

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>IT(TP)A No. 2588/Bang/2019</b>
<b>Assessment Year : 2006-07</b>

M/s. IBM India Pvt. Ltd., No. 12, Subramanya Arcade, Bannerghatta Road, Bangalore – 560 029. <b>PAN: AAACI4403L</b>	<b>Vs.</b>	The Joint Commissioner of Income Tax, Special Range-4, Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri Percy Pardiwala, Sr. Advocate
Revenue by	:	Shri K. Sankar Ganesh, JCIT DR ITAT

Date of Hearing	:	17-11-2022
Date of Pronouncement	:	30-12-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by the assessee against final assessment order dated 28/10/2019 passed by Ld. JCIT, Special Range-4, Bangalore for AY 2006-07 on following grounds of appeal:

The grounds stated hereunder are independent of and without prejudice to one another. The Appellant submits as under:

S.No.	Grounds of Appeal
1.	<b>Assessment order bad in law</b>
1.1.	At the outset, M/s IBM India Private Limited (hereinafter referred to as 'the Appellant' or 'the Company') prays that the order dated October 28, 2019 received on October 31, 2019, passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act'), by the Learned Joint Commissioner of Income-tax, Special Range – 4, Bengaluru ('JCIT'), be struck down as invalid, as the order is bad in law and on facts.
<b>Transfer Pricing   Grounds of appeal related to de-novo assessment proceedings</b>	
2.	<b>The de-novo assessment proceedings undertaken by the JCIT / the Additional Commissioner of Income-tax, Transfer Pricing – 1(1), 1(2) and 1(3) ('TPO') is bad in law. The Hon'ble Dispute Resolution Panel ('DRP') erred in upholding the same.</b>
2.1.	The show-cause notice issued by the Learned TPO proposing to undertake de-novo assessment proceedings is bad in law.
2.2.	The Hon'ble DRP in its original directions erred on facts and in law in issuing non-speaking directions.
2.3.	The Learned JCIT / Learned TPO erred on facts and in law in going beyond the scope of remand directed by the Hon'ble Income-tax Appellate Tribunal, which was confined to determination of arm's length price for rendering of software development services provided by the Appellant.
<b>Transfer Pricing   Grounds of appeal related to assessment order and transfer pricing order</b>	
3.	<b>The assessment order issued by the Learned JCIT, the transfer pricing order</b>

S.No.	Grounds of Appeal
	<b>issued by the Learned TPO and the reference made to the Learned TPO are bad in law. The Hon'ble DRP erred in upholding the same.</b>
3.1.	The assessment order issued by the Learned JCIT, is bad on facts and in law and is in violation of the principles of natural justice.
3.2.	The Learned JCIT has erred in making a reference to the Learned TPO, <i>inter-alia</i> , since he has not recorded an opinion that any of the conditions in Section 92C(3) of the Act were satisfied in the instant case. Accordingly, the order passed by the Learned JCIT/ Learned TPO is without jurisdiction.
3.3.	On the facts and in the circumstances of the case and in law, the Learned JCIT/ Learned TPO erred in not demonstrating that the motive of the Appellant was to shift profits outside India by manipulating the prices charged in its international transactions, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act.
3.4.	The assessment order passed by the Learned JCIT is without jurisdiction, <i>inter-alia</i> , insofar as it purports to give effect to an invalid order of the Learned TPO.
<b>Transfer Pricing   Grounds of appeal related to software development services segment</b>	
4.	<b>Determination of arm's length price by the Learned TPO based on comparability/ benchmarking analysis in relation to the software development services segment</b>
4.1.	The Learned JCIT/ Learned TPO erred on facts and in law in conducting a fresh benchmarking analysis using "non-contemporaneous" data and substituting the Appellant's analysis with the fresh benchmarking analysis on his own conjectures and surmises. The Hon'ble DRP erred in upholding the same.
4.2.	The Learned JCIT/ Learned TPO has erred in law in using 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 Hon'ble DRP erred in upholding the same.
4.3.	The Learned JCIT/ Learned TPO erred in law and on facts in disregarding the application of multiple-year data while computing the margins of alleged comparable companies as such data had an influence in determining the arm's length price of the international transaction undertaken by the Appellant. The Hon'ble DRP erred in upholding the same.
5.	<b>The Learned JCIT/ Learned TPO erred in law in applying the following arbitrary filters to arrive at a fresh set of companies as comparable to the Appellant, without establishing functional comparability. In doing so, the Learned JCIT / Learned TPO also erred in rejecting certain functionally comparable companies.</b> <ul style="list-style-type: none"> <li>• Export earnings less than 75% of total sales;</li> <li>• Different financial year ending;</li> <li>• Employee cost less than 25% of sales;</li> <li>• Related party transaction less than 25% of sales</li> </ul> <p>The Hon'ble DRP erred in upholding the same.</p>
6.	<b>The Learned JCIT/ Learned TPO erred in arbitrarily rejecting the comparable companies selected by the Appellant in the transfer pricing documentation without considering the functional and risk analysis undertaken by the Appellant and the filters applied by the Appellant. The Hon'ble DRP erred in upholding the same.</b>
6.1.	The Learned JCIT/ Learned TPO erred in rejecting Goldstone Technologies Limited selected as a comparable by the Appellant in the transfer pricing study without considering the functional and risk analysis undertaken by the Appellant. The Hon'ble DRP erred in upholding the same.
6.2.	The Learned JCIT/ Learned TPO erred in rejecting Maars Software International Ltd. having export earnings less than 75% of the total sales for the software development

