

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

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER**

IT(TP)A No.285/Bang/2021
Assessment Year: 2016-17

M/s. Wipro GE Healthcare Pvt. Ltd. No.4, Kadugodi Industrial Area Whitefield Bangalore 560 067 (presently at Prestige Shanthineketan, 6 th Floor, Crescent 4, ITPL, Whitefield, Bangalore 560 048)	Vs.	Deputy Commissioner of Income-tax Circle-7(1)(1) Bangalore
PAN NO : AAACW1685J		
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Pradeep, A.R. & Smt. Girija G.P., A.R.
Respondent by	:	Shri Sunil Kumar Singh, D.R.

Date of Hearing	:	25.01.2023
Date of Pronouncement	:	03.02.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by the assessee is directed against the assessment order passed u/s 143(3) r.w.s. 144C(13) and r.w.s. 143(3A) & 143(3B) of the Income-tax Act,1961 [‘the Act’ for short] dated 30.3.2021 for the assessment year 2016-17 by NFAC/CIT(A), Delhi.

2. The assessee M/s.Wipro GE Healthcare Pvt Ltd is a Joint Venture between General Electric Company, USA (“GE” or “the

parent”) and Wipro Limited. The assessee is engaged in contract manufacturing of medical diagnostic imaging equipment, ultrasound systems, patient monitoring and X-ray systems (“medical equipment”), provision of engineering and software services and distribution of medical diagnostic imaging equipment, therapy equipment and life sciences products (“medical products”).

The following additions have been made by the Assessing Officer (in short “AO”) on which the assessee is in appeal:

Particulars	As per Final Assessment order (Rs.)	As per Draft Assessment order (Rs.)
<u>Transfer Pricing adjustments:</u>	383,84,57,641	3,83,84,57,641
Royalty	20,27,37,762	20,27,37,762
Distribution segment	253,10,21,733	2,53,10,21,733
Software Development segment	110,46,98,146	110,46,98,146
Distribution	253,10,21,733	253,10,21,733
<u>Other Issues:</u>	87,38,88,152	87,38,88,152
Disallowance u/s 37 of the Act - Disallowance of lease payment on financial lease	26,12,77,130	26,12,77,130
Disallowance u/s 37 of the Act – Miscellaneous expense	16,27,83,384	16,27,83,384
Disallowance u/s 36(1)(vii) of the Act – Doubtful Advances	1,63,36,390	1,63,36,390
Disallowance u/s 37 of the Act – Disallowance of Provisions	41,76,13,362	41,76,13,362
- Legal and Professional expenses	23,65,54,350	23,65,54,350
- Advertisement and sales promotion	10,92,813	10,92,813
- Repairs and Maintenance	59,19,766	59,19,766
- Dealer Commission	17,40,46,433	17,40,46,433

31.10.2019- The TPO passed order u/s 92CA making TP adjustments amounting to Rs.3,83,84,57,641/- as listed above.

30.12.2019 - The Draft assessment order dated was passed by the AO by making the additions as listed above.

27.01.2020 – Against the Draft assessment order, the assessee filed its objections before the DRP.

11.02.2021 - The DRP gave its directions to the objections of the assessee.

30.03.2021 – Without following the directions of the DRP, the AO passed the final assessment order reiterating the draft assessment order.

25.06.2021 Against the orders of the authorities, the assessee has preferred the above appeal before this Tribunal by way of following grounds:

“That the order of the Assessing Officer (AO), Transfer Pricing Officer (TPO), the directions of the Dispute Resolution Panel (DRP) and the order of the transfer pricing officer in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.

- 1. That the total income computed and the total tax computed is hereby disputed.*
- 2. That the findings, reasons, conclusions of the authorities below and directions of Dispute Resolution Panel (DRP) u/s 144C are unsustainable in law requires to be set aside. Consequently, the additions based on such directions also requires to be set aside.*
- 3. The DRP erred in not considering the relevant materials, evidences, data and relevant law. The directions issued are without application of mind.*
- 4. That the Orders of AO / TPO and the Directions of the DRP violates the principles of judicial discipline as the binding nature of the orders of the higher appellate authorities have been totally ignored.*
- 5. That the order of the AO / TPO / DRP and the directions given therein are bad in law and not as per law requires to be cancelled.*
- 6. That the AO/TPO/DRP erred in not providing adequate and sufficient opportunity as required under law thus violating the principle of natural justice, hence on this ground alone the orders requires to be annulled.*

ISSUE OF TRANSFER PRICING

8. *That the order of the Transfer Pricing Officer is without jurisdiction, against the law, facts, circumstances, natural justice, equity and all other known principles of law.*
9. *The learned DRP erred in overlooking the fact that the entire objections filed by the appellant have not been considered by the TPO before passing order u/s 92CA.*
10. *The appellant denies the tax liability on the alleged surplus arising on the computation of arm's length price for, the impugned assessment year.*
11. (i) *The Learned AO erred in bringing to tax a sum of Rs.383,84,57,64 /- as outlined below in the table under section 92CA of the Act as per the communication/order of the Transfer Pricing Officer and the directions of DRP.*

<i>Sl.No</i>	<i>Description</i>	<i>Amount</i>
<i>1</i>	<i>Arm's Length Price difference in the royalty paid</i>	<i>Rs.20,27,37,762/-</i>
<i>2</i>	<i>Arm's Length Price difference in distribution segment</i>	<i>Rs.253,10,21,733 /-</i>
<i>3</i>	<i>Arm's Length Price difference in the Software services segment</i>	<i>Rs.110,46,98,146/-</i>

(ii) The learned TPO/ DRP erred in disregarding the use of multiple year data and ought to have accepted the use of contemporaneous data as per the transfer pricing regulations due to non-availability of current year data in public domain at the time of preparing the report.

iii) The learned TPO/DRP erred in rejecting companies having different financial year ending or whose data does not fall within the 12 month period of impugned financial year.

iv) The learned TPO/DRP erred in not considering working capital/risk adjustments.

v) The Learned AO / TPO / DRP erred in failing to rely on binding decisions of the Hon'ble ITAT in appellant's own ease for the earlier years from assessment year 2002 - 03 onwards.

12. i) *The Learned AO / TPO / DRP erred in making adjustment towards the royalty for use of technology amounting Rs.20,27,37,762/-*

without determining the comparable transaction in the public domain as prescribed under the Act and Rules.

ii) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 1013(3).

iii) The Learned AO / TPO / DRP erred in failing to rely on decision of the ITAT in appellant's own case for the years 2002 - 03 to 2004 - 05 and subsequent orders of the ITAT for AY: 2005-06 86 2006-07.

13. i) The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the distributor segment amounting 253,10,21,733/-.

ii) The Learned AO / TPO / DRP erred in making adjustment on transactions beyond AE transactions, thus, the adjustment proposed includes non AE transactions.

iii) The Learned AO / TPO / DRP erred in wrongly adopting the financial results of the assessee.

iv) The Learned AO / TPO / DRP erred in comparing the appellant's distribution margin with comparables which are not in the business of trading/distribution.

v) The Learned AO / TPO / DRP erred in not following their own orders passed for the earlier assessment years on this issue.

vi) The selection of the method by the Learned AO / TPO / DRP is not as per law.

vii) The Learned AO / TPO / DRP erred in not granting the variances deduction envisaged in the Act and Circular.

viii) The Learned AO / TPO / DRP erred in not carrying out the adjustments as required under law as well as the facts.

ix) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 1.013(3).

x) The Learned AO/TPO/DRP erred in rejecting certain comparables on unsustainable and untenable grounds/reasons while considering comparables which failed to meet the filters /criteria as required under law.

xii) The AO/TPO/DRP erred in considering the following comparables overlooking/rejecting the objections made by the assessee

- 1) Deccan Dental Depot Pvt Ltd*
- 2) Covidien Healthcare India Pvt Ltd*

- 3) *Vinod Medical Systems Pvt Ltd*
- 4) *Indian Hospitex Systems Pvt Ltd*
- 5) *India Medtronic Pvt Ltd*
- 6) *Sandor Medicaids Pvt Ltd*
- 7) *Iris Healthcare Technologies Pvt: Ltd*
- 8) *Medicept Dental India Pvt Ltd*
- 9) *IDS Denmed Pvt Ltd*
- 10) *Affiance Medi Tech Pvt Ltd*
- 11) *Olympus Medical Systems India Pvt Ltd*
- 12) *Weldon Biotech (India) Pvt Ltd*
- 13) *Pinnacle Biomed Pvt Ltd*
- 14) *Schiller Healthcare India Pvt Ltd*
- 15) *Stryker India Pvt Ltd*
- 16) *Everest Instruments Pvt Ltd*
- 17) *Confident Sales India Pvt Ltd*
- 18) *Narang Medical Ltd*
- 19) *Indifoss Analytical Pvt Ltd*

xiii) The Learned AO / TPO / DRP erred in failing to rely on decision of the ITAT in assessee's own case for the years 2002 - 03 to 2004 - 05 and subsequent orders of the ITAT for other assessment years.

xiv) The Learned AO / TPO / DRP erred in adopting TNMM as the MAM ignoring the findings of ITAT in the appellant's own case for earlier years and accepted by department on the same issue.

xv) The Learned AO/TPO/DRP have failed to apply the provisions of Rule 10B(4)&(5) and 10CA(2) while selecting the criteria and filters.

xvi) The Learned AO / TPO / DRP erred in not carrying out the adjustments like risk, working capital, et:c., as required under law as well as the facts.

xvii) The learned AO/TPO/DRP erred in rejecting the price per unit adjustment carried out by the appellant

xviii) The learned AO/TPO/DRP erred in rejecting the import duty adjustment carried out by the appellant.

xix) The learned AO/TPO/DRP erred in not considering the after sales support service segment while determining operating margin of distribution segment.

xxi) The learned AO/TPO/DRP erred in rejecting the corroborative analysis provided by the appellant.

xxii) The Learned AO/TPO/DRP erred in applying the trading income threshold of 75% to sales to select comparable companies. -

xxiii) *The learned AO/TPO/DRP erred in applying the Related party transactions threshold of 25% to revenues to select comparable companies.*

xiv) *The learned AO/TPO/DRP erred in not applying the Turnover filter as per law.*

14 i) *The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the Software Development Segment amounting Rs.110,46,98,146/-.*

ii) *The Learned AO / TPO / DRP erred in selecting the comparables. The selection of comparables does not confirm to the I.T. Rules. Further it also does not comply with the case laws on this point.*

iii) *The Learned AO / TPO / DRP erred in not carrying out the adjustments like risk, working capital, etc., as required under law as well as the facts.*

iv) *The Learned AO / TPO / DIRP erred in wrongly adopting the financial results of the assessee.*

v) *The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 10B(3).*

vi) *The Learned AO/TPO/DRP erred in rejecting certain comparables on unsustainable and untenable grounds/reasons while considering comparables which failed to meet the filters /criteria as required under law.*

vi) *The Learned AO / TPO / DRP erred in not granting the variances deduction envisaged in the Act and Circular.*

vii) *The Learned AO/TPO/DRP have failed to apply the provisions of Rule 10B(4)86(5) and 10CA(2) while selecting the criteria and filters.*

viii) *The learned AO/TPO/DRP erred in rejecting R D expense more than 3% on turnover to eliminate companies engaged in R 86 D activities.*

ix) *The learned AO/TPO/DRP erred in applying the software development service income threshold of 75% to sales to select comparable companies.*

x) *The learned AO/TPO/DRP erred in applying export 'turnover threshold of 75% to sales to select comparable companies.*

xi) *The learned AO/TPO/DRP erred in rejecting the comparable companies having ratio of employee cost to sales less than 25%.*

xii) *The learned AO/TPO/DRP erred in applying the Related party transactions threshold of 25% to revenues to select comparable companies.*

xiii) *The learned AO/TPO/DRP erred in not applying the Turnover filter as per law.*

xiv) *The Learned AO/TPO/DRP erred in not considering the company Taal Tech India Pvt Ltd as comparable rejecting the submissions made by the appellant.*

xv) *The Learned AO/TPO/DRP erred in considering the following companies as comparables rejecting the submissions / objections made by the appellant.*

- a) *Kals Information Systems Ltd*
- b) *Rheal Software Pvt Ltd*
- c) *Sybrant Technologies Pvt Ltd*
- d) *Harbinger Systems Pvt Ltd*
- e) *Orion India Systems Private Limited*
- f) *Nihilent Technologies Ltd*
- g) *Inteq Software Pvt Ltd*
- h) *Persistent Systems Ltd*
- i) *Infobeans Technologies Ltd*
- j) *Thirdware Solutions Ltd*
- k) *Infosys Ltd*
- l) *Aspire Systems (India) Pvt Ltd*
- m) *Cybage Software Pvt Ltd*
- n) *C G VAK Software & Exports Ltd*
- o) *R S Software (India) Ltd*
- p) *Larsen &, Toubro Infotech Ltd*

OTHER ISSUES/ADDITIONS/DISALLOWANCES

15. *The Learned AO/DRP erred in disallowing deduction claimed of Lease payments on financial lease of Rs. 26,12,77,130/- under section 37 of the I T Act.*

16. *The Learned AO/DRP erred in disallowing Miscellaneous Expenses of Rs. 16,27,83,384/- under section 37 of the I T Act.*

17. *The Learned AO/DRP erred in disallowing the written off receivables and advances of Rs. 1,63,36,390/- without objectively considering the explanation offered by the assessee.*

18. *The Learned AO / DRP erred in disallowing the following provisions for expenses amounting to Rs. 41,76,13,362/- on an entirely unsustainable reason.*

<i>Legal and Professional fees</i>	<i>23,65,54,350/-</i>
<i>Advertisement and sales promotion</i>	<i>10,92,813/-</i>

<i>Repairs and maintenance</i>	<i>59,19,766/-</i>
<i>Dealer's Commission</i>	<i>17,40,46,433/-</i>
<i>Total</i>	<i>41,76,13,362/-</i>

19. *Without prejudice, the AO having held that the aforesaid Rs.41,76,13,362/- is disallowed on a protective basis has added on a substantive basis while computing the income in para 9 and has also issued a demand notice levying full tax and interest on the said income. Thus the order of the AO is manifestly inconsistent.*

20. *Alternatively, the AO/DRP failed to appreciate and consider that if payees /receivers /deductees have paid the tax then no disallowance can be made u/s 40(a)(ia) of the Act.*

21. *The above disallowances have been made without providing sufficient and adequate opportunity as required under law and the Act. On this ground alone the above disallowances requires to be deleted.*

22. *The Learned AO/DRP erred in not giving TIS credit amounting to Rs. 1,58,77,886/- and no reasons or explanations have been given for denying the credit.*

ISSUE OF INTEREST U/S 234A, B & C

23. *The appellant denies the liabilities for interest u/s 234A, B 86 C of the Act. Further prays that the interest if any should be levied only on returned income. No opportunity has been given before the levy of interest u/s 234A, B 8s C of the Act.*

24. *Without prejudice to the appellant's right of seeking waiver before appropriate authority the appellant: begs for consequential relief in the levy of interest u/s 234A, B 86 C of the Act.*

25. *For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."*

3. Ground Nos.1 to 7 are general in nature, which do not require any adjudication.

3.1 Ground Nos.8 o 11 are general grounds relating to TP matters, which do not require any adjudication.

Ground No.12:

4. The ground raised in ground No.12 is as follows:

12) i) *The Learned AO / TPO / DRP erred in making adjustment towards the royalty for use of technology amounting Rs.20,27,37,762/- without determining the comparable transaction in the public domain as prescribed under the Act and Rules.*

ii) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 1013(3).

iii) The Learned AO / TPO / DRP erred in failing to rely on decision of the ITAT in appellant's own case for the years 2002 - 03 to 2004 - 05 and subsequent orders of the ITAT for AY: 2005-06 & 2006-07.

