above, the assessee submitted as under:-

> "The Ld A.R submitted that the assessee has entered into an Advance Pricing Agreement (APA) with CBDT on 29.3.2019 for settling Transfer pricing issues for assessment years 2016-17 to 2020-21 with a provision for roll- back of APA to three preceding assessment years, viz., 2013-14 to 2015-16. The Ld. A.R. submitted that the international transactions entered by the assessee during the year under consideration are similar to the international transactions that were entered during the years covered by APA. Accordingly, the Ld. A.R.

submitted that the Tribunal may direct the AO/TPO to adopt the net margin determined under APA for the current year also. In support of this contention, the Ld. A.R. placed his reliance on the decision dated 16.11.2021 rendered by the coordinate bench in the case of Yodlee Infotech Pvt. Ltd. Vs. ACIT (IT (TP)A No.513/Bang/2016."

7. We heard Ld. D.R. and perused the record. We notice that the coordinate bench in the case of Yodlee Infotech Pvt. Ltd. (supra) has considered an identical issue and has decided the same in favour of the assessee by restoring the issue to the file of the AO/TPO with a direction to ascertain the nature of international transactions that have been entered in the current year and if they are of similar nature as entered in the years covered by APA, then the issue can be decided in line with the terms and conditions of APA. The relevant portion of the order passed by the coordinate bench in the above said case is extracted below:-

"2. The assessee has filed grounds of appeal challenging the addition relating to transfer pricing adjustment made in respect of software development segment and marketing support services segment. The assessee has also filed an additional ground contending that the net margin rate determined under advanced pricing agreement for assessment years 2013-14 to 2019-20 should be adopted to the year under consideration also.

3. We heard the parties on the additional ground. The facts relating to the case are stated in brief. The assessee is a subsidiary of Yodlee (USA). The assessee has entered into a service agreement with its parent company to provide software development services and also marketing support services. The assessee is compensated on a Cost plus mark up basis. For the purposes of transfer pricing study, the activities of the assessee have been classified into two segments, viz., "Software support services" and "Marketing support services". The TPO made transfer pricing adjustment of Rs.5.44 crores in Software support services segment and Rs.3.93 lakhs in Marketing support services segment. The Ld. DRP granted partial relief to the assessee and accordingly the addition on account of TP adjustment was reduced to Rs.5.37 crores in software development segment and Rs.3.39 lakhs in marketing support services segment. Still aggrieved, the assessee has filed this appeal before us.

4. The Ld. A.R. submitted that the assessee is rendering services to its A.E. on 'Cost + Mark up' basis. He submitted that the assessee has entered into a bilateral advanced pricing agreement (APA) with CBDT on 17.12.2020 for 5 years commencing from financial years 2014-15 to 2018-19 (relevant to assessment years 2015-16 to 2019-20). The roll back was allowed for 2 years namely for assessment years 2013-14 & 2014-15. The Ld. A.R. submitted that the assessee had filed bilateral APA application covering financial years 2010-11 & 2011-12 , i.e., for Assessment years 2011-12 & 2012-13 as well. However, the above said two years were not allowed in APA agreement.

5. The Ld. A.R. submitted that there is no change in the activities carried on by the assessee during the year under consideration and also during the years covered by bilateral APA. Under bilateral APA, the margin of the assessee namely OP/OC was agreed to be 15.20% for assessment years 2013-14 to 2019-20. Accordingly, the Ld. A.R. submitted that the above said rate may be applied to the year under consideration also to both software development segment and marketing support services segment, even though the year under consideration is not covered by bilateral APA. He submitted that the Mumbai bench of Tribunal, in the case of 3i India Pvt. Ltd. Vs. DCIT (ITA No.581/Mum/2015 dated 16.9.2016), has accepted the above said view. He submitted that the Mumbai bench of Tribunal in the above said case has expressed the view that when, on similar functions and transactions the arm's length price has been agreed in APA, and if the said margin is compared with the margin declared in a period not covered by APA is not at variance, then the assessee's margin for the functions performed can be considered at arm's length. The Ld. A.R. submitted that the activities carried on by the assessee during the year under consideration is not at variance with the activities carried during the year covered for bilateral APA. Accordingly, he submitted that the profit margin of 15.20% should be considered as ALP for the year under consideration also. The Ld. A.R. submitted that the assessee has declared margin of 15.25% in software development segment and hence no transfer pricing adjustment is called for in this year for this segment, since the above said rate is more than the margin accepted in bilateral APA. In respect of marketing support services, the assessee has declared margin of 11%. The Ld. A.R. submitted that the assessee does not have any objection in adopting bilateral APA rate of 15.20% for marketing support services. The Ld. A.R. submitted that, if the above said contentions of the assessee are accepted, then other grounds do not require adjudication.

