

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

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

IT(TP)A No.3403/Bang/2018
Assessment year : 2014-15

Applied Materials India Pvt. Ltd., Unit 5, 3 rd Floor, Explorer Building, International Tech Park, Whitefield Road, Bangalore – 560 066. PAN: AAECA 2635C	Vs.	The Income Tax Officer, Ward 1(1)(1), Bangalore.
ASSEESSEE		RESPONDENT

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Respondent by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bangalore.

Date of hearing	:	30.05.2022
Date of Pronouncement	:	08.06.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is against the final order of the Income Tax Officer Ward – 1 (1) (1) – Bengaluru (the AO) dated 30/10/2018 passed under section 143(3) r.w.s. 144(13) of Income-tax Act, 1961 [the Act] for the assessment year 2014-15.

2. The Assessee is a wholly owned subsidiary of Applied Materials Inc., USA, which is a supplier of products and services to the global semiconductor industry. The Assessee was incorporated on 11.07.2003 under the provisions of the Companies Act, 1956, and is engaged in the provision of SWD services and engineering services to Applied Inc., its AE, as a captive service provider. In terms of the provisions of Sec.92A of the Act, the Assessee and its wholly owned holding company were Associated Enterprises ("AEs").

3. In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services is “international transaction” i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, the any income arising from an international transaction shall be computed having regard to the arm’s length price. In this appeal by the Assessee, the dispute is with regard to determination of Arm’s Length Price [ALP] in respect of rendering SWD services to the AE and TP adjustment in

respect of outstanding receivables on a notional basis. We shall deal each of the international transactions separately.

4. The assessee filed return of income declaring total income of Rs.51,02,55,190/-. The case was selected for scrutiny and since the assessee had international transactions, the AO referred assessee's case to Transfer Pricing Office (TPO). The TPO while passing the order under section 92CA made adjustments towards the determination of ALP towards the provision of Software Development (SWD) Services by the assessee to its AE for Rs.53,11,24,394/- and also TP adjustment with respect to interest on outstanding trade receivables for Rs.4,49,06,596/-. While passing the draft order the AO made the following disallowances in addition to the TP adjustments:-

- (i) Disallowance of depreciation on computer peripherals amounting to Rs. 3,19,328/-
- (ii) Disallowance of depreciation on leasehold improvements amounting to Rs.2,53,13,220

5. Aggrieved, the Assessee filed its objections before the DRP which were partly allowed, vide its directions dated 14.09.2018. Pursuant to the directions of the DRP, the AO passed the final assessment order dated 30.10.2018 in which the TP adjustment came to be reworked. Aggrieved by the final assessment order, the Assessee has preferred this appeal to the Tribunal.

6. The assessee has raised 12 grounds and several sub-grounds. Ground No. 1 to 3 are general in nature and Ground No. 11 and 12 are

consequential. Hence these grounds do not warrant separate adjudication and dismissed.

7. During the course of hearing, the Id.AR did not press for Ground No.6 and 8 and therefore the same is dismissed.

8. Out of the rest, Ground No.4, 5 and 7 pertain to TP adjustments and Ground No. 9 and 10 are relating to Corporate Tax issues. The assessee also raised an additional ground with regard to disallowance of education cess. However during the course of hearing the Id AR submitted that this ground is not pressed and hence dismissed.

9. We will first consider the issues pertaining to TP adjustments. As far as the provision of SWD services are concerned, the Assessee filed a Transfer Pricing [TP] Study to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method [TNMM] as the Most Appropriate Method [MAM] of determining ALP. The Assessee selected Operating Profit/Operating Cost [OP/OC] as the Profit Level Indicator [PLI] for the purpose of comparison. The PLI of the comparables is arrived at by considering the weighted average margin of the 3 years' data. The OP/OC of the Assessee was arrived at by the Assessee in its TP study as below:-

Operating Income	Rs.373,60,37,837 /-
Operating Cost	Rs.329,76,52,420 /-
Operating Profit (Op. Income – Op. Cost)	Rs. 43,83,85,417/-
Operating/Net mark-up (OP/TC)	13.29%

10. The Assessee chose companies engaged in providing similar services such as the Assessee. It identified the following companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the Assessee and claimed that the price charged in the international transaction is at Arm's Length:-

Sl. No.	Name of the company	Average NPI (in %)
1	Akshay Software Technologies Ltd.	6.01
2	Evoke Technologies Pvt. Ltd.	7.86
3	Helios and Matheson Information Technology Ltd.	19.77
4	R S Software (India) Ltd.	19.60
5	R Systems International Ltd.	13.61
6	Sasken Communication Technologies Ltd.	17.44
7	Ybrant Digital Ltd.	9.52
Arithmetical Mean		13.37

11. Out of the 7 comparables selected by the Assessee, the TPO accepted R S Software (India) Ltd., and rejected the other 6 companies. The TPO applied fresh filters and selected the comparables as under:-

Sl. No.	Name of the Company	Mark-up on Total Costs (WC-unadj) (in %)
1.	Infosys Ltd.	36.13
2.	Larsen & Toubro Infotech Ltd.	24.61
3.	Mindtree Ltd.	20.43
4.	Persistent Systems Ltd.	35.10
5.	R S Software(India) Ltd.	24.25
6.	Cigniti Technologies Ltd.	27.62
7.	S Q S India B FS I Ltd.	22.37
8.	Thirdware Solution Ltd.	44.68
AVERAGE MARK-UP		29.40

12. The Assessee submitted to the TPO that in order to ensure timely delivery of software development services to its AE, it utilized the services of certain third-party sub-contractors who performed a part of the services in the relevant previous year. It was further submitted that the said sub-contracting charges formed a part of its total cost base on which the cost plus mark-up of 13.37% was applied only because the revenue recognition policy followed by the Assessee and the service agreement entered into by it with its AE, both required that the mark-up be charged on the entire costs incurred by it for provision of the services. It was thus submitted that since the sub-contracting charges were paid to third-party service providers under uncontrolled circumstances, the same ought to be considered as being at arm's length. Moreover, the third-party service providers, being Tier I and Tier II companies in India, were marking-up their costs by a significant margin and it was thus submitted that the aforesaid sub-contracting charges included the profit element which was earned by such third-party service providers. Consequently, it was urged that applying a further mark-up on such already marked-up charges would lead to a duplication of mark-up, which would be wholly unreasonable. In that view of the matter, it was submitted that the said subcontracting charges were merely pass-through costs and thus ought to be excluded from both the Assessee's operating revenue and cost base while determining its effective NCP margin for provision of the software

development services and if that were to be done, its effective NCP Margin would be as follows:

Operating Income	Rs. 267,16,13,558/-
Operating Cost	Rs. 223,08,72,451/-
Operating Profit (Op. Income – Op. Cost)	Rs. 44,07,41,107/-
Operating/Net margin (OP/TC)	19.76%

