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

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

IT(TP)A No.2834/Bang/2017
Assessment year : 2012-13

M/s.Dell International Services India Private Limited, (for the merged entity Dell India Private Limited), No.12/1, 12/2A, 13/1A, Divyashree Greens, Koramangala Inner Ring Road, Domlur Post, Bangalore – 560 071. **PAN : AAACH1925Q**	Vs.	The Joint Commissioner of Income Tax, LTU, Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.134/Bang/2018
Assessment year : 2012-13

The Joint Commissioner of Income Tax, LTU, Bangalore.	Vs.	M/s.Dell International Services India Private Limited, (for the merged entity Dell India Private Limited), Bangalore – 560 071. **PAN : AAACH 1925Q**
APPELLANT		RESPONDENT

Assessee by	:	Shri T. Suryanarayana, Advocate
Revenue by	:	Shri Praveen Karanth, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	04.11.2022
Date of Pronouncement	:	11.11.2022

O R D E R

Per Bench

These cross appeals by the assessee and revenue are directed against the order of the CIT(Appeals)-5, Bengaluru dated 28.09.2017 passed u/s 143(3) r.w.s. 144C(3) of the Income-tax Act, 1961 [the Act] for the assessment year is 2012-13.

2. The brief facts of the case are that the Assessee is engaged in the manufacture and trading of IT hardware products and provides technical and marketing support services to its Associate Enterprises (AEs). For the relevant assessment year 2012-13, the assessee had certain international transactions inter alia being purchase of stock in trade (trading segment), provision of technical and marketing support services to its AEs, reimbursement and recovery of expenses to/from its AEs. We shall discuss the functions performed under each of the segments while discussing the adjustment determined by the TPO.

3. In the TP study maintained for the year under consideration, the Assessee treated all the international transactions as being at arm's length. During the year, the Assessee also recovered certain advertisement expenses from Intel USA ("Intel") and Microsoft USA ("Microsoft"). Since the transactions were with unrelated parties, the assessee did not benchmark the same. During the course of assessment proceedings, reference was made to the Transfer Pricing Officer (TPO). The TPO passed an order dated 27.01.2016 u/s. 92CA of the

Act determining a TP adjustment aggregating to Rs. 105,54,56,326/-, comprising of the following:

A. Adjustment determined by bifurcating the marketing and business support services segment into ITES segment (adjustment of Rs. 4,51,94,904/-) and MSS segment (adjustment of Rs. 2,22,61,422/-); and

B. Adjustment of Rs. 98,80,00,000/- determined in respect of the warranty expenses.

4. Pursuant to TP adjustment, a draft assessment order dated 29.03.2016 was passed by the AO in which the aforesaid TP adjustments were incorporated. Further, the A.O. also made various additions / disallowance on corporate tax issue.

5. Aggrieved, the Assessee filed its objections before the CIT(Appeals). The CIT(A) vide order dated 28.09.2017 granted partial relief. Aggrieved, by the extent of relief granted to the Assessee by the CIT(A), both the assessee (IT(TP)A No.2834/Bang/2017) and the Revenue (IT(TP)A No.134/Bang/2017) are in appeals before the Tribunal.

IT(TP)A No.2834/Bang/2017 (Assessee's appeal)

6. The assessee in the memorandum of appeal has raised 9 grounds and several sub-grounds pertaining to the transfer pricing adjustment which reads as follows and we will first adjudicate the same :-

I Transfer pricing
1. Order bad in law and on facts

- The order passed by the Joint Commissioner Of Income Tax, Large Tax Payers Unit ['the AO'], under section 143(3) of the Act and the order passed by the Commissioner of Income-Tax (Appeals) - 5, ['the CIT(A)'] under section 250 of the Act, are bad in law and on facts.
- Without prejudice to the generality of the above, the order issued by the Ld. AO is bad in law insofar as the fact that the AO did not issue to Dell International Services India Private Limited (for the merged entity Dell India Private Limited), a show cause notice, as per proviso to section 92C(3) of the Income-tax Act, 1961 ['the Act'].
- The order issued by the Ld. CIT(A) did not take cognizance of the objections raised by the Appellant in relation to the transfer pricing matters while issuing the order under Section 250.
- The Ld. CIT(A) in his order did not adjudicate on the grounds raised by the Appellant with respect to the adhoc adjustments proposed by the Ld. TPO in relation to the comparable companies for the impugned IT enabled services ('ITeS') and warranty charges.

2. Erroneous bifurcation of marketing and business support services into Marketing support services and ITeS

- The Ld. AO/ Ld. TPO has erred in fact and in law, in arbitrarily bifurcating Marketing and business support services segment into Marketing support services and ITeS without any basis. The Ld. CIT(A) erred in confirmed the same.
- The Ld. AO/ Ld. TPO erred on facts in arbitrarily apportioning the cost between marketing support services and ITeS. The Ld. CIT(A) erred in confirming the same.
- The Ld. CIT(A) and the Ld. AO / Ld. TPO erred in rejecting the value of international transactions as recorded in the books of account, as the arm's length price.

- The Ld. CIT(A) and the Ld. AO / Ld. TPO erred in determining a new arm's length price in substitution of the arm's length price determined by the Appellant.
- The Ld. CIT(A) and the Ld. AO/ Ld. TPO erred in law in holding that the fresh comparability analysis using non contemporaneous data conducted by the Ld TPO and further substituting the Appellant's analysis with fresh benchmarking, analysis on his own conjectures and surmises. Thus, the Appellant prays that the fresh benchmarking analysis conducted by the Ld. TPO is liable to be quashed.
- The Ld. AO/ Ld. TPO erred on facts in rejecting the comparable companies arrived at in the Transfer Pricing Study without considering the functions, assets and risk analysis of the Appellant. The Ld. CIT(A) erred in confirming the same.
- The Ld. AO/ Ld. TPO grossly erred on facts in benchmarking the transactions of the marketing and business support services of the Appellant with companies operating as full-fledged entrepreneurs without considering the differences in the functions performed, assets employed and risk undertaken by the Appellant vis-à-vis comparable companies. The Ld. CIT(A) erred in upholding the actions of the Ld. AO/ Ld. TPO.

3. Determination of arm's length price by the Ld. TPO in relation to the Marketing Support Services

- The Ld. AO/ Ld. TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability. The Ld. CIT(A) erred in upholding the actions of the Ld. AO/ Ld. TPO.
- The Ld. AO/ Ld. TPO erred in facts in arbitrarily rejecting companies based on their financial results without considering the functional comparability. The Ld. CIT(A) erred in upholding the actions of the Ld. AO/ Ld. TPO.

