

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "K", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

ITA No.4489/M/2010

Assessment Year: 2005-06

M/s. Oracle Financial Services Software Ltd. (Formerly known as I-flex Solutions Ltd.), Oracle Park, Off Western Express Highway, Goregaon (East), Mumbai – 400 063 PAN: AAACC1448B	Vs.	Additional Commissioner of Income Tax, Range 8(2), Mumbai
(Appellant)		(Respondent)

ITA No.5079/M/2010

Assessment Year: 2005-06

DCIT 8(2), Room No.216-A, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Oracle Financial Services Software Ltd. (Formerly known as i-flex Solutions Ltd.), 399, Subhash Road, Vile Parle (East), Mumbai – 400 057 PAN: AAACC1448B
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Ajit Jain, A.R. &
Shri Siddhesh Chaugule, A.R.

Revenue by : Dr. Yogesh Kamat, CIT D.R.

Date of Hearing : 17 . 10 . 2022

Date of Pronouncement : 16 . 01 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid cross appeals emanated from same impugned order passed by Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] are being taken up for disposal by way of composite order.

2. Appellant, M/s. Oracle Financial Services Software Ltd., (hereinafter referred to as the assessee) and appellant DCIT,-8(2), Mumbai (hereinafter referred to as the Revenue) by filing aforesaid cross appeals sought to set aside the impugned order dated 26.03.2010 passed by Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] on the grounds inter-alia that:

ITA No.4489/M/2010 (Grounds of Assessee)

“Ground No - 1 Denial of deduction under section 10A of the Income-tax Act, 1961 ('the Act') on interest income and failed to adjudicate on treating interest income as 'Income from other sources'”

(i) *On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) ['CIT(A)'] ought to have held that interest income of Rs. 10,88,36,054 is derived from the business of Software Technology Park of India ('STPI') units eligible for section 10A deduction.*

(ii) *On the facts and circumstances of the case and in law, the CIT(A) failed to adjudicate on the ground of appeal that interest income is 'Profits and gains of business or profession' and not 'Income from other Sources'.*

Ground No — 2 Unrealised Export Proceeds

On the facts and circumstances of the case and in law, the CIT(A) ought to have held that the applications filed with the Prescribed Authority for realising export consideration Rs.65,81,57,533, beyond prescribed time limit not being rejected constituted deemed/ implied approval of the Prescribed Authority on subsequent realisation of export proceeds through the normal banking channel. Consequently,

the CIT(A) ought to have held that the appellant is entitled to deduction under section 10A of the Act in respect of such realised export proceeds.

Ground No — 3 Disallowance under section 14A of the Act.

(i) *On the facts and circumstances of the case and in law, the CIT (A) erred in upholding disallowance of Rs.1,65,615 under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 ('the Rules') by treating the said amount as attributable to earning of exempt interest income.*

(ii) *Without prejudice to above, on the facts and circumstances of the case and in law, the CIT(A) ought to have held that provisions of Rule 8D of the Rules are not applicable for the assessment year 2005-06 and consequently, the disallowance under section 14A of the Act ought to have been deleted.*

The Appellant craves leave to add, to amend, alter, vary, omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal.”

ITA No.5079/M/2010 (Grounds of Revenue)

“1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing exemption u/s. 10A on Training Income of Rs.3.04 crores without appreciating the facts of the case that income is not from Development and Delivery of Software but from Training to customers and is not entitled for exemption u/s. 10A of the I.T. Act.*

2. *On the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in allowing loss of units eligible for exemption u/s.10A of Rs.12.75 crores from Chennai unit and Rs.5.0 crores from Goregaon unit with appreciating the facts of the case.*

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the exemption u/s.10A as deduction thereby resulting into allowing the loss of 10A units against non-10A unit without appreciating the fact that the exemption u/s.10A comes under Chapter III and cannot be equated with the deductions of Chapter VIA of the Act.*

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to pass Rectification Order u/s. 155(10) in respect of non-realization of export sale proceeds resulting into allowance of exemption u/s.. 10 A without appreciating the fact that sub-section 10 section 155 has been omitted by the Direct Taxes Law (Amendment Act, 1987 w.e.f. 01.04.1992.*

5. *On the facts and in the circumstances of the case and in law, the Ld. Cit(A) erred in deleting the action of the AO to reduce the telecommunication expenses of Rs.1,49,38,508/- from the export turnover attributable to various units without appreciating the fact that the definition of the word "Export Turnover" in clause (iv) of Explanation 2 to section 10A specifically excludes the expenses incurred in foreign exchange towards telecommunication charges etc., attributable to delivery of articles or things or computer software or providing technical services outside India.*

6. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made of Rs.4.28 crores u/s. 92CA(3) of the I.T. Act, 1961 on account of share of customization fee retained by overseas subsidiaries of the assessee company, without appreciating the facts of the case and the findings made by the Transfer Pricing Officer.*

7. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made of Rs.2.58 crores u/s.92CA(3) of the I.T. Act, 1961 on account of interest receivable on delayed receipt from overseas subsidiaries of the assessee company, without appreciating the facts of the case and the findings made by the Transfer Pricing Officer.*

8. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1.18 crores on account of interest charged on loan to overseas subsidiaries without appreciating the facts of the case.*

(2) The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the ITO/AC/DCIT be restored.

(3) The appellant craves to amend or alter any grounds or add a new ground which may be necessary."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company is into the business of providing comprehensive information technology solution to banks and financial institutions worldwide. The comprehensive range of solution includes Panaji application for the financial services industry, custom application software development, deployment for financial institutions. Assessing Officer (AO) after examining the appropriate issues as well as

transfer pricing issues as decided by the Ld. Transfer Pricing Officer (TPO)/ Ld. CIT(A) proceeded to frame the assessment by computing the total income as under:

<u>Income from Business and Profession</u>		
Net Profit as per Profit and Loss A/c		247,11,06,808
<u>Add:</u> Provision for wealth tax	60,000	
Provision for doubtful debts	13,95,091	
Provision for leave encashment	2,72,92,880	
Donation and Charity	86,84,890	
<hr/>		
Disallowance u/s. 40(a)(i)	7,21,87,500	
Disallowance u/s. 40(a)(i)	47,94,541	
Disallowance u/s. 40(a)(ia)	5,59,22,361	
Prov.for dimunition in value of investments	7,12,07,902	
Depreciation as per Accounts	20,66,57,000	
Depreciation on Corporate Assets	5,15,77,982	
Depreciation on Lease Vehicles	77,09,018	
Provision for gratuity	88,30,879	
Provision for bonus	5,42,999	
Finance on lease	12,18,323	
Expenditure on mergers and Acquisition	69,58,947	52,50,40,313
		299,61,47,121
<hr/>		
<u>Add :</u> <u>Disallowances/considered separately</u>		
Income from Training (para 4)	3,04,01,801	
Software Expenses (para 5)	20,56,57,059	
Disallowance u/s.14A (para 9)	1,65,615	23,63,24,475
		323,23,71,596
<hr/>		
<u>Less :</u> Depreciation as per I.T. Rules	27,61,19,801	
Profit on sale of fixed assets	36,66,545	
Profit on sale of Corporate Assets	2,80,861	
Leave encashment paid during the Year	14,10,471	
Leave encashment allowed u/s 43B	14,06,111	
Bonus paid during the year	3,63,597	
Gratuity paid during the year	12,09,890	
Lease rentals paid during the year	99,49,000	
Interest allowed on payment basis u/s 43B	10,031	
Profit on sale of investments	1,68,04,478	32,12,20,785
		291,11,50,811

Flex Solutions Ltd.

A.Y. 2005-06

Add: Loss on 10A Units (Para 8)

Chennai Unit	12,60,64,116	
Goregaon Unit	<u>4,99,34,410</u>	<u>17,59,98,526</u>
		308,71,49,337

Less: Deduction u/s. 10A (As per Annexure A-I & Annexure-II)

Vile Parle	12,98,20,692	
Pune	6,39,11,510	
CV Raman	54,96,57,351	
Millenium Towers	<u>2,69,87,696</u>	<u>77,03,77,249</u>
		231,67,72,088

Less: Interest Income considered separately (para 3)	26,44,19,000	
Depreciation on Software Expenses (para-5)	<u>16,94,67,980</u>	
Deduction u/s.35D (para 10)	<u>2,80,000</u>	<u>43,43,32,595</u>
Business Income		188,22,73,878

Income from Other Sources

Interest Income (para 3)	26,44,19,000	
Less: UTI Interest Bonds - Exempt	<u>22,29,643</u>	<u>26,21,89,357</u>

Capital Gains:

Long Term capital loss (as per return)	15,36,35,056	<u>214,44,63,235</u>
Gross Total Income		<u>32,97,290</u>

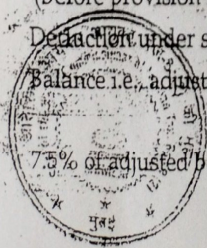
Less: u/s. 80G - Donation		<u>214,11,65,945</u>
---------------------------	--	----------------------

<u>Add: Adjustment on account of International Transactions as per order u/s. 92CA(3)(para 11)</u>		<u>8,05,87,833</u>
Total Income		<u>222,17,53,778</u>
Rounded off u/s.288A		<u>222,17,53,780</u>

Long Term capital loss of Rs.15,36,35,056 is allowed to be carried forward.