13. The TPO was of the view that the sub-contracting charges formed part of the operating cost of the Assessee for provision of SWD services and thus cannot be excluded from either its cost base or operating revenues as it would not give a correct picture of the profit margin earned by it. The TPO therefore recomputed the ALP and made the TP adjustment as given below:-

Arm's Length Mean Mark-up	29.40%
Operating Cost	Rs.3,29,76,52,420/-
Arm's Length Price – 129.40% of Operating Cost	Rs.4,26,71,62,231/-
Price Received	Rs.3,73,60,37,837/-
Shortfall being adjustment u/s. 92CA	Rs.53,11,24,394 /-

14. The assessee raised objections before the DRP. The DRP rejected the contentions of the Assessee and upheld the inclusion of the following companies on the basis that they are functionally comparable:-

- (a) Infosys Ltd.;
- (b) Larsen and Toubro Infotech Ltd.;
- (c) Persistent Systems Limited.; and
- (d) Thirdware Solution Ltd.

15. The DRP accepted the contention of the Assessee and directed the inclusion of Sagarsoft (India) Limited and exclusion of Cigniti Technologies Ltd. and SQS India BFSI Ltd. in the final list of comparables.

16. The DRP rejected the contentions of the Assessee that the sub-contracting charges incurred by it for provision of the software development services ought to be considered as pass-through costs and thus ought not to have been included in the operating revenues or costs while determining the arm's length price of the services provided by it to its AE.

17. The assessee has raised the following grounds with regard to determination of Net Cost Margin of the assessee excluding the sub-contract charged:-

“4.1 The Id. AO/TPO had erred on facts and in law in not acknowledging that the sub-contracting charges incurred by the Assessee represents arm's length consideration and was thereby required to be considered as pass-through costs and that the same thus ought to be excluded from the Assessee's operating costs and income while computing the arm's length price. The Id. Panel erred in confirming the same.

4.2 Without prejudice to the above, the Id. AO/TPO erred in not making a reasonably accurate adjustment to the Assessee's NCP margin so as to eliminate the material effects of the differences between the Assessee and the comparable companies in this regard.

18. The Id. AR submitted that the determination of net cost margin excluding the sub-contract charges is decided against the assessee by the Tribunal in assessee's own case for the AY 2011-12 in IT(TP)A No.17/Bang/2016 dated 21.09.2016 (page 2265 to 2269 of PB, para 4 to 8 of the order). The relevant observations of the Tribunal are as follows:-

“7. We have considered the rival submissions as well as the relevant

material on record. Undisputedly, the assessee is charging a mark up on the software development services provided to the AE being captive service provider. Therefore the assessee is not acting as an agent or distributor of the AE but is a provider of services of its own. It is not the case of rendering services of an agent without any value addition but the assessee is providing software development services to the AE and charging margin on the same. Therefore the cost on the software development activity is incurred by the assessee and charging the AE on the said services with a mark up of 10% on cost. The cost of sub-contracting in software development services is also charged with 10% mark up to the AE. When the margin on the cost of sub-contracting charges is part of the operating revenue of the assessee then only the cost of sub-contracting activity cannot be excluded as pass through. It would amount to artificially inflate the margins of the assessee on the other revenue from the services other than sub-contracting activity. In any case, pass through cost can be considered only when the activity of providing services to the AE does not involve value addition on the part of the AE. The decision of the Delhi Benches of the Tribunal in the case of DCIT Vs. Cheil Communications India Pvt. Ltd. (supra) would not help the case of the assessee as in the said case the activity of the assessee was only a distributor without any value addition. It

is pertinent to note that outsourcing cost in software development services activity is part and parcel of cost of providing the service to the AE and cannot be separated from the operating cost and operating revenue of the said segment of services. Accordingly, the cost of software development services cannot be treated in this fashion as claimed by the assessee. Hence we do not find any merit in the contention raised by the assessee on this issue.

8. As regards the alternative plea raised by the Id. AR that the comparables should also have similar activity, we find that the TPO has applied a filter of cost of employee which subsumes the outsourcing activity of both assessee as well as the comparables. Accordingly, the issue is decided against the assessee.”

19. Respectfully following the above decision of the coordinate bench of the Tribunal, we see no reason to interfere with the decision of the lower authorities and hence these grounds of the assessee are dismissed.

20. Vide ground No.5, the assessee raised the following grounds relating to the comparability analysis adopted by TPO for determination of ALP:-

“5.1 The Ld. AO/ Ld. TPO grossly erred on facts and the Ld. Panel erred in confirming the benchmarking of transactions of software development services of the Assessee with companies operating as full-fledged entrepreneurs without considering the differences in the functions performed, assets employed and risk undertaken by the Assessee vis-à-vis the companies selected as being comparable.

5.2 The Ld. AO/ Ld. TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as

- comparables to the Assessee, without establishing functional and the Ld. Panel also erred in confirming the same.
- 5.3 The Ld. AO/ Ld. TPO erred on facts in arbitrarily accepting companies without considering the turnover and size of the Assessee and comparables. The Ld. Panel also erred in confirming the same.
- 5.3.1 The Ld. AO /Ld. TPO erred in not applying the turnover filter at the upper limit so as to reject high turnover companies.
- 5.3.2 The Ld. AO/ Ld. TPO, while applying the said turnover filter at the lower limit so as to reject companies having turnovers less than INR 1 crore in FY 2013-14, erred in not applying the said filter at the upper end so as to reject high turnover companies as well. The Ld. Panel also erred in confirming the same.
- 5.4 The Ld. AO/ Ld. TPO grossly erred in law in deviating from the uncontrolled party transaction definition as per the Income-tax Rules and arbitrarily applying a 25% related party criteria in accepting / rejecting comparables, rejecting the Assessee's ground for application of the related party transaction filter at a threshold of 10% or 15% of sales. The Ld. Panel also erred in confirming the same. Accordingly, basis application of 15% related party filter, Persistent Systems Ltd and Thirdware Solutions Ltd. ought to stand rejected.
- 5.5 The Ld. AO/ Ld. TPO grossly erred on facts in arbitrarily rejecting companies having software development services income less than 75% of total operating revenues. The Ld. Panel also erred in confirming the same.