6. The Ld. D.R. on the contrary submitted that the assessee had applied for bilateral APA only for assessment year 2015-16 to 2019-20 and the roll back was allowed for only two years namely for assessment years 2013-14 & 2014-15. Hence, the year under consideration is not covered by roll back period. Accordingly, he submitted that the margin agreed under bilateral APA should not be applied for the year under consideration. With regard to the reliance of the assessee on the decision rendered by Mumbai Bench of Tribunal in the case of 3i India Pvt. Ltd. (supra), the Ld. A.R. submitted that the facts prevailing in the above said case is distinguishable. He submitted that the assessee before the Mumbai Tribunal was rendering investment advisory services and also portfolio

management services. The assessee did not bench mark PMS services separately. Hence, the TPO made separate adjustment on account of PMS. The Tribunal did not uphold the action of TPO. In the instant case both the assessee as well as the TPO has bench marked the transactions under TNMM method only. Hence, there is no parity of facts and accordingly submitted that the decision rendered by Mumbai Tribunal should not be applied.

7. In the rejoinder, the Ld. A.R. submitted that the principle laid down by Mumbai bench of Tribunal in the above said case is that the profit margin agreed by CBDT under bilateral APA can be applied to the years not covered by APA. He submitted that the assessee is requesting the bench to follow the said proposition only.

8. We heard the rival contentions and perused the record. It is an admitted fact that the assessee has entered into a bilateral APA with CBDT for assessment years 2015-16 to 2019-20 with roll back for two years, viz., for assessment years 2013-14 & 2014-15. It is the plea of the assessee that there is no change in the functions performed and services rendered to its A.E. during the year under consideration vis-a-vis the years covered by APA. It is the contention of the assessee that the CBDT has accepted to profit margin of 15.20% for the periods covered by APA and hence the same rate should be applied to the year under consideration also. In support of this contention, the assessee has placed reliance on the decision rendered by Mumbai bench of Tribunal in the case of 3i India Pvt. Ltd. (supra). In the above said case, the Mumbai bench of Tribunal has decided as under with regard to the above said contention of the assessee:-

> *"17. Thus, in view of the aforesaid decision, we hold that no separate PMS services needs to be benchmarked as the same is part and parcel of rendering of investment advisory services which is evident from the functions performed in terms of the "Investment Advisory Agreement" entered between the assessee and its AE. We further agree with the contention of the Ld. Senior Counsel that, if the similar function was carried out by the assessee in the earlier years and also in the subsequent years with same FAR analysis, then particularly for this year, it cannot be held that, assessee was performing PMS services separately which was not there earlier and in subsequent years. It has not been disputed that so far as FAR and overall functions are concerned, it remains the same not only in the earlier years but also in subsequent years. Thus, this year no exception can be carved out to deviate from the principle of consistency; and accordingly, we hold that no separate adjustment on account of PMS can be made that too on ad-hoc basis without adhering to Transfer Pricing provisions under the Income-tax Act as well as IT Rules. Though the APA in the case of assessee has been entered from AY 2005-16 onwards but it does give an indication that the 'Cost + Mark up' charged by the assessee in this year (20%) is in and around the same range which has been agreed in the APA (21%). The relevant portion of the APA for the sake of ready reference is reproduced below:*

3. Covered Transactions:

"The international transactions of provision of non-binding investment advisory services & related support services; and recovery of service pay between the Applicant and its Associated Enterprises 3i Investment Plc (hereinafter referred to as (AEs)), shall be the covered transactions for the Agreement and the Agreement shall apply to these international transactions.