4.1 Facts of the case are that the assessee has paid an amount of Rs. 20,27,37,762/- to its AE, **M/s. Monogram Licensing International, Inc.** based at Delaware, USA. The assessee was asked to submit the details of this payment along with the agreements. The assessee submitted the agreement dated November 21, 2000 between M/s. Monogram Licensing International, Inc. based at Delaware, USA and Wipro GE. As per the agreement submitted by the assessee, General Electric Co. owns all the licenses and it has licensed the AE M/s. Monogram Licensing International Inc. to license the licensed marks. In reply to the showcase notice, the assessee has stated as follows:

“The taxpayer submitted that it pays royalty at 1% of net selling price of products and services for using the licensed name of the AE in the applicable jurisdiction. The trademark is used in packaging, advertising, instruction book and other literature relating to the product. The trademark and the trade name of the GE company helps WGE add credibility and without the trademark and trade name of the GE company the products sold by WGE will be a generic product which will neither command the price it is currently sold at nor have any buyers in the highly technology driven precision industry and also in gaining demand for its product. Therefore, as Wipro GE uses the 'GE' trademark and tradename which is owned by GE Company, Wipro GE is able to sell its products in the Indian market and meet the growing demand in the medical equipment industry. The Assessee also submits that, the Assessee is able to sell its products because of the GE brand associated with the products. The customer places its order with the Assessee and the Assessee in turn places the orders with the AEs to meet the customers demand. The prices are

negotiated between the Assessee and the customers and the prices are market driven. The distribution of medical equipment along with its service component will help the Assessee in the long-term business with the customers. Further, in terms of the arrangement with the affiliates, Wipro GE is responsible for local pricing in the domestic market.”

4.2 The TPO observed that the arguments of the assessee are fallacious for the following reasons. As per the TP study report and the submissions made by the assessee, WGE identifies the customers and forecasts the demands of the customers for the products of the AEs in Indian Market. Most of the goods imported from the AEs are delivered directly to the customers. This basically means that the customer is ordering for the equipment knowing very well that it is a GE product. Moreover, once the order is placed with the AE, WGE places the order on behalf of the customer and that too for a GE product. Everyone involved knows very well what they are negotiating for. Moreover, when GE sells the product to the customer, it would have already included in its price the cost of the trademark and the trade name. Additionally, the trademark is owned by a different entity and whereas the trademark royalty is paid to a different entity.

4.3 In view of this, the assessee's contentions were rejected by the TPO. The TPO observed that the same issue was debated at length in the previous assessment year also. Since the facts and circumstances of the case has not changed, based on the points discussed in the previous assessment year and the points mentioned in the show cause notice issued and also the points mentioned in the above paragraphs, the TPO held the ALP of the Royalty payment as NIL. The entire amount of Rs. 20,27,37,762/- (Rs.9,98,86,675/- + Rs.10,28,51,087/-) was treated as adjustment u/s 92CA of the Act.

4.4 It is further observed by the TPO that the DRP has upheld the adjustment of Royalty to Nil in the assessee's own case for the AY 2014-15. The DRP has held that

“In the case of JCB India Ltd v Deputy Commissioner of Income tax Circle13(1),New Delhi ,the ITAT Delhi has held that where the assessee company engaged in manufacture of construction equipment ,paid Royalty to its AE for usage of a particular machine ,since said transaction of payment of Royalty was independent of other transactions, assessee's contention of applying TNNM on entity level could not be accepted and ALP of transaction in question was to be determined separately under CUP method. Even though in transfer pricing proceedings, aggregation of related transactions is permissible, -yet there is no rule that all related and unrelated transactions can be combined and shown at ALP under TNNM entity level.”

4.5 The Id. TPO observed that in the case of **Sony Ericson Mobile Communication India Pvt. Ltd. it has been held that** *'it would not be proper and appropriate to apply the TNMM method in case of Indian assessed is engaged in manufacturing activities and distribution and marketing of imported and manufactured products as interconnected transactions. Import of raw material for manufacture would possibly be an independent transaction viz., marketing and distribution activities or functions. 'A careful perusal of the judgment of the Hon'ble jurisdictional High Court divulges that though a number of closely linked transactions can be aggregated, but, the transactions which are not closely related to each other would require determination in a segregated manner.*

4.6 **Further, the Id. TPO observed that the Punjab &.Haryana High Court in knorr-Bremse India Pvt. Ltd. held that** *“It further laid down emphatically tit: 'the contention that as the services and goods are utilized by the assessee for the manufacture of the final product*

they must be aggregated and considered to be a single transaction and the value thereof ought to be computed by the TNMM is acceptable. Merely because the purchase of each item and the acceptance of each service is a component leading to the manufacture/production of the final product sold or service provided by the assessee, it does not follow that they are not independent transactions for the sale of goods or provision of services. When 'we consider more than one separate transaction under the combined umbrella of TNMM on an entity level, it is quite possible that a probable addition on account of transfer pricing adjustment arising from one international transaction may be usurped by the income from the other international transaction giving higher income on transacted value. That is the reason for which the legislature has provided for determining the ALP of each international transaction separately, from the others. As the international transactions of payment of royalty and fees for technical services are separate transactions and not closely linked with the other transactions with which the assessee has merged them, we cannot permit such merger or aggregation for the purpose of the determining their ALP on entity level under TNMM."

4.7 The Id. TPO observed that although closely related transactions can be aggregated, but, unrelated transactions cannot be clubbed for determining ALP on a combined basis. The relevant criteria to determine whether certain transactions be considered as one international transaction or not is to see if such transactions were entered into a package deal or were intended to be simultaneously accepted or these are so closely linked that one cannot at all stand without the other. If the above criteria is satisfied, then, two or more related transactions can be considered as one international transaction for the purpose of determining their ALP. On the contrary, if the above criteria is not satisfied, then, these transactions are to be viewed separate from each other and, accordingly, their ALP should also be determined in a distinct manner as if these are two separate independent transactions. The Id. TPO finally concluded that

mere fact that both the intra-group services and goods are utilized by the assessee for the manufacture of the final product, cannot be treated decisive to consider such separate transactions as a single transaction.

5. The ld. DRP confirmed the findings of the ld. TPO. Against this assessee is in appeal before us.

6. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in assessment years 2005-06 & 2006-07 in ITA Nos.701&701/Bang/2021 dated 5.8.2021, wherein held as under:

3. *Ground No.5 & 6 are with regard to TP adjustment of Rs.1,74,04,730/- towards royalty payment.*

3.1 *This issue was considered by this Tribunal on earlier occasion in assessee's own case and this Tribunal in IT(TP)A No.40/Bang/2011 for the assessment 2005-2006 and the Tribunal vide order dated 21.4.2017 set aside this issue to the file of AO/TPO for fresh consideration, of which the TPO/AO sustained addition of Rs.1,74,04,730/-. Against this assessee is in appeal before us.*

3.2 *The assessee has paid royalty of Rs.1,74,04,730/-. Royalty has been paid having regard to the support services by the Group company. The assessee is in the business of advanced diagnostic equipment. After sales support becomes a critical component for the equipment sold. The assessee's group affiliates have extended a unique condition wherein the equipment is under constant monitoring through the network of satellites. The advantage of such a system is that it allows remote monitoring besides remote maintenance. The assessee is a beneficiary of such facility. It would have cost hundreds of millions of dollars to have an own exclusive facility besides the assessee also does not have such technology to put up the facility. It would not have made any economic sense to facilitate such facility independently. Thus, the payment of royalty enhances the commercial value for the business of the assessee.*

3.3 *The Tribunal for AY 2005-06 and 2006-07 in IT(TP)A 40/B/11 & 1647/B/13 dt.21.04.2017 has set aside the issue of royalty to the file of the TPO/AO for reconsideration in the light of the directions of the Tribunal for the AY's 2002-03 to 2004-05. The Tribunal has dealt with the issue in para 16 to 18 of the order. Relevant portion is extracted as under:*

“18. Since the issue was already set aside to the file of the Assessing Officer for choosing the proper comparable therefore in view of the earlier year of this Tribunal, we set aside this issue to the record of the TPO/AO for reconsideration of the same in the light of the directions of the Tribunal for the Assessment years 2002-03 to 2004-05 (supra). Further in case no comparable is found in respect of royalty payment by the assessee then the TPO/AO may consider the royalty payment as part of the international transactions under trading segment and then determine the ALP by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment.”

3.4 During the set aside proceedings, the assessee vide reply dt.05.06.2019 submitted that by considering royalty payment as part of the international transaction under trading segment, the margin of the assessee is higher than that of the comparable company. However, the TPO in para 4.5 & 4.6 has stated as follows:

“4.5 During the set aside proceedings, the taxpayer has not identified any comparable in respect of the royalty payment. Since the TPO has chosen the company, M/s Advanced Micronic Devices Ltd., as a comparable to the taxpayer, in the trading segment, the same is considered as comparable for the royalty transaction also.

4.6 The R&D expenses of the comparable & royalty over net sale is considered as per the annual report for the current year is:

Sl No	Company name	R&D Exp	Royalty/ trademark	Net sale	Margin over sale
1	Advanced Micronic Devices Ltd.	0	0	2684.75 lakhs	0%
	Average				0%

The computation of ALP of the royalty payment is made using CUP/CUT method using the above-mentioned comparable as follows:”

3.5 From the above, it can be seen that the AO has chosen M/s Advanced Micronic Devices Ltd as a comparable which has not incurred any royalty payment as the company has no trademark licensed to it. Due to lack of comparable transaction, ex-facie the company cannot be considered as a comparable with the assessee. The adoption of CUP method is also not as per law in the absence of comparable transaction. Hence in the impugned case, there is no comparable identified as required in law by the TPO. In the absence of comparable transaction, the Tribunal has held as extracted supra that the royalty payment be considered as operating cost in the trading segment. The TPO has adopted M/s Advanced Micronic Devices Ltd as a comparable in the trading segment. By applying the same, the assessee in its reply dt.05.06.2019 has worked out the margin by considering royalty as part of the trading segment. The margin of the assessee in the trading segment

works out to 39.49% after considering royalty as operating cost as against the margin of the comparable M/s Advanced Micronic Devices Ltd being 28.06%. Since the margin of the assessee is higher than that of the comparable, the transaction is at arm's length and consequently the addition requires to be deleted.

3.6. The Ld. D.R. submitted that there is no proof of any services having actually been rendered by the A.E. The facts of issue shows that the services, even if any, rendered by the A.E. were mere duplication of the functions being carried out by the tax payer on its own and independently. The assessee did not get any economic value from the alleged trade mark/trade name fee paid. The ALP of the so-called trade mark/trade name for charges so paid by the assessee was determined as nil and he prayed that the same to be confirmed.

3.7 We have heard the rival submissions and perused the materials available on record. In earlier occasion, assessee came in appeal before this Tribunal. The Tribunal remitted the issue with the directions in IT(TP)(A) No.40/Bang/2011 & 1647/Bang/203 dated 21.4.2017 as discussed in para 3.3 of this order.

3.8 On set aside assessment, the TPO repeated the same what he has done on earlier occasion without considering the direction of the Tribunal where the Tribunal given a direction that in case comparable is not found in respect of payment of royalty by the assessee, then the TPO/AO may consider the royalty payment on part of the international transaction under trading segment and determine the ALP by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment. Before us, Ld. A.R. submitted that if it is considered as operating cost, then the margin of the assessee is higher than the margin of comparable i.e. M/s. Advance Micronic Devices Ltd. In our opinion, the AO has to consider this royalty payment as an operating cost and has to verify whether the margin of assessee is higher than the margin declared by the comparable company i.e. M/s. Advance Micronic Devices Ltd. and decide accordingly. In view of this, the issue in dispute is set aside to the file of AO/TPO for the limited purpose for comparison of margins with the comparable company and decide accordingly.

4. Next ground No.8 is with regard to sustaining addition of Rs.2,42,33,641/- u/s 37 of the Act by holding that it was wholly and exclusively incurred for the purpose of business. Facts of this case are that this issue has been set aside by the Tribunal vide order cited (supra) for reconsideration by the AO/TPO. On set aside assessment the addition has been sustained by AO. Since the assessee has not substantiated those expenses as incurred wholly and exclusively for the purpose of business. Hence, the assessee once again in appeal before us.

4.1. The Ld. A.R. submitted that the impugned issue was set aside by the Tribunal in IT(TP)A 40/B/11 dt.21.04.2017 to the AO for reconsideration and adjudication. The AO vide his notice dt.11.11.2019 sought details of dealer commission. The assessee vide replies dt.27.11.2019 & 11.12.2019 submitted the party wise details of provision and payments along with the details of deduction of TDS and prayed that the same should be allowed as business expenditure. However, rejecting the details and information provided and the practice consistently followed by the assessee, the

AO has disallowed the dealer commission as not incurred wholly and exclusively for the purposes of business and disallowed the same u/s 37 of the Act.

4.2 The assessee disagrees with the findings of the AO as he has erred in wrongly interpreting the facts, submissions, method of accounting and the practice consistently followed by the assessee. The sales are booked by various dealers appointed by the assessee and commission is paid on the sales made by them, however, the actual payment is made upon realization of the sales proceeds and on fulfilling other concomitant services / obligations. At the time of booking sales, the quantification of commission to each dealer is uncertain in nature, hence the amount of dealer commission expense is not booked against particular dealer account, but carried in the books under "Other Liabilities" account. Once the dealer fulfils the conditions related to the sales, he becomes eligible to claim the commission. Then, the commission will be moved from "Other liabilities" account to respective dealer account, and paid immediately after deducting TDS on the same. This practice is followed consistently and TDS is deducted where ever applicable. Hence it is prayed that the dealer commission incurred be allowed in the interests of justice as the same has been wholly and exclusively incurred for the purposes of its business.

4.3 The Ld. D.R. submitted that Ld. DRP in his order observed that the assessee is not in a position to furnish the particulars (name, address, evidence of deduction of TDS, etc.) in respect of persons to whom commission amounting to Rs.2,42,33,641/- have been paid pertaining to AY 2005-06. Therefore, he is not in a position to prove identity of the payee, genuineness of expenses incurred and substantiate that expenses are incurred wholly and exclusively for the purpose of business. The assessee's claim of following the practice of accounting also could not be substantiated as the assessee is unable to discharge the primary onus of establishing the identity and the genuineness of the transaction. In view of the circumstances, Ld. DRP held that the assessing officer has correctly held that the dealer commission amounting to Rs.2,42,33,641/- has not been incurred wholly and exclusively for the purpose of business.