- 5.6 The Ld. AO/ Ld. TPO also erred on facts and in law in arbitrarily rejecting companies with different year ending (i.e. other than 31 March 2014) and in inconsistently applying such filter, and the Ld. Panel also erred in confirming the same.
- 5.7 The Ld. AO/ Ld. TPO also erred on facts in erroneously computing the margins of certain companies identified as comparable by the Ld. TPO such as Larsen & Toubro Infotech Limited, Mindtree Limited, R S Software (India) Limited, and Thirdware Solution Limited. The Ld. Panel erred in upholding the same.
- 5.8 The Ld. AO/ Ld. TPO/ Ld. Panel erred in arbitrarily rejecting Akshay Software Technologies Ltd, Sasken Communication Technologies Ltd. and Ybrant Digital Limited despite these companies being functionally comparable to the Assessee. The Ld. Panel also erred in confirming the same.
- 5.9 The Ld. AO/ Ld. TPO erred in selecting Infosys Limited, Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, R S Software (India) Limited, and Thirdware Solution Limited as comparables, despite the fact that the functions performed, assets employed and risks assumed by these companies being dissimilar and incomparable to that of the Assessee. The Ld. Panel erred in confirming the same.
- 5.10 The Ld. AO/ Ld. TPO erred in arbitrarily rejecting certain companies from the Ld. TPO's own search matrix, despite the fact that they are functionally comparable and pass all the filters applied by the Ld. TPO, viz. Maveric Systems Limited and InfoMile Technologies Limited.
- 5.11 The Ld. AO/ Ld. TPO erred in not considering the Assessee's submission that Infosys Limited, Larsen &

Toubro Infotech Limited and Persistent Systems Limited were held as functionally not comparable by the Hon'ble Bangalore Tribunal in the Assessee's own cases of AY 2010-11 and AY 2011-12.

5.12 The Ld. AO/Ld. TPO erred in considering Provision for Doubtful Debts as non-operating while computing the margins of the comparable companies. The Ld. Panel erred in upholding the actions of the Ld. TPO.

5.13 The Ld. AO/Ld. TPO erred in considering data obtained u/s 133(6). The Ld. Panel erred in upholding the actions of the TPO.

21. Out of the above grounds, ground no. 5.1 to 5.6 are general in nature.

22. The Id. AR submitted that issue of erroneous consideration of margins of certain companies contended in ground no.5.7 is consequential and will not be pressed if the exclusion of those comparable companies are allowed in favour of the assessee. Since the companies sought for exclusion by the assessee are upheld in the ensuing paragraphs, this ground is consequential and not taken up for adjudication as not pressed.

23. The Id. AR did not press ground no.5.8 for inclusion of Akshay Software Technologies, Sasken Communication Technologies Ltd., and Ybrant Digital Limited.

24. Hence only ground Nos.5.9 to 5.11 are contended for adjudication with regard to exclusion of the companies viz., Infosys Limited, Larsen & Toubro Infotech Limited, Mindtree Limited,

Persistent Systems Limited, R S Software (India) Limited, and Thirdware Solution Limited.

25. We have heard the rival submissions. The ld. AR did not press for the exclusion of R S Software (India) Ltd in the course of hearing. Accordingly this issue is dismissed as not pressed. The ld AR made a detailed written submission with regard to the inclusions which are reproduced below:-

- a) Regarding Infosys Ltd., it is submitted that this company is functionally dissimilar to the assessee company on various counts and therefore it ought to be rejected from the final list of comparables. Infosys Ltd. renders services like customer service experience, simplification of digital marketing etc., which are not part of routine IT services and therefore cannot be compared to the Assessee who renders routine IT services. While the TPO observed that the company provides business consulting, technology, engineering and outsourcing services and operates in three business segments which correspond to vertical line of business in SWD and therefore is comparable. Apart from rendering diverse dissimilar services, the company offers software products and platforms. However, the TPO observed that from the annual report of the company, under the segmental break-up does not disclose revenue from sale of products. It was submitted that while the company earns income from both rendering software services and development of products, there are no segmental details in respect of the services rendered. Further, the services rendered by the company are not functionally comparable to the routine SWD services rendered by the Assessee. The company also invests in products which helped the company establish itself as a credible IP Owner. Also, the company has significant intangibles as a part of its fixed assets in the nature of intellectual property. It company owns

seven Edge products/platforms and six other product based solutions. It leverages on its premium banking solution 'Finnacle ®', owns significant brand value and focuses immensely on brand building. For this purpose it incurs significant brand building expenses, which goes to help the company have a premium pricing for its services. IT derives more than 51% of its revenue from onsite activities and places high reliance on the onsite activities as they generate higher revenue when compared to services performed at their own facilities. Since the company adopts a business model different from that of the Assessee who renders services offshore, the company ought to be excluded. The company also heavily focuses on research and development activity and incurs significant expenditure for this account. For the concerned financial year the company has incurred research and development expenses of Rs.873 crores. The company for the relevant financial year has earned abnormally high profit with margin of 36.13%, which makes it incomparable to the Assessee. The company has also incurred significant selling and marketing expenses. Further, during the year under consideration, the company merged with its wholly owned subsidiary Infosys Consulting India Ltd., for which no reasonably accurate adjustment can be made to eliminate the material effects thereof on the margin of the company. In any event, the turnover of the company is much higher when compared to the assessee, and hence it ought to be excluded from the list of comparables.

- b) Regarding Larsen & Toubro Infotech Ltd., it is submitted that it is functionally incomparable to the Assessee on various counts. The company is a market leader and thus enjoys significant benefits on account of ownership of marketing intangibles, intellectual property rights and business rights. Also, in addition to the above, the company owns proprietary software products like Unitrax®, Accurusi and Scriptor™ which are developed in-house. During the relevant financial year, the company has added Rs.708 million

worth of intangible assets. Also, the company is engaged in diversified activities including cloud computing, infrastructure management, analytics & information management etc. Further, L&T enjoys significant brand value. As a result of this high brand value, the company enjoys a high bargaining power in the market. The company has also incurred significant expenses in foreign currency amounting to 44.03% of its total expenditure which suggests that is engaged in provision of onsite services. Hence, it operates on a business model different from that of the Assessee and is thus incomparable to it. Further, during the year under consideration, the company has undertaken major restructuring, whereby the company decided to consolidate engineering services businesses under a separate subsidiary of L&T. Pursuant to this the product engineering services business of the company was transferred to its subsidiary L&T Technology Services Ltd., and thereafter its wholly owned subsidiary GDA Technologies Inc. which was a part of the aforesaid business was wound up. It is submitted that no reasonably accurate adjustments can be made to eliminate the material effects of the said differences between the company and the Assessee. The annual report of the company also discloses significant amount of capital work-in-progress which indicates that the company is into development of products.