Computation of Income u/s. 115JB

Net profit as shown in the Profit and Loss Account (before provision for tax)	247,11,06,808
Deduction under section 10A	<u>77,03,77,249</u>
Balance i.e. adjusted book profit u/s.115JB	<u>170,07,290,559</u>
7.5% of adjusted book profits	12,75,54,717



Since the tax computed on the income computed as per the normal provisions of IT Act, 1961 is higher than the tax computed u/s 115JB, the income computed under normal provisions of the Income Tax Act, 1961 is taken as the assessed income and the tax is computed accordingly.”

ITA No.4489/M/2010 (Assessee’s appeal)

Ground number 1:

4. The AO held that the interest income of Rs.10,88,36,054/- is not eligible for deduction under section 10A of the Income Tax Act, 1961 (for short 'the Act') for the reason that interest income has not been derived from exempt industrial undertaking. The Ld. CIT(A) by relying upon the decision rendered by Honourable Supreme Court in case of Liberty India 317 ITR 218 held that while claiming a deduction the receipts beyond the first degree cannot be considered and as such interest income cannot be said to be derived from business of development of software being not of first degree thus upheld the findings returned by the AO that interest income by the assessee is income from other sources. The Ld. AR for the assessee at the very outset contended that this issue is already covered in favour of the assessee in its own case for A.Y. 2003-04 and 2004-05 in ITA Nos.4888 & 5023/M/2007 & ITA Nos.4488 & 5078/M/2010.

5. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. We have perused para 15 of the order passed by the co-ordinate Bench of Tribunal in assessee's own case for A.Y. 2003-04 and 2004-05 (supra), copy of which is available at page 1 to 16 of the case law paper book, which is on identical grounds, the operative para of which is extracted for ready perusal as under:

“15. A reading of section 10A of the Act would show that profits and gains derived by an undertaking from export of articles or things or computer software would be eligible for deduction. Whereas, in the decisions relied upon by the Departmental Authorities, the dispute related to claim of deduction under chapter VI-A of the Act. The Full Bench of the Hon’ble Karnataka High Court in case of CIT vs. Hewlett Packard Global Ltd. (supra), while dealing with a dispute relating to deduction claimed under section 10A/10B of the Act in respect of interest income, had an occasion to examine the provisions contained under section 10A and 10B of the Act in contrast to the provisions contained in Chapter VI-A of the Act as well as various decisions of the different High Courts on the issue of allowability of deduction of interest income under various provisions of chapter VI-A. After examining the issue, the Hon’ble Karnataka High Court held that those decisions would not cover the cases under sections 10A and 10B of the Act which are special provisions and complete code in themselves and deal with profits and gains derived by the assessee of special nature and character like 100% export oriented units in Special Economic Zones. The Hon’ble High Court ultimately held that interest income earned on temporary parking of surplus funds in the ordinary course of business would not be taxable as income from other sources but would be integral part of export business activity. Hence, cannot be de-linked from the profits and gains derived by the undertaking from the export of articles or things as provided under section 10A or section 10B of the Act. The aforesaid decision of the Hon’ble Karnataka High Court was subsequently followed by the Hon’ble jurisdictional High Court in case of Cybertech Systems & Software Ltd. vs DCIT (Supra). Various other decisions cited by learned counsel for the assessee also express

similar view. Thus, in principle we accept assessee's contention that interest earned from temporary parking of surplus funds in bank deposits, bonds as well as loans to employees and subsidiary would qualify for deduction under section 10A of the Act. However, the quantification and attribution of such interest to the 10A units has to be examined by the AO. The assessee is directed to furnish necessary evidence in this regard to establish its claim of deduction under section 10A of the Act on the amount of Rs. 12,37,49,444/-. This ground is allowed subject to factual verification."