- The Ld. AO/ Ld. TPO erred in rejecting the TP Study comparable companies despite these companies being functionally comparable. The Ld. CIT(A) also erred in confirming the same.
- The Ld. AO/ Ld. TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability, such as, (i) companies whose data for financial year ('FY') 2011-12 was not available, (ii) companies with service revenue less than 75% of total operating revenue, (iii) companies with related party transactions greater than 25% of sales (iv) companies with export sales less than 75% of total sales and (v) companies with different financial year ending (i.e. other than 31 March 2012). The Ld. CIT(A) also erred in confirming the same.
- The Ld. AO/ Ld. TPO also erred on facts in erroneously computing the margins of the Appellant and companies identified as comparable by the Ld. TPO viz. Cameo Corporation Services Limited, Concept Communication Ltd and Killick Agencies & Marketing Ltd. The Ld. CIT(A) erred in confirming the same.
- The Ld. AO/ Ld. TPO erred in including APITCO Ltd., Axis Integrated Systems Limited, BVG India Ltd and Just Dial Limited as comparable despite these companies being functionally dissimilar to the Appellant. The Ld. CIT(A) also erred in confirming the same.

4. Determination of arm's length price by the Ld. TPO in relation to the impugned ITeS

- Without prejudices to ground no. 2 above, the Ld. CIT(A) and the Ld. AO/ Ld. TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability, such as, (i) companies whose data for financial year (`FY') 2011-12 was not available, (ii)

companies with ITeS revenue less than 75% of total operating revenue, (iii) companies with related party transactions greater than 25% of sales (iv) companies with export sales less than 75% of total sales (v) companies employee cost less than 25% of turnover were excluded and (vi) companies with different financial year ending (i.e. other than 31 March 2012).

- Without prejudices to ground no. 2 above, 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 2012-13, erred in not applying the said filter at the upper end so as to reject high turnover companies as well. The Ld. CIT(A) erred in not adjudicating the same.
- Without prejudices to ground no. 2 above, the Ld. AO/ Ld. TPO erred on facts in arbitrarily accepting companies without considering the turnover and size of the Appellant and comparables. The Ld. CIT(A) erred in not adjudicating the same.
- Without prejudices to ground no. 2 above, the Ld. AO /Ld. TPO erred in not applying the turnover range at the lower and upper limit so as to reject high turnover companies. The Ld. CIT(A) erred in not adjudicating the same.
- Without prejudices to ground no. 2 above, the Ld. AO/ Ld. TPO erred on facts in erroneously computing the margins of Infosys BPO Limited and Microgenetic System Limited, identified as comparable by the Ld. TPO. The Ld. CIT(A) erred in not adjudicating the same.
- Without prejudices to ground no. 2 above, the Ld. AO/ Ld. TPO erred in including Universal Print Systems Ltd, Infosys BPO Limited, TCS e-Serve Ltd, BNR Udyog Limited and Excel Infoways Ltd. as comparable despite these companies being functionally dissimilar to the Appellant. The Ld. CIT(A) erred in not adjudicating the same.

5. Erroneous adjustment of Rs. 98.80 Crores as Warranty cost to be received from AEs

- The Ld. AO and Ld. TPO erred on facts in considering that the Appellant undertakes warranty obligations for the direct sales made by Dell Global B.V., The Netherlands, Singapore Branch ('DGBV'). This is based on mere surmises and conjectures and completely ignoring the facts and the functions assets and risk analysis of the Appellant in connection to the same. The Ld. DRP also erred in confirming the same.
- The Ld. TPO and Ld. AO erred on facts and in law in arbitrarily proposing an adjustment on account of warranty cost in relation to the marketing support services, to the tune of INR 87.04 Crores without considering the facts of the Appellant. The Ld. CIT(A) erred in not adjudicating the same.
- The Ld. TPO and Ld. AO erred in not following the directions of the Dispute Resolution Panel for the previous years and arbitrarily applied a mark-up of INR 11.76 Cr to the adhoc warranty cost allocated. The Ld. CIT(A) erred in not adjudicating the same.
- The Ld. TPO and Ld. AO did not take into consideration the Appellant's detailed submission on the warranty cost and proposed an adhoc TP adjustment by following the previous year's approach. The Ld. CIT(A) erred in not adjudicating the same.
- The Ld. TPO and Ld. AO did not take cognizance of the details filed by the Appellant in connection to the direct sales made in India by its associated enterprise viz. DGBV.
- Without prejudices to the above, the Ld. TPO and Ld. AO further erred in not restricting the TP adjustment in proportionate to the DGBV sales made in India. The Ld. CIT(A) erred in not adjudicating the same.

6. Erroneous data used by the TPO

- The Ld. AO and Ld. TPO has erred in law and the Ld. CIT(A) further erred in confirming use of data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.
- The Ld. CIT(A), the Ld. AO and Ld. TPO erred in law, and on facts in disregarding the application of multiple-year data while computing the margins of comparable companies.

7. Non-allowance of appropriate adjustment to the comparable companies by the Ld. CIT(A) and Ld. AO/ Ld. TPO

- The Ld. AO and Ld. TPO erred in law and on facts in not allowing appropriate adjustments under Rule 10B to account for, inter alia, differences in (i) accounting practices, (ii) marketing expenditure adjustment, (iii) research and development expenditure adjustment, (iv) working capital and (iv) risk profile adjustment to account between the Appellant and the comparable companies.

8. Variation of 5% from the arithmetic mean

- The Ld. AO and Ld. TPO erred in law in not granting the benefits of proviso to section 92C(2) of the Act available to the Appellant.

9. Relief

- The Appellant prays that the Ld. AO/ Ld. TPO be directed to grant all such relief arising from the preceding grounds as also all relief consequential thereto.

Bifurcation of marketing and business support services segment into ITES and MSS segments (Ground Nos.I(2) to I (4) and I(6) to I(7))

7. The Assessee provides business support services to Dell Global B.V. Singapore Branch (DGBV) in relation to the products sold by the said entity to its customers in India. The business support services comprise of the following services:

- Telephonic support services;
- Marketing support services; and
- Logistic support services.

8. The Assessee provides telephonic support services for standard problems to the customers who purchase the products sold by DGBV in India. In case an on-site service is required, the Assessee send third party service provider for such services. The technical support services include services in relation to products sold by DGBV which are under warranty period. In relation to warranty services, the cost of third party service provider and spares are borne by the Assessee, and recovered from DGBV.