- c) Persistent Systems Ltd. : It is submitted that this company ought to be excluded from the final list of comparables inter alia for the reasons that it is functionally not comparable to the Assessee and as there exists peculiar economic circumstances for which no appropriate adjustment can be made to its mark-up to eliminate the material effects thereof. It is functionally dissimilar as it is engaged in rendering IT services and in the development of software products without there being separate segmental information disclosed in its Annual Report for such activities. The company focuses mainly on product development and during the year under

consideration launched a new product brand 'Accelerite'. Further, it made significant investments towards research and development activities in the relevant previous year. The company has incurred significant expenses in foreign currency amounting to 13.14% of its total revenue which suggests that is engaged in provision of onsite services. The company also made significant investment in intellectual property led solutions and also had a dedicated team for research and IP developments. It also owns several IP solutions, and during the year under consideration it acquired four products. Also, Persistent Systems, Inc. which is a subsidiary of the company acquired CloudSquads, Inc during the year under consideration. The acquisition constitutes peculiar economic circumstances for which no adjustment can be made to this company's mark-up to eliminate the material effects thereof.

- d) Thirdware Solutions Ltd. : At the outset, the Id. AR submitted that the company is functionally dissimilar to the Assessee and ought to be excluded from the final list of comparables. It is engaged in rendering software development, implementation and support services. The company is also engaged in development of software products and earns revenues from sale of user licenses for software applications. These diverse services are reported under one segment without any details being available as regards these services. During the year, the company has liquidated the Singapore entity i.e. Thirdware Solutions Singapore Pte Ltd. due to solvency of business activities, constituting a peculiar economic circumstance. Further, a perusal of the annual report shows that the income from rendering services during the year was 'Nil' and therefore the company fails many of the filters applied by the TPO himself and therefore ought to be excluded. The company purchased stock-in-trade during the year and also owns intangibles. Further, the margins of the company fluctuate on a year-on-year basis due to the different revenue recognition model that the company follows.

Pertinently, the company was rejected by the TPO in the assessment year 2013-14 on the basis that the segmental financials are unavailable, which position continues in the present year. Therefore even in the year under consideration, the company ought to be rejected.

- e) The exclusion of comparability of above companies were considered by the Tribunal in assessee's own case for AYs 2010-11 in IT(TP)A No.180(Bang)/2015, order dated 26.8.2016 and for AY 2011-12 by order dated 21.9.2016 (*supra*) and were directed to be excluded from the final list of comparables. Further reliance is placed on the decisions of this Tribunal in the cases of *LG Soft India Pvt. Ltd. v. DCIT (Order dated 28.05.2019 in IT(TP)A No. 3122/Bang/2018)*, *EMC Software and Services India (P.) Ltd. v. JCIT ([2020] 115 taxmann.com 293 (Bangalore - Trib.)*) and *Brocade Communications Systems (P.) Ltd. v. DCIT ([2020] 117 taxmann.com 439 (Bangalore - Trib.)*, wherein in the cases of similarly placed assesseees, for the assessment year 2014-15, the company came to be excluded. In view of the above, it is submitted that this company ought to be excluded from the final list of comparables.

26. The ld. DR supported the orders of the lower authorities.

27. We find that in the assessee's own case for AY 2011-12, the coordinate Bench of this Tribunal vide order dated 21.9.2016 (*supra*) has dealt with this issue and held as under:-

“9.2.4 We have considered the rival submissions as well as the relevant material on record. At the outset we note that the functional comparability of these two companies have examine by the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (*supra*) in para 60 and 61 & paras 24 to 26 as under:

'60. ****

61. ****

(4) Persistent Systems Ltd.

24. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. The assessee raised objections against selection of this company on the ground that this company is functionally not comparable as engaged in the product development. The segmental information for services and product is not available. Further, the assessee has also pointed out that there was an acquisition and restructuring during the year under consideration.

25. The DRP has noted the fact that this company has reported the entire receipt from sales and software services and product. Therefore, no segmental information was found to be available for sale of software services and product. Further, the DRP has noted that as per Note 1 of Schedule 15, this company is predominantly engaged in outsource software development service. Apart from the revenue from software services, it also earns income from licence of products, royalty on sale of products, income from maintenance contract, etc. These facts recorded by the DRP has not been disputed before us.

26. Therefore, when this company is engaged in diversified activities and earning revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, etc., the same cannot be considered as functionally comparable with the assessee. Further, this company also earns income from outsource product development. In the absence of any segmental data of this company, we do not find any error or illegality in the findings of the DRP that this company

cannot be compared with the assessee and the same is directed to be excluded from the set of comparables.’

We further find from the Annual Report that there is no change in the activity and functions of these companies during the year under consideration in comparison to the Assessment Year 2010-11. Accordingly, following the decisions of the co-ordinate benches of this Tribunal (supra), we direct the A.O./TPO to exclude these companies from the set of comparables.”

(iii) Infosys Ltd.

18. We have heard the learned DR as well as the learned A.R. and considered the relevant material on record. At the outset, we note that the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) has considered this issue in para 17 as under:

‘(2) Infosys Ltd.

17. The assessee objected against the selection of this company on the ground that this company has a big name and brand value and therefore it has a bargaining power. It also contended that the turnover of this company is Rs. 21,140 crores, which is 442 times higher than the assessee.’

Following the decision of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra), we do not find any reason to interfere with the directions of the DRP on this issue.

(iv) L&T Infotech Ltd.

19. *****

We further find that the comparability of this company has been considered by the co-ordinate bench of the this

Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) in paras 62 to 65 as under:

‘62. The assessee has raised objection against this company on the basis of high turnover in comparison to the assessee. It was also contended that related party transaction (RPT) of this company is 18.66%. The DRP rejected objections of the assessee on the ground that TPO has applied 25% filter of RPT and annual report of the company does not show any other services rendered other than software development services provided by this company. Thus the DRP held that software development segment is comparable to the assessee and therefore this company has to be retained as comparable.

63. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. The Id. AR has submitted that this company is having 18.66% RPT and further this company earns revenue from both services and products. Thus, the Id. AR submitted this company is also in the software products and therefore cannot be considered as good comparable. He has further contended that in a series of decisions, the Tribunal has applied 15% RPT filter and since this company is having more than 15% RPT, the same cannot be considered as a good comparable.

64. On the other hand, the Id. DR has submitted that TPO has applied RPT filter of 25% and therefore only for this company, the RPT cannot be reduced to 15%. Further, the DRP has examined annual report of this company and found that this company earns

revenue from software development services and accordingly is comparable.

65. We have considered the rival submissions and relevant material on record. We find that in the normal circumstances the tolerance range of RPT should not be more than 15%. In the case of the assessee, the availability of the comparable is not an issue and therefore we do agree with the view taken by the coordinate Benches of the Tribunal that the threshold limit of tolerance range should not exceed 15% as far as RPT revenue is concerned. Therefore, we direct the AO/TPO to apply 15% RPT filter in respect of all the comparables.'

In view of the above facts recorded by the DRP as well as the decision of the co-ordinate Bench, we do not find any reason to interfere with the directions of the DRP.