4.4 We have heard the rival submissions and perused the materials available on record. The assessee claimed that it has paid a sum of Rs.2,42,33,641/- towards commission to dealers and according to the assessee, it is wholly and exclusively incurred for the purpose of business. Further, assessee submitted the list of payments made to various parties and also furnished the details of deductions of TDS at the time of payment of commission to various dealers. It was also noted that in the case of receipt of this commission by those parties, the department has accepted it. However, in the hands of assessee it was treated as not incurred by the assessee, which is incorrect. Further, the books of accounts of the assessee is not rejected by challenging the entries in the books of accounts. On this point also, we are of the opinion that the claim of assessee is to be allowed as genuine. Accordingly, we allow this ground of appeal taken by the assessee.

4.5 In the result, the appeal of the assessee in ITA No.701/Bang/2021 is partly allowed for statistical purposes.

6.1 Same view was taken in assessee's own case in A.Y. 2012-13 in IT(TP)A No.703/Bang/2021 dated 7.10.2022.

6.2 In view of the above decisions, taking a consistent view, we allow the ground taken by the assessee.

Distribution Segment:

Ground No.13:

7. Ground No.13 of the assessee's appeal is reproduced as under:

13. i) *The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the distributor segment amounting 253,10,21,733/-.*

ii) The Learned AO / TPO / DRP erred in making adjustment on transactions beyond AE transactions, thus, the adjustment proposed includes non AE transactions.

iii) The Learned AO / TPO / DRP erred in wrongly adopting the financial results of the assessee.

iv) The Learned AO / TPO / DRP erred in comparing the appellant's distribution margin with comparables which are not in the business of trading/distribution.

v) The Learned AO / TPO / DRP erred in not following their own orders passed for the earlier assessment years on this issue.

vi) The selection of the method by the Learned AO / TPO / DRP is not as per law.

vii) The Learned AO / TPO / DRP erred in not granting the variances deduction envisaged in the Act and Circular.

viii) The Learned AO / TPO / DRP erred in not carrying out the adjustments as required under law as well as the facts.

ix) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 1.013(3).

x) The Learned AO/TPO/DRP erred in rejecting certain comparables on unsustainable and untenable grounds/reasons while considering comparables which failed to meet the filters /criteria as required under law.

xii) The AO/TPO/DRP erred in considering the following comparables overlooking/rejecting the objections made by the assessee

- 1) *Deccan Dental Depot Pvt Ltd*
- 2) *Covidien Healthcare India Pvt Ltd*

- 3) *Vinod Medical Systems Pvt Ltd*
- 4) *Indian Hospitex Systems Pvt Ltd*
- 5) *India Medtronic Pvt Ltd*
- 6) *Sandor Medicaids Pvt Ltd*
- 7) *Iris Healthcare Technologies Pvt: Ltd*
- 8) *Medicept Dental India Pvt Ltd*
- 9) *IDS Denmed Pvt Ltd*
- 10) *Affiance Medi Tech Pvt Ltd*
- 11) *Olympus Medical Systems India Pvt Ltd*
- 12) *Weldon Biotech (India) Pvt Ltd*
- 13) *Pinnacle Biomed Pvt Ltd*
- 14) *Schiller Healthcare India Pvt Ltd*
- 15) *Stryker India Pvt Ltd*
- 16) *Everest Instruments Pvt Ltd*
- 17) *Confident Sales India Pvt Ltd*
- 18) *Narang Medical Ltd*
- 19) *Indifoss Analytical Pvt Ltd*

xiii) The Learned AO / TPO / DRP erred in failing to rely on decision of the ITAT in assessee's own case for the years 2002 - 03 to 2004 - 05 and subsequent orders of the ITAT for other assessment years.

xiv) The Learned AO / TPO / DRP erred in adopting TNMM as the MAM ignoring the findings of ITAT in the appellant's own case for earlier years and accepted by department on the same issue.

xv) The Learned AO/TPO/DRP have failed to apply the provisions of Rule 10B(4)&(5) and 10CA(2) while selecting the criteria and filters.

xvi) The Learned AO / TPO / DRP erred in not carrying out the adjustments like risk, working capital, et:c., as required under law as well as the facts.

xvii) The learned AO/TPO/DRP erred in rejecting the price per unit adjustment carried out by the appellant

xviii) The learned AO/TPO/DRP erred in rejecting the import duty adjustment carried out by the appellant.

xix) The learned AO/TPO/DRP erred in not considering the after sales support service segment while determining operating margin of distribution segment.

xxi) The learned AO/TPO/DRP erred in rejecting the corroborative analysis provided by the appellant.

xxii) The Learned AO/TPO/DRP erred in applying the trading income threshold of 75% to sales to select comparable companies. -

xxiii) The learned AO/TPO/DRP erred in applying the Related party transactions threshold of 25% to revenues to select comparable companies.

xiv) The learned AO/TPO/DRP erred in not applying the Turnover filter as per law.

7.1 Facts of the issue are that Wipro GE markets, distributes and services the complete range of GE's medical diagnostic imaging and therapy equipment in the Indian market. Based upon customer requirements, Wipro GE imports medical systems from other GE Healthcare global entities. Wipro GE also caters to the after sales market segment by way of supply of spare parts and service of equipment. Based on the functional analysis, Wipro GE is classified as a Distributor of medical products which provides after sales services on diagnostic and therapy equipment.

Margin of the assessee as computed by the TPO in the TP Order is as under:-

Particulars	Rs.
Operating Revenue	2535,87,21,072/-
Operating Expenses	2302,03,25,347/-
Operating Profit	233,83,95,725/-
OP/OR	9.22%
OP/OC	10.16%

Comparables selected by Appellant in TP report and their arithmetic mean:

Sl. No.	Name of the company	Wt. Avg (%)
1	Advanced Micronic Devices Ltd	-103.43
2	Thakral Services (India) Ltd	-11.98
3	Max Medical Services Ltd	-3.56
4	Usart Technologies India Pvt Ltd	-0.50
5	Zicom Electronic Security Systems Ltd	1.71
6	Ind-Agiv Commerce Ltd	3.51
7	Lyka Exports Ltd	9.38
8	Keith Electronics Pvt Ltd	9.25
Median		3.59%

Out of the 8 comparables selected by the assessee, the TPO has rejected all of them.

Final Comparables selected by TPO:

Sl No	Company Name	Wt. PLI (OP/OC)%
1	Deccan Dental Depot Pvt Ltd	0.65
2	Covidien Healthcare India Pvt Ltd	2.85
3	Vinod Medical Systems Pvt Ltd	3.88
4	Indian Hospitex Systems Pvt Ltd	3.89
5	India Medtronic Pvt Ltd	4.62
6	Sandor Medicaids Pvt Ltd	4.88
7	Iris Healthcare Technologies Pvt Ltd	4.93
8	Medicept Dental India Pvt Ltd	5.31
9	I D S Denmed Pvt Ltd	6.07
10	Affiance Medi Tech Pvt Ltd	6.79
11	Olympus Medical Systems India Pvt Ltd	6.86
12	Weldon Biotech (India) Pvt Ltd	7.14
13	Pinnacle Biomed Pvt Ltd	7.41
14	Schiller Healthcare India Pvt Ltd	8.00
15	Stryker India Pvt Ltd	9.17
16	Everest Instruments Pvt Ltd	12.55
17	Confident Sales India Pvt Ltd	15.40
18	Narang Medical Ltd	15.63
19	Indifoss Analytical Pvt Ltd	18.17
	35 th Percentile	4.93
	Median	6.79
	65 th Percentile	7.41

Computation of arm's length price by the TPO and the adjustment made:

Operating Revenue (OR)	Rs.1769,15,48,168/-
Operating Cost (OC)	Rs.1902,13,13,780/-
Adjusted Arm's length Margin	6.79% of operating revenue

Arm's Length Price (ALP) (100%-6.79% = 93.21%) of operating revenue	Rs.1649,02,92,047/-
Price Received	Rs.1902,13,13,780/-
Adjustment u/s 92CA	Rs.253,10,21,733/-

7.2 The adjustment made by the TPO of Rs.253,10,21,733/- in the Distribution Segment has been adopted by the AO in the Draft assessment order u/s 143(3) rws 144C(1) of the Act dated 30.12.2019. The assessee filed objections before DRP on 27.01.2020. The assessee filed its written submissions before DRP on 29.01.2021 emphasizing on the binding decisions of the Tribunal in assessee's own case for earlier years. Without appreciating the submissions of the assessee, the DRP passed its directions u/s 144C(5) on 11.02.2021 rejecting the grounds. The AO passed the final assessment order u/s 143(3) rws 144C(13) and 144C(13) rws 143(3A) & 143(3B) of the Act dated 30.03.2021 retaining the TP adjustment in Equipment segment of Rs.253,10,21,733/- as per draft assessment order.

7.3 The AO/TPO/DRP has erred in not relying on decision of the CIT (A) / ITAT in assessee's own case for the years 2002 – 03 to 2004 – 05, 2005-06, 2006-07 and subsequent orders of the ITAT for other assessment years. The direction of the ITAT to restrict the adjustment to the international transaction i.e, AE purchases of Rs.964,72,92,298/- has not been adhered to by the TPO. The TPO yet again has made the adjustment on domestic sales of Rs.1769,15,48,148/- which is not an international transaction.

8. The ld. A.R. requested to delete the TP adjustment in the trading segment by placing reliance on the order of the Tribunal in assessee's own case in IT(TP)A No.703/Bang/2021 dated 7.10.2022 for the assessment year 2012-13.

9. The ld. D.R. relied on the orders of the lower authorities.

10. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in assessment years 2012-13 in ITA No.703/Bang/2021 dated 7.10.2022, wherein held as under:

“28. Wipro GE markets, distributes and services the complete range of GE's medical diagnostic imaging and therapy equipment in the Indian market. Based upon customer requirements, Wipro GE imports medical systems from other GE Healthcare global entities. Wipro GE also caters to the after sales market segment by way of supply of spare parts and service of equipment. Based on the functional analysis, Wipro GE is classified as a Distributor of medical products which provides after sales services on diagnostic and therapy equipment.

28.1 The ITAT in IT(TP)A 340/Bang/2017 dated 31.08.2017 has restored the matter for re-adjudication of all the issues in the light of the findings given in earlier years. However, the order of the lower authorities violates the principles of judicial discipline as the binding nature of the orders of the higher appellate authorities have been totally ignored.

Margin of the Assessee as computed by the TPO in the TP Order:

<i>Particulars</i>	<i>Rs.</i>
<i>Revenue</i>	<i>1388,87,76,432</i>
<i>Cost</i>	<i>1341,57,47,576</i>
<i>Profit</i>	<i>47,30,28,856</i>
<i>OP/OC</i>	<i>3.52%</i>
<i>OP/OR</i>	<i>3.41%</i>

28.2 Comparables selected by Assessee in TP report and their arithmetic mean:

<i>Sl. No.</i>	<i>Name of the company</i>	<i>(%)</i>
<i>1</i>	<i>ADS Diagnostic Limited</i>	<i>8.41</i>
<i>2</i>	<i>Advanced Micronic Devices Ltd</i>	<i>2.07</i>
<i>3</i>	<i>Central Scientific Supplies Co. Ltd</i>	<i>-0.15</i>
<i>4</i>	<i>Frontline Electro Medical Ltd</i>	<i>0.01</i>
<i>5</i>	<i>Kusum Electrical Inds Ltd</i>	<i>9.84</i>
<i>6</i>	<i>Softouch Hygiene Products Ltd</i>	<i>10.41</i>
<i>Arithmetical Mean</i>		<i>5.10</i>

28.3 Out of the 6 comparables selected by the Assessee, the TPO accepted the 1 highlighted above, viz. Advanced Micronic Devices Ltd and rejected the other 5 comparables.

28.4 Final Comparables selected by TPO and their arithmetic mean:

Sl No	Company Name	(OP/OR) (in%)
1	Maestors Medline Systems Ltd (seg)	29.57
2	Advanced Micronic Devices Ltd (seg)	7.29
	Average	18.43

Computation of arm's length price by the TPO and the adjustment made:

PLI Margin	18.43
OR	1388,87,76,432
ALP* 81.57%	1132,90,74,935
OC	1341,57,47,576
Shortfall	208,66,72,641
Value of International Transaction (to be benchmarked)	791,22,27,227
Percentage to Total Cost	43.80%
Proportionate adjustment	91,39,62,617

28.5 The adjustment made by the TPO of Rs.91,39,62,617/- in the Distribution Segment has been adopted by the AO in the Draft assessment order u/s 143(3) rws 254 rws 144C(1) of the Act dated 30.12.2019. The assessee filed objections before DRP on 27.01.2020. The assessee filed its written submissions before DRP on 11.01.2021 emphasizing on the binding decisions of the Tribunal in assessee's own case for earlier years. Without appreciating the submissions of the assessee, the DRP passed its directions u/s 144C(5) on 11.02.2021 rejecting the grounds. The AO passed the final assessment order u/s 143(3) rws 254 rws 144C(13) of the Act dated 30.03.2021 retaining the TP adjustment in Equipment segment of Rs.91,39,62,617/- as per draft assessment order.

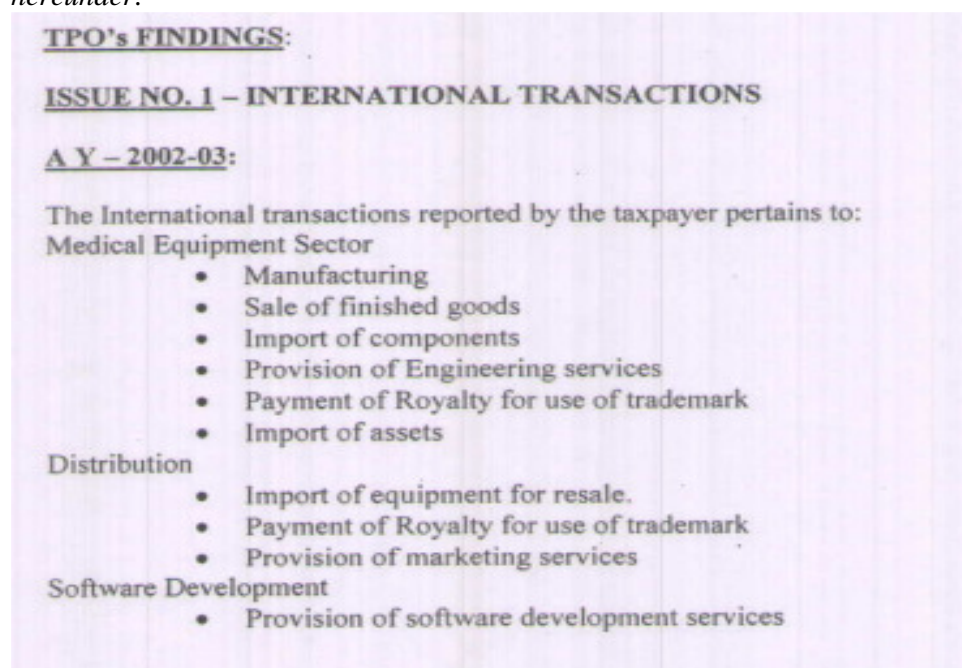
28.6 The AO/TPO/DRP has erred in not relying on decision of the CIT (A) /ITAT in assessee's own case for the years 2002 – 03 to 2004 – 05, 2005-06, 2006-07 and subsequent orders of the ITAT for other assessment years. The direction of the ITAT to restrict the adjustment to the international transaction i.e, AE purchases has not been adhered to by the TPO. The TPO yet again as was made in the original proceeding has made the adjustment on domestic sales which is not an international transaction.