4. Functions, Assets and Risks:

"The functions performed, assets employed and risk undertaken (hereinafter referred to as "FAR") by the Applicant, and by its AE(s), for the covered transactions shall be as given in Appendix I.

5. Most Appropriate Transfer Pricing Method(s):

"The most Appropriate Transfer Pricing Method for the covered transactions shall be the Transactional Net Margin Method (hereinafter referred to as "TNMM") within the Applicant as the tested party and operating profit margin as Profit Level indicator (PLI). Recovery of service pay is included in "operating expense; and hence it will get benchmarked with the transaction of provision of non-binding investment advisory services and related support services.

6. Arm's Length Price:

"The arm's length price (hereinafter referred to as "ALP") of the covered transactions shall be the operating profit margin of not less than 21% for each previous year of APA Years and Rollback Years.

The determination of ALP for Rollback Years is subject to the condition that the ALP would get modified to the extent that it does not result in reducing the total income or increasing the total loss, as the case may be, of the applicant as already declared in the return of income of the said years".

18. Whence, on similar functions and the transactions the Arm's length price has been agreed at 21% which if compared with the margin of 20% in this year, then same is not at variance, therefore, it can be held that the assessee's margin of 20% for the functions performed are at Arm's Length Price. Accordingly, we hold that, upward adjustment of Rs.8,83,93,866/- is without any basis and is directed to be deleted."

9. We also notice that Pune bench of ITAT has also examined the question as to whether the profit margin determined under bilateral APA could be applied for the years not covered by APA in the case of M/s AbicorBinzel Production (India) Pvt Ltd vs. DCIT (ITA Nos.2253 to 2255/PUN/2014 dated 15.12.2017). In the above

said case, the assessee had entered into bilateral APA for assessment years 2014-15 to 2018-19 with roll back period covering preceding four assessment years, viz., AY 2010-11 to 2013-14. The assessee sought application of margin agreed under bilateral APA for assessment years 2005-06 to 2007-08. It was also submitted that identical plea put forth for AY 2009-10 has been accepted by the co-ordinate bench in the assessee's own case in ITA No.139/PN/2014. The Pune bench of ITAT accepted the contentions of the assessee and the relevant portion of the order passed by the Pune bench of ITAT are extracted below:-

> *5. In the light of fact that assessee has entered into APA, the Co- ordinate Bench of the Tribunal in the assessment year 2009-10 has directed Assessing Officer to decide the issue in accordance with the terms and conditions of APA as nature of transactions are similar. The relevant extract of findings of the Tribunal on this issue are as under:*
>
> > *"8. The perusal of grounds of appeal reflects that the assessee is in appeal on account of transfer pricing adjustment made in the hands of assessee. No other grounds of appeal have been raised by the assessee other than transfer pricing adjustment. The assessee has made a request since it had entered into Advance Pricing Agreement (APA) with CBDT covering nine years from assessment years 2010-11 to 2013-14 under roll back provisions and from assessment years 2014-15 to 2018-19 being the balance APA period, similar proposition should be applied to the year under consideration also as the international transactions entered into by the assessee with its associate enterprises in the instant assessment year are identical to the international transactions which were part of APA proceedings. The DCIT(TP) 1(1), Pune has submitted a report dated 13.07.2016, in which it has been stated that the international transactions during the assessment year 2009-10 were similar to the international transactions entered during assessment years 2010-11 to 2015-16. In view thereof, where the international transactions entered into by the assessee with its associate enterprises are similar to the international transactions in the succeeding years, then where the APA proceedings have been carried out in the case of assessee and the Board and the assessee have come to a settlement vis-à-vis the manner of computation of arm's length price in the case of assessee in relation to the international transactions with its associate enterprises, we deem it fit to restore this issue also back to the file of Assessing Officer, who shall consider the plea of assessee and shall after obtaining report from the TPO in this regard, decide the issue in accordance with law. Reasonable opportunity of being heard shall be afforded to the assessee while deciding the issue. The grounds of appeal raised by the assessee are thus, allowed. In respect of the balance additions, no specific ground of appeal has been raised nor any arguments have been made by the learned Authorized Representative for the assessee, hence the same are not disturbed."*