28. Following the aforesaid order of the Tribunal for the AY 2011-12 in assessee's own case (*supra*), we direct exclusion of Infosys Ltd., Larsen and Toubro Infotech Ltd., and Persistent Systems Ltd. from the list of comparables.

29. As far as Thirdware Solutions Ltd., is concerned, this Tribunal in *EMC Software and Services India (P.) Ltd. v. JCIT ([2020] 115 taxmann.com 293 (Bangalore - Trib.)* considered this issue and excluded this company with the following observations:-

“(iv) Thirdware Solutions Ltd. the company is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the development of software products and earns revenue from

sale of user licenses and purchase stock in trade during the year and has intangibles.

Further the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. The above comparable was excluded in assessee's own case on functional dissimilarity in the Assessment Years 2005-06 and 2007-08 and learned Authorised Representative also relied on Lime Labs (India) (P.) Ltd. v. ITO [2019] 101 taxmann.com 201 (Delhi Trib.). We found the co-ordinate Bench of the Tribunal in the case of LG Software India (P.) (supra) for the Assessment Year 2014-15 has excluded the comparable as observed at paras 8 & 8.1 at page 4 as under :

"8. We also notice that in A.Y 2008-09, the co-ordinate bench has excluded M/s. Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that M/s. Thirdware Solutions Ltd. is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in A.Y 2008-09, we direct exclusion of M/s. Thirdware Solutions Ltd."

The comparable Thirdware Solutions Ltd. has to be excluded as it is predominant in activity and segmental details are not available. Accordingly we direct the TPO/A.O to exclude this comparable from the list of comparables for determining the ALP."

30. Following the order of the Tribunal in the case of *EMC Software and Services India (P) Ltd. (supra)*, this company is directed to be excluded from the list of comparables.

31. Though the ground No.5.10 relates to inclusion of Maverick Systems Ltd. and Infomile Technologies Ltd., the Id. AR made submissions with regard only to the former, hence the second company is not considered as not pressed.

32. With regard to Maverick Systems Ltd., the Id. AR submitted that this company appeared in the accept/reject matrix of the search conducted by the TPO and its inclusion was sought by the Assessee. However, it was rejected by the TPO without any basis. The DRP upheld the exclusion of the company on the basis that generally, companies with R&D expenditure of less than 3% alone were considered, and therefore Maverick which had incurred expenses of 6% ought to remain excluded.

33. In this regard it is submitted that the actions of the lower authorities are erroneous and wholly inconsistent. Excluding companies on an adhoc and arbitrary basis without applying a filter at a specific threshold is erroneous. It is submitted that once companies pass the filters applied by the TPO, they cannot be excluded on any other arbitrary basis, as the same would amount to cherry picking companies which is impermissible. Further, consistently across all assessees, the TPO and the DRP reject the application of R&D expenses > 3% of total turnover filter. While so, in the present case, the DRP has rejected Maveric for having R&D expenses greater than 3%. It is submitted that the company is functionally comparable and passes all filters applied by the TPO, which is not disputed by the lower

authorities. Therefore this company ought to be included in the final list of comparables. Reliance is placed on the decisions of this Hon'ble Tribunal in the cases of *EMC Software and Services India (P.) Ltd. (supra)*. and *Brocade Communications Systems (P.) Ltd. (supra)*, wherein in the cases of similarly placed assesseees, for the assessment year 2014-15, the company came to be remanded for fresh verification.

34. We find that in *EMC Software and Services India (P.) Ltd. (supra)*, the Tribunal regarding the comparability of Maveric Systems Ltd. observed as under:-

“Maveric Systems Limited : This comparable was rejected by the TPO and it was sought for inclusion by the assessee and whereas TPO has rejected without any basis and was excluded on the ground that the company was engaged in R & D activity and expenditure is 6% of total turnover. Similarly, the DRP has upheld the exclusion of the company. The learned Authorised Representative submitted that company's functional profile is comparable and applied the TPO filters. Whereas the DRP has observed that the company has incurred substantial expenses to the tune of 6% of turnover towards R & D and the tolerable limit is 3%. We found the observations of the DRP are without any basis. Accordingly we restore this issue to the file of TPO to give a logical conclusion and findings.”

35. Respectfully following the above order of the Tribunal, we restore this issue to the TPO with similar directions.

36. Ground No.7 is regarding interest of Rs.4,49,06,596 on the average outstanding trade receivables. Before the TPO the assessee submitted that the amounts outstanding have been settled by the AE on

an on-going basis in the normal course of business having regard to economic and commercial factors. Since the outstanding receivables related to the SWD services rendered, the determination of ALP of the outstanding receivables is not warranted as the same is subsumed in the ALP of the principal transaction. It was contended the outstanding receivables could not be made subject matter of a TP adjustment as the same is not covered under the provisions of Section 92B of the Act. Without prejudice, since the delay pertained to the invoices mentioned above, adjustment if any ought to be restricted to the same.

37. The TPO however rejected the contentions of the Assessee and computed the TP adjustment on the basis of average receivables and considered the interest rate at LIBOR+400 basis points. While the considering the objections filed by the assessee DRP directed the TPO to allow 30 days credit period and compute interest by taking the short term deposit rate of State Bank of India. Aggrieved the assessee is in appeal before us.

38. The Id.AR submitted that :-

- a. The outstanding receivables are only in respect of the provision of software development services by the Assessee and since the arm's length price of the said transaction is subsumed in the principal transaction of rendering SWD services, the outstanding receivable cannot be made subject matter of a TP adjustment.

- b. Reliance in this regard is placed on the case of *Avnet India (P.) Ltd. v. DCIT* (reported in [2016] 65 taxmann.com 187 (Bangalore-Trib) (para 8) which was upheld by the Hon'ble High Court of Karnataka in ITA No. 358/2016) and the decision in *Goldstar Jewellery Ltd. v. JCIT* (reported in [2015] 53 taxmann.com 353 (Mumbai-Trib)).
- c. The delayed receivables, if at all, would have to be aggregated with the principal transaction of rendering SWD services. On aggregation, if a working capital adjustment is determined, it would take into account the impact of the delayed receivables on the margin of company, and therefore a separate adjustment on that count is not warranted. Reliance in this regard is placed on *Kusum Healthcare Pvt. Ltd. v. ACIT* ([2015] 62 taxmann.com 79 (Delhi - Trib.), upheld by the Hon'ble Delhi Court in *PCIT v. Kusum Healthcare Pvt. Ltd.* ([2017] 398 ITR 66 (Delhi)).
- d. The TPO determined the adjustment without applying any method as prescribed under Rule 10B of the Rules, and therefore the entire adjustment is liable to be set aside. Reliance in this regard is placed on *CIT v. Merck* (reported in (2016) 73 taxmann.com 23 (Bombay) and *Verifone India Technology Pvt. Ltd. V. ACIT* (Order dated 25.04.2022 passed in IT(TP)A No. 290/Bang/2021).