28.7 The TPO/DRP have adopted TNMM as the MAM to benchmark the transaction. It was submitted to the TPO/DRP that the Tribunal in ITA 810 to

812/Bang/2007 dated 16.05.2008 for the AY's 2002-03 to 2004-05 has held Resale Price Method as the MAM to benchmark the transaction. Relevant portion is reproduced as under:

“Accordingly, he has held Resale Price Method as explained in Rule 10B(1)(b) will be the MAM since the trading segment involves purchases of goods which is resale. In my view resale price method offers a solution for the issue on hand. Accordingly TPO is directed to adopt resale price method of ALP determination. In doing so gross margin being the difference between the purchase price paid to AE and sale price realized offers a simple and reliable basis. Accordingly, TPO will do so. This decision takes care of the guidance offered in rule 10(c) of the rules.”

28.8 The said ruling by the ITAT has been accepted by the department and no further appeal has been made to the High Court. The Order giving effect to ITAT order passed by the TPO dt.09.07.2013 for AY 2002-03 to 2004-05 wherein the TPO accepted the margin computation/results of the assessee and deleted the TP adjustment. The issue stands concluded in this manner. The same is extracted hereunder:



No international transaction has been reported from service sector. In addition to the above there are reimbursement of expenses between WGE & its affiliates.

As per the directions of the Ld CIT(A), ~~the international transactions from the AEs~~ ^{transactions} in the trading segment consists of

1. Purchases from AEs	-	204,70,55,257
2. Purchases from Non-AEs	-	30,69,76,652
3. Local purchases & other total costs	-	64,64,57,005

The purchases from AEs of Rs.204,70,55,257/- is adopted in making the ALP adjustment towards Trading segment instead of Rs.372,73,04,153/- adopted by the TPO in his order.

The Margin earned by Wipro GE Medical Systems is as under:

		Rs.
Total Sales of Trading		3,464,149,383
Less: Local Purchases & Imports from Non Affiliates		
Import Non Affiliates / Local Purchase	306,976,752	
Other local costs – Installation and warranty		
Costs, accessories, etc.,	24,830,157	
Less: Paid to affiliates as purchase price	<u>2,047,055,257</u>	<u>2,378,862,166</u>
Margin earned		<u>1,085,287,217</u>
Margin as % of purchase		53.02%
Margin as % of sales		31.33%

The margin earned by Advanced Micronics Devices Limited is as under:

		(Rupees in Crores)
Trading Sales		22.44
Less: Purchase of traded goods		<u>16.94</u>
		5.50
Margin as % of purchase		32.47%
Margin as % of sales		24.51%

As the margin earned by the taxpayer is not less than the TPO's comparable margin, the international transactions are treated as at arm's length.

A Y – 2003-04:

As per the directions of the Ld CIT(A), the international transactions from the AEs toward purchases consists of

1. Manufacturing segment	-	57,93,88,134
2. Services segment	-	26,38,69,630
3. Trading segment	-	174,93,84,171

The purchases from AEs of Rs.174,93,84,171/- is adopted in making the ALP adjustment towards Trading segment instead of Rs.3128,65,34,719/- adopted by the TPO in his order.

The Margin earned by Wipro GE Medical Systems is as under:

		Rs.
Total Sales of Trading		3,128,534,719

Less: Local Purchases & Imports from Non Affiliates		
Import Non Affiliates / Local Purchase	608,430,485	
Other local costs – Installation and warranty Costs, accessories, etc.,	200,619,363	
Less: Paid to affiliates as purchase price	<u>1,749,384,171</u>	<u>2,558,434,019</u>
Margin earned		570,100,700
Margin as % of purchase		32.59%
Margin as % of sales		18.22%

The margin earned by Advanced Micronics Devices Limited is as under:

	(Rupees in Crores)
Trading Sales	27.27
Less: Purchase of traded goods	<u>21.03</u>
	6.24
Margin as % of purchase	29.67%
Margin as % of sales	22.88%

As the margin earned by the taxpayer is not less than the TPO's comparable margin, the international transactions are treated as at arm's length.

A Y – 2004-05:

As per the directions of the Ld CIT(A), the international transactions from the AEs toward purchases consists of

1. Manufacturing segment	-	66,73,73,612
2. Services segment	-	43,44,23,435
3. Trading segment	-	159,83,78,273

The purchases from AEs of Rs.159,83,78,273/- is adopted in making the ALP adjustment towards Trading segment instead of Rs.266,77,45,363/- adopted by the TPO in his order.

The Margin earned by Wipro GE Medical Systems is as under:

		Rs.
Total Sales of Trading		3,198,159,596
Less: Local Purchases & Imports from Non Affiliates		
Import Non Affiliates / Local Purchase	271,498,479	
Other local costs – Installation and warranty Costs, accessories, etc.,	540,639,044	
Less: Paid to affiliates as purchase price	<u>1,598,378,274</u>	<u>2,410,515,797</u>
Margin earned		787,643,799
Margin as % of purchase		49.28%
Margin as % of sales		24.63%

The margin earned by Advanced Micronics Devices Limited is as under:

	(Rupees in Crores)
Trading Sales	41.52
Less: Purchase of traded goods	<u>33.57</u>
	7.95

Margin as % of purchase	23.68%
Margin as % of sales	19.15%

As the margin earned by the taxpayer is not less than the TPO's comparable margin, the international transactions are treated as at arm's length.

ISSUE NO. 2 – MOST APPROPRIATE METHOD

The Ld. CIT(A) has directed to adopt Resale Price Method (RPM) instead of Transactional Net Margin Method (TNMM) as Most Appropriate Method (MAM) since the trading segment involves purchases of goods which is resold.

Therefore, the RPM is treated as MAM.

ISSUE NO. 3 – COMPARABLE

As directed by the Ld. CIT(A), the only comparable considered is M/s. Advanced Micronics Devices Ltd. (AMDL).

28.9 Similarly, the Tribunal in assessee's own case for the AY 2005-06 vide order dt.21.04.2017 in IT(TP)A 40/Bang/11 and 1647/Bang/2013 held that the adjustment on account of transfer pricing can be made only in respect of the international transaction and in this case to be confined to the purchases made from AE. Relevant portion is extracted hereunder:

“15. Having considered the rival submissions as well as the relevant material on record, we find that the TPO while computing the ALP has apparently taken the gross profit margin of the AMDL at entity level by assuming that the entire activity of AMDL is only trading in the medical equipments. So far as the issue of considering the segmental details of the comparable companies, on principle we do not find any error on this point as the comparability of the assessee's trading segment in medical equipment has to be determined by considering the same segment of the comparable companies in the same activity. Therefore if the comparable company is having more than one segment as considered by the CIT (Appeals) then only the trading segment of the said company has to be compared with the assessee. Further the CIT (Appeals) has also recomputed the gross margin of the assessee and again held that the adjustment is required to be made only in respect of purchases made from the AE and not on the entire transaction in the trading segment. There is no quarrel on this issue that the adjustment on account of transfer pricing can be made only in respect of the international transactions. In the case on hand, the international transactions in trading segment is confined only to the purchases made from the AE. Since there are other transactions of import and procurement from domestic market therefore the adjustment cannot be made by considering the entire trading segment of the assessee. Thus on principle, we do not find any error on these points however, the CIT (Appeals) has undertaken to recompute the margins of the comparable as well as assessee by considering the fresh material which was not available with the TPO/A.O. which it is not permissible to the CIT (Appeals) to do this exercise of re-computation without giving an opportunity to the TPO/A.O. The proper course of action on the part of CIT (Appeals) would have been to ask the TPO/A.O. for remand report by considering all the relevant material. However, the CIT (Appeals) did not choose to issue any remand order but undertaken the entire exercise on his own. Thus it is clear that the TPO/A.O. was not given an opportunity in this process of recomputing the margins of the comparable as well as assessee. Accordingly in view of the above facts and circumstances of the case, we set aside this issue to the record of the TPO/A.O. to consider and verify relevant record and then determine the ALP in the light of our above observations.”

28.10 The TPO for the AY 2005-06 while passing the order giving effect vide order dt.28.10.2019 has followed the direction of the ITAT of applying RPM method and restricting the adjustment only in respect of the international transactions and thus held that no adjustment was required. Relevant portion is extracted hereunder:

3.3 The Resale Price Method (RPM) is considered as the Most Appropriate Method as was considered by the TPO in his order u/s 92CA of the Act. The taxpayer's margin is recomputed taking into consideration the local purchases and imports from non-affiliates and other costs incurred on purchases from affiliates since, as observed by the Hon'ble ITAT's order, the adjustment can be made only in respect of the international transactions. The assessee has transactions of import and procurement from domestic market and considering the same, the taxpayer's margin is recomputed as under:

Total Sales of Trading		313,56,31,130
Less: Local Purchases &		
Imports from Non-Affiliates		
Import Non-Affiliates	13,03,64,642	
Local Purchase		
Other local costs – installation and		
Warranty costs, accessories, etc.	52,87,43,408	
Less: Paid to affiliates as per purchase price	175,79,64,919	241,70,72,969
Margin earned		71,85,58,161
Margin as % of purchase		40.87%
Margin as % of sale		29.01%

3.4 The segmental financial information provided by the comparable company, M/s Advanced Micronic Devices Ltd., for the FY 2004-05, to the Ld. CIT(A) was also examined. Accordingly, the gross profit margin of the Health Care segment of the comparable is recomputed as under: \

		Rs. (In lakhs)
Trading Sales	2684.75	
Less: Material Cost	1994.49	
Service charges	68.32	
Power & Fuel	-	
Spares & Materials	30.35	2093.16
Margin earned		591.59
Margin as % of purchase		28.26%
Margin as % of sale		22.03%

As the margin earned by the taxpayer is higher than the comparable's margin as computed above, no adjustment is required in the trading segment of the taxpayer.

28.11 For AY 2006-07, similar computation considering RPM method, AE purchases and AMDL as comparable was made in line with the direction of ITAT for earlier years and the Learned CIT-A vide order dated 18.09.2013 deleted the TP adjustment in trading segment as the margin of the assessee was higher compared to that of the comparable. There has been no appeal by the department against the CIT-A order on this issue and thus stands concluded. Thus, for the earlier years the lower authorities have followed the binding decision of the Tribunal in assessee's own case.

28.12 It may be noted that the same TPO i.e, DCIT, TP-2(2)(1), Bangalore passed the Order giving effect for both AY 2005-06 and AY 2012-13 on the same day 28.10.2019. Though TPO followed the specific direction of the ITAT for AY 2005-06, the same was not followed for the AY 2012-13. Thus the TPO has been inconsistent in her own approach. The TPO is in error in not following the orders of the Tribunal in assessee's own case which is a binding precedent. The TPO has tried to take a contrary position on an issue which has been overwhelmingly settled in the earlier years. There being no change in fact or law it was imperative for the TPO to follow the same method of computation as done earlier. Not doing so amounts to violation of law as explained by Hon'ble Madras High Court in L.G. Ramamurthi 110 ITR 453. Relevant portion extracted hereunder:

“Appeal(Tribunal)—Precedent—Tribunal coming to conclusion that gifts were sham—In subsequent assessment year a differently constituted Tribunal came to a different conclusion, viz., gifts were real Tribunals is not right in taking an altogether different view in later year on same set of facts when there was no fresh material before it.”

28.13 *In the impugned year the AE purchases are Rs.541,23,20,773/- in the trading segment. The assessee’s margin for the impugned year as calculated by applying RPM method and considering AE purchases as the international transaction in the manner directed/accepted by the Tribunal and lower authorities in earlier years is hereunder:*

WIPRO GE MEDICAL SYSTEMS PVT LTD - ASST. YEAR : 2012-2013		
Particulars	Amount(Rs)	Amount(Rs)
Total Sales of Trading		10,36,32,72,257
Less: Local Purchases & Imports from Non Affiliates (NOTE - 1)		
Import Non Affiliates	35,21,33,186	
Local Purchase	34,59,81,724	
		69,81,14,911
Sales realisations on affiliates purchases		9,66,51,57,346
Less: Paid to affiliates as purchase price	5,41,23,20,773	
Other costs	1,54,05,20,022	6,95,28,40,795
Margin earned		2,71,23,16,551
Margin as % of purchase		50.11%
Margin as % of sales		28.06%
NOTE -1 These purchases are accessories and small items bought & sold as per the requirement of the customers. No profit margin is envisaged on these purchases as customers themselves can procure these items directly from the suppliers.		

28.14 *In line with the treatment given to AY’s 2002-03 to 2004-05, AY 2005-06 & 2006-07 the margin of the assessee has been calculated at 50.11%. As mentioned supra, the TPO for the impugned year has considered M/s.Maestro Mediline Systems Ltd (seg) at a margin of 29.57% and M/s. Advanced Micronic Devices Ltd at a margin of 7.29%, thus average being 18.43%. It may be seen in all the earlier years that M/s. Advanced Micronic Devices Ltd (7.29%) has been consistently considered as a comparable and thus the margin of the assessee at 50.11% being higher than that of M/s. Advanced Micronic Devices Ltd, the adjustment requires to be deleted.*

28.15 *The assessee has objected to M/s. Maestro Mediline Systems Ltd (seg) being considered as a comparable on various grounds. Without going into the merits of the said company being considered as a comparable and assuming without admitting that M/s. Maestro Mediline Systems Ltd (seg) is considered as a comparable for this year, the margin of the comparables as arrived at by TPO is 18.43%. Thus, the margin of the assessee at 50.11% is more than the margin of the comparables calculated by the TPO at 18.43%; therefore, no adjustment is required in the trading segment.*

28.16 *In view of the above, since the facts and law are the same and on the parity of reasoning the TP adjustment in the trading segment is to be deleted.*

29. *The Ld. D.R. relied on the order of the lower authorities.*

30. *We have heard both the parties and perused the materials available on record. The main grievance of the Ld. A.R. on this issue is that AO/TPO/DRP has not considered the earlier decision of Tribunal in A.Y. 2002-03 to 2004-05, 2005-06, 2006-07, as such order passed by the lower authorities is bad in law. The Judicial discipline requires consistency in its proceedings. The AO/TPO what criteria followed in earlier year for determining the ALP, the same to be followed in next assessment year unless and until there is a change in facts of the case. In the present case, the Ld. D.R. not brought on record any change in circumstances to deviate from earlier order of the Tribunal for the assessment year especially 2005-06 and 2006-07 in IT(TP)A No.40/Bang/2011 & 1647/Bang/2013 dated 21.4.2017 wherein the Tribunal followed the earlier order of the Tribunal for the AY 2002-03 and 2004-05, which has been reproduced in earlier para of this order. Being so, we direct the AO/TPO to pass fresh order in the light of above observation of the Tribunal in AY 2005-06 and 2006-07. Once the AO/TPO pass the order in conformity with earlier order of the Tribunal, other issue raised by the assessee with regard to comparables is infructuous. This ground of assessee is partly allowed for statistical purposes.”*

10.1 Same view was taken in assessee's own case in A.Y. 2012-13 in IT(TP)A No.703/Bang/2021 dated 7.10.2022.

10.2 In view of the above order of the Tribunal this ground is remitted to the file of AO/TPO on similar lines. This ground of appeal is partly allowed for statistical purposes.