8. Since the facts and grounds are identical having not been controverted by Ld. D.R. following the order passed by the co-ordinate Bench of the Tribunal in assessee's own case (supra), we are of the considered view that earning interest from the surplus funds deposited with bank, bonds as well as loans to the employees and subsidiaries are eligible for deduction under section 10A of the Act subject to the quantification and attribution of such interest to 10A units by the AO. The assessee shall furnish evidence to established its claim under section 10A of the act which is to the tune of Rs.10,88,36,054/- derived from business of Software Technology Park of India (STPI) units. So ground No.1 of the assessee is allowed subject to the verification and quantification by the AO.

Ground No.2

9. Ground No.2 has not been pressed during the course of argument by the Ld. A.R. for the assessee, hence dismissed having been become infructuous.

Ground No.3

10. The assessee has claimed interest of Rs.22,29,643/- earned from UTI bond as exempt income without disallowing any corresponding expenses under section 14A of the Act. The

Ld. CIT(A) upheld the disallowance made by the AO by relying upon the decision rendered by Dahiya Capital Management Pvt. Ltd. (2009) 312 ITR 81.

11. It is categoric case of the assessee that the entire investment on which the assessee has earned interest income at the rate of 6.75% tax free US – 64 bond was made earlier in the year 1998 and no expenditure has been incurred for earning the same and further contended that disallowance under rule 8D is not applicable in this case.

12. First of all it is settled principle of law that rule 8D is prospective in nature and is not applicable in respect of assessment years prior to 2007 as held by Hon'ble Supreme Court in case of Maxopp Investment Limited (2018) 91 taxmann.com 154 and Essar Technology limited (2018) 90 taxmann.com 2.

13. Furthermore, when the assessee has come up with categoric plea that UTI bonds were received as part of restructuring of UTI against the unit originally held in 1998 and were required to be held till maturity no direct or indirect expenses were incurred for earning such interest income nor any market research or any day to day analysis was required in the present case, disallowance confirmed by the Ld. CIT(A) is not sustainable.

14. Honourable High Court of Bombay in case of CIT vs. Sociedade De Fomento Industrial (P.) Ltd. (2021) 123 taxmann.com 38 (Bombay) held that "no doubt expenditure under section 14A includes both direct and indirect expenditure but that expenditure must have a proximate relationship with exempt

income and surmises or conjunctures is no answer." So in the instant case when the assessee has purchased UTI bonds in 1998 and earned interest income thereon in A.Y. 2005 – 06 no proximate relationship in the expenditure disallowed to the tune of Rs.1,65,615/- by the AO with the exempt income has been established but mechanically applied rule 8D which is not applicable for the year under consideration. So in these circumstances we are of the considered view that disallowance made under section 14A by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law, hence ordered to be deleted.

ITA No.5079/M/2010 (Revenue's appeal)

Ground No.1

15. The assessee received an amount of Rs.3,04,01,801/- as income arising on account of training imparted by the assessee company to its clients and included the same for the purpose of deduction under section 10A of the Act. The AO disallowed the same having not been arising from export of software development by the assessee.

16. The Ld. CIT(A) however by following the order passed by his predecessor in assessee's own case for A.Y. 2004 – 05 allowed the same which is under challenge before the Tribunal.

17. The Ld. A.R. for the assessee contended that this issue has already been decided in favour of the assessee in its own case for A.Y. 2002 – 03 and 2003-04.

18. We have perused the order passed by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y 2003 – 04 which is on identical facts and decided in favour of the assessee by returning following findings:

“7. We have considered rival submissions and perused the materials on record. The issue arising for consideration is, whether the income derived from training activity would qualify for deduction under section 10A of the Act. In fact, learned Commissioner (Appeals) has decided the issue against the assessee following his predecessor’s decision in assessee’s own case in assessment year 2002-03. Pertinently, assailing the decision of the First Appellate Authority on the disputed issue in assessment year 2002-03, assessee had preferred an appeal before the Tribunal. While deciding the issue in ITA No. 3699/Mum/2006 and CO 366/Mum/2006 vide order dated 31.08.2010, the Tribunal held that income derived from training given to customers for use of the software developed by the company being intricately connected to the export of software, it has to form part of both total turnover and export turnover for computing deduction under section 10A of the Act. In other words, the Tribunal in the preceding assessment year has allowed assessee’s claim of deduction under section 10A of the Act in respect of the income derived from training activity. It is relevant to observe, aforesaid decision of the provision has been upheld by the Hon’ble jurisdictional High Court while dismissing revenue’s appeal in Income Tax Appeal No. 2352 of 2011 vide order dated 24.03.2014. Facts being identical, respectfully following the decision of the co-ordinate Bench and the Hon’ble jurisdictional High Court in assessee’s own case, as referred to above, we direct the AO to allow assessee’s claim of deduction under section 10A of the Act by including it both in the total turnover as well as export turnover. This ground is allowed.”