- e. The Assessee has substantial own funds and has not incurred any additional cost on account of the delayed receivables, warranting a TP Adjustment. Also, the average delay was only of 83 days and since the same is marginal, no TP adjustment on that count is required to be made. Reliance in this regard is placed on *OSI Systems Pvt. Ltd. v. DCIT* (Order dated 18.11.2020 passed in ITA No. 2228/Hyd/2017, at paras 6.6 and 6.7).
- f. Without prejudice, an appropriate study ought to be made, taking into account the credit period extended by the comparables, and the delay, if any, ought to be computed accordingly. Reliance in this regard is placed on the decision of this Hon'ble Tribunal in the case of *ISG Novasoft Technologies Ltd. V. DCIT* (Order dated 18.03.2021 passed in IT(TP)A No. 3284/Bang/2018).
- g. Interest, if any, ought to be adopted at LIBOR+2% as held in *Swiss Re Global Solutions India Pvt. Ltd.* (Order dated 21.01.2022 passed in IT(TP)A No. 397/Bang/2021).

39. We have considered the rival submissions and perused the material on record. In our opinion, the impugned issue is squarely covered by the decision of the coordinate Bench of the Tribunal in the case of *Swiss Re Global Business Solutions India Pvt. Ltd. (supra)* wherein it was held as under:-

“35. The only other issue that remains for adjudication is ground No.15 with regard to re-characterizing certain trade receivables as unsecured loans and computing notional interest on such trade receivables. The main contention of the Id. AR is that deferred receivables would not constitute a separate international transaction and need not be benchmarked while determining the ALP of the international transaction. In our opinion, this issue was considered by the Tribunal in assessee’s own case for AY 2014-15 and in para 23 to 23.9 of the order dated 21.5.2020 this Tribunal held as under:-

“23. Ground No. 14-17 alleged by assessee against adjustment of notional interest on outstanding receivables.

From TP study, it is observed that payments to assessee are not contingent upon payment received by AEs from their respective customers. Further Ld.AR submitted that working capital adjustment undertaken by assessee includes the adjustment regarding the receivables and thus receivables arising out of such transaction have already been accounted for. Alternatively, he submitted that working capital subsumes sundry creditors and therefore separate addition is not called for.

23.1. Ld.TPO computed interest on outstanding receivables under weighted average method using LIBOR + 300 basis points applicable for year under consideration that worked out to 3.3758% on receivables that exceeded 30 days. It has been argued by Ld.AR that authorities below disregarded business/commercial arrangement between the assessee and its AE's, by holding outstanding receivables to be an independent international transaction.

23.2. Ld.AR placed reliance on decision of Delhi Tribunal in Kusum Healthcare (P.) Ltd. v. Asstt. CIT [2015] 62 taxmann.com 79, deleted addition by considering the above principle, and subsequently Hon'ble Delhi High Court in Pr. CIT v. Kusum Health Care (P.) Ltd. [2018] 99 taxmann.com 431/[2017] 398 ITR 66, held that no interest could have been charged as it cannot be considered as international transaction. He also placed reliance upon decision of Delhi Tribunal in case of Bechtel India (P.) Ltd. v. Dy. CIT [2016] 66 taxman.com 6 which subsequently upheld by Hon'ble Delhi High Court vide order in Pr. CIT v. Bechtel India (P.) Ltd. [IT Appeal No. 379 of 2016, dated 21-7-16] also upheld by Hon'ble Supreme Court vide order, in CC No. 4956/2017.

23.3. It has been submitted by Ld.AR that outstanding receivables are closely linked to main transaction and so the same cannot be considered as separate international transaction. He also submitted that into company agreements provides for extending credit period with mutual consent and it does not provide any interest clause in case of delay. He also argued that the working capital adjustment takes into account the factors related to delayed receivables and no separate adjustment is required in such circumstances.

23.4. On the contrary Ld.CIT.DR submitted that interest on receivables is an international transaction and Ld.TPO rightly determined its ALP. In support of the contentions, he placed reliance on decision of Delhi Tribunal order in Ameriprise India (P.) Ltd. v. Asstt. CIT [2015] 62 taxmann.com 237 wherein it is held that, interest on receivables is an international transaction and the transfer pricing adjustment is warranted. He stated that 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;. . . . '

23.5. Ld.CIT.DR submitted 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, he submitted that any delay in realization of same needs to be considered within transfer pricing adjustment, on account of interest income short charged or uncharged. It was argued that insertion of Explanation with retrospective effect covers assessment year under consideration and hence under/non-payment of interest by AEs on debt arising during course of business becomes international transactions, calling for computing its ALP. He referred to decision of Delhi Tribunal in Ameriprise (supra), in which this issue has been discussed at length and eventually interest on trade receivables has been held to be an international transaction. Referring to discussion in said order, it was stated that Hon'ble Delhi Bench in this case noted a decision of the Hon'ble Bombay High Court in the case of CIT v. Patni Computer Systems Ltd. [2013] 33 taxmann.com 3/215 Taxman 108 (Bom.), which dealt with question of law:

"(c) 'Whether on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging an interest during such credit period would not amount to international transaction whereas section 92B(1) of the Income-tax Act, 1961 refers to any other transaction having a bearing on the profits, income, losses or assets of such enterprises?'"

23.6. Ld.CIT.DR submitted that, while answering above question, Hon'ble Bombay High Court referred to amendment to section 92B by Finance Act, 2012 with retrospective effect from 1.4.2002. Setting aside view taken by Tribunal, Hon'ble Bombay High Court restored the issue to file of Tribunal for fresh decision in light of legislative amendment. It was thus argued that non/under-charging of interest on excess period of credit allowed to AEs for realization of invoices, amounts to an international transaction and ALP of such international transaction has to be determined by Ld.TPO. Insofar as charging of rate of interest is concerned, he relied on decision of the Hon'ble Delhi High Court in CIT v. Cotton Naturals (I) (P.) Ltd. [2015] 55 taxmann.com 523/231 Taxman 401 holding that currency in which such amount is to be re-paid, determines rate of interest. He, therefore, concluded by summing-up that interest on outstanding trade receivables is an international transaction and its ALP has been correctly determined.

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

This Bench referred to decision of Special Bench of this Tribunal in case of Special Bench of ITAT in case

of Instrumentation Corpn. Ltd. v. Asstt. DIT (IT) [2016] 71 taxmann.com 193/160 ITD 1 (Kol. - Trib.), held that outstanding sum of invoices is akin to loan advanced by assessee to foreign AE., hence it is an international transaction as per Explanation to section 92B of the Act. We also perused decision relied upon by Ld.AR. In our considered opinion, these are factually distinguishable and thus, we reject argument advanced by Ld.AR.