9. The TPO held that the services under the technical and marketing services segment is essentially dissemination of information and the Assessee is acting as communication channel between the customers and the AEs, using IT medium. Thus, the services rendered by the Assessee are to be considered as ITES. Upon holding so, the TPO bifurcated the segment into ITES segment and MSS segment and benchmarked them separately. In arriving at this conclusion, the TPO relied on the order passed in the Assessee's case for the assessment

year 2009-10 and 2010-11. The DRP confirmed the TPO's order. Aggrieved the assessee is in appeal before the Tribunal.

10. The ld.AR submitted that under the technical and marketing support services segment, the Assessee does not render any services in the nature of ITES. The services rendered are in the nature in the nature of marketing support services and incidental technical services. On the erroneous basis that what the Assessee does is merely dissemination of information using IT media, the TPO held that the services are in the nature of ITES. The ld AR also submitted that even if the services rendered are considered to be ITES, the services that are being classified as ITES are rendered by the Assessee to third party customers of the AE on behalf of the AE. Since the so called ITES are being rendered to third parties, it cannot be subject matter of TP assessment. The ld AR also submitted that the major post-sales support in relation to the warranty support and co-ordination, i.e., call centre support is not being provided by the Assessee directly to its AEs. The Assessee has outsourced these services to another Group Entity in India which is compensated at an arm's length mark-up of cost plus 15%. The ld AR drew our attention to the decision of this Tribunal in the Assessee's own case for the assessment year 2009-10 (Order dated 18.03.2022 passed in IT(TP)A Nos. 269 and 217/Bang/2014) and submitted that the above issue is squarely covered by this decision.

11. The ld DR supported the orders of lower authorities

12. We heard the rival submissions and perused the material on record. We will look at the definition of ITES as defined in **Rule 10TA(e)** of the Income-tax Rules, 1962, which reads as under:

> "information technology enabled services" means the following business process outsourcing services provided mainly with the assistance or use of information technology, namely:—
>
> (i) back office operations;
> (ii) call centres or contact centre services;
> (iii) data processing and data mining;
> (iv) insurance claim processing;
> (v) legal databases;
> (vi) creation and maintenance of medical transcription excluding medical advice;
> (vii) translation services;
> (viii) payroll;
> (ix) remote maintenance;
> (x) revenue accounting;
> (xi) support centres;
> (xii) website services;
> (xiii) data search integration and analysis;
> (xiv) remote education excluding education content development; or
> (xv) clinical database management services excluding clinical trials, but does not include any research and development services whether or not in the nature of contract research and development services;"

13. From the above definition, it is evident that merely because services are rendered using IT medium, they cannot be termed as ITES. We also notice that the coordinate bench of the Tribunal in assessee's own case has considered the same issue and held that –

> "7.8 We have heard rival submissions and perused the material on record. The TPO held that services under the technical and marketing services segment is essentially dissemination of information and the assessee is acting as communication channel

between the customers and the AEs using IT medium. According to the TPO, those services rendered by the assessee are to be considered as ITES. After holding so, the TPO bifurcated segment into IT segment and MSS segment and bench marked them separately.

7.8.1 In this context, it is pertinent to note that for assessment year 2013-2014, the DRP granted relief to the assessee by holding that services rendered are in the nature of marketing support services. Copy of the DRP's order for assessment year 2013-2014 is placed on record at page 770 Vol.4 of the case law compilation. The DRP has given the above directions at page 10. The relevant finding of the DRP in assessment year 2013-2014 reads as follows:-

> "Having considered the submissions, and on perusal of the details filed, we note that as per the Services Agreement entered between the assessee and Dell Global BV (Singapore branch) dated 01.01.2009, the assessee is required to prove certain technical support to the customers who purchase products from the assessee, to provide logistics support to ensure delivery of products and services to the customers and also provide marketing support and Sales promotion services. The technical services are provided to the customers of products, and as such cannot be compared to the function of provision of ITES service. Therefore. we are no in agreement with the TPO's view in comparing such services to call entre activity, and there is no information for the TPO to take such a view. Besides, we note that all these functions is provision of logistics support, marketing support and technical support have interrelation in the facts & circumstances of the case. Therefore, it would not be appropriate to segregate them into Technical Services & Marketing Supports services.
>
> Accordingly, the TPO's action in such segregated analysis is disapproved. The TPO is directed to consider the Marketing support and Technical Support as an integrated function and such integrated revenue of these two activities may be benchmarked as Marketing Support Service. Accordingly, the TPO's benchmarking analysis with regard to Marketing Support Service would be considered applicable for this integrated Market Support & Business Support Services. The TP analysis made by the TPO by taking comparables relating to IES segment are here

> by rejected. The TPO is accordingly directed to recompute the-adjustment in line with the above direction.
>
> We also note here, that in view of the above, the objections raised in 22-26, against comparability analysis of comparables relating to ITES functions are rejected as infructuous."
>
> 7.8.2 The functions performed by the assessee under this segment are prima facie identical for the concerned assessment year and for the assessment year 2013-2014. For assessment year 2013-2014, when the DRP had held that services rendered by the assessee are in the nature of marketing and support services and since no appeal preferred by the Revenue to the ITAT, the matter had attained finality. Therefore, we are of the view that the entire TP issue raised under marketing support services segment needs to be examined afresh by the AO / TPO in the light of the DRP's directions for assessment year 2013-2014. It is ordered accordingly."

14. In the year under consideration, the facts are similar to that of assessment year 2009-10 and therefore respectfully following the decision of the coordinate bench of the Tribunal, we remit the issue back to the AO/TPO for fresh consideration in the light of the DRP's directions for assessment year 2013-2014. It is ordered accordingly. These grounds are allowed for statistical purposes.

15. Since assessee's main issue relating technical and marketing support segments raised in ground no. 2 is restored to the AO / TPO for fresh consideration, the other grounds in this segment also are restored to the TPO for fresh adjudication (as the same would be relevant if TPO rejects the assessee's contentions in ground 2). The grounds I(2) to I (4) and I(6) to I(7) are allowed for statistical purposes.

Adjustment determined in respect of warranty cost – Ground I(5)

16. The Assessee provides telephonic support services for standard problems to the customers who purchase the products sold by DGBV in India. The technical support services include services in relation to products sold by DGBV which are under warranty period. In relation to warranty services, the cost of third party service provider and spares are borne by the Assessee, and recovered from DGBV. The warranty obligation as regards the sales made by the AEs directly in India is wholly on the AEs and the Assessee only provides co-ordination and support services as regards the same, for which it is compensated on cost plus 5%. The co-ordination and support services includes call centre support, cost for third party services for assistance to customers of the AEs, etc. The cost of spares and parts to be replaced under the warranty are borne by the AEs.

17. The TPO made an adjustment on the basis that the Assessee had not made any recovery towards the warranty services and the out of pocket warranty charges paid to third parties and the same was upheld by the DRP.