S.No.	Grounds of Appeal
	services segment. The Hon'ble DRP erred in upholding the same.
6.3.	The Learned JCIT/ Learned TPO erred in rejecting Megasoft Ltd. having different financial year ending for the software development services segment. The Hon'ble DRP erred in upholding the same.
6.4.	The Learned JCIT/ Learned TPO erred in rejecting Orient Information Technology Ltd. having employee cost less than 25% of the total sales for the software development services segment. The Hon'ble DRP erred in upholding the same.
6.5.	The Learned JCIT/ Learned TPO erred in rejecting Pentasoft Technology Limited having employee cost less than 25% of the total sales for the software development services segment. The Hon'ble DRP erred in upholding the same.
7.	<b>The Learned JCIT/ Learned TPO erred in selecting comparables that were functionally not comparable to the captive software development services rendered by the Appellant. The Hon'ble DRP erred in upholding the same.</b>
7.1.	The Learned JCIT/ Learned TPO erred in selecting <u>Infosys Technologies Limited</u> as comparable, despite that the business of the company was functionally not comparable to the captive software development services rendered by the Appellant. Infosys Technologies Limited earns significant profitability on account of its brand, owns intangibles, has significant onsite revenues and cannot be compared with the Appellant owing to the difference in risk profile. The Hon'ble DRP erred in upholding the same.
7.2.	The Learned JCIT/ Learned TPO erred in selecting Larsen & Toubro Infotech Limited as comparable, despite that the business of the company was functionally not comparable to the captive software development services rendered by the Appellant. Larsen & Toubro Infotech Limited has significant onsite revenues during the year. The Hon'ble DRP erred in upholding the same.
7.3.	The Learned JCIT/ Learned TPO erred in selecting <u>Persistent Systems Limited</u> as comparable, despite that there is no segmentation available in respect of revenue earned by it on account of both software development services and software products. The Hon'ble DRP erred in upholding the same.
7.4.	The Learned JCIT/ Learned TPO erred in selecting Zylog Systems Limited as comparable, despite that the business of the company was functionally not comparable to the captive software development services rendered by the Appellant. Zylog Systems Limited has significant marketing expenses and onsite operations. The Hon'ble DRP erred in upholding the same.
8.	<p><b>The Learned JCIT/ Learned TPO erred in rejecting the following comparables accepted by the Appellant from the <u>original</u> transfer pricing order dated September 8, 2010.</b></p> <ul style="list-style-type: none"> <li>• Aztec Software &amp; Technology Services Ltd;</li> <li>• i-Gate Global Solutions Ltd;</li> <li>• Mindtree Consulting Ltd;</li> <li>• R Systems International Ltd.;</li> <li>• Sasken Communication Technologies Ltd;</li> <li>• Lucid Software Ltd;</li> <li>• Mediasoft Solutions Ltd;</li> <li>• SIP Technologies &amp; Exports Ltd;</li> <li>• Synfosys Business Solutions Ltd;</li> <li>• Megasoft Ltd;</li> <li>• Lanco Global Systems Ltd</li> </ul> <p>The Hon'ble DRP erred in upholding the same.</p>

S.No.	Grounds of Appeal
<b>Transfer Pricing   Grounds of appeal related to Advertisement, Marketing and Promotion ('AMP') expenses</b>	
<b>9.</b>	<b>Determination of arm's length price in respect of purported AMP function</b>
9.1.	The Learned JCIT/ Learned TPO erred on facts and in law, while failing to appreciate the fact that the AMP expenses incurred by the Appellant were in respect of its own business requirements and all the benefits resulting from such expenditure accrued to the Appellant (in the form of increased sales and market share) and benefit to Associated Enterprise ('AE') if any is purely incidental. The Hon'ble DRP erred in upholding the same.
9.2.	The Learned JCIT/ Learned TPO erred in treating the AMP expenses of the Appellant as wholly incurred towards distribution function, while failing to take cognizance of the fact that the AMP expenses pertain to entire business of the Appellant (viz. export services segment and domestic segment). The Hon'ble DRP erred in upholding the same.
9.3.	The Learned JCIT/ Learned TPO erred on facts and in law, in holding AMP expenditure of the Appellant as an international transaction under Section 92B of the Act and assuming jurisdiction to determine the arm's length price thereof, when such expenditure represents only transactions undertaken with independent third parties. The Hon'ble DRP erred in upholding the same.
9.4.	Without prejudice to Ground No. 9(3) above, the Learned JCIT/ Learned TPO erred on facts and in law by not identifying the AE which was the beneficiary of the AMP function performed by the Appellant. Further, the Learned JCIT / Learned TPO erred in presuming that the compensation for AMP function (if any), should be separately paid by the beneficiary to the Appellant. The Hon'ble DRP erred in upholding the same.
9.5.	Without prejudice to Ground No. 9(3) above, the Learned JCIT/ Learned TPO erred on facts and in law, while failing to appreciate that there was no agreement or arrangement between the AE and the Appellant for brand promotion. The Hon'ble DRP erred in upholding the same.
9.6.	The Learned JCIT/ Learned TPO also erred on facts and in law, in invoking the provisions of Section 92F(v) of the Act by surmising that the Appellant and its AE acted in concert. The Hon'ble DRP erred in upholding the same.
9.7.	The Learned JCIT/ Learned TPO erred on facts and in law in applying the Other (similar to bright line test), which is not a method prescribed under Section 92C of the Act read with Rule 10B of the Rules and therefore, acted beyond the jurisdiction as prescribed under the provisions of the Act and the Rules. The Hon'ble DRP erred in upholding the same.
9.8.	The Learned JCIT/ Learned TPO also erred on facts and in law, in presuming that the Appellant has incurred 'excessive expenditure' as part of its AMP function of promoting 'brand' of the AE. In this regard, the Learned JCIT/ Learned TPO erred in questioning the commercial expediency of the Appellant. The Hon'ble DRP erred in upholding the same.
10.	<b>Without prejudice to ground 9 above, the Learned JCIT/ Learned TPO erred in selecting functionally dissimilar companies while determining the bright line for the alleged AMP function performed by the Appellant. The Learned JCIT/ Learned TPO further erred in not taking cognizance of the intensity of AMP functions undertaken by respective comparable companies selected <i>vis-à-vis</i> the alleged AMP function performed by the Appellant. The Hon'ble DRP erred in upholding the same.</b>
10.1.	The Learned JCIT/ Learned TPO erred in selecting Goldmine Advertising Ltd. without establishing functional similarity between the Appellant and the aforementioned company in relation to the alleged AMP function performed by the Appellant. The Hon'ble DRP