23.8. Alternatively, it has been argued that in TNMM, working capital adjustment subsumes sundry creditors. In such situation computing interest on outstanding receivables and loans and advances to associated enterprise would amount to double taxation. Hon'ble Delhi Tribunal in case of Orange Business Services India Solutions (P.) Ltd. v. Dy. CIT [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-a-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 characterised as international transactions."

23.9. In view of the above, we deem it appropriate to set aside this issue to Ld.AO/TPO for deciding it in conformity with the above referred judgment. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in accordance with law."

36. Accordingly, we are of the opinion that deferred receivables would constitute an independent international transaction and the same is required to be benchmarked independently as held by the Hon'ble Karnataka High Court in *PCIT v. AMD (India) Pl. Ltd.*, ITA No.274/2018 dated 31.8.2018.

37. Once we have held that the transaction between the assessee and AE was in foreign currency with regard to receivables and transaction was international transaction, then transaction would have to be looked upon by applying the commercial principles with regard to international transactions and accordingly proceeded to take into account interest rate in terms of London Inter Bank Offer Rate [LIBOR] and it would be appropriate to take the LIBOR rate + 2%. For this purpose, we place reliance on the judgment of the Bombay High Court in the case of *CIT v. Aurionpro*

Solutions Ltd., 99 CCH 0070 (Mum HC). It is ordered accordingly”

40. In view of the above discussion and considering the decision of the of the coordinate bench of the Tribunal (*supra*) and the judgment of the Hon’ble High Court of Karnataka in the case of *AMD (India) Pvt. Ltd. (supra)*, we hold that the treatment of interest on deferred receivables is rightly considered as an independent international transaction and benchmarked separately by the revenue authorities.

41. With regard to calculation of interest, we notice that the TPO while computing the interest has taken the opening and closing balance of the receivables and calculated the interest adjustments. The assessee had submitted the invoice wise details before the DRP which is reproduced below. In respect of the services rendered by the Assessee to its AE, it raises invoices, under which the AE is granted 30 days’ time to make payment. During the course of hearing the Id.AR brought to our attention that the TPO in assessee’s own case for the assessment year 2018-19 has allowed the credit period of 90 days and prayed that the same may be allowed for the year under consideration. The Id AR also submitted that during the year under consideration, realizations in respect of certain invoices were made after the period of 30 days granted under the invoice, details of which are as under:-

Sl No.	Invoice No.	Date of Invoice	Amount of realisation	Due date for receipt of payments	Actual date/ date of receipt of payments	No. of days delayed
			A	B	C	D=C-B
1.	AMIND 115/ FY 2014	17-Dec-13	68,860,000	15-Jan-14	15-Apr-14	90
			140,146,834	15-Jan-14	28-Apr-14	103
2.	AMIND C73/FY 2013	21-Jan-14	6,078,765	19-Feb-14	29-Apr-14	69
3.	AMIND 116/ FY 2014	21-Jan-14	139,934,408	19-Feb-14	28-Apr-14	68
			68,090,000	19-Feb-14	13-May-14	83
			84,459,945	19-Feb-14	27-May-14	97
4.	AMIND 117/ FY 2014	14-Feb-14	150,760,055	15-Mar-14	27-May-14	73
			99,040,000	15-Mar-14	9-Jun-14	86
			33,105,105	15-Mar-14	23-Jun-14	100
5.	AMIND C74/FY 2013	19-Feb-14	11,266,914	20-Mar-14	29-Apr-14	40
6.	AMIND 118/ FY 2014	14-Mar-14	240,027,931	12-Apr-14	23-Jun-14	72
			65,205,000	12-Apr-14	14-Jul-14	93
			75,344,908	12-Apr-14	31-Jul-14	110
Total			1,182,319,866		Average days	83
Forex Loss adjustment			(22,024,749)			
Balance as on 31.03.2014			1,160,295,117			
Balance as per Financial Statements			1,160,295,117			
Difference						
Interest Receivables @ 4.38%						11,610,091

42. Considering the fact that the average receivable days is 83 and that the TPO in assessment year 2018-19 has allowed 90 days credit for the assessee, we are of the view that it is reasonable to allow 90 days credit for the purpose of calculating interest on receivables. We are also of the opinion that the interest rate to be adopted is LIBOR rate + 2%, taking a consistent view as held in the aforesaid order of the

Tribunal, following the judgment of the Bombay High Court in the case of *CIT v. Aurionpro Solutions Ltd., 99 CCH 0070 (Mum)*. We direct the AO to recompute the interest on delayed payments accordingly.

43. Ground No.9 raised by the assessee is as follows:-

“9 Reduction in amount of income-tax depreciation claimed on computer peripherals of Rs. 319,328.

9.1 The Ld. Panel and Ld. AO have erred in restricting the income tax depreciation on computer peripherals at 15% as against 60% claimed by the Assessee.

9.2 The Ld. Panel and Ld. AO erred in not treating computer peripherals as part of 'computers' for computing depreciation under section 32 of the Act

9.3 Without prejudice to the above, the Ld. AO has erred in computing excess income-tax depreciation on such computer peripherals to be disallowed by considering the relevant assets as having been put to use for more than 180 days during the relevant previous year as against less than 180 days.”

44. It is submitted that during the relevant year, the assessee had made additions to the block of assets 'Computer including computer software' of Rs.12,19,28,624/-. In the said block, it had added certain computer peripherals, and claimed depreciation on the entire block of assets including the peripherals at the rate of 60%. The peripherals were in the nature of battery, head set and external hard disk, all of which were incapable of functioning without the aid of computer

systems and were always connected to, and accessible through the computer system alone. The AO restricted the depreciation to 15% on the basis that the assets were not computer software eligible for depreciation at 60% and were instead electronic items. The DRP upheld the AO's order that the assets are not integral part of the computer and were eligible for depreciation at 15%.

45. The Id AR submitted that the peripheral devices are integral part of the computer system and cannot operate independently and therefore, the same are eligible for depreciation at the rate of 60% as it applicable to 'computers and computer software'. The Id AR placed reliance in this regard is placed on the following decisions:-

- i. Expeditors International (India) (P.) Ltd. v. ACIT ([2008] 118 TTJ 652 (Delhi));
- ii. ITO v. Samiran Majumdar ([2006] 98 ITD 119 (Kolkata));
- iii. CIT v. BSES Yamuna Powers Ltd. [2013] 358 ITR 47 (Delhi);
- iv. DCIT v. Datacraft India Ltd. ([2010] 133 TTJ 377 (Mumbai) (SB));
- v. DCIT v. UAE Exchange & Financial Services Ltd. ([2016] 69 taxmann.com 84 (Bangalore - Trib.)); and
- vi. CIT v. Sony India (P.) Ltd. ([2012] 26 taxmann.com 237 (Delhi)).