19. So following the order passed by the co-ordinate Bench of the Tribunal in assessee's own case on identical issue qua which no distinguishable facts have been brought on record by the Ld. D.R. for the Revenue, the AO is directed to allow the assessee's claim of deduction under section 10A of the Act by including the same both in the total turnover as well as export turnover. So ground No.1 is determined against the Revenue.

Ground Nos.2 and 3

20. The AO has added back the amount of losses of the assessee's Chennai unit and Goregaon units on the ground that section 10A is an exemption section and not a deduction section. However, the Ld. CIT(A) following the order passed by his predecessor in A.Y. 2004 – 05 and following the order passed by Chennai Special Bench of Tribunal in case of Scientific Atlanta India Technology (P) Ltd vs. ACIT [ITA 536/Mds/2007], deleted the same.

21. The Ld. CIT(A) deleted the addition of the losses of Chennai unit and Goregaon unit which is under challenge before the Tribunal by returning following findings:

“7.2. This issue raised in appeal was also before my learned predecessor in office and in his order No. CIT(A)-VIII/DCIT- 8(2)/IT-390/2007-08 dated 21.07.2009 for the AY 2004-05 this ground of the Appellant was allowed in favour of the Appellant.

7.3. Further, the Counsel for Appellant has brought to my notice the recent judgment of the Chennai Special Bench of the Tribunal in the case of Scientific Atlanta India Technology (P) Ltd vs. ACIT [ITA 536/Mds/2007] wherein the Honourable Tribunal has held that the section 10A is a deduction section and not an exemption section. Further, it held that the deduction has to be computed undertaking-wise while computing income under the head "profits and gains of business and profession and loss to be set-off against the profits of other units.

7.4. I have gone through the order of the Additional CIT, the submissions made by the Appellant's Counsel, the order of my predecessors in office and the judgment of the Chennai Special Bench in the case of Scientific Atlanta. The facts being the same for the year under appeal and being squarely covered by the judgment of the Chennai Special Bench, and accordingly this ground is fully allowed in favour of the Appellant. The Assessing Officer is directed to delete the addition of the losses of Chennai Unit and Goregaon Unit. Accordingly the ground of the Appellant stands fully allowed.”

22. Since the issue is no longer res-integra having been covered by the order passed by Chennai Special Bench (supra) and this

issue has also been decided in favour of the assessee by the Honorable Supreme Court in case of CIT vs. Yokogawa India Ltd. (2017) 77 taxmann.com 41 (SC), we find no illegality or perversity in the impugned findings. Hence, ground numbers 2 and 3 are determined against the Revenue.

Ground No.4

23. In view of the submissions made by the Ld. A.R. for the assessee this ground has become infructuous as relief sought for by the assessee by way of rectification application has already been granted. So ground number 4 is dismissed having been become infructuous.

Ground No.5

24. The assessee company claimed to have incurred telecom expenses of Rs.1,49,38,508/- which were not charged/ collected from customer. However, the AO has not allowed to reduce the telecommunication expenses from the export turnover while computing the deduction under section 10A of the Act.

25. However, the Ld. CIT(A) allowed the inclusion of telecommunication expenses in the export turnover for the purpose of calculating deduction under section 10A of the Act by returning following findings:

“9.3. I have verified the invoice copy. In the present case, the Appellant has received consideration against software i.e. goods. The sample invoices submitted by the Appellant clearly shows that it did not recover any such expenditure from the customers.

9.4 Further, in the case of Patni Telecom (P) Ltd (22-SOT 26), the Hyderabad bench of the Tribunal, on the similar facts has held that "If such expenses are not included in the consideration received in

convertible foreign exchange, deduction of such expenditures from the consideration does not arise”.

9.5. The same view has been taken by the Special Bench, Chennai in Sak Soft Ltd. in its order dated 06-03-2009 As such, following the above judgment of Special Bench as also that of Patni Telecom, in my view, the Assessing Officer was not correct in excluding telecommunication expenses amounting to Rs.1,49,38,508 from export turnover while calculating deduction under section 10A of the Act. Accordingly, I direct the Assessing Officer to compute deduction under section 10A without excluding the telecommunication expenses from the export turnover Accordingly the ground of the Appellant stands allowed.”