18. The ld AR submitted that the Assessee has in fact recovered the expenses incurred in respect of the warranty services, with a mark up of 5%. Therefore, no further adjustment is warranted. The ld AR also submitted that the above issue is squarely covered by the decision of this Hon'ble Tribunal in the Assessee's own case for the assessment year 2009-10 (supra).

19. We heard the DR. We notice that the coordinate bench of the Tribunal in assessee's own case (supra) for has considered the issue of adjustment towards warranty cost and held as under –

> "8.7. We have heard rival submissions and perused the material on record. The assessee had submitted that the amount of Rs.211.42 crore does not pertains to the sales made by the AEs in India and it pertains solely to the sales made by the assessee. The DRP in its directions held that the assessee was to show that expenses in relation to providing support services for AEs warranty obligation are either reduced from the cost or accounted for separately. The DRP in fact directed that since the services in relation to the warranty obligations are provided by third party service providers and the assessee is only coordinated for the same, no mark up is warranted. The relevant finding of the DRP in this regard reads as follows:-
>
> > "6.6.6 The assessee is directed to demonstrate to the TPO that the above reimbursement has either been reduced from the costs or accounted for separately. In absence of such demonstration, the TPO can take the above to be a part of the warranty costs debited to the P&L account and effect suitable adjustment. Since the services related to warranty are being handled by a third party and the assessee is being used only as a medium, the TPO is not correct in charging a markup on this amount. Hence, the objection relating to markup on the warranty cost is upheld. The TPO cannot charge a markup on warranty amount as such services are not rendered by the assessee to its AE."
>
> 8.7.1. In the light of the above directions of the DRP, which we are in consonance with the TPO, is directed to reexamine the issue raised in ground 10 afresh. It is ordered accordingly."

20. Respectfully following the above decision we direct the TPO to re-examine the issue raised in ground no.5 afresh. It is ordered accordingly. This ground is allowed for statistical purposes.

CORPORATE TAX

Disallowance under section 40(a)(ia) of rebates given to customers (Ground No. II (1) of Assessee's appeal)

21. During the assessment proceedings, the AO called for details of taxes deducted at source on payments of an amount of Rs. 40,72,04,283 in the nature of rebate given to distributors. The assessee submitted before the AO that taxes were not liable to be deducted at source on the rebate given to distributors. The AO was of the view that the transaction was between principal and agent and not principal to principal basis and therefore the assessee was obliged to deduct tax at source u/s. 194H of the Act. Accordingly, he disallowed the said amount.

22. The CIT(Appeals) relying on the DRP directions for AY 2011-12 confirmed the disallowance.

23. Before us, the ld. AR submitted that the sum of Rs. 40,72,04,283 represents rebate payment to distributors on which the provisions of TDS are not applicable. It was further submitted that the Assessee is in the business of manufacture and trading of computers along with related accessories that are sold goods through its distributors by adopting two models for distribution as described under:

A. Bill to Order

Under this model, the distributor undertakes to collate orders from the prospective customers on behalf of the Assessee and acts as an agent between the customer and Assessee for which the distributor earns commission at a prescribed rate on every successful order. The Assessee is ultimately responsible for all the risks and reward arising from such

orders after the same is accepted. The entire obligation pertaining to fulfilment of orders is on the Assessee and not the distributor. The Assessee deducts applicable taxes at source on such commission paid to the distributors under bill to order model.

B. Stock and Sell (SNS)

In this model the distributors purchase final products from the Assessee at its own risk and in turn sell the same to the ultimate customer or a sub distributor at a predetermined price. The title in the goods is passed on to the distributor upon delivery of goods subsequent to sale by the Assessee. It is the responsibility of the distributor thereafter to sell such goods to the consumers and any unsold goods would not be returned back to the Assessee. Further, the distributor shall make the payments in relation to such purchases, within the time prescribed in the agreement irrespective of whether the same is sold by him or not. Further, upon achieving certain predetermined targets as set out by the Assessee, the distributors are eligible for rebate / volume discount at a predetermined rate. Therefore the nature of relationship between the **Assessee and the distributors is that of a principal-to-principal** and therefore there is no tax is liable to be deducted at source. This is evident from a reading of the agreement at page 2063 of Volume 5.

24. The ld AR drew our attention to the various clauses of the agreement to substantiate that the transaction of the Assessee with its distributors in relation to rebate / discount is on principal-to-principal basis and hence the provisions of 194H are not applicable. Further the ld. AR relied on the following case laws in this regard -

- ***Harihar Cotton Pressing Factory v. CIT*** (Reported in [1960] 39 ITR 594 (Bombay)
- ***Ahmedabad Stamp Vendors Association v. UOI*** (Reported in [2002] 124 Taxman 628 (Gujarat))
- ***CIT v. Ahmedabad Stamp Vendors Association*** (Reported in [2012] 25 taxmann.com 201 (SC
- ***Bharti Airtel Ltd. v. DCIT*** (Reported in [2014] 52 taxmann.com 31 (Karnataka)

- ***CIT v. United Breweries Ltd***. (Reported in [2017] 80 taxmann.com 123 (Andhra Pradesh and Telangana)
- ***CIT v. Intervet India (P.) Ltd.*** (Reported in [2014] 49 taxmann.com 14 (Bombay
- ***ACIT v. Acer India (P.) Ltd***. (Order dated 05.10.2018 passed by this Hon'ble Tribunal in ITA No. 1940/Bang/2018)

25. The ld. DR relied on the orders of the lower authorities.

26. We notice the coordinate bench of the Tribunal in assessee's own case for AY 2010-11 had considered a similar issue and held that

> 59. We have considered the rival submissions and perused the material on record. The assessee is distributing the products under two models i.e. Sales through distributors who act as agents and gets compensated on a commission basis. The second model is where the products are sold to the distributor and the distributer get a rebate in the products purchased based on the business volume. When the relationship between the assessee and the distributor is on a principal to principal basis, the rebate /volume discount given by the assessee on the price of products sold to distributer cannot be characterized as commission in order to attract section 194H of the Act thereby there is no liability to deduct tax at source. We notice that the Hon'ble jurisdictional High Court has expressed a similar view in the case of Bharti Airtel Ltd (supra) where it is held that –
>
> > 51. From the aforesaid clauses, it is clear that there is no relationship of principal and agency. On the contrary, it is expressly stated that the relationship is that of principal to principal. Secondly the Distributor/Channel Partner has to pay consideration for the Product supplied and it is treated as sale consideration. There is a Clause, which specifically states that after such sale of Products, the Distributor/Channel Partner cannot return the goods to the assessee for whatever reason. It is the Channel Partner and the Distributor who have to insure the products and the godowns at their cost. They are even prevented from making any representation to the retailers unless

authorized by the assessee. What is given by the assessee to its Distributor/ Channel Partner is a trade discount. It is not commission.