Software Development Segment:

Ground No.14:

11. Ground No.14 of the appeal of the assessee is reproduced as under:

14 *i) The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the Software Development Segment amounting Rs.110,46,98,146/-.*

ii) The Learned AO / TPO / DRP erred in selecting the comparables. The selection of comparables does not confirm to the I.T. Rules. Further it also does not comply with the case laws on this point.

iii) The Learned AO / TPO / DRP erred in not carrying out the adjustments like risk, working capital, etc., as required under law as well as the facts.

iv) The Learned AO / TPO / DIRP erred in wrongly adopting the financial results of the assessee.

- v) *The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 10B(3).*
- vi) *The Learned AO/TPO/DRP erred in rejecting certain comparables on unsustainable and untenable grounds/reasons while considering comparables which failed to meet the filters /criteria as required under law.*
- vi) *The Learned AO / TPO / DRP erred in not granting the variances deduction envisaged in the Act and Circular.*
- vii) *The Learned AO/TPO/DRP have failed to apply the provisions of Rule 10B(4)86(5) and 10CA(2) while selecting the criteria and filters.*
- viii) *The learned AO/TPO/DRP erred in rejecting R D expense more than 3% on turnover to eliminate companies engaged in R 86 D activities.*
- ix) *The learned AO/TPO/DRP erred in applying the software development service income threshold of 75% to sales to select comparable companies.*
- xii) *The learned AO/TPO/DRP erred in applying export 'turnover threshold of 75% to sales to select comparable companies.*
- xiii) *The learned AO/TPO/DRP erred in rejecting the comparable companies having ratio of employee cost to sales less than 25%.*
- xii) *The learned AO/TPO/DRP erred in applying the Related party transactions threshold of 25% to revenues to select comparable companies.*
- xiii) *The learned AO/TPO/DRP erred in not applying the Turnover filter as per law.*
- xiv) *The Learned AO/TPO/DRP erred in not considering the company Taal Tech India Pvt Ltd as comparable rejecting the submissions made by the appellant.*
- xv) *The Learned AO/TPO/DRP erred in considering the following companies as comparables rejecting the submissions / objections made by the appellant.*
- a) *Kals Information Systems Ltd*
 - b) *Rheal Software Pvt Ltd*
 - c) *Sybrant Technologies Pvt Ltd*
 - d) *Harbinger Systems Pvt Ltd*
 - e) *Orion India Systems Private Limited*
 - f) *Nihilent Technologies Ltd*
 - g) *Inteq Software Pvt Ltd*
 - h) *Persistent Systems Ltd*
 - i) *Infobeans Technologies Ltd*

- j) Thirdware Solutions Ltd*
- k) Infosys Ltd*
- l) Aspire Systems (India) Pvt Ltd*
- m) Cybage Software Pvt Ltd*
- n) C G VAK Software & Exports Ltd*
- o) R S Software (India) Ltd*
- p) Larsen &, Toubro Infotech Ltd*

11.1 Facts of the case are that the assessee is engaged in providing software services and technology solutions to its parent for products manufactured worldwide.

11.2 Wipro GE has entered into a master development agreement with GE Healthcare (GEHC), whereby Wipro GE provides software services. The software services are part of the GEHC Global Technology Operations. The services pertain to the development of software, which is vital in terms of the functionality of the medical products manufactured by GEHC. The services rendered are in the nature of coding to sub-system work and providing image solutions as well as IT service solutions including base support, business, product and infrastructure software across all technologies and home grown or purchased software. It also includes expertise in various technologies, implementation, monitoring and support of IT infrastructure and software solutions. Wipro GE also carries on operations by way of providing online support and developing support platforms.

11.3 Wipro GE provides engineering services including value-engineering services for Wipro GE product design and solving Wipro GE global's customer related design problems and issues. The services are in the nature of providing engineering drawing/designs (both 2D and 3D models) by using software like CAD, CAM etc. Wipro GE does not create any engineering software but utilizes the engineering software to generate designs/drawings.

11.4 The Margin of the assessee as computed by the TPO in the TP Order

Particulars	Rs.
Operating revenue	740,73,35,817
Operating Cost	677,49,39,480
Operating profit	63,23,96,337
OP/OC	9.33%

11.5 The Comparables selected by assessee and their margins are as under:

Sl No	Name of the Company	Wt. Avg (%)	Remarks
1	CAT Technologies Ltd	-14.47	Fails PBT \geq 0, hence rejected
2	Sasken Communication Technologies Ltd	-0.97	Functionally different, hence rejected
3	C G-VAK Software & Exports Ltd	0.07	Passed all the filters, hence accepted
4	Taal Tech India Pvt Ltd	3.01	Different Financial year ending (Jan-Dec), hence rejected
5	Mindtree Ltd	15.64	Fails Export/Sales >75% filter, hence rejected
6	R S Software (India) Limited	18.24	Passed all the filters, hence accepted
7	Larsen & Toubro Infotech Ltd	18.24	Passed all the filters, hence accepted
8	Tata Elxsi Ltd	25.11	Functionally different, hence rejected

Out of the 8 comparables selected by the assessee, the TPO accepted the 3 highlighted above and rejected 5 other comparables.

The final list of Comparables selected by TPO and their margins are as under:

Sl No.	Name of the comparable	OP/OC (%) Weighted Average
1	Kals Information Systems Ltd	8.60
2	E-Zest Solutions Ltd	10.87
3	Rheal Software Pvt Ltd	14.50
4	Sybrant Technologies Private Limited	14.74
5	Harbinger Systems Pvt Ltd	15.06
6	CG-Vak Software & Exports Ltd	18.50
7	R S Software (India) Ltd	20.87
8	Larsen and Toubro Infotech Ltd	24.83
9	Orion India Systems Private Limited	25.64
10	Nihilent Technologies Ltd	26.36
11	Inteq Software Pvt Ltd	28.20
12	Persistent Systems Ltd	30.89
13	Infobeans Technologies Ltd	32.42
14	Thirdware Solutions Ltd	36.90
15	Infosys Ltd	38.61
16	Aspire Systems (India) Pvt Ltd	39.28
17	Cybage Software Pvt Ltd	66.45
	35 th Percentile	18.50%
	Median	25.64%
	65 th Percentile	30.89%

11.6 The Computation of arm's length price by the TPO and the adjustment made is as under:

Particulars	Rs.
Arm's length price	851,20,33,963/-
Price received	740,73,35,817/-
Shortfall	110,46,98,146/-

11.7 The adjustment made by the TPO of Rs. 110,46,98,146/- in the Software Development Segment has been adopted by the AO in the Draft assessment order u/s 143(3) rws 144C of the Act dated 30.12.2019. The assessee filed objections before DRP on 27.01.2020. The assessee filed its written submissions before DRP on 29.01.2021 seeking inclusion and exclusion of comparables interalia on various filters. The DRP passed its directions u/s 144C(5) on 11.02.2021 and directed exclusion of M/s. E-Zest Solutions Ltd and inclusion of M/s.Sasken Communication Technologies Ltd as comparable. The AO passed the final assessment order u/s 143(3) rws 144C(13) and 144C(13) rws 143(3A) & 143(3B) of the Act dated 30.03.2021 retaining the TP adjustment in Software Development segment at Rs. 110,46,98,146/- as per draft assessment order.

11.8 Before the Tribunal the assessee has filed a chart seeking exclusion/inclusion of comparables on various grounds. The same are outlined hereunder.

11.9 The assessee is seeking exclusion of all the comparables chosen by the TPO. The assessee is seeking inclusion of **Sasken Communication Technologies Ltd** and **Taal Tech India Pvt Ltd** as comparables.

11.10 On the issue of turnover filter, the TPO has excluded companies having turnover of less than Rs.1 Crore. It is the view of the TPO in para 16 of the TP order that the exclusion of comparables on the basis of size and turnover of the companies is not justified in view of the decisions in Societe Generale Global Solution Centre P Ltd vs DCIT in IT(TP)A 1188/B/2011 and Capgemini India Pvt Ltd vs ACIT in ITA 7861/Mum2011. The DRP has held that comparables cannot be excluded on the ground of size and level of operations.

11.11 The assessee submitted that the ITAT Bangalore in the case of Fulcrum Fund Services (India) Pvt Ltd vs ITO in IT(TP)A 2521/B/2017 dt.12.04.2019 by considering wide range of decisions on this issue including that of Chryscapital Investment Advisors India (P) Ltd vs DCIT (held as obiter dicta) and the other decisions mentioned supra has held that the law laid down in Genisys Integrating System (India) Pvt Ltd. V. DCIT, ITA No.1231/Bang/2010 dt.05.08.2011 [152 TTJ 215/53 SOT 159] is the correct law on the application of turnover filter. In the case of Genisys the Tribunal has held that companies having turnover in the range of Rs.1crore to Rs.200 crores cannot be compared with companies having turnover above Rs.200 crores. The relevant observations of the Tribunal in the case of Fulcrum is extracted as hereunder:

“7.3. We have given a careful consideration to the rival submissions. The Bangalore Bench of the ITAT had an occasion to deal with an identical issue in the case of DCIT Vs. M/s. Northern Operating Services (supra), wherein the Tribunal came to the conclusion that – turnover was relevant criteria in choosing comparable companies and that a company, whose turnover is more than Rs. 200 Crores, cannot be compared with the company, whose turnover is less than Rs. 200 Crores. In Coming to the aforesaid conclusion, the Tribunal relied on the decision rendered by the ITAT, Bangalore Bench in the case of Autodesk India P. Ltd., Vs. DCIT (2018) [96 taxmann.com 263] (Bangalore-Trib) reviewing all the conflicting decisions on the point, and concluding that the application of turnover filter still holds good and has not been in any manner diluted by the decision of Hon'ble Karnataka High Court in the case of M/s. Acusis Software (I) Pvt. Ltd., Vs. ITO in ITA No. 223/2017, dt. 14-08-2018, following the relevant observations of the Tribunal, held as under:..”

11.12 Applying the said decision, the companies having turnover less than Rs.200 crores and more than Rs.2000 crores should be eliminated from the list of comparables as the assessee's turnover is Rs.740.73crores.

11.13 The assessee is seeking exclusion of the following 11 comparables on account of turnover filter.

Sl no	Company name	Turnover (in Crores)
1	Kals Information Systems Pvt. Ltd.	2.88
2	E-Zest Solutions Ltd	56.51
3	Rheal Software Private Limited	6.27
4	Sybrant Technologies Pvt. Ltd.	4.28
5	Harbinger Systems Pvt Ltd	71.68
6	C G- V AK Software & Exports Ltd.	10.24
7	R S Software (India) Ltd.	171.41
8	Larsen & Toubro Infotech Ltd.	5,847.13
9	Orion India Systems Private Limited	63.09
10	Inteq Software Private Ltd.	17.47
11	Infobeans Technologies Ltd.	61.93
12	Infosys Ltd.	54,153

11.14 The turnover of the above companies are far higher/lower than that of the assessee company. Since the assessee falls under category of companies having turnover between Rs.200crores to Rs.2000crores, the ld. A.R. submitted that the above comparables needs to be excluded.

11.15 In so far as the company **E-Zest Solutions** is concerned, the same has been rejected by the DRP on the ground of functional dissimilarity. Even on the ground of turnover filter, the ld. A.R. submitted that the AO/TPO may be directed to exclude the same if not already done.

11.16 Regarding the comparables **Persistent Systems Pvt. Ltd.** and **Thirdware Solution Ltd**, the assessee had objected before the TPO and DRP that the same are not functionally comparable, however the DRP rejected the objections of the assessee. The ld. A.R. submitted that this Tribunal in the case of SanDisk India Device Design Centre Pvt. Ltd in IT(TP)A 288/Bang/2021 dt.30.06.2022 has directed to exclude both the comparables Persistent Systems Pvt. Ltd. and Thirdware Solution Ltd from the list on the ground of functional dissimilarity. For this purpose, the ld. A.R. has extracted the relevant portion as under:

“17.7 He placed reliance on the decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT (supra) wherein this Tribunal following its decision in case of LSI India research development (P.) Ltd. vs. DCIT reported in [2021] 124 taxmann.com 83, excluded Persistent Systems Ltd., L&T Infotech Ltd., Thirdware Solutions and Infosys Ltd. by observing as under:

“3.2 This Tribunal in LSI India research development (P.) Ltd. v. DCIT (supra) observed in respect of persistent systems, L & T Infotech, Thirdware Solutions, Infosys Ltd. as under:

16. As far as the challenge by the assessee on exclusion of aforesaid 5 companies in ground No. 2(f), the ld. counsel for the assessee has brought to our notice a decision of Bangalore Bench of ITAT for the very same Assessment Year 2014-15 in the case of LG Soft India (P.) Ltd. v. DCIT [IT(TP) Appeal No. 3122 (Bang.) of 2018, dated 28-5-2019]. In this order rendered in a case of assessee rendering SWD services such as the assessee, the Tribunal excluded 3 out of 5 companies referred to in the earlier paragraph and remanded 1 company for fresh consideration with the following observations:-

"5. The Ld A.R submitted that M/s Infosys Ltd, M/s Persistent Systems Ltd and M/s Thirdware Solutions Ltd have been excluded by the co-ordinate bench in the assessee's own case in AY 2008-09 in IT(TP)A No. 1673/Bang/2012.

6. We notice that the co-ordinate bench has excluded M/s Infosys Ltd in AY 2008-09 by following the decision rendered by another co-ordinate bench in the case of 3DPLM Software Solutions Ltd (IT(TP)A No. 1303/Bang/2012 dated 28-11-2013, wherein the decision rendered in the case of Trilogy E Business Software India P Ltd (ITA No. 1054/Bang/2011) was followed and

it was held that M/s Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It was further observed that the break-up of revenue from software services and software product is not available. 6.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Infosys Ltd.

7. In AY 2008-09, the co-ordinate bench has excluded M/s Persistent Systems Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd (supra), where in it was held that M/s Persistent Systems Ltd is engaged in product development and product design services while the assessee is a software development service provider. Further, the segmental details were not available.

7.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Persistent Systems Ltd. We also notice that in AY 2008-09, the co-ordinate bench has excluded M/s Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that M/s Thirdware solutions Ltd is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available. 8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Thirdware Solutions Ltd.