In view of the facts discussed above, we are of considered opinion that it would be just and proper to restore these issues to the file of Assessing Officer with similar directions as above by the Tribunal in assessee's appeal for assessment year 2009-10. We further find forces in the submission of ld. DR that before deciding the issues raised in ITA Nos. 2253 to 2255/PUN/2014 A.Ys. 2005 -06 to 2007-08 appeals under consideration, it would be relevant to ascertain the nature of international transactions that have been carried out during assessment years 2005-06 to 2007-08. If they are of similar nature, the same can be decided afresh in line with the terms and conditions of APA. The appeals of the assessee are thus, allowed for statistical purpose with aforesaid directions."

10. We notice that the Pune bench of ITAT has accepted similar contentions in principle and restored the issues to the file of AO with the direction to ascertain the nature of international transactions that have been carried out during assessment years 2005-06 to 2007-08 and if they are of similar nature, then the same can be decided afresh in line with the terms and conditions of APA. Following the above said decision of the Tribunal, we restore this issue to the file of AO/TPO with the direction to ascertain the nature of international transactions that have been entered in the current year and if they are of similar nature as entered in the years covered by APA, then they can be decided in line with the terms and conditions of APA."

Following the above cited decision, the transfer pricing grounds raised by the assessee in this appeal as well as cross objection and also the transfer pricing grounds urged by the revenue are restored to the file of the AO with similar directions as made in the above cited case.

8. The assessee has raised following grounds on corporate issues:-

a) Disallowance of custom duty charges paid on de-bonding of capital goods.
b) Disallowance of custom duty charges paid on purchase of materials/consumables.
c) Disallowance u/s 40(a)(ia) of the Act of communication expenses on account of non-deduction of tax at source.

d) Disallowance of software expenses holding it as capital in nature and further invoking provisions of section 40(a)(ia) of the Act.

9. The first corporate issue urged by the assessee relates to disallowance of custom duty charges paid on de-bonding of capital goods. The assessee claimed a sum of Rs.21,80,870/- as customs duty on debonding of capital goods. The assessee contended that the above said amount was paid for removal of capital asset from export-oriented unit and hence it is allowable as revenue expenditure. The A.O. did not accept the same and accordingly disallowed the above said claim holding it as capital in nature. The assessee had also claimed another sum of Rs.40,892/- incurred towards de-bonding charges on capital goods. The AO disallowed the same on identical reasoning. Thus the aggregate amount of disallowance was Rs.22,21,762/-.

10. Before Ld. CIT(A), the assessee raised very same contentions that were raised before A.O. The assessee also bifurcated the amount of Rs.22,21,762/- as under:-

Customs duty paid on capital goods	-	19,11,223
Customs duty paid on consumables	-	3,10,539
		22,21,762

The Ld. CIT(A) took the view that both the expenditure should be treated as capital in nature and accordingly confirmed the disallowance. However, accepting the alternative submission of the assessee, the Ld. CIT(A) directed the A.O. to allow depreciation admissible on the amount so capitalized.

11. Before us, the Ld. A.R. fairly conceded that the issue of disallowance of customs duty paid on de-bonding of capital goods was decided against the assessee by the coordinate bench in the assessee's own case in ITA Nos.161 & 162/Bang/2019 relating to assessment years 2009-10 & 2010-11 and it has been held that if the value of asset has been capitalized, then the custom duty paid should also be capitalized. The Tribunal further held that assessee should be allowed depreciation on the amount so capitalized. In view of the decision rendered by the coordinate bench in the assessee's own case referred above, we confirm the disallowance of custom duty relating to capital goods amounting to Rs.19,11,223/-. As held by the Tribunal, the A.O. is directed to allow applicable depreciation thereon.