26. Since this issue has already been thrashed by the special Bench of the Tribunal in case of Patni Telecom (supra) we find no scope to interfere in the findings returned by the Ld. CIT(A). Hence ground No.5 raised by the Revenue is dismissed.

Ground No.6

27. The Ld. TPO/AO have made adjustment of Rs.4,28,06,836/- on account of customisation fee paid by the assessee to overseas subsidiaries, retained by overseas subsidiaries for marketing, distribution, administration and client management services of customisation work.

28. The Ld. CIT(A), by following the earlier years' order passed in favour of the assessee in its own case, allowed the claim of the assessee. The Ld. A.R. for the assessee contended that this issue has also been decided in favour of the assessee in its own case for A.Y. 2002 – 03, 2003 – 04 and 2004-05.

29. We have perused the order passed by the co-ordinate Bench of the Tribunal passed in assessee's own case for A.Y. 2002 – 03

which is on identical facts and has been decided in favour of the assessee by returning following:

“16. The Assessing Officer made referents u/s.92CA(1) of the Act to the Transfer Pricing Officer (in short TPO) for ascertaining the computation of Arm’s Length Price (in short ALP) in relation to international transactions entered into by the assessee with its subsidiaries which are Associated Enterprises (in short A.E). The TPO passed the order u/s.92CA(3) on the issue of determining the ALP of the international transactions relating to commission paid on customisation fees to AE's, which was computed at Rs.5,35,03,798/- as against Rs.4,81,53,418/-, which resulted into upward adjustment to the income of the assessee. The assessee contended that the assessee has subsidiaries which act as the sales and marketing offices of the assessee. The nature of the transaction between the assessee and its subsidiaries are essentially of re-sale. The ultimate sale prices are negotiated by the subsidiaries directly with the end-customers and assessee offers negotiated a margin of 10%. In addition to the subsidiaries, there are local independent distribution agents to whom the commission is paid @ 20% to 30%. Whereas, external agents are given commission @ 15 to 20%. It was also explained that the ultimate margin given by the assessee to its subsidiaries is only 10%. The assessee also contended that for the customisation work subsidiaries are paid more. Assessee also contended that customisation work is not done by the distributors but same is entrusted to the subsidiaries. Though the A.O. has not made any comment on the reasons given by the assessee justifying payment of more commission but made the addition to the income, which is based on the order passed by the TPO u/s 92CA(3) of the Act and that resulted into an addition of Rs.53,50,379/- The assessee challenged the addition before the Learned CIT (A) who deleted the same. Now, the revenue is in appeal before us.

17. We have heard the rival submissions of the parties. The Learned D.R. vehemently argued that there is no reason to pay the additional commission to the subsidiaries then the independent local distributors. It is argued that entire customisation work is done by the assessee only and there is no contribution by the subsidiaries in the customisation work entrusted by the users of the software manufactured by the assessee company. Per contra, the Learned Counsel argues that in addition to the sale of the software, the additional assignments or jobs for collection of customisation work is done by the subsidiaries (A.Es.). Ld. Counsel also referred to the sample copy of the agreement, which is placed in the paper book and submits that so fare as the local independent distributors are concerned, some of them are paid between 15 to 20% only on the selling the product of the assessee. He submitted that though the entire customisation work is done by the assessee but all the data collection work is done by the subsidiaries. The Learned Counsel supported the order of Learned CIT (A) deleting the addition.”

30. Aforesaid order passed by the Tribunal has also been confirmed by the Honorable Bombay High Court vide order dated 24.03.2014 passed in CIT vs. M/s. I-Flex Solutions Ltd. in Income Tax Appeal No.2352 of 2011 by returning following findings:

“8. As far as the last question is concerned, what has been found by the Commissioner of Income Tax (Appeals) as also the Income Tax Appellate Tribunal is that the computation of Arm's Length Pri along with the price in relation to international transactions entered in by the assessee with it's subsidiaries is concerned, commission has been paid on customisation fees which was computed at Rs.5,35,03,798/-a against Rs.4,81,53,418/- which resulted into upward adjustment to the income of the assessee. The argument was that the assessee has subsidiaries which act as a sale and marketing office of the assessee The nature of the transaction is essentially of re-sale. The ultimate sale prices are negotiated by the subsidiaries directly with the end-customer and assessee's offers are negotiated. Therefore, when there are subsidiaries, but local independent distribution agents to whom a commission has been given then, the ultimate margin offered and paid to the subsidiaries is only 10%. In other words, there has not been found to be a variation of such nature as would enable the Assessing Officer to question the payment. In such circumstances, the finding of fact which has been rendered cannot be said to be vitiated by any perversity or any error of law apparent on the face of record.