S.No.	Grounds of Appeal
	erred in upholding the same.
10.2.	The Learned JCIT/ Learned TPO erred in selecting Concept Communication Ltd. without establishing functional similarity between the Appellant and the aforementioned company in relation to the alleged AMP function performed by the Appellant. The Hon'ble DRP erred in upholding the same.
10.3.	The Learned JCIT/ Learned TPO erred in selecting Concept Public Relations India Ltd. without establishing functional similarity between the Appellant and the aforementioned company in relation to the alleged AMP function performed by the Appellant. The Hon'ble DRP erred in upholding the same.
10.4.	The Learned JCIT/ Learned TPO erred in selecting Cyber Media Research and Services Ltd. without establishing functional similarity between the Appellant and the aforementioned company in relation to the alleged AMP function performed by the Appellant. The Hon'ble DRP erred in upholding the same.
<b>Transfer Pricing   Grounds of appeal related to software development services segment and AMP adjustment</b>	
11.	Without prejudice to the grounds mentioned above, the Learned JCIT/ TPO erred in law and on facts in not allowing appropriate adjustments under Rule 10B of the Income Tax Rules, 1962 to account for, inter alia, differences in (a) accounting practices, (b) depreciation adjustment, (c) marketing expenditure, (d) research and development expenditure and (e) risk profile between the Appellant and the companies identified by the Learned TPO/AO. The Hon'ble DRP erred in upholding the same.
12.	Without prejudice to the grounds mentioned above, the Learned JCIT/ TPO erred in law and on facts in not allowing adjustment on account of working capital differences which was provided to the Appellant in the original transfer pricing order dated September 8, 2010. The Hon'ble DRP erred in upholding the same.
13.	Without prejudice to the grounds mentioned above, the Learned JCIT / Learned TPO erred in law in not granting the variation as per proviso to Section 92C(2) of the Act. The Hon'ble DRP erred in upholding the same.
<b>Corporate Tax Grounds</b>	
14.	<b>Denial of relief under section 10A of the Act</b>
14.1.	The Learned JCIT and the Hon'ble DRP have erred in law and on facts in denying the relief claimed by the Appellant under section 10A of the Act to the extent of INR 27,27,23,731.
14.2.	The Learned JCIT and the Hon'ble DRP have erred in law and on facts in concluding that the requirements of section 10A(3) are not fulfilled in respect of amounts retained in the foreign bank account due to the fact that the said bank account was not approved during the relevant period. In doing so, the Learned JCIT and the Hon'ble DRP have erred in not following the well-established principle that a <i>post facto</i> approval cannot be a reason to deny relief under section 10A of the Act to the Appellant.
15.	<b>Disallowance of provision for obsolescence</b>
15.1.	The Learned JCIT and the Hon'ble DRP have erred in law and on facts in disallowing the deduction claimed in respect of provision for obsolescence amounting to INR 4,96,52,000.
15.2.	The Learned JCIT and the Hon'ble DRP have erred in disregarding the orders of the jurisdictional High Court in the Appellant's own case for AY 2001-02 and AY 2002-03 where in the Hon'ble Karnataka High Court has upheld the deduction in respect of provision of obsolescence claimed by the Appellant.

S.No.	Grounds of Appeal
16.	<b>Short credit in respect of Tax Deducted at Source</b>
16.1.	The Learned JCIT has erred in law and in fact in granting credit for Tax Deducted at Source ('TDS') to the extent of Rs 36,11,19,570 as against Rs 36,38,18,113 claimed by the Appellant, thereby resulting in a short credit of TDS to the extent of Rs 26,98,543.
17.	<b>Short credit in respect of Foreign Tax Credit</b>
17.1.	The Learned JCIT has erred in granting short credit for Foreign Taxes paid. Pursuant to the partial denial of relief under section 10A of the Act, a certain proportion of the income earned by the STP units has also been taxed and consequently, a higher amount of Foreign Tax Credit needs to be granted to the Appellant.
18.	<b>Initiation of Penalty Proceedings</b>
18.1.	The Learned JCIT has erred in initiating penalty proceedings under section 271 of the Act.
19.	<b>Other grounds</b>
19.1.	The Learned JCIT has erred in law and on facts in levying interest under section 234B, 234D and 220(2) of the Act.
20.	<b>Relief</b>
20.1.	The Appellant prays that directions be given to grant all such relief arising from the preceding grounds as also all reliefs consequential thereto.
20.2.	The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds of appeal, at any time before or during the hearing of the appeal.

## 2. Brief facts of the case are as under:

2.1 At the outset, the Ld.AR submitted that the assessee wish to contest the issues raised in Ground Nos. 2, 7 1, 7.3 and 14.

2.2 It is submitted that all other grounds are either general in nature or academic at this stage. Considering the above submission by the Ld.AR, we are adjudicating only Ground nos. 2, 7.1, 7.3 and 14.

2.3 The assessee submits that, the Ld.TPO in the original transfer pricing order dated 28/10/2009 selected certain set of comparables. In the original transfer pricing order, the Ld.TPO did not make any adjustment on account of Advertisement, Marketing and Promotional ('AMP') expenses incurred by the assessee. The Ld.TPO granted to assessee of working capital adjustment also in the original proceedings.

2.4 Before the DRP, the only issue contested by the assessee was in respect of the comparables that the assessee sought to exclude. The DRP agreed with exclusion of two comparables i.e. Infosys Ltd. and Megasoft Ltd. out of the several comparable companies argued by the assessee.

2.5 In an appeal filed before this *Tribunal* in IT(TP)A No. 1461/Bang/2010 vide order dated 28/07/2017 remanded the appeal to the Ld.AO by observing as under:

*“3. Regarding the Transfer Pricing issue raised by the assessee as per ground No. 2 reproduced above, it was submitted by learned AR of the assessee that as per the order of DRP, it can be seen that on page No. 4 of the DRP order, 6 specific objections are not properly decided by DRP and the DRP order is very cryptic. He also submitted that this is the first year of DRP and this may be the reason that DRP has passed cryptic order and therefore, the entire transfer pricing matter may go back to the file of AOITPO for fresh decision because the assessment order is passed by the AO as per the directions of DRP. Learned DR of the Revenue also submitted that the transfer pricing issue may be restored back for the file of AO for a fresh decision because as per the directions of DRP also, the decision of DRP is only with regard to 2 comparable companies i.e., Infosys Ltd., and Megasoft Limited and there is no decision of DRP regarding other comparable companies.*

.....

.....