12. We have noticed that the assessee has submitted before Ld. CIT(A) that the customs duty paid included a sum of Rs.3,10,539/- relating to purchase of consumables. We restore this issue to the file of the A.O. with a direction to examine this claim of the assessee. If the consumables have been allowed as revenue expenditure, then the customs duty paid on it also shall take same colour and accordingly should be allowed as revenue expenditure.

13. The next issue relates to disallowance made u/s 40(a)(ia) of the Act for non-deduction of tax at source. The A.O. noticed that the assessee has claimed a sum of Rs.1,60,67,325/- on "communication" expenses. The A.O. noticed that the assessee has not deducted tax at source on the amount of Rs.74,49,138/-, which consisted of payments made to companies like M/s Bharti Airtel, M/s Conference call services India P Ltd, M/s Falcon Business Resources P Ltd, M/s Sistema Shyam Teleservices Ltd . Further, it included provision created for accrued expenses also. Accordingly,

the A.O. disallowed the above said amount of Rs.74,49,138/- u/s 40(a)(ia) of the Act. The Ld. CIT(A) noticed that an identical issue has been examined by him in assessment years 2008-09, 2012-13 & 2013-14, wherein the disallowance was confirmed. Before Ld CIT(A), the assessee submitted that it has deducted TDS on part of amount consisting payment made towards postage an courier charges, MCI relay charges. Accordingly, the Ld. CIT(A) directed the AO to reduce the amount which has suffered TDS and confirm the disallowance of remaining amount.

14. The Ld. A.R. submitted that an identical issue was considered by the coordinate bench of Tribunal in the assessee's own case in A.Y. 2009-10 & 2010-11 in ITA Nos.161 & 162/Bang/2019 and the same was decided against the assessee on the following reasoning:

a) Explanation 6 to section 9(1)(vi) inserted by the Finance Act 2012 with retrospective effect from 1.6.1976 shall apply to the payment of connectivity charges.
b) The decision rendered by Hon'ble Karnataka High Court in the case of CIT Vs. CGI Information Systems & Management Consultants Pvt. Ltd. (2014) 48 Taxmann.com 264, wherein it has been held that intra-net facilities provided by a non-resident company and used by the assessee by making payment would amount to royalty.

15. The Ld. A.R. submitted that the assessment year under consideration is AY 2011-12 and the relevant to the financial year is 2010-11. He submitted that explanation 6 was inserted in section 9(1)(vi) of the Act by Finance Act, 2012 with retrospective effect from 1.6.1976, meaning thereby, when the assessee incurred the communication expenses the above said provision was not available in the statute book. The Ld. A.R. submitted that the Hon'ble

Supreme Court has held in paragraph 84 & 85 of the order passed by it in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (Civil Appeal No.8733 to 8734 of 2018 and Others dated 2.3.21) that person mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, viz., to apply expanded definition of royalty inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act for the assessment year in question at a time when such explanation was not actually and factually in the statute. The Ld. A.R., accordingly, submitted that the Tribunal could not have invoked explanation 6 inserted subsequently for confirming the disallowance u/s 40(a)(ia) of the Act, when the same was not available in the Statute. With regard to the decision rendered by Hon'ble Karnataka High court in the case of CGI Information Systems & Management Consultants Pvt. Ltd.(supra), the Ld. A.R. submitted that the said decision was also rendered subsequent to the closure of the financial year. The Ld. A.R. placed reliance on the decision rendered by coordinate bench in the case of M/s. Teekays Interiors Solutions Pvt. Ltd. Vs. Deputy Commissioner of Income-tax (ITA No.400/Bang/2017 dated 15.2.2019) and submitted that the coordinate bench has held that the liability to deduct tax at source cannot be fastened upon the assessee retrospectively on the basis of subsequent decision rendered by the jurisdictional high court.