46. The Id AR also submitted, without prejudice, that the AO has erroneously computed the depreciation by treating all the assets as having been put to use for more than 180 days and that the disallowance if at all has to be computed considering the fact that the assets amounting to Rs. 2,96,676/- were put to use for more than 180

days and the assets amounting to Rs. 2,46,828/- were put to use for less than 180 days.

47. The Id. DR supported the orders of the lower authorities.

48. We have considered the rival submissions and perused the material on record. This issue came up for consideration in assessee's own appeal for the AY 2013-14. By order dated 13.05.2020, the Tribunal dealt with this issue as follows:-

“This ground has been raised by assessee against disallowance of depreciation claimed at the rate of 60% on racks, Xerox machine and accessories, batteries and stabiliser. Ld. AO disallowed the claim and granted 15% depreciation for the reason that they are not integral part of computers which has been upheld by DRP.

13.1. Ld.AR submitted that these machines are required for keeping computer peripherals and integral parts of the computer and ought to be granted depreciation at the rate of 60%. 13.2. On the contrary learn CIT DR submitted that the machinery is listed are not required to run the computer and can function independently without being attached to a computer. He thus submitted that these machines do not therefore fall into the category of peripherals attached to the computer. He thus supported the orders passed by authorities below.

13.3. We have perused submissions advanced by both sides in light of records placed before us. Undoubtedly machines like racks, batteries stabilisers can function without a computer and is attachable to any other electrical appliances. Therefore these machines do not form part of computer peripherals. Insofar as the Xerox machine is concerned, it is an ascertained able at this stage whether these machines could be exclusively and independently used without being

attached to a computer as such kinds of Xerox machines do exist. Assessee has also not been able to establish details of accessories that has been categorised to be forming part of computer peripherals.

13.4. Accordingly we set aside this issue back to Ld.AO/TPO for verifying the actual use and nature of Xerox machines and the accessories that has been considered as computer peripherals. In the event it is ascertained able that these accessories and Xerox machines could not be independently used but could only be used on being attached to computer 60% depreciation should be allowed. Insofar as racks, batteries and stabilisers are concerned these do not fall within the category of computer peripherals and we uphold the depreciation being allowed only at 15%. Accordingly this ground raised by assessee stands partly allowed.

49. In the year under consideration, the assessee has produced the list of assets with the details of date of purchase. We notice that the AO while computing the disallowance had not taken into consideration the date of put to use of the asset. We also notice that in assessee's own case cited *supra*, the coordinate bench of the Tribunal has allowed the rate of depreciation based on the nature of assets. Given this, we remit the issue back to the AO to verify the nature of asset and allow depreciation considering the principle laid down by the coordinate bench of the Tribunal in assessee's own case (*supra*) and the date of asset being put to use. This ground is allowed in favour of the assessee for statistical purposes.

50. Ground No.10 reads as follows:-

“10 Erroneous denial of depreciation on leasehold improvements included in the block of 'furniture and fixtures' of Rs. 25,313,220.

10.1 The Ld. Panel and Ld. AO erred in law and on facts in disallowing income-tax depreciation amounting to Rs.25,313,220 claimed on lease hold improvements included in the block of 'furniture and fixtures' by alleging failure to submit documentary proof/ evidences substantiating the date of put to use of assets for leasehold improvements acquired during FY 2013-14

10.2 The Ld. Panel and Ld. AO erred in law in disallowing income-tax depreciation amounting to Rs. 21,189,432 claimed on lease hold improvements included in opening WDV as at 1 April 2013.

10.3 The Ld. Panel and Ld. AO erred in disregarding the provisions of explanation 5 to section 32 of the Act as per which the relevant income-tax depreciation has to be mandatorily allowed w.r.t assets that a taxpayer owns and uses.

10.4 Without prejudice to the above, the AO erred in not allowing depreciation on leasehold improvements from the date on which new premises started to function.”

51. The assessee has acquired additional workspace at the following locations:-

- a. Unit 2 and 3, 3rd Floor, Explorer building, International Tech Park, Whitefield Road, Bangalore.
- b. Ground Floor, Inventor Building, International Tech Park, Whitefield Road, Bangalore.

52. In connection with the above, the assessee undertook various civil and interior work in the nature of putting up of modular furniture, lab design and installation activities, electrical and cable networking, fire safety

systems, etc. Accordingly during the year an addition of Rs.6,78,99,990/- was made towards leasehold improvements, falling within the block of 'Furniture and Fixtures' and consequent depreciation on the same was claimed.

53. The AO disallowed the claim on the ground that the claim is on the basis of date of bill and not on the basis of the asset being put to use. The AO disallowed the entire depreciation on leasehold improvement for Rs.25,31,31,220/-.

54. The DRP upheld the disallowance on the ground that the assessee failed to produce any document to show that the assets were ready to use/put to use.

55. Before us, the Id. AR submitted that the assessee had capitalised the leasehold improvements after receiving the invoices from the relevant vendor, which was after the asset was completed and was ready to be put to use. The Id AR brought to our attention that the date of put to use have been certified by the tax auditor in the tax audit report. The Id AR alternatively submitted that, in the event of depreciation claim is disallowed, the disallowance need to be re-worked considering the date in which the relevant new premises started to function as the date of assets being put to use. The Id AR also contended that the depreciation disallowance should be restricted to the additions made during the year under consideration and not on the opening written down value (WDV) on which depreciation is allowed in the earlier years.

56. We have heard the Id. DR and perused the material on record. The AO has denied the depreciation on leasehold improvement since, according to AO, the assessee had not furnished the invoices & bills supporting the expenditure and that the assessee had not provided evidence for completion of the work. The break-up of disallowance of depreciation of Rs.25,31,31,220/- is as under which is worked out as per date put to use as certified in the tax audit report (page 1523 of paper book):-

- i. Depreciation of Rs.2,11,89,432/- claimed on opening WDV as at 1 April 2013 at the rate of 10%.
- ii. Depreciation of Rs. 4,123,788/- claimed on additions made during FY 2013-14 at the rate of 10%.

57. We notice that the AO has considered the entire WDV while computing disallowance and not the current year additions to the assets which is not the right way to compute the disallowance. In our considered view, the computation of disallowance should be restricted to the additions made during the year. We therefore set aside the issue and restore it to the AO with a direction for proper verification of additions made to assets in the year under consideration based on the evidences submitted by the assessee for the purpose determination of disallowance in accordance with law. Accordingly this issue is remitted to the AO for fresh decision, after giving opportunity of being heard to the assessee.

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

Pronounced in the open court on this 08th day of June, 2022..

Sd/-

Sd/-

(GEORGE GEORGE K.)
JUDICIAL MEMBER

(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 08th June 2022.

/Desai S Murthy /

Copy to:

1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.