*5. From the above Para reproduced, from the directions of the DRP, it is seen that the decision of DRP is with regard to only 2 comparable companies i.e., Infosys Ltd., and Megasoft Ltd., whereas the assessee is objecting to inclusion of several comparable companies such as Kals Information Systems Ltd., Persistent Systems Ltd., Tata Elxsi Ltd., Bodhtree Consulting Ltd., Accel Transmatic Ltd., Flextronics Software Systems Ltd., in addition to Infosys Ltd., and Megasoft Ltd. This is true that in the objections raised by the assessee before the DRP, as reproduced above, no name of any comparable company is mentioned but still the DRP has picked up only 2 names i.e., Infosys Ltd., and Megasoft Ltd., for its entire discussion and*

*decision and therefore, we feel it proper that under these facts, the entire TP matter should go back to the file of AO for a fresh decision by way of speaking and reasoned order. Accordingly, ground No. 2 of the assessee's appeal is allowed for statistical purpose."*

It is submitted that the assessee took grounds to state that the original directions of the learned DRP was not a speaking and reasoned order. The assessee also raised appropriate grounds on the comparables selected by the Ld.TPO in the original transfer pricing order. The said grounds and the submissions made by the assessee were appreciated by *Coordinate Bench* and the matter was remanded to the Ld.AO for a fresh decision by way of speaking and reasoned order on the issues that were alleged by the assessee.

2.6 The Ld.AR submitted that pursuant to the order of the *Tribunal* in the original appeal, the Ld.TPO issued a Show Cause Notice to the assessee on 10/09/2018, that extended the scope and sought additional information in relation to issues that did not form part of the original round of proceedings before this *Tribunal*. The assessee objected to the SCN issued, vide submission dated 05/10/2018.

2.7 He submitted that assessee filed objection on the new issue that was raised by the Ld.TPO as it was out of the scope of remand proceedings. The Ld.TPO did not take into consideration the objections raised by the assessee, and passed an order dated 31/10/2018 wherein adjustments were made on account of AMP expenses. Further, on the issues of determination of arm's length price of export of software service segment, fresh search was conducted by the Ld.TPO fresh set of comparables were chosen. The Ld.TPO did not grant any working capital

adjustment in the remand proceedings. The Ld.TPO thus proposed total adjustment as under:

Sl.No.	Name of the segment	Total adjustment
1.	SWD	356,51,01,933/-
2.	AMP	926,362,302/-
	Total	449,14,64,235/-

2.8 Relying on the TP order, the Ld.AO passed Draft Assessment Order on 28/12/2018. In the said DAO, the Ld.AO continued to make adjustments in relation to the issues which were not part the subject matter of the original appeal before the *Tribunal*.

3. Aggrieved by the actions of the Ld.AO/ TPO, the assessee filed objections before the DRP. The DRP upheld the DAO passed by the Ld.AO, and accordingly, the Ld.AO passed the Final Assessment Order on 28/10/2019.

4. Aggrieved by the same, the assessee preferred an appeal before the *Tribunal*.

4.1 The Ld.AR submitted that under no circumstances should a specific remand by the *Tribunal* be construed as 'setting aside of the entire transfer pricing matter for a de-novo assessment. He submitted that in a remand proceedings, the Ld.AO cannot take up issues that were not a subject matter of the appeal before the *Tribunal* in the original proceedings. It is submitted that, the remand proceedings ought to be confined to grounds raised by the assessee before the *Tribunal*, in the original round of proceedings in relation to determination of arm's length price in respect of export of software services transaction undertaken by the assessee. He submitted that the dispute in relation to

adjustment on account of AMP expenses was never before this *Tribunal* in the original appeal.

4.2 In support of the above, he relied on the decision of *Hon'ble Allahabad High Court* in the case of *S. P. Kochhar v. Income Tax Officer [1984] 145 ITR 255 (ALL)*, wherein the *Hon'ble High Court* held that, the powers of the *Tribunal* are restricted to the grounds of appeal raised before it. It was further held that during the set-aside proceedings, the powers of the Ld.AO are restricted to the subject matter of the appeal before the *Tribunal* and that the AO cannot ask questions on the issues which were not subject matter of such appeal.

4.3 He also relied on the decision of *Hon'ble Gujarat High Court* in the case of *Saheli Synthetics Pvt Ltd v. Commissioner of Income-tax 12008] 302 ITR 126 (GUJ)*, wherein the *Hon'ble High Court* held as under:

*"Similarly even where an assessment is set aside simpliciter, without any enhancement proposal. it is always in the context of the appeal against the order of assessment and cannot be read to mean that the appellate authority granted powers to the Assessing Officer in relation to items of assessment which were never forming part of the appeal before the appellate authority. At the cost of repetition it is required to be noted that processing a new source of income which was on the record before the Assessing Officer but is not forming part of subject matter of appeal before the appellate authority can be undertaken by the appellate authority only in the course of enhancement of assessment and, therefore, any set aside, which does not involve a proposal for enhancement, cannot be used for the purpose of expanding the scope of the powers available to the Assessing Officer while making a fresh assessment pursuant to a set aside." Emphasis applied*

4.4 The assessee further places reliance on the decision of *Hon'ble Karnataka High Court* in the case of *Citizen Watch Co. Ltd*

*v. Inspecting Assistant Commissioner [1984] 148 ITR 774 (KAR)* (copy enclosed as Annexure 3), wherein the Hon'ble High Court observed as under:

"34. The orders of the ITO insofar as they dealt with receipts from documentation fee were separate, distinct and severable. Hence, the question of petitioner challenging that part of the orders of the ITO or the AAC examining, much less directing, a fresh determination did not arise and was even unthinkable. From this, it follows that the orders of the AAC should only be read as not dealing and deciding the receipts from documentation fee that was not challenged before him but should be so construed as setting aside and remitting the cases only to the extent they had been challenged before him. The orders of remand made by the AAC cannot be read in any other manner. In this view, the earlier orders of the ITO on receipts from documentation fee had become final and was not open for re-examination and re-determination by the ITO. On this short ground, this contention of the petitioner has to be upheld." *Emphasis applied*

4.5 The Ld.AR submitted that in the decision of *Hon'ble Calcutta High Court in the case of Surendra Overseas Ltd. V. Commissioner of Income-tax [1979] 120 ITR 872 (CAL)*, Hon'ble Court held as under:

"31. With respect, we agree with the principle laid down in *Pulipati Subbarao & Co. [1959] 35 ITR 673 (AP)*, viz., that where the order of the AAC is specific, it is not open to the ITO to conduct a fresh enquiry beyond the said directions and to proceed to make a fresh assessment without any reference to the earlier assessment.