16. We heard Ld. D.R. on this issue and perused the record. We have also gone through the order passed by the Tribunal in the assessee's own case for AY 2009-10 & 2010-11. We notice that the coordinate bench has rendered decision on disallowance made u/s 40(a)(ia) on two types of claim as given below:-

(a) Disallowance of broadband connectivity charges (Dealt in paragraphs 16 to 18)

(b) Year end provision on Communication expenses. (Dealt in Paragraphs 23 to 26)

Payments falling under (a) above was decided against the assessee. In respect of yearend provision, the matter was restored to the file of AO with certain directions.

17. The contentions of the Ld A.R are addressed hereunder:-

(a) The decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra) makes it clear that an assessee cannot be expected to do impossible. Admittedly, the explanation 4 to section 9(1)(vi) was inserted only in 2012 with retrospective effect. However, the fact remains that the said provision was not available in the statute when the impugned payments were made by the assessee. Hence, on this score, the addition cannot be sustained. Accordingly, we agree with the contentions of Ld A.R on this issue.

(b) It is the submission of Ld A.R that the decision of Hon'ble Karnataka High Court was not available when the impugned payments were made, i.e., the decision was rendered subsequent to the closure of the accounting year. However, it is settled law that the Courts do not make any law and they only interpret the law. Accordingly, it is the duty of the assessee to show the reason or basis which led it to entertain bonafide belief that the impugned payments were not liable to TDS provisions. For example, in the case of software purchases, decisions of various benches of tribunal were available in favour of the assessee prior to the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd. Accordingly, the bonafide belief stood proved. In the instant case, the assessee has not brought on any authority, which formed the basis that the impugned payments are not liable to tax deduction at source.

18. We noticed earlier that the claim of Rs.74,49,138/- consisted of payments made to certain parties and also accrual entries. We have noticed earlier that the Tribunal, in the assessee's own case, has rendered different decision in respect of claim on the basis of payments made and the claim on the basis of accrual entries. In this year, the assessee has not furnished any break-up details of the above said amount of Rs.74,49,138/- booked under the head "Communication expenses". Further, the nature of expenses included in "communication expenses" was also not given. In fact, the assessee has submitted before Ld CIT(A) that 'Communication expenses" also include postal and courtier charges, meaning thereby, the nature of expenses is required to be seen to find out TDS liability on the impugned payments. We have held that the amendment made to sec.9(1)(vi) in 2012 cannot be taken support of. However, we are of the view that it is the duty of the assessee to show the basis or reasoning, which led the assessee to form bonafide belief that the impugned payments do not attract TDS provisions. Further, the nature of expenses are also required to be see. If the assessee is able to show the basis for bonafide belief, then the entire amount of Rs.74,49,138/- is liable to be deleted. Depending upon the nature of expenses also, the applicability of TDS provisions needs to be examined.

19. Accordingly, in the interest of natural justice, we are of the view that the assessee may be provided with an opportunity to furnish the details of nature of expenses and also to prove the bonafide belief. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO for examining it afresh in the light of discussions made supra.

20. The next issue contested by the assessee relates to disallowance of software expenses holding it capital in nature. The revenue is also contesting the decision of Ld. CIT(A) in directing the A.O. to allow depreciation on software purchases.

21. The Ld. A.R. submitted that the issue of software purchases i.e. whether it is capital or revenue in nature requires examination afresh in the light of decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). We find merit in the said contention. Accordingly, we restore this issue to the file of the A.O. with a direction to examine the same afresh by applying principles laid down by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. (supra). The order passed by Ld CIT(A) on this issue is accordingly set aside.

22. In the result, the appeal and cross objection filed by the assessee and the appeal of the revenue are treated as partly allowed for statistical purposes.

Order pronounced in the open court on 31st Jan, 2022

Sd/-	**Sd/-**
(George George K.)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 31st Jan, 2022.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.