60. It is the contention of the assessee that the clauses of the agreement with its distributors demonstrate that the transactions in relation to rebate/discount are on a principal-to-principal basis not attracting the provisions of section 194H. We are of the view that the agreements with distributors require examination to verify the claim of the assessee. We therefore remit this issue to the AO for verification of the agreements which the assessee has entered into with the distributors in relation to discount/rebate transactions and decide the allowability based on the ratio laid down by the Hon'ble High Court after giving reasonable opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

27. Respectfully following the above decision we remit this issue to the AO for verification of the agreements which the assessee has entered into with the distributors in relation to discount/rebate transactions and decide the allowability based on the ratio laid down by the Hon'ble High Court after giving reasonable opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

Disallowance of deferred revenue [Ground No.II(2)]

28. The Assessee is engaged in the business of sale of computer hardware, and also offers warranty service to the customers, which represents a contractual obligation on part of the Assessee to provide services for a defined period for a given consideration agreed. Though the entire sale price for warranty is invoiced to customers along with sale of products during the previous year, the obligation to provide services and the outflow of resources (cost of spares, labour and

logistics) would happen over a period of time. Therefore, in line with the matching principles of accounting, the revenue for the same would be recognized proportionately in the year of providing the services. Also, following the matching concept, the cost in relation to providing such services would also be recognized in the same year.

29. The AO brought to tax the deferred revenue of Rs. 105,43,36,985/- by holding that the Income-tax Act, 1961 ("the Act") does not provide for the concept of deferred revenue.

30. By placing reliance on the directions issued by the DRP in the Assessee's case for the assessment years 2009-10 and 2010-11, the DRP rejected the claim of the Assessee that only the proportionate revenue pertaining to the current year is to be brought to tax. Accordingly, the DRP rejected the objections of the Assessee and upheld the order of the AO

31. Ld AR submitted that –

- At the outset, it is submitted that the AO erred in proceeding on an erroneous footing that there is no concept of deferment of income as per the Act and contending that the income of Rs. 105,43,36,985/- has accrued to the Appellant during the financial year 2011-12.
- It is submitted that the AO ought to have relied on the cancellation policy provided under the terms of warranty wherein the customer has the right to cancel the contract with a prior notice and upon cancellation of the contract, the Assessee has to refund the entire consideration less cost of services already rendered. Sample warranty terms are available at pages 284-290 Annexure 2 to submission dated 07.03.2016 – Volume 2 of the paperbook.

- In terms of Section 5 of the Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which is received or is deemed to be received in India in such year, **accrues or arises or is deemed to accrue or arise to him in Indiaduring such year.** It is submitted that during the year under consideration, to the extent of Rs. 105,43,36,985/-, no income "accrued" to the Assessee.

- In the Assessee's case, as the obligation to provide the warranty services which could involve outflow of resources like goods(spares) and services are yet to occur and hence, in line with the generally accepted accounting principles, revenue is recognized on a straight-line basis over the period of contract. Any portion of consideration for which invoices have been raised but, some portion of the contract period pertains to subsequent yearwould be classified under **"other liabilities" and the same would be recognized as revenue in the year in which obligation to provide the services arise**.

- To illustrate, say the Company sells a laptop in December 2011 along with warranty for two years. In such a case, proportionate revenue towards warranty services for four months would be accounted in FY 2011-12 and the balance would be carried forward to the next two years and offered to tax based on time proportion. Thus, though the full consideration for providing the service is agreed and received during the FY 11-12, the obligation to service the customer arises over a period of time in FY 11-12 (4 months), 12-13(12 months) and 13-14 (8 months). Thus, the contracts which are extending beyond the current financial year, the consideration towards such contracts should also be assessed to tax on annual basis in which the services are provided. Until such consideration is recognized as revenue, the same shall be classified under other liabilities.

- Under the Act, income accrues or arises when the Assessee acquires a right to receive the same. The right to receive is coupled with the liability on the other party to make the payment. In the Assessee's case, in relation to contracts for services extending beyond the

financial year 2011-12 under consideration, the Assessee is under a contractual obligation to render the service to the customer in the subsequent years and the same would involve outflow of cost/resources for the Assessee. Further, in case the contract is cancelled, the Assessee is liable to refund the consideration received originally, less cost of services already rendered.

- It is submitted that as and when the services are rendered in a particular year, the revenue deferred to such year is recognized as revenue during such year (amortised) and offered to tax. The movement of deferred revenue is as under:

Assessment Year	Opening Balance (under Other Liabilities)	Closing Balance (under Other Liabilities)	Net debit to Revenue (P&L)
2010-11	(216,92,03,935)	(341,83,99,970)	124,91,96,035
2011-12	(341,83,99,970)	(481,01,21,184)	139,17,21,213
2012-13	(481,01,21,184)	(586,44,58,169)	105,43,36,985

- Clearly, the Assessee has been recognizing the revenue periodically on the basis of accrual and offered them to tax.

32. The ld AR also submitted that the issue is squarely covered by the order of this Hon'ble Tribunal in Assessee's own case for assessment year 2010-11 [order dated 18.08.2022 passed in IT(TP)A Nos. 562 & 400/Bang/2015] at paras 31-35, where the assessee's ground of appeal was allowed, accepting the above contentions and the addition deleted.

33. The ld DR relied on the order of the lower authorities.

34. We notice that the coordinate bench in assessee's own case for AY 2010-11, has dealt with a similar issue and held that

31. We heard the rival submissions and perused the materials on record. The main ground on which the DRP confirmed the order of AO is that the amount received towards warranty is not refundable even when the customer cancels the warranty agreement. The relevant extract from the DRP order reads as under –

> "Having heard the assessee we find that the assessee has stated that the amount so received on account of installation services and upsell warranty services was part of the goods sale process and not refundable to the payers even if the service could not be ultimately utilized by the customer. Even where such customer opts to cancel using the service being offered by assessee, the unutilized balance was not refundable. Thus, the amount paid was for outright purchase of services and not an advance to be appropriated against future use of the service. The assessee acquires the absolute right to utilize the amount so received. Thus, the income crystallizes as soon as a customer makes payment. The right to receive the income vests with the assessee as soon as the services are purchased by customers. Since, the assessee employed mercantile system of accounting, income would accrue with receipt and it cannot be considered as advance income, which could be deferred for tax purpose."