32. Following our decision in *Income-tax Reference No. 176 of 1970 (Katihar Jute Mills (P.) Ltd. v. CIT)*, we hold that in the instant case also there was no dispute regarding the allowability of the development rebate at any stage of the proceedings. The AAC did not consider that question at all and the same was not in any way connected with or covered by or related to any of the grounds of appeal. Read in its entirety and in its proper context the order of the AAC set aside the assessment only partially. This is indicated in the order itself. It cannot be said that it was the intent or purport of the said order that the entire assessment in all its aspects was set aside or that the ITO was left unfettered or was directed to pursue any enquiry

*he liked and make a fresh assessment covering all items de novo. Emphasis applied"*

4.6 The Ld.AR thus submitted that the action of the Ld.TPO and the DRP extend the scope of the remand proceedings to issues which were not lying before the *Tribunal* in the original appeal are bad in law and ought to be quashed.

4.7. On the contrary, the Ld.DR relied on observation of the authorities below. He also relied on the decision of *Hon'ble Madras High Court* in case of *M/s.Hundai Moters India Ltd vs. DCIT & Ors in WP no. 38346 of 2017 vide order dated 16/07.2018*.

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

4.8.1. The powers of the *Tribunal* as per section 254(1) are confined to the subject-matter of appeal as constituted by the original grounds of appeal and such additional grounds as may be raised by the leave of the *Tribunal*. Thus, when the *Tribunal* allows an appeal and sets aside the assessment and remands the case for making fresh assessment, the power of the Ld.AO is confined to such subject-matter only. He can not take up the questions which were not the subject-matter of appeal before the *Tribunal*. This will be so even though no specific direction has been given by the *Tribunal*. If a specific direction is given, then there is no scope whatsoever for the Ld.AO to travel beyond those directions or restrictions.

4.8.2. The decisions relied by the Ld.DR is on different facts. *Hon'ble Madras High Court* in the writ petition filed by the assessee therein held that, the assessee cannot surpass all the

appellate forums by filing the writ. We are therefore of the opinion that this decision is of no assistance to the assessee.

4.8.3. In the present facts, the assessee had only challenged certain comparables before the *Tribunal* in the original proceedings. As there was non adjudication of the objection raised by the assessee before DRP, the *Tribunal* considered it fit remand the issues to the Ld.TPO to consider the objection of the assessee and then pass a fresh order. The Ld.TPO on the contrary issued notice calling upon the assessee to address such issues which were not the subject matter of appeal before the *Tribunal* or for that matter even considered in the first round of appeal.

4.8.4. In our opinion the issue of AMP raised by the Ld.TPO in the remand proceedings is out of the scope of section 254(4) as the issue of APM was not the subject matter for consideration by the *Tribunal* under section 254(1). We therefore hold the addition made on account of AMP adjustment to be bad in law and deserves to be deleted.

**Accordingly Groundno.2 raised by the assessee stands allowed.**

5. The Ld.AR submitted that **Ground No.3-8** by the assessee are in respect of comparables sought for inclusion/exclusion. However it is submitted that if two comparables alleged by the assessee for exclusion is considered, other comparables need not be adjudicated.

5.1. The Ld.AR submitted that assessee wish to contest Infosys Ltd and Persistent Systems Ltd., raised in Ground 7.1& 7.3 for exclusion on the ground of functional dissimilarity.

Considering the above submission by the assessee we keep the other comparables sought for inclusion/exclusion open to be contested in appropriate circumstances.

**6. Ground no.7.1:** The Assessee seeks exclusion of Infosys Ltd., as it is functionally not similar with the assessee.

It is submitted that this comparable .....(from the chart)

6.1. The Ld.AR at the outset submitted that this comparable was excluded by coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 reported in (2014) 46 *taxmann.com* 129. It is submitted that the function of this company remains the same even for assessment year under consideration and therefore on the same principles, this company is to be excluded.

6.2. On the contrary, the Ld.DR relied on the orders passed by the authorities below.

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

6.3. We note that coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 observed and held as under:

**9.21** (4) *M/s Infosys Technology Ltd.:* As far as this company is concerned, the learned counsel for the assessee submitted before us that a portion of the profit earned by the company is attributable to its brand value. The profit margin of this company after deducting brand related profits from the operating revenue would only be 11.88%. Out attention was drawn to page-723 of the paper book No. 3 filed by the assessee with regard to TP issue. Appendix -2.4 at pages 738 to 742 gives the basis on which the brand value has been evaluated. It was further submitted that this company owns significant intangible and in this regard our attention was drawn to the Annual Report of this company for FY 2007-08 wherein it has been mentioned that during the fiscal 2008 this company had generated over 102 inventions and filed an aggregate of 10 patents in India and US. It is also been mentioned

that in all this company had filed 119 patent applications which are pending in India as well as in US. It was also pointed out by the learned counsel for the assessee that the R&D expenses on this company is significantly higher and therefore, this company should be excluded, as the assessee does not engage in itself in any R&D activity. Our attention was also drawn to the fact that onsite revenue of this company is more than 50%. It was submitted that the TPO had applied filters in choosing comparable and one such filter was that companies which have less than 25% of the revenue from exports were excluded. Applying the same logic learned counsel for the assessee submitted that while applying onsite filter the TPO should adopt more than 50% on site revenue and take this company out of the comparable companies, while making an order in respect of export software service provider. Our attention was also drawn to the decision of the Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies Pvt. Ltd. [\[2013\] 219 Taxman 26/36 taxmann.com 289](#) wherein the Hon'ble Delhi High Court after considering the risk profile, nature of services, revenue, ownership of branded/proprietary products, onsite v. Offshore revenue's, expenditure on advertising/sales promotion and brand building, expenditure on research & development of M/s Infosys Technology Ltd. (supra) with software service provider by name/s Agnity India Technologies (P.) Ltd. (supra) cannot be compared with a small service software provider. The learned DR relied on the order of the DRP.

.....