9. The reasons assigned by the Tribunal in paragraph no.15 of the order are based essentially on the nature of the dealings. Once the subsidiaries are found to be collecting the customization work and which work was not being done by independent distributors, then, the justification has been rightly accepted.”

31. So we are of the considered view that the Ld. CIT(A) has passed a valid order and we find no scope to interfere into the same hence the ground number 6 raised by the Revenue is dismissed.

Ground No.7

32. The Ld. TPO has made addition of Rs.2,58,83,997/- on account of notional interest from overseas subsidiaries on account of outstanding balances lying with them. However, the Ld. CIT(A)

has deleted this addition/adjustment which is under challenge before the Tribunal.

33. The Ld. A.R. for the assessee contended that this issue has already been decided in favour of the assessee in its own case for A.Y. 2003-04 and 2004-05, which fact has not been controverted by the Ld. D.R.

34. We have perused the order passed by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2003-04 in ITA No.5023/M/2007 which is on identical facts. It is contended by the Ld. D.R. for the Revenue that Ld. CIT(A) has failed to appreciate the facts inter-alia that the result of overseas subsidiaries not having collected the amount from final end customers and do not represent any advantage conferred on the overseas subsidiaries.

35. The Ld. CIT(A) decided the issue in favour of the assessee by returning following findings :

“17.5. I have perused the facts of the case and the TPO's order. It is seen that Nil rate of interest has been charged by the appellant in an uncontrolled transaction involving a third party and so an Internal CUP exists to establish that there is no need to levy interest on outstanding with AE's.

17.6. It is also seen that the AE's also did not charge interest to third party customers so as to pay corresponding interest to the appellant. The longer outstanding period is inter-alia, the result of AE's not having collected the accounts from final end customers and do not represent any advantage conferred on the AE. These material facts have escaped the attention of the TPO leading to an erroneous conclusion on his part.

17.7. It has also to be accepted that the appellant operates in a service industry where emphasis is on building long term relationship with the customers and payment terms are not accorded same level of importance as in other business.

17.8. In view of the facts stated, this action of the Learned TPO/ Additional CIT is not reasonable and hence adjustment made on notional interest is deleted.”

36. The coordinate Bench of the Tribunal decided the identical issue in favour of the assessee in its own case for A.Y. 2003-04 and 2004 – 05 by returning following findings:

“20. We have considered rivals submissions and perused the materials on record. As could be seen, while explaining the cause of delay in remittance by overseas subsidiaries, the assessee has submitted that such delay was because of delay in remittance by the end customers to the overseas subsidiaries. To establish such claim, the assessee had furnished reconciliation statement, bank statement of subsidiaries and some other evidences. Notably, learned Commissioner (Appeals), in fact has appreciated assessee’s contention that there could be delay/considerable time gap in remittance of receivables by the overseas subsidiaries and the third party distributors, as the AEs are not the end customers, whereas, the third party distributors are themselves the customers. He has also appreciated the fact that some of the subsidiaries in USA and Netherland are incurring losses. Thus, when the AEs themselves are not the end customers and their remittance to the assessee, in turn, depends upon the remittances by the end customers, it cannot be said that the AEs have benefitted because of delay in remitting the receivables.

21. It is also observed, before the TPO the assessee had furnished certain evidences including the bank statements of subsidiaries and reconciliation statement reconciling the time gap in amounts receivable from subsidiaries and from third parties. These evidences furnished by the assessee, certainly, support assessee’s claim that the delay in receivables was purely because of the delay in receipt from end customers. In fact, learned Commissioner (Appeals) has also appreciated this fact. Thus, after taking into consideration the entire factual aspect, we are of the view that the adjustment made on account of delayed receivables has to be deleted. Accordingly, we do so. This ground is allowed.”