32. However it is submitted that upon cancellation of the contract, the Assessee has to refund the entire consideration less cost of services already rendered. On perusal of a sample warranty terms (pages 2527-2540, relevant page 2537, Volume 6 of the paperbook) we notice that the assessee would refund the money upon premature cancellation of warranty service. The extract of the clause in the agreement is reproduced below for reference:-

> "**Cancellation**. Subject to the applicable product and services return policy for Customer's geographic location, Customer may terminate this Service within a defined number of days of Customer's receipt of the Supported Product by providing Dell with written notice of cancellation. If Customer cancels this Service within that period, Dell will send Customer a full refund less the costs of support claims, if any,

made under this Service Description. However, if that period has transpired since Customer's receipt of the Supported Product, Customer may not cancel this Service except as provided by an applicable state/country/province law which may not be varied by agreement.

Dell may cancel this Service at any time during the Service term for any of the following reasons:

Customer fails to pay the total price for this Service in accordance with the invoice terms;
Customer refuses to cooperate with the assisting analyst or on-site technician; or
Customer fails to abide by all of the terms and conditions set forth in this Service Description.

If Dell cancels this Service, Dell will send Customer written notice of cancellation at the address indicated on Customer's invoice. The notice will include the reason for cancellation and the effective date of cancellation, which will be not less than me 0-01 days from the date Dell sends notice of cancellation to Customer, unless state law requires other cancellation provisions that may not by varied by agreement. IF DELL CANCELS THIS SERVICE PURSUANT TO THIS PARAGRAPH, CUSTOMER SHALL NOT BE ENTITLED TO ANY REFUND OF FEES PAID OR DUE TO DELL."

33. The assessee recognizes that portion of consideration for which invoices have been raised pertaining to the year under consideration and the balance portion of the contract period that pertains to subsequent year is classified under "other liabilities". The revenue thus deferred is recognized in the year in which obligation to provide the services arise. In Assessee's case, as the obligation to provide the warranty services which could involve outflow of resources like goods(spares) and services are yet to occur and hence it is submitted that in line with the generally accepted accounting principles, the revenue is recognized on a straight line basis

over the period of contract. Under the Act, income accrues or arises when the assessee acquires a right to receive the same and the right to receive is coupled with the liability on the other party to make the payment. Further in relation to contracts for services extending beyond the financial year 2009-10 under consideration, the Assessee is under a contractual obligation to render the service to the customer in the subsequent years and the same would involve outflow of cost/resources for the Assessee. It is also important to note that, in case the contract is cancelled, the Assessee is liable to refund the consideration received originally, less cost of services already rendered. From the detailed working and sample invoices submitted before the DRP (pages 2294 and 2541 to 3192 of Volume 6 of the paperbook) that the when the services are rendered in a particular year, the revenue deferred to such year is recognized as revenue during such year (amortised) and offered to tax and therefore it is clear that the Assessee has been recognizing the revenue periodically on the basis of accrual and offered them to tax.

34. The coordinate bench of the Tribunal in the case in Schneider Electric IT Business India Pvt. Ltd. v. JCIT, LTU [ITA Nos. 299/Bang/2014 and 218/Bang/2014) dated 30.04.2019] has considered a similar issue and held that –

> "91. We have carefully considered the rival submissions. The first aspect which we would like to clarify is that it was not correct on the part of the AO to characterize the sum of Rs.5,38,22,153 as undisclosed income. The income is disclosed in the books of accounts but is not recognized for the purpose of income tax computation because of the Assessee's accounting policy which in turn is based on AS-9 of ICAI. The second aspect which has to be clarified is that the deferment of revenue as not pertaining to the relevant AY 2009-10 is also substantiated by the Assessee and the basis of deferral of revenue is clearly given in paper book no.7 pages 1620 to 1897. Therefore there can be no dispute that the income deferred did not pertain to AY 2009-10, if one were to accept that deferral of income, though it has accrued to an Assessee, is possible. The principal question therefore that

needs to be addressed is regarding whether deferring revenue is permissible under the mercantile system of accounting followed by the Assessee where income that accrues or arises to an Assessee has to be regarded as income.

92. The learned counsel for the Assessee in his rejoinder submitted that the decision of the Tribunal rendered in the case of Optum Health & Technology (India) (P.) Ltd. (supra) is clearly distinguishable because in that case not only was the revenue received but also services were rendered and still the Assessee chose to defer revenue recognition and it was in those circumstances, the Tribunal held that deferring revenue was not proper and had to be regarded as income of the relevant year.

93. We have given a very careful consideration to the rival submissions. Similar issue had arisen for consideration in the case of Punjab Tractors Co-op. Multipurpose Society Ltd. (supra) before the Hon'ble Punjab & Haryana High Court. In that case the facts were that the assessee was engaged in the purchase and sale of tractors, motor cycles, etc., and doing their repairing. It had received advances from the buyers of tractors to cover their service charges for a period of one year after the expiry of initial warranty period. It had shown same on the liability side in the balance sheet for the assessment year 1978-79 under the head 'Post-Warranty Service Advances' (PWS Advances). It used to make adjustment of the amount received from PWS Advances Account to the Workshop Income Account during the quarter in which the work of repairs and services was done, and included the amount so adjusted as income of the relevant year. Out of the aggregate amount shown in PWS Advances Account, the Assessing Officer treated proportionate sum for the period covered as the assessee's income for the assessment year in question. The Commissioner invoked section 263 and held that the entire amounts received in the previous year towards PWS Advances were trading receipts of the year directly connected with the business of servicing and repairs of tractors. He,

accordingly, set aside the assessment. On appeal, the Tribunal upheld the Assessing Officer's action disagreeing with the finding of the Commissioner. On reference, the Hon'ble Punjab & Haryana High Court held as follows:

> "The taxability of income normally depends upon the system of accounting followed by the assessee. Even in the case of an assessee following the mercantile system of accounting, a mere claim, by the assessee in respect of an amount without the right to claim cannot form the basis for taxability. Where the assessee follows the cash system of accounting, the taxability is to be based on receipt basis and not on accrual basis. Receipt, either accrued or deemed, is not made a condition precedent to taxability. Profits or gains are taxable if they have accrued or have arisen or are, under the Act, deemed to have accrued or arisen to the assessee in the accounting year. Generally, income must accrue first, receipt normally follows the accrual. In other words, the right to receive must come into existence before the actual receipt takes place. Receipt, by itself, is not sufficient to attract tax. It is only receipt as 'income' which would attract tax. Every receipt by the assessee is, therefore, not necessarily income in his hands. It bears the character of income at the time when it accrues in the hands of the assessee and then it becomes eligible to tax. What is relevant to determine whether money received is income or simply an advance, is the initial character of the receipt and not the head under which the amount is credited in the books of account. If no income has resulted, it cannot be said that income accrued merely on the ground that the assessee has been following the mercantile system of accounting."