**9.23** We have considered the rival submissions. This Tribunal in the case of Logica (supra) had considered, Infosys Technology Ltd. (supra) Tata Elxsi Ltd. and Wipro Ltd., as a comparable in the case of software Services Provider such as the Assessee and this Tribunal held as follows:

'13. So also, the comparables listed at Sl. Nos. 10, 14 and 26 have to be rejected as functionally not comparable with that of this assessee in view of the decision of the Mumbai Bench of the Tribunal in the case of Technologies India Private Ltd. in ITA No. 7821/Mum/2011, wherein it was held as under:—

"7.2 Lucid Software Limited .... (not relevant in this case)

7.4 Infosys Technologies Ltd."

The parameter for identifying comparable entity has to be seen from the angle of functions formed by the company, size of the company in terms of the sale revenue, stage of business cycle and company's growth cycle. In the case of Infosys, there are huge intangible assets which as per the information provided by the learned AR are valued at Rs. 69,522 crores, which comprises of brand value itself at Rs. 22,915 crores. Based on such fund valuation, the profit of Infosys is predominantly due to its premium branding. It is India's No. 2 software service exporter and Third in the World as an IT Service company. It is a giant company which is evident from its revenue fund from the sales

*which itself is more than Rs. 13145 crores and expenditure on advertisement/sales promotion and expenditure on R&D is at Rs. 69 crores and Rs. 167 crores respectively, whereas in the case of the assessee the revenue is only 10.7 crore with no expenditure on advertisement, sales and promotion etc., which are borne by the associated enterprises. Even from the test of 'FAR' i.e. function performed, assets employed and risk assumed, comparability analysis miserably fails in this case. The comparison of function and profile as has been reproduced in para 6(iv) above, mostly shows that the profit level indicators in relation to return of cost, return of sales and return of assets are huge between Infosys and the assessee company and therefore, the Infosys cannot be treated as comparable entity for making comparability analysis with the assessee-company. The comparability of Infosys Technology of the company as that of an assessee has been dealt with ITAT Delhi Bench in the case of 'Agnity India Technologies Private Limited' (ITA No. 3856/Delhi/2010), wherein it was held that Infosys is against in the area of development of software and it assumes all risks, leading to higher profit and cannot be compared with the company which is a captive unit of its parent company assuming only limited currency risk. In view of the above finding, we hold that the Infosys cannot be taken as a comparable for determining the arm's length price in the case of the assessee."*

.....  
**9.24** *We have considered the submissions on behalf of the assessee and the decisions rendered by this Tribunal in the case of Trilogy E-Business Software India Ltd. (supra) and Logical (P.) Ltd. (supra) and are of the view that for the reasons given by the assessee in his submissions before us and the reasons given by the Tribunal in the cases referred to above on identical facts and circumstances. Infosys Technology Ltd. (supra). Tata Elxsi and Wipro Ltd. have to be excluded as a comparable while determining ALP in the case of the assessee in the present case.*

6.4. There is nothing on record placed by the revenue authorities to take a contrary view. As this comparable has been held to be not functionally similar with the assessee it deserves to be excluded.

We direct the Ld.TPO to exclude Infosys Ltd from the final list.

**Accordingly Ground no.7.1 raised by the assessee stands allowed.**

**7. Ground No.7.3.** Assessee seeks to exclude Persistent systems Ltd.

7.1 The Ld.AR submitted that this comparable is functionally not similar to assessee as it is engaged in software product development and services. The Ld.AR also submitted that there is no segmental details available in respect of the revenue generated by this company on sale of products. He placed reliance on the decision of *Coordinate Bench of this Tribunal* in case of *Infineon Technologies Pvt. Ltd.* in *ITA No. 159/Bang/2019* for *A.Y. 2006-07 vide order dated 04/03/2020* in support of its contention.

On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

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

7.2 We refer to page 2199 of the paper book wherein annual report of this comparable has been placed. The business segment concentration Head reveals that this company is primarily engaged in offering complete product lifecycle services to the software product companies in infrastructure segment. The annual report reveals that a substantial .....of the operation of the company's business is derived from infrastructure, ISV segment. At page 220 of the paper book, we note that there is no segmental details in respect of the sale of the software services and product and therefore in our considered opinion, this company deserves to be excluded from the final list of comparables.

We direct the Ld.TPO to exclude Persistent System Ltd from the final list.

**Accordingly Ground no.7.3 raised by the assessee stands allowed.**

8. The Ld.AR submitted that **Ground No 9-11** is against addition made on account of AMP adjustment.

As we have already deleted the addition by holding to be bad in law in Ground no.2, these grounds becomes infructuous.

**Accordingly these grounds are dismissed as infructuous.**

**9. Ground no.12** is against denial of Working Capital Adjustment.

9.1 The Ld.AR submitted that the Ld.TPO in the original assessment proceeding had granted the WCA to the assessee.

9.2 We also draw support from the observation of *Coordinate Bench of this Tribunal* in case of *Huawei Technologies India (P.) Ltd. vs. JCIT reported in [2019] 101 taxmann.com 313*.

9.3 We thus remand this issue to the Ld.AO/TPO for considering the claim of the assessee of Working Capital Adjustment in accordance with the principles laid down in *Huawei Technologies India (P.) Ltd. vs. JCIT (supra)*.

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

**Accordingly, the transfer pricing adjustment pertaining to AMP expenses ought to be deleted.**

**10. Ground No. 14 of the subject appeal - Denial of relief of tax holiday under section 10A of the Act**

10.1 In the original DAO dated 30/12/2009, the Ld.AO had denied relief under section 10A of the Act amounting to INR 203,19,41,646. The disallowance was upheld by the DRP in its original directions and accordingly, the original FAO was passed denying such relief.

10.2 Aggrieved by the same, the assessee filed the original appeal before the *Tribunal*. While disposing off the original appeal, the *Tribunal* set aside the claim for relief of tax holiday with directions to the Ld.AO to allow the claim to the extent of receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange.

10.3 The Ld.AO granted relief to the extent of INR 175,92,17,915 and disallowed the balance amount of INR 27,27,23,731 by concluding that the balance amount was deposited in an account outside India which was not approved by the Reserve Bank of India (RBI). The Ld.AR submitted that the Ld.AO arrived disregarded the submission of the assessee that the RBI had subsequently in 2014, condoned the lapse on part of the assessee in not obtaining the renewal of permission to maintain such account.

Aggrieved by the above, the assessee filed the subject appeal before the Hon'ble ITAT.

10.4 The Ld.AR submitted that before Ld.AO, the assessee had filed the permission granted by RBI on 30/07/2012, wherein the assessee was permitted to hold and maintain the Foreign Currency Account in its own name for a period of one year from

24/08/2012. It was submitted that the RBI vide its letter dated 04/01/2013, clarified that the lapse on part of the assessee in not obtaining renewal of permission of RBI to maintain the Foreign Currency Account stands condoned from the last renewal given by RBI. The Ld.AR relied on the copy of the letters from RBI dated 24/08/2012, and 04/01/2013 which are scanned and reproduced hereinbelow.