17. As far as exclusion of Larsen & Toubro Infotech Ltd., is concerned, the Tribunal in the very same case of LG Soft (P.) Ltd. (supra) in another order dated 27-9-2019 in MP No. 95/Bang/2019 held that exclusion of Larsen & Toubro Infotech Ltd., was omitted to be adjudicated in the original order dated 28-5-2019 passed by the Tribunal referred in the earlier paragraph and held that Larsen & Toubro Infotech Ltd., is also not a comparable company because there were extraordinary events that occurred in the relevant previous year and that it possessed brand and intangibles and there was no segmental information of sub-contracting expenses". 3.3 There is nothing on record brought by the Ld. CIT. DR in order to establish that these are comparable with assessee that is a captive service provider which functions at the strict supervision and instructions by the AE's. Further we note that turnover criteria has to be applied with an upper limit which is not been considered by the Ld. TPO. The TPO has applied less than 1 crore turnover limit to eliminate the comparables however it failed to apply upper limit considering the functions performed assets owned and risk assumed by assessee under this segment for the year under consideration."

17.8 Before us, the Ld. DR has not been able to place anything on record contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Persistent Systems Ltd., L& T Infotech Ltd., Thirdware Solutions and Infosys Ltd. from the final list."

In view of the above decision, it is requested that the companies Persistent Systems Pvt. Ltd. and Thirdware Solution Ltd be removed from the list of comparables.

Regarding the comparable ***Nihilent Technologies Ltd*** the assessee had objected before the TPO and DRP that the same is not functionally comparable and regarding the comparable ***Aspire Systems (India) Private Limited*** the assessee had objected it is functionally dissimilar and fails the threshold limit of 15% RPT filter. The DRP rejected the objections of the assessee. It is submitted that the Hon'ble Bangalore tribunal in the case of SanDisk India Device Design Centre Pvt. Ltd in IT(TP)A 288/Bang/2021 dt.30.06.2022 has directed to exclude the comparables Nihilent Technologies Ltd and Aspire Systems (India) Private Limited from the list. Relevant portion is extracted hereunder:

“17.9 In respect of Nihilent Ltd., Infobeans Technologies Ltd. and Aspire Systems (India) Pvt. Ltd., Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT (supra) observed as under:

“Comparable Sought to be excluded by the assessee
Aspire System India Pvt. Ltd. (Aspire)

40. The assessee sought exclusion of Aspire from the final set of comparables for benchmarking SDS segment on the ground that it fails Related Party Transaction (RPT) filters as its RPT/ sales ratio is more than 25%. The assessee computed the significant related party transactions at 37.58% whereas the Ld. TPO computed it at 23.55%. The TPO is directed to recalculate the RPT/sales ratio by providing opportunity of being heard to the assessee. So this comparable is remitted back to the Ld. TPO to decide afresh.”

“Nihilent Analytics Ltd. (Nihilent)

44. The assessee sought exclusion of Nihilent on ground of its functional dissimilarity vis-à-vis assessee. We have examined the website information of Nihilent, made available by the assessee at page No.405 of the paper book, wherein it is mentioned that it is engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data science, cloud services etc.

45. Perusal of the disclosure of enterprise's reportable segment explanatory available at page No.A406 of the paper book shows that Nihilent is engaged in software development and consultancy, engineering services, web development and hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing and financials of Nihilent available at page No.A304, A405-A406 of the paper book shows that Nihilent has only one business segment and in the absence of segmental financials, as it is into diversified business, this company cannot be a valid comparable vis-à-vis assessee, who is a low risk entity working on cost + markup model. Hence, Nihilent is ordered to be excluded as a comparable.
Nihilent Ltd.

46. The assessee sought exclusion of Nihilent Ltd. as a comparable on the ground that it is functionally dissimilar vis-à-vis assessee. This objection was also raised before the Ld. DRP but rejected. The assessee relied upon website

of the company which is made available at page A412 of the paper book wherein Nihilent Ltd. is shown to be engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data signs, cloud services etc. The annual financials of this company available at page A412 & A413 of the paper book shows that it is rendering Enterprise transformation and change management, Digital transformation services and Enterprise IT services but segmental financials are not available as is apparent from its financials available at page A305, A412 & A413 of the paper book. When this company is into various segments but segmental financials are not available it cannot be a valid comparable vis-à-vis assessee which is a routine software development service provider working on cost + markup model, hence ordered to be excluded.....”

17.10 Perusal of the annual report, filed before us in respect of the above two comparables, we note that the segmental financials are not available in respect of Nihilent and Infobeans and the RPT in respect of Aspire Systems India Pvt. Ltd. is more than 25% being the threshold limit considered by the Ld.TPO. Nothing has been placed before us by the Ld.DR in order to take a different view. Respectfully following the Hon’ble Mumbai Tribunal, we direct the Ld.TPO to exclude Nihilent, Infobeans and Aspire Systems from the final set.”

In view of the above decision, it is requested that the companies Nihilent Technologies Ltd. and Aspire Systems (India) Private Limited be removed from the list of comparables.

Regarding the comparable Cybage Software Pvt. Ltd., the assessee had objected before the TPO and DRP that the same is not functionally comparable, lacks segmental information and has extraordinary high margins. However, the TPO and DRP rejected the objections of the assessee. It is submitted that the Hon’ble Pune tribunal in the case of Optiva India Technologies Pvt Ltd in ITA 194/Pun/2021 dt.21.07.2022 has directed to exclude comparable Cybage Software Pvt. Ltd on the ground of functional dissimilarity. Relevant portion is extracted hereunder:

“ Cybage Software

17.1 The assessee contends that this company is mainly Onsite service provider whereas the assessee is offsite service provider and therefore, functionally different. Further, there is incorrect reporting figures which are unreliable. This company is product development as well as R & D Intensive Company. The arguments of the assessee were not accepted by the A.O/T.P.O and the company was held to be comparable. The ld. A.R demonstrated through Annual Report at page 1804, as per the description of the business of this company that it is onsite service provider. Furthermore at page 1796 of the Annual Report this company is doing other computer related activities but nowhere software services are mentioned. On the other hand, the assessee is offsite provider and thus functionally different. We direct the A.O/T.P.O to exclude this company from the list of comparables.”

Similarly, the Hon’ble Hyderabad tribunal in the case of Infor (India) Pvt Ltd - IT(TP)A 198/Hyd/2021 dt.06.10.2021 has directed exclusion of Cybage Software. Relevant portion is extracted hereunder:

“4.3. Next come M/s.Thirdware Solution Limited and M/s.Cybage Software Private Limited which have already have been ordered to be excluded by the tribunal after holding the same to be functionally different than software development services and having abnormally average high margin; respectively.”

In view of the above decisions, it is requested that the company Cybage Software Pvt Ltd. be removed from the list of comparables.

The assessee has sought for inclusion of the following companies:

1) **Sasken Communication Technologies Ltd. -**

This company has been considered as a comparable in the TP report by the assessee. The TPO rejected this as a comparable on the basis of functional dissimilarity. The assessee prayed for inclusion of the company before the DRP. The DRP vide its directions dated 11.02.2021 in para 3.9.2 directed the AO/TPO to include the software services segment margin for the purpose of comparability. Relevant portion is extracted hereunder:

“ 3.9.2.1 Panel: Having considered the submissions, and on perusal of the annual report, we note that this company is engaged in providing Software services including network engineering services and is functionally comparable to the assessee. As per information in the annual report, the company has R&D activities & patents of its own which give rise to revenue stream for the company. However, the company has provided segmental information for its revenue from software services & products. Accordingly, we consider it appropriate to direct the TPO to include the software services segment margin for the purpose of comparability. AO is directed accordingly.”

Though the AO has mentioned in the final assessment order that the said comparable has been included it is not clear whether the AO/TPO has adopted the margins of software services segment alone. Hence it is requested that AO/TPO may adopt the directions of the DRP.

2) **Taal Tech India Pvt Ltd -**

This company has been considered as a comparable in the TP report by the assessee. The TPO rejected this as a comparable on the ground that it has different financial year ending. The DRP also upheld the same overlooking the submissions made and annual report provided by the assessee. The copy of the Balance Sheet and Profit & Loss account is enclosed as PB-II page 681-682 which indicates that the financial year ending is 31st March which is the case with the assessee. Hence it is prayed that the company may be directed to be included by the AO/TPO if it passes all other filters.

11.17 The final list of comparables after considering the above arguments are as hereunder:

Sl. No	Name of the Comparable company	(OP/OC) before WC Adjustment
1	Sasken Communication technologies ltd	1.47%
2	Taal Tech India Pvt Ltd	5.60%
	ARITHMETIC MEAN	3.54%

11.18 Keeping in view of the above, the ld. A.R. submitted that assessee's margin for the SWD segment is **9.33%** which is higher than the aforementioned adjusted margins of the comparable companies i.e, **3.54%**. In view of the above submissions, the ld. A.R. for the assessee submitted that the transaction is at arms length and therefore the TP adjustment made requires to be deleted in the interest of justice.

12. The ld. D.R. relied on the orders of the lower authorities.

13. We have heard the rival submissions and perused the materials available on record. The ld. A.R. submitted that assessee's margin is higher than the comparable margin. Hence, no adjustment is required and he drew our attention to the following chart:-

IT(TP)A No.285/Bang/2021
M/s. Wipro GE Healthcare Pvt. Ltd., Bangalore

WIPRO GE HEALTHCARE PVT LTD

ITA 285/B/2021 ; ASSESSMENT YEAR 2016-17

FINAL LIST OF COMPANIES SELECTED BY TPO AS COMPARABLE IN SOFTWARE SEGMENT (KINDLY REFER PAGE 60 OF TP ORDER, PB-I page 199)

Assessee's Turnover -
Rs. 740,73,35,817/-

Assessee's OP/OC - 9.33%

(PB-I page 146)

Sl. No.	Name of company	Comparable of	Turnover (in crs) Operating Revenue	OP/OC %	Comparable margin	Rejected as comparable On Grounds	Rejected as comparable in	Page/ Para
1	Kals Information Systems Pvt. Ltd.	TPO	2.88	8.60%		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II, page 675, para 7.3.1
2	E-Zest Sloutions Ltd.	TPO	56.51	10.87%		Functionally different	Rejected by the DRP on the ground of functional dissimilarity	PB-I , page 46
						Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II, page 675, para 7.3.1
3	Rheal Software Privaate Limited ('Rheal')	TPO	6.27	14.50		Fails Turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II, page 675, para 7.3.1
4	Sybrant Technologies Pvt. Ltd.	TPO	4.28	14.74		Fails Turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
5	Harbinger Systems Pvt Ltd	TPO	71.68	15.06		Fails Turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
6	C G- V AK Software & Exports Ltd.	TPO & Assessee	10.24	18.50		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
7	R S Software (India) Ltd.	TPO & Assessee	171.41	20.87		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
8	Larsen & Toubro Infotech Ltd.	TPO & Assessee	5,847.13	24.83		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
9	Orion India Systems Private Limited	TPO	63.09	25.64		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1

IT(TP)A No.285/Bang/2021
M/s. Wipro GE Healthcare Pvt. Ltd., Bangalore

Sl. No.	Name of company	Comparable of	Turnover (in crs) Operating Revenue	OP/OC %	Comparable margin	Rejected as comparable On Grounds	Rejected as comparable in	Page/ Para
10	Nihilent Technologies Ltd.	TPO	251.22	26.36		Functionally different & Lacks segmental details	SanDisk India Device Design Centre Pvt. Ltd - IT(TP)A 288/Bang/2021 dt.30.06.2022	PB-III page 1107 to 1109, para 17.9 & 17.10
11	Inteq Software Private Ltd.	TPO	17.47	28.2		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
12	Persistent Systems Pvt. Ltd.	TPO	1,463.81	30.89		Functionally different	SanDisk India Device Design Centre Pvt. Ltd - IT(TP)A 288/Bang/2021 dt.30.06.2022	PB-III page 1105 to 1107, para 17.7 & 17.8
13	Infobeans Technologies Ltd.	TPO	61.93	32.42		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
14	Thirdware Solution Ltd.	TPO	213.89	36.9		Functionally different & Lack of segment details	SanDisk India Device Design Centre Pvt. Ltd - IT(TP)A 288/Bang/2021 dt.30.06.2022	PB-III page 1105 to 1107, para 17.7 & 17.8
15	Infosys Ltd.	TPO	54,153.00	38.61		Fails turnover filter	Fulcrum Fund Services (India) Pvt Ltd - IT(TP) A 2521/B/2017 dt.12.04.2019	PB-II page 675, para 7.3.1
16	Aspire Systems (India) Private Limited	TPO	230.80	39.28		Fails RPT filter	SanDisk India Device Design Centre Pvt. Ltd - IT(TP)A 288/Bang/2021 dt.30.06.2022	PB-III page 1107 to 1109, para 17.9 & 17.10
17	Cybage Software Pvt. Ltd.	TPO	726.48	66.45		Functionally different	Optiva India Technologies Pvt Ltd - ITA 194/Pun/2021 dt.21.07.2022	PB-III page 1132, para 17.1
						Abnormal High Margins	Infor (India) Pvt Ltd - IT(TP)A 198/Hyd/2021 dt.06.10.2021	-

35th Percentile	18.50	
Median	25.64	
65th Percentile	30.89	

LIST OF COMPANIES SEEKING INCLUSION AS COMPARABLE IN SOFTWARE SEGMENT

Sasken Communication Technologies Ltd.	Assessee	400.18	1.47	1.47		As per DRP directions only software services segment margin to be included for the purpose of comparability
						EIT Services India Pvt Ltd - IT(TP)A 210/Bang/2021 dt.22.08.2022
Taal Tech India Pvt. Ltd.	Assessee	49.79	5.60	5.60		Rejected by TPO/DRP on the ground that it has different financial year ending (PB-I page 45). The same is erroneous as the financial statements are prepared as at 31st March (Refer PB-II Page 681-682)
Arms Length Margin				3.54		

13.1 In view of the above, we remit the issue to the file of AO to verify whether margin declared by the assessee is higher than the margin of the above comparables and if the margin of those comparables is lower than the assessee, then there is no requirement of any TP adjustment to be made. Directed accordingly.

Ground No.15:

14. Ground No.15 of the assessee's appeal is reproduced as under:

The Learned AO/DRP erred in disallowing deduction claimed of Lease payments on financial lease of Rs. 26,12,77,130/- under section 37 of the I T Act.

14.1 Facts of the case are that during the course of assessment proceedings the assessing officer noticed claim of deduction of its. 26,12,77,130/- under the head lease payments on financial lease. The assessee was asked to provide details of such payments made and why it should be allowed as a deduction. The assessee didn't furnish any reply before the AO. The assessing officer treated the transaction as a financial lease which involved purchasing of an asset with the help of a loan and treated it as a capital expense. Accordingly, the claim of deduction of Rs.26,12,77,103/- was disallowed. Before the ld. DRP, the assessee has submitted that the details sought were voluminous in nature and time given to comply notice was very short, therefore the assessee sought time vide its reply dated 26.12.2019 before the ld. DRP, which is as under:

'The above dated notice has been served on the assessee on the same day at 13.19.33 IST seeking compliance by 26.12.2019 at 4.00pm, thus giving hardly any time for the assessee to comply with the notice as 25th being Christmas holiday and 26th is the only working day available for the assessee to comply with the voluminous data and information sought by your good selves. The assessee submits that sufficient and reasonable opportunity and time be given as required under law so as to enable it to comply with notice as the required information is voluminous; not available in the required format and not readily available as the

the same has to be sourced / assimilated from various departments, within the organisation. Hence the assessee request your goodselves to kindly grant three weeks time to furnish the same in the interests of justice and oblige."

14.2 The assessee has claimed before the panel that deduction of Rs.26,12,77,130/- is towards lease payment on assets taken on lease whose life is short tenure in nature. The entire lease payment has been claimed as allowable expenditure in the computation of income. Such claim is consistent with the past practice for the earlier years which has been accepted by the department. The assessee claimed that it has followed the Accounting Standard -19-Leases issued by the ICAI. The assessee has submitted before the Id. DRP that the amount of Rs.26,12,77,130/- consists of Rs.22,10,20,121/- towards principal repayment of lease and Rs.4,02,57,009/- towards interest paid on finance lease. The assessee has disallowed the sum of Rs.4,02,57,009/- paid towards interest on finance lease. The assessee is aggrieved as neither lease rental is allowed nor the payment of interest and depreciation on the assets,

14.3 The Id. DRP observed that the contention of the assessee is that the AO has not given sufficient time to file the details and the details are voluminous in nature. However, the assessee has not filed these details before the panel as well. If the assessee claims that it was not given sufficient time by the AO to file the voluminous details., it should have filed the details at least before the panel to substantiate it's argument. Nothing prevented the assessee from filing before the panel. As relevant details have not been filed before the Id DRP, the submission made by the assessee remained unsubstantiated. Although sufficient time has lapsed since filing of objection before the panel and the matter was heard several times by the Id. DRP, yet the assessee has filed nothing beyond written submission which remained unsubstantiated for want of

supporting documents. As the assessee has not produced details such as lease agreements and other supporting evidences, the Id. DRP was not in a position to agree with the arguments of the assessee and accordingly, rejected the claim of the assessee that the action of the AO is contrary to the law and the addition required to be vacated and accordingly the Id. DRP rejected this ground of appeal.

15. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in the case of Texas Instruments (India) Pvt. Ltd. Vs. JCIT in ITA Nos.852 & 831/Bang/2017 dated 29.6.2022, , wherein held as under:

39. *Ground No.6 is regarding disallowance of lease rentals paid on equipment and motor cars. The grounds raised by the assessee in this regard are as follows:-*

“6.1 The learned CIT(A) and the AO have erred in law and on facts in disallowing an amount of Rs 25,500,765 and Rs 77,520,788 pertaining to lease rentals paid by the Appellant on account of assets taken on lease being equipment and motor car respectively by treating the same as capital in nature.

6.2. Without prejudice to the above, the learned AO has erred on facts in disallowing an amount of Rs 25,500,765 pertaining to lease rentals on equipment as against the amount of Rs 23,059,332 claimed by the Appellant in the computation of income.

6.3. The learned CIT(A) and the AO have erred in law and on facts in disregarding the reliance placed by the Appellant on the decision of the Honourable Supreme Court in the case of M/s ICDS Limited Vs CIT (350 ITR 527).

6.4. Without prejudice to the above, the CIT(A) and the AO have erred in law and on facts in failing to allow depreciation in respect of such assets even though it has been held that lease rentals are capital expenditure in nature.

6.5. The learned AO has erred in law and on facts in proposing to disallow the lease rentals under section 40(a)(ia) of the Act by concluding that the lease rentals, if treated to be as revenue expenses would be liable to Tax Deduction at Source ("TDS") under section 1941 of the Act, without

appreciating the fact that the expense does not warrant tax withholding under the provisions of section 194I of the Act.”

40. *As far as this ground is concerned, the material facts are that the assessee entered into a lease agreement with IBM Global Services India Pvt. Ltd., whereby it took certain equipment on lease. This agreement is dated 29.08.2005. A copy of the lease agreement is available on pages 181 to 189 of the assessee's PB. The assessee also entered into a lease agreement in respect of certain vehicles with GE Capital Transportation Financial Services Ltd. This agreement is dated 28.12.2004 , which is placed at page Nos.568 to 585 of the assessee's PB. Another lease agreement for vehicles dated 21.03.2007 was entered into by the assessee with GE Mani Financial Services Ltd., which is at pages 586 to 603 of the assessee's PB. Under this agreement also, the assessee took certain vehicles on lease. The assessee paid lease rentals amounting to Rs.2,30,59,332 towards lease rentals for lease of equipment and a sum of Rs.7,75,20,,788 towards lease of motor cars.*

41. *In view of Accounting Standards AS-19 issued under the Companies (Accounting Standards) Rules, 2006, the assessee in its books of accounts treated itself as the owner of the asset and capitalized the value of the equipment as well as the vehicles in its books of accounts. Depreciation was computed and debited in the P&L A/c. The following accounting treatment was adopted by the assessee as per AS 19, in the case of finance lease, the lessee (to whom significant risks and rewards have been transferred) would for all practical purposes be treated as the owner of the asset and expenditure on the same shall be capitalised in his books, while the lessor would not be considered as the owner, but the lease rentals received by the lessor shall be recorded as revenue in its books of accounts. In summary, the accounting treatment prescribed for finance leases for a lessee is as follows:-*

- *The assets taken on finance lease are capitalised in the books of accounts of the lessee and depreciation is computed in the books of accounts. However, the value at which the purchase is recorded does not contain margin on sale of the lessor;*
- *This margin is accounted by way of interest in the books of the lessee (ie finance lease):*
- *The monthly instalments paid by the lessee are towards principal and interest charges components –*
 - ***The interest component is booked as finance charges in the books of accounts; and The principal amount is reduced from the lessor's account in the books of the lessee;***
 - ***Any profit / loss on account of disposal of the leased asset are to be charged to the profit and loss account.***

42. *As far as Tax treatment of finance lease for income tax purposes is concerned, as per Circular No. 2 dated February 9, 2001 ("the Circular") issued by the Central Board of Direct Taxes ("CBDT"), pertaining to finance lease arrangements, it has been clarified that the provisions of AS 19 shall not be applicable for tax purposes. This Circular seeks to confirm that the introduction of AS-19 will not have any impact*

on the tax treatment for finance leased assets in as much as the depreciation allowance will be available to the lessor, if he is the owner of the asset (in accordance with the contract between the lessor and the lessee) and if he satisfies the provisions of section 32 of the Act. The Circular therefore, essentially confirms that the tax treatment for leased assets will not get affected by accounting treatment prescribed by AS-19. The above tax treatment has also been upheld by the Supreme Court in its decision in the case of ICDS Limited Vs CIT (350 ITR 527) wherein Hon'ble Supreme Court has held that in a leasing transaction, the lessor would be entitled to claim depreciation under section 32 of the Act on the leased assets and the lessee would be entitled to deduction with respect to the lease rentals. Given the above, the tax treatment of the assets taken on finance lease (both equipment and car lease) in the case of lessee was as summarised below.

- The depreciation on the leased assets which are capitalised in the books is added back to the taxable income;*
- Interest component which is already debited in the books as finance charges is added back to the taxable income;*
- The entire monthly instalments (which includes the interest charges) is claimed as deduction from the taxable income;*
- Any profit / loss arising on account of disposal of the leased asset which is charged to the profit and loss account are to reduced / added back respectively to the taxable income.*

43. In light of the above, the Assessee submitted that the Assessee has made the following adjustments (on account of the leased assets) to its net profits to arrive at its taxable profits:-

- The depreciation on assets acquired under finance lease is added back to net profits;*
- The finance charges of Rs 15,250,304 have been added back to the net profits;*
- The profit of Rs 5,570,701 on account of the foreclosure of the lease has been excluded from the net profits; and*
- The aggregate amounts of monthly instalments amounting to Rs 77,520,788 towards vehicles and Rs 23,059,332 towards equipment have been claimed as a deduction.*

44. The AO however, disallowed the claim of the assessee for deduction on account of lease rentals for the following reasons:-

- > The Assessee is the owner of the assets acquired under finance lease. Therefore, Assessee is only eligible to claim depreciation on the assets acquired under finance lease and not the lease rental paid towards acquisition of these assets;*

- > *If the Assessee claims the lease rentals as revenue expenditure, the Assessee ought to have debited the same to profit and loss account. An expenditure not debited to profit and loss account cannot be claimed as revenue expenditure;*
- > *The assessee has not deducted tax on the lease rental paid under section 194I of the Act. Therefore, lease rentals are disallowed under section 40(a)(ia) of the Act;*
- > *The Assessee and the lessor have colluded with each other, wherein both the parties have made undue claims with an intention to suppress their profits.*

45. *On appeal by the assessee, the CIT(A) upheld the order of the AO. Aggrieved by the order of the CIT(A), the assessee has preferred ground No.6 before the Tribunal.*

46. *We have heard the rival submissions. We have also perused copies of the lease agreement entered into between the assessee and the lessor. It is clear from the terms of the agreement that the assessee was only a lessee and the lessor was the owner of the equipment as well as the vehicles. The AO in the order of assessment has culled out certain clauses of the agreement and came to the conclusion that the assessee is the owner of the assets and the lease rentals paid was nothing but an expenditure paid for acquiring an asset which was to be regarded as a capital expenditure. This conclusion of the AO, in our view, is clearly erroneous. Even assuming that the expenditure has to be regarded as a capital expenditure, the AO ought to have allowed depreciation to the assessee. In this regard, we find that in the computation of total income which is at page 52 of the assessee's PB that the assessee has added to the profit as per the P&L A/c the finance charges on lease and reduced lease rentals paid. Therefore, whatever be the position with regard to the books of account in compliance with AS-19; as far as computation of the total income for the purpose of the Act is concerned, the assessee has made claim only for deduction on account of lease rentals paid. There is no basis for the Revenue authorities to come to a conclusion that the assessee has adopted a colourable device with a view to gain tax advantage. In this regard, we find that the AO as well as the CIT(A) have quoted various clauses of the lease agreement out of context, ignoring the main clause in the agreement which clearly lays down that the assessee is only a lessee and the lessor is the owner of the assets leased. In such a scenario, the conclusion of the Revenue authorities cannot be sustained. The assessee is entitled to claim deduction on account of lease rentals paid as it is a Revenue expenditure.*

47. *In so far as the applicability of the provisions of section 40(a)(ia) of the Act is concerned, the Hon'ble High Court of Karnataka in assessee's own case on an identical issue for Assessment Year 2008-09 in the decision reported in [2021] 127 taxmann.com 59 (Karnataka) held that neither provisions of 194I nor 194C of the Act are attracted to lease financing of motor vehicles and therefore there could be no disallowance under section 40(a)(ia) of the Act. In so far as the applicability of provisions of section 40(a)(ia) of the Act in respect of lease rentals paid for lease of equipment is concerned, it is seen from the submission made by the Assessee before the CIT(A) at page 672 of the Assessee's PB that the Assessee has duly deducted tax at source on payment of lease rentals. On a perusal of the order of the Revenue authorities, we do not find any specific*

discussion on this issue. In these circumstances, we deem it fit and proper to remand the question whether the lease rentals were subjected to TDS by the Assessee. The AO will afford due opportunity of being heard being to the Assessee. Thus, ground No.6 is partly allowed.

15.1 In view of the above, taking a consistent view, we remit this issue to the file of AO/TPO on similar lines. This ground of appeal is partly allowed.

Ground No.16:

16. Ground No.16 of the assessee's appeal is reproduced below:

The Learned AO/DRP erred in disallowing Miscellaneous Expenses of Rs. 16,27,83,384/- under section 37 of the I T Act.

16.1 Facts of the case are that during the course of assessment proceedings the AO noticed an expense of Rs.16,27,83,384/- classified as "miscellaneous expenses" under the head "other expense". In response to AO's notice asking why such expenses should be allowed, no reply was furnished by the assessee. As no reply was furnished, the assessing officer added back the amount of Rs 16,27,83,384/- being not laid out wholly and exclusively for the purpose of business. Before the ld. DRP, the assessee has submitted that the details sought were voluminous in nature and time given to comply with the notice was very short. Therefore, the assessee sought time vide its reply dated 26.12.2019. The assessee has submitted before the ld. DRP the details of the miscellaneous expenses of Rs 16,27,83,384/- along with TDS details in an email. The assessee submitted that the same is provided only in soft copy as there are 4.72 lakh line items (approx.) On Perusal of the submissions made by the assessee, the ld. DRP observed that the details of miscellaneous expenditure along with evidence of TDS made could not be submitted before the AO due to paucity of time as well as voluminous nature of the transaction. The assessee was directed by the ld. DRP to produce the same before the AO and in case the

AO finds that these expenditures have been laid out wholly and exclusively for the purpose of business, the same may be allowed accordingly. Against this, the assessee is in appeal before us.

17. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, it is observed that similar issue came for consideration before this Tribunal in IT(TP)A No.703/Bang/2021 dated 7.10.2022, wherein held as under:

“64. The AO vide notice u/s 142(1) dated 10.12.2019 sought the detail regarding miscellaneous expenses to be furnished in the required format. The assessee submitted the detail sought for in the required format alongwith TDS made vide reply dated 26.12.2019 as extracted hereunder:

“The details of Miscellaneous Expenses and the TDS made thereon are enclosed as Annexure-7... Further the statutory auditors after going through the books and records have in their Tax audit report have certified that TDS has been deducted, hence the assessee prays that no disallowance be made in this regard in the interests of justice. The assessee has been deducting tax at source and has also been filing the required annual/ quarterly returns as per law and requests your honour to kindly verify the factum of deduction of tax at source from the records available with the department...”

64.1 However the AO has made the disallowance for want of documentary evidence. The DRP rejected the objections of the assessee and upheld the action of the AO.

64.2 The disallowance has been made inspite of submitting all the details and particulars which has been duly noted by the AO. The entire breakup of expenditure including the name of the party, amount, TDS made alongwith description is available at paperbook-II page 396. The AO did not ask for any other evidence or detail. The notice u/s 142(1) on this issue does not bring out any lapse on the part of the assessee to submit any detail/evidence. This is a case wherein the AO has made an addition without any justification and for no lapse on the part of the assessee. The details furnished by the assessee are self-explanatory and has been incurred wholly and exclusively for the purpose of business and is allowable u/s 37 of the Act. Hence the addition has to be deleted.

65. After hearing both the parties, we are of the opinion that assessee has to establish the genuineness of the expenditure by filing the requisite details. In the present case, assessee produced the recipient's details along with details of TDS. Had the AO have any doubt, he should have made further enquiry by summoning the respective party, which he failed to do so. Hence, in our opinion, the expenditure cannot be disallowed only on surmises and conjectures. Accordingly, we allow the ground taken by the assessee.”

17.1 In view of the above order of the Tribunal, we remit this issue to the file of AO/TPO to verify in the light of above decision. Ordered accordingly.

Ground No.17:

18. Ground No.17 of the assessee's appeal is reproduced as under:

'The Learned AO/DRP erred in disallowing the written off receivables and advances of Rs. 1,63,36,390/- without objectively considering the explanation offered by the assessee.

18.1 The ld. DRP observed that the AO noticed from the profit and loss account of the assessee that the assessee has debited Rs.17.34 crore in respect of provision of doubtful receivable and advances under the head "other expenses" out of this amount the assessee has added back Rs. 15,70,63,610/- in the computation of income. Accordingly, the AO asked to explain the difference between the provision debited in the P & L account and the provision added back in the computation of income. Since no reply was received from the assessee, the assessing officer added back the difference being Rs.1,63,36,390/- u/s 36(1)(vii) of IT Act.

18.2 Before the ld. DRP, the assessee has submitted as under:

The difference of Rs. 1,63,36,390/- has arisen due to adjustments made on the following two issues:

a. Obsolescence; In relation to provision for obsolescence, for the purpose of tax computation under normal provisions, the same is treated as an allowable expenditure and no adjustment is made. Therefore, the amount of Rs.2,01,86,702/- incorrectly accounted under provision for doubtful receivables and advances is reduced from the provision. Further, for the purpose of MAT, the aforesaid amount is added along with the existing provision for obsolescence amounting to Rs. 15,24,18,889/-. Thus an amount of Rs.17,26,05,591/- (Rs. 15,24,18,889 + 2,01,86,702) has been disallowed towards provision for obsolete inventory.

b. Interest income: An amount of Rs.38,42,222/- pertaining to interest income on FD was incorrectly accounted under section provision for doubtful receivables and advances. The same being interest in nature, the provision is increased to such extent and the corresponding income is reflected under 'Income from Other Sources'. Therefore, considering the above two adjustments, the final amount disallowed under provision for doubtful receivables and advances is Rs.15,70,63,610/-. Since the assessee has explained the difference, it is requested that the disallowance being unwarranted be deleted in the interest of justice."

18.3 The assessee was asked to substantiate its arguments with documentary evidences and submit necessary reconciliation in support of his argument. However, no documentary evidences and reconciliation statement could be filed before the Id. DRP, which substantiates that assessee's argument. As the assessee has not discharged its primary onus, Id. DRP found it difficult to agree with the contention of the assessee. Accordingly, the Id. DRP upheld the disallowance of Rs. 1,63,36,390/-made by the Assessing Officer.

19. We have heard the rival submissions and perused the materials available on record. The main contention of the Id. A.R. is that the AO has not followed the Id. DRP's order and requested to give a direction to AO/TPO to pass consequential order in conformity with the Id. DRP's order. We accede to the request of th assessee's counsel and accordingly, the issue is remitted to the AO/TPO to pass consequential order in conformity with the order of the Id. DRP.

Ground Nos.18 to 20:

20. Ground No.18 to 20 of the assessee's appeal are reproduced as under:

18. The Learned AO / DRP erred in disallowing the following provisions for expenses amounting to Rs. 41,76,13,362/- on an entirely unsustainable reason.

<i>Legal and Professional</i>	<i>23,65,54,350/-</i>
<i>Advertisement and sales</i>	<i>10,92,813/-</i>
<i>Repairs and maintenance</i>	<i>59,19,766/-</i>
<i>Dealer's Commission</i>	<i>17,40,46,433/-</i>
<i>Total</i>	<i>41,76,13,362/-</i>

19. Without prejudice, the AO having held that the aforesaid Rs.41,76,13,362/- is disallowed on a protective basis has added on a substantive basis while computing the income in para 9 and has also issued a demand notice levying full tax and interest on the said income. Thus, the order of the AO is manifestly inconsistent.

20. Alternatively, the AO/DRP failed to appreciate and consider that if payees /receivers /deductees have paid the tax then no disallowance can be made u/s 40(a)(ia) of the Act.

20.1 Facts of the case are that during the course of assessment proceedings the AO vide his SCN dt.24.12.2019 sought details and computation of provisions made in respect of various expenses to be complied by 26.12.2019. Since the time given to comply with the notice was very short, the assessee sought time vide its reply dt.26.12.2019. However, the AO disallowed the sum of Rs.41,76,13,362/- on estimate and protective basis for the reason that no details were furnished by the assessee. The manner of computation by the AO are at page 7 of the draft assessment order. The same is extracted hereunder:

Sl No	Name of the expenses	Expenses shown for AY 2015-16	Provisions made by the assessee in AY 2015-16	Expenses shown for AY 2016-17	Provisions determined for AY 2016-17
1	Legal and professional fees	112,84,00,000	16,72,58,556	159,59,00,000	23,65,54,350
2	Advertisement and sales promotion	23,62,00,000	10,93,276	23,61,00,000	10,92,813
3	Repair and maintenance	31,06,00,000	57,58,470	31,93,00,000	59,19,766
4	Dealer's Commission	23,31,00,000	8,95,78,767	45,29,00,000	17,40,46,433
	TOTAL				41,76,13,362

20.2 The assessee is aggrieved by the disallowance as the same was done without providing adequate, reasonable and sufficient opportunity as required under law and the Act.

20.3 Before the DRP, the assessee submitted the details of the provisions made for AY 2016-17 which is as under:

Particulars	Rs.
Legal and Professional fees	23,87,20,611
Advertisement and Sales promotion	2,62,71,514
Repairs and Maintenance - Building	10,76,60,089
Repairs and Maintenance – Plant & machinery	19,32,810
Repairs and Maintenance - others	52,94,053
Dealer Commission	4,17,98,786
Total	42,16,77,863

20.4 The assessee submitted that during the impugned assessment year it had made provisions for expenses of Rs.42,16,77,863 in the nature of legal & professional fees, Advertising and sales promotion, Repairs and maintenance and dealer commission. Such amount has been reversed in the subsequent year and offered to tax in the year of reversal. Based on the above, the assessee submitted that the aforesaid amount, being in the nature of provision, the same should not be disallowed on the ground of non-deduction of taxes at source. The provision made was not credited to any party's or individual account, as it was not clear to whom payment was required to be made. Further, if the assessee was required to deduct TDS, it would not be able to issue Form 16A to the payee as the payee were not known while

creating such provisions.

20.5 Reliance in this regard is placed by the ld. A.R. on the decision of Delhi Tribunal in the case of Apollo Tyres Ltd vs. DCIT [2017] 78 taxmann.com 195 wherein it was held that where assessee-company could not ascertain identity of payees while making provision for expenditure under several heads of income at year end, assessee was not required to deduct tax at source on such provision.

20.6 Also, reliance is placed by the ld. A.R. for the assessee on the decision of Chennai Tribunal in the case of Dishnet Wireless Limited vs. DCIT in ITA Nos. 320-329/Mds/2014 wherein it was held that where the payee couldn't be identified, no liability for TDS shall arise. Similar view was also taken by Mumbai Tribunal in the case of Prizer Ltd vs. ITO in ITA No. 1667/Mum/2010.

20.7 The assessee further submitted to the fact that on mere creation of provision based on estimate, no income could have been accrued in the hands of the payee/ deductee and hence, there could be no liability to deduct tax. Reliance in this regard is placed by the ld. A.R on the decision of Jurisdictional High Court in the case of Karnataka Power Transmission Corporation Ltd vs. DCIT [2016] 67 taxmann.com 259 wherein it was held that no liability to deduct tax at source shall arise till the sum is chargeable to tax in India. Same view has been followed by the Jurisdictional Tribunal in the case of TE Connectivity India Pvt. Ltd vs ITO in ITA No. 3/Bang/2015 wherein the Tribunal held that the company is not liable to deduct tax at source as no income has accrued in the hands of the payee. Similar view has also been taken by the Jurisdictional Tribunal in the case of Bosch Ltd vs. ITO in ITA No. 1583/Bang/2014.

20.8 The AO has relied on the DRP's orders for the earlier years in AY's 2012-13, 2013-14 & 2014-15 for making the said disallowance. The Tribunal for the AY's 2013-14 to 2015-16 has set aside this issue and remitted back to AO.

20.9 In view of the above facts and relying on the above mentioned decisions, the assessee requested that the disallowance made based on estimate or protective basis is untenable and requires to be deleted in the interest of justice.

21. After hearing both the parties, we are of the opinion that similar issues in ground Nos.18 to 20 came for consideration before this Tribunal as follows:

(i) Ground No.18 in assessee's own case in IT(TP)A No.2525/Bang/2017 dated 23.3.2018 for the AY 2013-14 wherein held as under:

4. "Having carefully examined the orders of the lower authorities and the orders of the Tribunal for the AYs 2010-11 to 2012-13, we find that in the earlier years also, the DRP did not admit the additional evidence filed before him and the Tribunal for that reason set aside the order of the DRP and restored the matter to the TPO/AO to re-adjudicate the issues raised before them after affording opportunity of being heard to the assessee. Copies of the orders of the Tribunal are placed on record. From a careful perusal of the orders of the TPO, we find that he started the proceedings from 28.07.2016 and concluded it on 25.10.2016 within a period of less than 3 months; whereas the DRP started its proceedings on 30.01.2017 and concluded it on 22.09.2017 after taking almost 8 months. Before the DRP the assessee has filed additional evidence on 29.08.2017 but it was not admitted by the DRP having observed that these evidence should have been filed before the TPO. Without looking to the additional evidence, the DRP has adjudicated the issues and confirmed the order of the TPO. In the earlier years also, the DRP did not admit the additional evidence and confirmed the order of the AO and the Tribunal in all these years set aside the order of the DRP and restored the matter to the AO/TPO to re-adjudicate the issues raised before the Tribunal afresh, after affording opportunity of being heard to the assessee. In all these years, the issues are almost common, therefore, we are of the view that if we express our views on any of the issues, the proceedings pending in earlier years before the TPO/AO would get affected and there would be no independent application of the mind of the AO/TPO. Under these circumstances, we are of the view that let this matter also go back to the AO/TPO to re-adjudicate the issues raised before us afresh, after

affording opportunity of being heard to the assessee. Accordingly, we set aside the order of the DRP and restore the matter to the AO/TPO to re-adjudicate the issues raised before us after affording opportunity of being heard to the assessee in the light of additional evidence filed before the DRP.

5. *In the result, the appeal of the assessee stands allowed for statistical purposes.”*

21.1 Keeping in view of the above decision, ground No.18 of the assessee's appeal is remitted to decide afresh in the light of decision cited (supra).

(ii) Ground No.19:- We are of the opinion that this issue came for consideration in assessee's own case in IT(TP)A No.3154/Bang/2018 dated 6.9.2019 for the AY 2014-15, wherein held as under:

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

5. *It has been submitted that ground no.1-12 are general in nature and therefore, do not require adjudication. Ld.AR has filed before us a chart detailing manner in which the grounds in present appeal are covered by orders of this Tribunal for earlier years which is annexed as **Annexure-I**. As submitted by Ld.AR, we have perused all decisions passed by this Tribunal in assessee's own case for assessment years 2005-06 to 2013-14 and found that issues in present appeal are common with earlier years and have been set aside to Ld.TPO on the ground that TPO as well as DRP failed to consider objections raised by assessee. In respect of transfer pricing addition made by Ld.AO. It is observed that DRP/TPO for year under consideration did not consider objections raised by assessee against comparables selected by Ld.TPO and simply followed DRP directions issued for AY 2013-14. As AY: 2013-14 has been set aside by this Tribunal, we deem it fit and proper to remit the issues to file of Ld. AO/TPO for taking necessary action of passing a speaking order by granting fair opportunity to assessee of being heard. It is also observed that all these issues are pending before lower authorities and we find no reason to adjudicate these issues at this stage. Accordingly, following earlier orders passed by this Tribunal in assessee's own case, we set aside all issues to Ld.AO for re-adjudication of issues in the light of the findings given in earlier years.**(Refer Annexure – I)***

6. *In the result appeal filed by assessee stands allowed for statistical purposes.”*

21.2 Keeping in view of the above decision, we remit this issue in ground No.19 to the file of AO/TPO for reconsideration in the light the above decision.

21.3. Ground No.20:- We are of the opinion that this issue came for consideration in assessee's own case in IT(TP)A No.2442/Bang/2019 dated 11.12.2020 for the AY 2015-16, wherein held as under:

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

6. It has been submitted that Ground no. 1-12 are general in nature and therefore, do not require adjudication. Ld.AR has filed before us a chart detailing manner in which the grounds in present appeal are covered by orders of this Tribunal for earlier assessment years annexed as Annexure-I. As submitted by Ld.AR, we have perused all decisions passed by this Tribunal in assessee's own case for assessment years 2005-06 to 2014-15 and found that issues in present appeal are common with earlier years and have been set aside to Ld.TPO on the ground that Ld.TPO as well as DRP failed to consider objections raised by assessee.

7. In respect of transfer pricing addition made by Ld.AO. It is observed that DRP/TPO for year under consideration did not consider objections raised by assessee against comparables selected by Ld.TPO and simply followed DRP directions issued for AY 2014-15. As AY: 2014-15 has been set aside by this Tribunal, we deem it fit and proper to remit the issues to file of Ld.AO/TPO for taking necessary action of passing a speaking order by granting fair opportunity to assessee of being heard. It is also observed that all these are pending before lower authorities and we find no reason to adjudicate these issues at this stage. Accordingly, following earlier orders passed by this Tribunal in assessee's own case, we set aside all issues to Ld.AO for re-adjudication of issues in the light' of the findings given in earlier years. (Refer Annexure 1).

7. In respect of Ground No.16, being disallowance of provision for onerous contract amounting to Rs.60,00,000/-. Ld.AR could not prove from the records that the same has been debited to profits & Loss account. Accordingly we reject this ground. However, assessee may claim such amount in relevant year of Accrual. Accordingly Ground No.16 stands dismissed.

8. In the result appeal filed by assessee stands partly allowed for statistical purposes."

21.4 We remit this issue in ground No.20 to the file of AO/TPO for reconsideration in the light of the above decision.

22. Ground No.20 of the assessee's appeal is reproduced below:

Alternatively, the AO/DRP failed to appreciate and consider that if payees /receivers /deductees have paid the tax then no disallowance can be made u/s 40(a)(ia) of the Act.

22.1 This ground is infructuous in view of our findings in ground Nos.18 to 20.

Ground No.22:

23. Ground No.22 of the assessee's appeal is reproduced below:

The Learned AO/DRP erred in not giving TDS credit amounting to Rs. 1,58,77,886/- and no reasons or explanations have been given for denying the credit.

23.1 After hearing both the parties, we are of the opinion that this requires verification by the AO/TPO on the basis of TDS deduction made by the respective parties. Accordingly, this issue is remitted to the AO to verify the same and grant the eligible TDS to the assessee.

24. The last grounds in this appeal in ground Nos.23 & 24 are with regard to charging of interest u/s 234A & 234B of the Act. According to the Id. A.R., the assessee filed return of income within the time stipulated in section 139(1) of the Act and as such there was no delay in filing the return of income. The levy of interest u/s 234A of the Act is bad in law. In our opinion, this requires to be verified at the end of the AO if the return has been filed within the due date prescribed u/s 139(1) of the Act. If return for this year has been filed within due date u/s 139(1) of the Act, there cannot be any levy of interest u/s 234A of the Act. With regard to levy of interest u/s 234B of the Act, which is consequential and mandatory in nature and to be computed accordingly.

25. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 3rd Feb, 2023

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 3rd Feb, 2023.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.