The Hon'ble Court accordingly upheld the stand of the Assessee. Holding that the Assessee did not become owner of the money received unless the services are rendered and was not entitled to

appropriate the same till service was rendered in lieu of which the same was received in advance.

94. The Hon'ble Madras High Court in the case of Coral Electronics (P.) Ltd. (supra) also dealt with similar case. The assessee is a private limited company carrying on business in television sets. In the previous year ending 31st March, 1983, and 31st March, 1988 corresponding to the assessment years 1983-84 and 1988-89, respectively, the assessee had collected service charges, which were bifurcated into two items, one as pertaining to year and another pertaining to the subsequent assessment year and, therefore, excluded from consideration in determining the total income of year. The Assessing Officer treated it as income and taxed the same. The Tribunal has held that it is not taxable income. On a reference the Hon'ble Court held the amount that was received was only as charges for the services to be rendered in future. The services may be rendered or may not be rendered depending upon withdrawal of the money as and when the customer required. So, it is highly uncertain as to whether it would at all remain as income of the assessee. Only when the service is done the assessee has a right over the amount that was deposited. Till then, he has no right over the same. It is in that sense till then, it cannot be considered as an income of the assessee and is not eligible to tax.

95. The Mumbai ITAT in the case of IOT Infrastructure & Energy Services Ltd. (supra) had to deal with identical case. The facts of that case were that the Assessee had not offered for tax an amount being difference between progress billing as on 31-3-2007 and cumulative revenue booked as per accounts as on 31-3-2007 in respect of three contracts. The assessee explained to Assessing Officer that progress billing was inclusive of advances received from customers which amount did not reflect work performance. It was also explained that progress billing was done not only for amount of work done but also for mobilisation and other advances receivable by it as per terms of relevant contract

and that mobilisation and other advances received by assessee by raising progress billings did not represent income of assessee at time of raising progress bills and same therefore had no effect whatsoever on income of assessee, which was recognised by method of percentage of completion. The Assessing Officer, however, held that amount due to customers as shown by assessee was nothing but understatement of its profits and added same to total income of assessee. On further appeal the question before the Tribunal was as to whether amount due to customers as shown by assessee was nothing but receipt of advance before accrual of income and, therefore, same could not be treated as income of assessee at point of receipt. The Tribunal held in favour of the Assessee.

96. As far as the decision of the Tribunal in the case of Optum Health & Technology (India) (P.) Ltd., is concerned, as rightly contended by the learned counsel for the Assessee the facts were that the sums were received in advance and in respect of the sums received services were also performed but still the Assessee did not recognize revenue but postponed recognition based on the bills raised on the clients for services performed. Though there are observations in the order of the Tribunal that postponement of recognition of income is not possible on the basis of AS-9 of ICAI when income accrues or arises under the mercantile system of accounting, those observations have to be confined as decision on the facts of that case. In the light of the decision of the Hon'ble High Courts of Punjab & Haryana and the Hon'ble Madras High Court, we are of the view that the claim made by the Assessee deserves to be accepted. Accordingly the addition made by the AO and confirmed by the DRP is directed to be deleted. Gr.No.19 is accordingly allowed."

35. In the light of the decision of the coordinate bench of the Tribunal and considering the facts of the case as discussed above, we are of the view that claim of the assessee deserves to be accepted and the addition made

by the AO as confirmed by the DRP is hereby deleted. This ground accordingly is allowed in favour of the assessee.

35. Respectfully following the decision of the coordinate bench we hold that the claim of the assessee deserves to be accepted and the addition made by the AO as confirmed by the DRP is hereby deleted. This ground accordingly is allowed in favour of the assessee.

Disallowance of fixtures and stores interiors expenses (Ground Nos.II (3)

36. For the year under consideration the Assessee incurred an expenditure amounting to Rs. 4,25,15,813/- towards fixture and stores interiors expenses. The expenditure was claimed as being revenue in nature and deductible under Section 37(1) of the Act for the reason that the said expenditure was incurred for maintaining uniformity in the franchisee stores and the Assessee neither owns nor derives any enduring benefit on such expenditure,

37. The AO classified the expenditure as capital in nature for the reasons that (i) the Form 3CD filed for AY 2012-13 noted the said expenditure aggregating Rs. 4,25,15,813/- as capital expenditure debited to profit and loss account; (ii) it was incurred towards purchase / acquiring of assets; and (iii) it is one time investment by the Assessee and lifetime of the assets are more than one year giving enduring benefit to the Assessee.

38. The AO accepted the alternative claim of the Assessee to allow depreciation on the said amount (worked out to Rs. 42,51,581/-) and

accordingly made a disallowance of the expenditure to the extent of Rs. 3,82,64,232/-.

39. The CIT(A) confirmed the order of the AO.

40. The ld. AR submitted that for an expenditure to be treated as capital in nature, the asset must be owned by the Assessee, used by the Assessee and further the same should result in an enduring benefit for the Assessee. The ld AR also submitted that the assessee has incurred expenditure on behalf of the Franchisees towards furnishing the interiors as per the set standards of the Assessee. The ld AR further submitted that the said expenditure has not resulted in bringing into existence any asset or advantage to the Assessee but only facilitates the business operations of the Assessee efficiently by maintaining uniform standards across all Franchisee stores. Hence, the expenditure is revenue in nature and deductible under Section 37(1) of the Act as the same is laid out wholly and exclusively for the business of the Assessee. Reliance was placed on the following case laws:-

i. Empire Jute Co. Ltd. v. CIT [Reported in [1980] 3 Taxman 69 (SC)] at para 11;
ii. CIT v. Geoffrey Manners & Co. Ltd. [Reported in [20090] 180 Taxman 87 (Bombay) at paras 3-5;
iii. CIT v. Asian Paints (India) Ltd. [Reported in [2016] 75 taxmann.com 152 (Bombay)] at para 5(e);
iv. CIT v. IBM India Ltd. [Reported in [2014] 43 taxmann.com 470 (Karnataka)] at para 10;
v. DCIT v. Jubilant Foodworks Ltd. [Reported in [2022] 137 taxmann.com 345 (Delhi-Trib.) at para 11.

41. The ld. DR relied on the orders of lower authorities.

42. We have considered the rival submissions and perused the material on record. We notice that the coordinate bench of the Tribunal in the case of M/s. NIKE India Pvt.Ltd vs DCIT (IT(TP)A No.202/Bang/2021 dated 26.07.2022) has considered a similar issue and held that –

> 32. In so far as the aforesaid grounds of appeal are concerned, the material facts are that the assessee claimed deduction of a sum of Rs.14,45,55,444/- as revenue expenditure. These expenses were incurred by the assessee for furnishing the retail showrooms where the assessee's products are sold by the retailers i.e., franchisees. On perusal of the ledger of these expenses, the AO found that expenses include furniture for the stores, designs of the stores, etc. The AO on perusal of the agreement between the assessee and one of the franchisees viz., Pioneer Sports Company, New Delhi, found that all cots of refurbishment of the shop including and not limited to the cost of any new hardware and software solution shall be borne by the Nike i.e., the Assessee. According to the AO, these items of expenses cannot be regarded as revenue expenses as they endure for a longer period of time. The AO also made a reference to clause 12 of the agreement whereby the franchisee has to bear the insurance of goods and fixtures supplied by the assessee. Considering all these aspects, the AO concluded that the expenditure as a capital expenditure and he accordingly disallowed the claim of the assessee for deduction. The DRP agreed with the conclusions of the AO.
>
> 33. The learned Counsel for the assessee submitted that expenses are purely revenue in nature and the intention was to ensure that the franchisee showrooms confirmed to certain standards. It was submitted that the expenses do not add any value to existing assets and they are revenue in nature. Alternatively, it was claimed that the assessee should be allowed depreciation in the event the expenditure is treated as capital in nature. Learned Counsel for the assessee placed reliance on the decision of the ITAT, Bengaluru Bench, in the case of Emdee Apparel

in ITA Nos.576, 577/Bang/2007, order dated 21.09.2012. In the aforesaid case, the question arose in the context of identical expenditure incurred in the case of retail trader of Reebok Footware and Shoes incurring expenses which was disallowed as capital expenditure by the Revenue authorities. The Tribunal, after considering the various decisions cited on behalf of the assessee, finally concluded as follows:

> "Coming to question No.2, we find that in a catena of decisions relied upon by the learned counsel for the assessee (cited supra), it has been held that when any expenditure is incurred by an assessee on leasehold premises, even though it may give an enduring benefit, it would not amount to capital expenditure as no capital asset is being created in favour of the assessee. In some of the cases, the expenditure is on civil and electrical works also. In the case before us, we find that the AO has erroneously held that there was no termination clause in the agreement of lease and that the lease is permanent. We find that the lease is for a period of 4 years only and the assessee was to pay for lease rental as well interest-free security deposit for the lease and also that the assessee is required to incur the expenditure for interior and exterior works for carrying on the business as per 'brand' specifications. In such a situation, it cannot be said that the assessee is deriving an enduring benefit nor can it be said that any capital asset has been created in favour of the assessee. The quantum of expenditure cannot determine the nature of the expenditure. Therefore, respectfully following the decisions relied upon by the learned counsel for the assessee we hold that this expenditure is revenue in nature. This ground of appeal is accordingly allowed."

34. Learned DR placed reliance on the order of the AO and also made a reference on the decision of the ITAT, Delhi Bench, in the case of Carrier Airconditioning and Refrigeration Ltd., in ITA No.5244/Delhi/2015, order dated 13.07.2018.

35. We have given a careful consideration to the rival submissions. The decision rendered by the ITAT Delhi in the case of Carrier Air-conditioning (supra) was a case of renovation to a leased

premises and the finding was that it was a complete replacement of the existing premises. In this case we are concerned with refurbishing a show room to make it attractive for customers to visit and purchase assessee's products. In the given circumstances, we are of the view that the decision in the case of Emdee Apparels (supra) is applicable. Consequently, the claim made by the assessee is directed to be accepted and the relevant grounds of appeal are allowed.

43. The Assessee is primarily engaged in the manufacturing and trading of Dell brand Computer hardware and peripheral products. The sale of all these products in India are also carried out under a Franchise model. Under the said model, third party contractors would act as a Franchisee for the Assessee in India, where the said Franchise would open exclusive shops/ stores for sale of its products. To maintain the set standards and to ensure all the Franchise stores provides the customers an environment where these products are sold in Dell exclusive stores, the Franchisees are required to furnish the interiors as per the set standards of the Assessee, which include specific type of glow sign board towards use of the Assessee's name, logo and trademarks on the stores, fixtures, etc. In order to facilitate the above objective, the Assessee incurs such expenses on behalf of the Franchisees which are neither recoverable nor give the Assessee any kind of ownership towards the same. The ld AR submitted a sample copy of franchisee agreement entered into by the Assessee (pages 232 and 246 – Volume 2 of the paper book). On perusal of the sample franchise agreement it is noticed that the assessee is required to bear the cost of interior and exterior designing of the store, infrastructure for selling Dell's products. The cost born by the assessee includes cost

towards furniture, branding, glow signboard & fixing etc. The assessee is required to incur the expenditure for interior and exterior works for carrying on the business as per 'brand' specifications. The agreement entered into by the assessee with franchise is not perpetual agreements and is entered into for a period of two years (refer clause 7 of the franchise agreement in page 236 of paper book) and the agreement also has clauses for termination under certain circumstances. Given this it cannot be said that the assessee is deriving an enduring benefit nor can it be said that any capital asset has been created in favour of the assessee. In assessee's case, the expenses are incurred for the purpose of refurbishing the showroom which provides the customers an environment where these products are sold in Dell exclusive stores. In view of these discussion and respectfully following the decision of the coordinate bench of the Tribunal in the case of Nike India (supra) we hold the expenses incurred by the assessee towards fixture and stores interiors expenses is an allowable expenses and the claim made by the assessee is directed to be accepted. This ground is allowed in favour of the assessee.

44. Ground no. 4 is regarding levy of interest u/s. 234B which consequential. Ground no.5 is with regard to levy of interest u/s. 234C where it is submitted that the lower authorities erred in levying interest under Section 234C without appreciating that the same is applicable on returned income and not on assessed income are consequential in nature. We therefore direct the AO to verify and compute the interest u/s.234C in accordance with law.

IT(TP)A No.134/Bang/2018

45. The only issue contended by the revenue with regard to the transfer pricing adjustment is direction given by the CIT(A) to allow working capital adjustment for marketing support services. This issue does not warrant separate adjudication in view of the decision on the TP issues while considering the assessee's appeal in paragraph 14 herein above where the issue remitted back to the AO/TPO for fresh consideration. The revenue appeal is therefore allowed for statistical purposes.

46. In the result, the appeal of the assessee is partly allowed and the revenue's appeal is allowed for statistical purposes.

Pronounced in the open court on this 11th day of November, 2022.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 11th November, 2022.
/*Desai S Murthy /*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.