भारतीय रिज़र्व बैंक  
RESERVE BANK OF INDIA

FE.BG.EXD.No. 1009 /06.06.009/2012-13

www.rbi.org.in

August 24, 2012

BY Courier

The Authorized Signatory  
IBM India Pvt. Ltd  
12, Subramanya Arcade- 1  
Bannerghatta Main Road  
Bangalore-560029

Sir,

**Foreign Currency Account maintained with HSBC NY- M/s IBM India Pvt. Ltd**

Please refer to your letter dated July 30, 2012 forwarded by your AD (vide their letter dated July 1, 2012) to our office on the captioned subject.

2. In this connection, we advise that the company has our permission to hold and maintain the said Foreign Currency Account in its own name for one year from the date of renewal subject to further renewal of such permission.

3. This approval is, however, without prejudice to any action that may be taken by any statutory authorities in future.

Yours faithfully,

(R. Subhadra)  
Manager

विदेशी मुद्रा विभाग, 10/3/08, नृपतुंगा रोड, पोस्ट बॉक्स संख्या 5470, बंगलूर - 560 001. भारत  
फोन : (080) 2221 7775 फैक्स : (080) 2223 7882 ई-मेल : fedbangalore@rbi.org.in

Foreign Exchange Department, 10/3/08, Nrupatunga Road, P.B. No. 5470, Bangalore - 560 001. India  
Tel. : (080) 2221 7775 Fax : (080) 2223 7882 E-mail : fedbangalore@rbi.org.in



भारतीय रिज़र्व बैंक

RESERVE BANK OF INDIA

www.rbi.org.in

FE.BG.EXD.No.3485/06.06.009/2012-13

January 4, 2013

IBM India Pvt. Ltd.  
12, Subramanya Arcade -1  
Bannerghatta Main Road  
Bangalore – 560029

Dear Sir

**Foreign Currency Account maintained with HSBC NY- M/s IBM India Pvt. Ltd.**

In continuation of our letter FE.BG.EXD.No.1009/06.06.009/2012-13 dated August 24, 2012, we advise that our permission to hold and maintain the said Foreign Currency Account in your name will be for one year from **August 24, 2012**, subject to compliance with (i) the extant repatriation norms under FEMA 1999 in respect of "on-site" and "off-site" contracts laid down in para. A (III) of our A P (DIR Series) Circular No. 33 dated February 28, 2007 and (ii) the condition mentioned at (c) of our letter EC.BG.No.HD 814/EXD II/08.10.132/ 99-2000 dated January 18, 2000. Please note that the present renewal shall automatically lapse at the end of one year from the date of present renewal. If you desire to apply for further renewal, you may submit application well in advance (not less than 45 days) to enable us to examine the same. Incidentally, the date of AD bank's letter mentioned as July 1, 2012 in our letter dated August 24, 2012 may be read as July 31, 2012.

2. We further condone the lapse on the part of your company in not obtaining the renewal of permission of Reserve Bank of India to maintain the Foreign Currency Account at regular intervals after the last such renewal given by RBI vide letter EC.BG.No. 374 HD /EXD II/08.10.132/ 2001-02 dated November 10, 2001 for one year, subject to your having complied with the repatriation/reporting/audit requirements stipulated in our AP (DIR Series) Circular No. 54 dated June 29, 2002.

3. This approval is without prejudice to any action that may be taken by any other statutory authorities in future, if any.