37. So following the order passed by the co-ordinate bench of the Tribunal in assessee's own case for A.Y. 2003 – 04, we are of the considered view that when undisputedly AEs are not the end customers and their remittance to the assessee in turn depends upon the remittances by the end customers it cannot be said that the AEs

have benefited because of delay in remitting the receivables. These facts have been duly thrashed by the Ld. CIT(A). So we find no illegality or perversity in the impuned findings returned by the Ld. CIT(A). Hence, ground No.7 is decided against the Revenue.

Ground No.8

38. Ld. TPO/AO have made addition of Rs.1,18,97,000/- on account of interest charged to the overseas subsidiaries by the assessee in respect of the loans granted to them as well as deemed guarantee charge. However, the Ld. CIT(A) deleted this addition which is under challenge.

39. The Ld. A.R. for the assessee contended that this ground is also covered by the order passed by the Tribunal in assessee's own case for A.Y. 2004 – 05 available at page 1 to 16 of the paper book.

40. It is undisputed fact on record that the assessee has charged interest at different rates from its AEs at USA and Mauritius that is at the rate of 2.44% and 3.54% respectively. The Ld. TPO/AO proceeded to hold that interest should have been charged at 3.275% and not 2.44%. The Ld. CIT(A) thrashed the facts and reached the conclusion that when the interest rate charged by the assessee from its AEs in America during financial year 2004 – 05 was ranging from 1.66% to 3.275% with average of 2.44%, the Ld. TPO stuck to the rate charged in the last quarter i.e. January 25th to March 2005 where the rate applicable was 3.275% and has not sought any clarification from the assessee. So the Ld. CIT(A) reached the

conclusion that since the interest has been charged at average LIBOR rate which is standard parameter the same is at arms length.

41. Similarly Ld. CIT(A) deleted the addition/adjustment made by the Ld. TPO/AO on account of guarantee cost on the ground that the AEs have taken loan from the assessee directly and there is no question of guarantee. This issue has already been decided by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2004 – 05 (supra) by returning following findings:

“40. Briefly the facts are, in course of proceeding before him the TPO found that the assessee had advanced loans to its AEs by charging interest at LIBOR+basis points. When called upon to justify the arm's length nature of interest charged, the assessee submitted a letter from HDFC Bank showing the interest charged by the Bank on loan advanced to one of the subsidiaries, M/s I-Flex Solution Inc. Applying the said interest rate as CUP, the assessee submitted that the interest charge is at arm's length. The Transfer Pricing Officer, however, was not convinced with the submissions of the assessee. He observed, the loan to the subsidiary by the Bank would have been possible only upon a corporate guarantee being provided by the assessee. Thus, the assessee would be required to provide a benchmark of guarantee commission. He observed, in a third party situation a guarantee provided would have entailed cost. Thus, ultimately, he concluded that the assessee should have charged guarantee commission of 1.75% on the loan amount. Accordingly, he proposed an adjustment of Rs. 22,21,000/-. Assessee challenged the aforesaid adjustment before learned Commissioner (Appeals). After considering the submissions of the assessee, learned Commissioner (Appeals) deleted the adjustment.

41. We have considered rival submissions and perused the material on record. As rightly observed by learned Commissioner (Appeals), question of providing a corporate guarantee will arise in a situation where the borrower has obtained debt from third party lender. In the facts of the present case, the assessee itself has advanced the loans to the AEs and has charged interest at the appropriate rate of LIBOR + certain basis points. No material has been brought on record by the TPO to demonstrate that the rate of interest charged by the assessee on the loans advanced is not at the appropriate rate prevailing in the countries, where the AEs are located. Therefore, in the aforesaid factual position, when the assessee has charged interest on the loans advance, there is no question of additionally charging guarantee commission for provision of corporate guarantee. In view of the aforesaid, we do not find any infirmity in the decision of learned Commissioner (Appeals). This ground is dismissed. In the result, appeal is dismissed.”

42. Following the order passed by the co-ordinate Bench of the Tribunal, we are of the considered view that the Ld. CIT(A) has rightly reached the conclusion that when the interest has already been charged by the average LIBOR rate as discussed in the impugned order the adjustment made by the Ld. TPO/AO on account of arms length is not sustainable in the eyes of law and similarly adjustment made by the assessee on account of guarantee fees also not sustainable as AEs have directly taken the loan from the assessee and as such there is no question of making payment of guarantee fee. So we find no ground to interfere into the findings returned by the Ld. CIT (A). Hence ground No.8 is determined against the Revenue.

43. Resultantly, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is allowed.

Order pronounced in the open court on 16.01.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 16.01.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.