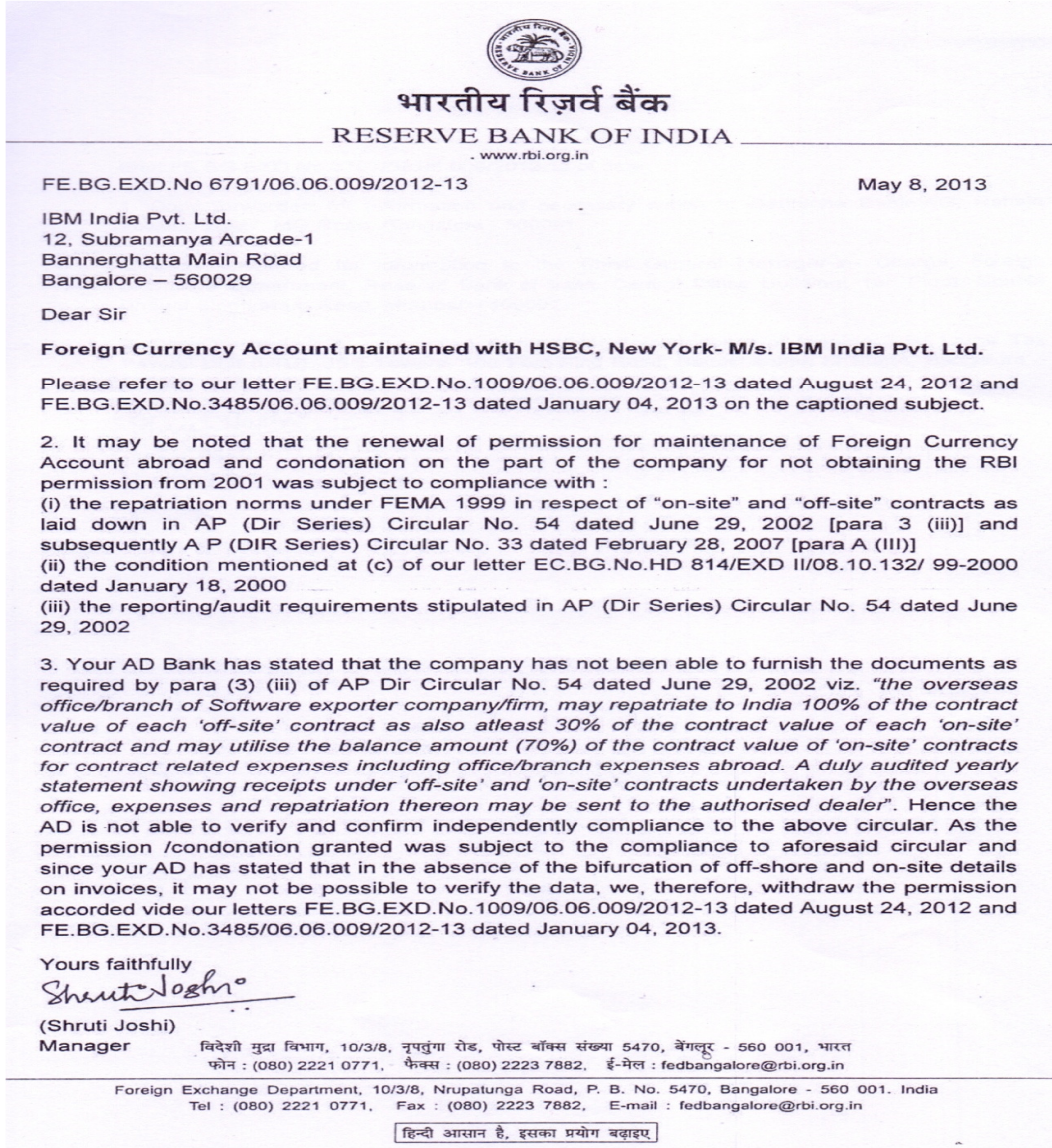
Yours faithfully

(Shrutti Joshi)  
Manager

विदेशी मुद्रा विभाग, 10/3/8, नृपतुंगा रोड, पोस्ट बॉक्स संख्या 5470, बेंगलूर - 560 001, भारत  
फोन : (080) 2221 0771, फैक्स : (080) 2223 7882, ई-मेल : fedbangalore@rbi.org.in

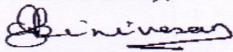
Foreign Exchange Department, 10/3/8, Nrupatunga Road, P. B. No. 5470, Bangalore - 560 001, India

10.5 Further the RBI vide its letter dated 08/05/2013 scanned and reproduced as under, wherein RBI withdrew the renewal and the condonation granted to the assessee in its letter dated 24/08/2012, and 04/01/2013.



Subsequently, the realisation of sale proceeds of the assessee was audited by the independent auditor (Deloitte Haskins and Sells) appointed by the Authorised Dealer and a report was furnished to the RBI, wherein the auditors had concluded that no variances were observed in the Foreign Currency Account maintained by

the assessee. Accordingly, the RBI vide its letter dated February 28, 2014, restored the Foreign Currency Account facility to the assessee which is scanned and reproduced as under is the restoration order:

<b>भारतीय रिज़र्व बैंक</b> <b>RESERVE BANK OF INDIA</b> <small>www.rbi.org.in</small>		
FE.CO.Trade (EXD)/	16341	/05.45.000/2013-14 February 28, 2014
Deutsche Bank AG Mezzanine Floor Raheja Towers 26-27, M.G. Road Bangalore		
Dear Sir,		
<b><u>IT Investigation in respect of M/s IBM India Pvt Ltd. (IBM)</u></b>		
Please refer to your letter dated July 12, 2013 and the subsequent correspondence/meetings/discussions related to the captioned subject.		
2. In this connection, we advise that after a careful analysis of the Audit Report submitted by M/s Deloitte Haskins and Sells and subsequent clarifications provided by you, it is has been decided to restore the Foreign Currency Account facility to the company. You are advised to ensure compliance in letter and spirit with all relevant extant FEMA instructions while enabling operations in the account.		
Yours faithfully,		
 (C. D. Srinivasan) Chief General Manager		
<small>विदेशी मुद्रा विभाग, केन्द्रीय कार्यालय, केन्द्रीय कार्यालय भवन, शाहीद भगतसिंह मार्ग, फोर्ट, मुंबई - 400 001. भारत            का. फोन : (022) 2260 1000 फैक्स : (022) 2266 5330 अमर भवन फोन : (022) 2260 3000 फैक्स (022) 2269 4935 ई-मेल : helpfed@rbi.org.in            Foreign Exchange Department, Central Office, Central Office Building, Shahid Bhagat Singh Marg, Fort, Mumbai - 400 001, India            OB: Tel. : (022) 2260 1000 Fax : (022) 2266 5330 Amar Building Tel.: (022) 2260 3000 Fax : (022) 2269 4935 E-mail : helpfed@rbi.org.in</small>		
<small>चेतावनी : रिज़र्व बैंक द्वारा ई-मेल, डाक, एसएमएस या फोन-कॉल के जरिए किसी को भी व्यक्तिगत जानकारी जैसे बैंक के खाते का न्यूनरा, पासवर्ड आदि नहीं मांगी जाती है। यह धन रखने या देने का प्रस्ताव भी नहीं करता है। ऐसे प्रस्तावों को किसी भी तरीके में जवाब मत दिलीए।            Caution : RBI never sends mails, SMSs or makes calls asking for personal information like bank account details, passwords, etc. It never keeps or offers funds to anyone. Please do not respond in any manner to such offers.</small>		
<small>डिजिटल साक्ष्य है</small>		

10.6 In support of its claim, the Ld.AR placed reliance on the decision of the *Coordinate Bench of this Tribunal* in the case of *Cepha Imaging Pvt Ltd v. Department of Income Tax in ITA Nos.603 and 604/Bang/2010, and 684 and 685/Bang/2010*. In the said decision, the Hon'ble Tribunal has held as under:

*".. Since the assessee company has obtained post facto approval from RBI coupled with the fact that it has also realised the said amounts, it is entitled to the deduction u/s 10A/10B of the Act of the said amounts. Therefore, the conclusion of CIT(A) in this issue is affirmed. Hence, the ground raised by the revenue is dismissed. Emphasis applied"*

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

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

10.7 The assessee has produced letter of RBI dated 28/02/2014, the Competent Authority, mentioned u/s. 10B(3) of the Act. In the said letter, it is been clearly stated that the assessee is granted post facto extension. The assessee company has subsequently also realized the said amount. The assessee has obtained post facto approval from RBI coupled with the fact that it has also realized the said amounts, it entitled to the deduction u/s. 10A/10B of the Act on the said amounts.

**Accordingly, this ground raised by assessee stands allowed.**

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

**Order pronounced in the open court on 30<sup>th</sup> December, 2022.**

**Sd/-**  
(CHANDRA POOJARI)  
Accountant Member

**Sd/-**  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 30<sup>th</sup> December, 2022.  
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore