

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU “C” BENCH, BENGALURU**

**Before Shri Chandra Poojari, Accountant Member
and
Smt. Beena Pillai, Judicial Member**

IT(TP)A No. 177/Bang/2022 (Assessment Year: 2017-18)		
M/s. Arris Group India Pvt. Ltd. 33/1 3 rd Floor, The Senate Usloor Road, Usloor Bangalore 560042 Bangalore 560100 PAN – AA ECP2172M (Appellant)	Vs.	DCIT, Circle - 1(1)(1) Bmtc Building Kormangala Bengaluru 560095 (Respondent)

Assessee by:	Shri Salil Kapoor, Advocate
Revenue by:	Shri Praveen Karanth, CIT-DR

Date of hearing:	03.11.2022
Date of pronouncement:	20.01.2023

ORDER

Per: Beena Pillai, J.M.

Present appeal is filed by the assessee against the final assessment order dated 2/01/2022 passed by NFAC, Delhi for assessment year 2017-18 on following grounds of appeal:

1:0 *Erroneous levy of income-tax and interest thereon*

1:1 *On the facts and in the circumstances of the case, and in law, the Additional / Joint / Deputy / Assistant Commissioner of Income Tax/ Income-tax Officer at National e-Assessment Centre, Delhi ('the Ld. AO') erred in*

determining total income of the Appellant for the captioned AY at INR 44,15,91,448.

1:2 *On the facts and in the circumstances of the case, and in law, the Id. AO has erred in determining tax liability of INR 44,15,91,448 (including interest under section 234B and 234C of the Act)*

2:0 *Validity of the Order:*

2:1 *On the facts and circumstances of the case and in law, the Ld. Assessing Officer ('AO')/ Ld. Transfer Pricing Officer ('TPO') erred in not following the directions of the Hon'ble Dispute Resolution Panel ('DRP') of granting necessary relief to the Appellant thereby violating the provisions set out in Section 144C of the Act, and hence, the impugned Order passed is bad-in-law and void ab initio and deserves to be quashed.*

TRANSFER PRICING ISSUES:

3:0 *Transfer Pricing Adjustment of INR 171,589,561 on account of provision of Software Development Services / information Technology (IT) services ["SWD services"]:*

3:1 *The Hon'ble DRP Ld. AO / Ld. TPO have erred on the facts of the case and in law in making an upward adjustment of INR 171,589,561 to the total income of the Appellant by holding that the international transaction relating to SWD services provided by the Appellant to its AEs is not at arm's length.*

3:2 *The Id.AO/TPO/DRP erred in facts of the case and in law in disregarding the benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data in the transfer pricing ('TP') study report maintained as per section 92D of the Income Tax Act, 1961 ('the Act') read with Rule 10D of the Income-tax Rules, 1962 ('the Rules') and thereby erred in rejecting the TP documentation maintained by the Appellant.*

3:3 *The AO/TPO/DRP have erred in rejecting the detailed functional and economic analysis and methodical search process undertaken by the Appellant to identify*

comparable companies providing services similar to the finance shared services rendered by the Appellant.

- 3:4 *The AO/TPO/DRP have erred in undertaking a fresh search at the time of transfer pricing assessment thereby disregarding the use of contemporaneous data and modifying/ applying additional search filters to arrive at a fresh set of companies comparable to the provision of finance shared services rendered by the Appellant.*
- 3:5 *The AO/TPO/DRP erred in law and in facts of the case in applying inappropriate qualitative and quantitative criteria for accepting/rejecting companies. Further, the AO/TPO/DRP erred in applying an inappropriate rejection criteria of rejecting companies having export earnings less than 75% of total turnover. The AO/TPO/DRP erred in law and in facts of the case in applying filter of service income in excess of 75% of total turnover.*
- 3:6 *The AO/TPO/DRP erred in not providing any directions and not accepting the additional ground of objection made by the Appellant before the DRP of applying an upper limit for the sales turnover filter. The AO/TPO/DRP has erred in not appreciating the fact that since lower limit on the sales turnover filter has been universally accepted by both Assessee and TPO, similar filter should also be applied on the upper limit on turnover while carrying out the comparability analysis.*
- 3:7 *The AO/TPO/DRP have erred in rejecting following comparable companies considered by the Appellant in its transfer pricing study report.*
- i. E-Zest Solutions Ltd.*
 - ii. Melstar Information Technologies Limited*
 - iii. Nintec Systems Limited*
 - iv. Yudiz Solutions Pvt. Limited*
- 3 : 8 *The Ld. AO/TPO/DRP have erred in rejecting the following additional comparable companies considered by the Appellant at the time of the assessment before the Ld.TPO and the DRP proceedings.*
- i. Indianic Infortech Limited*
 - ii. Batchmaster Software Private Limited*
 - iii. DCIS DOT COM Solutions India Private Limited*

- iv. Inteq Software Private Limited*
- v. Minvesta Infotech Private Limited*
- vi. Sybrant Technologies Private Limited*
- vii. Synfosys Business Solutions Limited*

3:9 *The Ld. AO/TPO/DRP erred on facts in arriving at a new set of comparable companies by adding following companies which have an entirely different functionally and risk profile and are not comparable to the Appellant with respect to provision of SWD services:*

- i. Larsen and Touhro Infotech Limited*
- ii. Great Software Laboratory Private Limited*
- iii. Mindtree Limited*
- iv. Persistent Systems Limited*
- v. Aptus Software Labs Private Limited*
- vi. Cygnet Infotech Private Limited*
- vii. Nihilient Technologies Limited*
- viii. OFS Technologies Limited*
- ix. Threesixty Logica Testing Services Private Limited*
- x. Infosys Limited*
- xi. Cybage Software Private Limited*
- xii. Consilient Technologies Private Limited*

3:10 *The AO/TPO/DRP erred in law and on facts by accepting companies having supernormal profits, extra-ordinary activities, high-end functions, research & development functions, presence of brand and intangibles, etc. as comparable to the Appellant*

3:11 *The AO/TPO/DRP erred in law and in facts of the case in cherry picking companies having high operating margins and companies that are functionally dissimilar to the Appellant.*

3:12 *Without prejudice to the above contentions, the Ld.AO/TPO/DRP have erred in computing the operating margin of the companies selected as comparable to the provision of IT services rendered by the Appellant.*

3:13 *Without prejudice to the above contentions, the Appellant has also filed a rectification application before the Ld.TPO and AO for considering the corrected margins of comparable companies as selected by Ld.AO/TPO/DRP for provision of*

IT services rendered by the Appellant. The same is pending before the Ld.TPO/AO.

3:14 *Without prejudice to the above contentions, the Ld.AO/TPO/DRP have erred in not allowing working capital adjustment and depreciation adjustment in computing the operating margin of the companies selected as comparable to the provision of finance shared services rendered by the Appellant.*

3:15 *The Ld.AO/TPO/DRP erred in not accepting the Appellant's claim for risk adjustment and hence comparing full-fledged risk bearing entities with the Appellant's captive operations without making any risk adjustment for differences between the functional and risk profile of comparable companies vis-a-vis the risk profile of the Appellant.*

3:16 *The Ld.AO/Ld.TPO erred in facts of the case and in law in treating gain/loss on foreign exchange fluctuation as non-operating in nature.*

CORPORATE TAX ISSUES:

4:0 Re.: Disallowance of depreciation on 'Goodwill' u/s. 32 of the Income-tax Act, 1961:

4:1 *The AO/DRP has erred in confirming the disallowance of depreciation of Rs.2,98,95,760/- on 'Goodwill' of Rs.11,95,83,041/- u/s. 32 of the Income-tax Act, 1961.*

4:2 *The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, depreciation is allowable on goodwill and the stand taken by the AO/DRP is illegal, incorrect, erroneous and misconceived and not in accordance with law and the AO/DRP ought to have held as such.*

4:3 *The Appellant submits that the AO/DRP be directed to delete the disallowance made by him and to re-compute its total income accordingly.*

5:0 Re.: Validity of the adjustments made to the returned income in terms of the Intimation issued u/s. 143(1) of the Act:

5:1 *The AO has erred in making the impugned aforesaid additions to the income computed in the 'Intimation' issued*

u/s. 143(1) of the Act, as against making the additions to returned income.

5 : 2 *The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the adjustments made by the CPC-Bangalore/AO are misconceived, incorrect, erroneous and not in accordance with the law, and deserves to be deleted.*

5:3 *The Appellant submits that the AO be directed to delete the adjustments so made and to re-compute its total income and the tax thereon accordingly.*

6:0 Re.: Short credit for tax deducted at source amounting to Rs. 46,516/-:

6:1 *The AO has erred in granting the Appellant credit for tax deducted at source short to the extent of Rs. 46,516/- while computing the total tax liability for the year under consideration.*

6:2 *The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to a credit of Rs.62,534/- being the total tax deducted at source from its income.*

6:3 *The Appellant submits that the AO be directed to grant full credit for tax deducted at source and to re-compute its tax liability accordingly.*

6:4 *Without prejudice to the above, the Appellant has filed a rectification application in respect of the above which is, as yet, pending adjudication.*

7:0 Re.: Short credit for advance tax source amounting to Rs. 7,13,00,000/-:

7:1 *The AO has erred in granting the Appellant credit for advance tax short to the extent of Rs.7,13,00,000/- while computing the total tax liability for the year under consideration.*

7:2 *The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to a credit of Rs.10,33,00,000/- being the total advance tax paid for the year.*

7:3 *The Appellant submits that the AO be directed to grant full credit for advance tax and to re-compute its tax liability accordingly.*

7:4 *Without prejudice to the above, the Appellant has filed a rectification application in respect of the above which is, as yet, pending adjudication.*

8:0 **Re.: Erroneous levy of interest u/s. 234A of the Income-tax Act, 1961:**

8:1 *The AO has erred in levying interest u/s.234A of the Income-tax Act, 1961 while computing the tax payable by the Appellant.*

8:2 *The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject it is not liable to pay interest u/s.234A of the Income-tax Act, 1961 and the levy is unjustified, incorrect and illegal.*

8:3 *The Appellant submits that the AO be directed to delete the interest so levied by him and re-compute its tax liability accordingly.*

8: 4 *Without prejudice to the above, the Appellant has filed a rectification application in respect of the above which is, as yet, pending adjudication.*

9:0 **Re.: Excessive levy of interest u/s. 234B of the Income-tax Act, 1961:**

9:1 *The AO has erred in levying excessive interest u/s.234B of the Income-tax Act, 1961 while computing the tax payable by the Appellant.*

9:2 *The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject it is not liable to pay the excess interest u/s. 234B of the Income-tax Act, 1961 and the levy is unjustified, incorrect and illegal.*

9:3 *The Appellant submits that the AO be directed to delete the excess interest so levied by him and re-compute its tax liability accordingly.*

9:4 *Without prejudice to the above, the Appellant has filed a rectification application in respect of the above which is, as yet, pending adjudication.*

10:0 Re.: Excessive levy of interest u/s. 234C of the Income-tax Act, 1961:

10:1 *The AO has erred in levying interest u/s.234C of the Income-tax Act, 1961 while computing the tax payable by the Appellant.*

10:2 *The Appellant submits that considering the facts and circumstances of its case and the law on the subject it is not liable to pay the interest u/s.234C of the Income-tax Act, 1961 and the levy is unjustified, incorrect and illegal.*

10:3 *The Appellant submits that the AO be directed to delete the interest so levied by him and re-compute its tax liability accordingly.*

10:4 *Without prejudice to the above, the Appellant has filed a rectification application in respect of the above which is, as yet, pending adjudication.*

11:0 Re.: General:

11:1 *On the facts and circumstances of the case, and in law, the Ld. AO erred in initiating penalty proceedings under section 270A r.w.s. 274 of the Act.*

11:2 *The Appellant craves leave to add, alter, amend and/or substitute and/or modify in any manner whatsoever modify all or any of the foregoing grounds of appeal at or before the hearing of the appeal.*

2. Brief facts of the case are as under:

The assessee is a company engaged in provision of software development services, IT enabled services and marketing and sales support services to its associated enterprises. For the year under consideration assessee filed his return of income disclosing total income of ₹ 23,57,92,730/-. The return was processed under section 143(1) of the Act, and the case was selected for scrutiny.

Statutory notices were issued to assessee, in response to which, various details were filed by the authorised representative. The Ld.AR from the details filed noted that assessee had international transaction with its associated enterprises that exceeded ₹ 15 crores and therefore reference was made to the Ld.TPO for determining the arms length price of the international transaction.

2.1. On receipt of the reference, the Ld.TPO called for the economic details of the international transactions entered between the associate with a informed 3 CEB. From the details filed, the Ld.AO noted that following were the transactions assessee had with its associated enterprise: -

Particulars	Amount(INR)
Receipt for provision of contract software development services*	1,95,72,80,609
Receipt for Provision of contract IT enabled services*	23,27,75,972
Receipt for provision of contract marketing and sales support services*	1,93,54,674
RSU compensation cost payable	5,43,54,597
ESPP compensation cost payable	37,73,510
Remittance on behalf of employees towards ESPP	1,66,06,209
Recovery of expenses received	89,59,740
Purchase of shares	39,96,80,000

2.2. The Ld.TPO noted that assessee used TNMM as most appropriate method and OP/OC has a PLI to determine its arms margin at 15% for all the 3 segments being software development service, IT enabled service and marketing enabled services. The

Ld.TPO noted that for SWD segment assessee selected 14 compatibles and under ITeS segment, 10 compatibles were selected. As the mean median of the compatibles selected by assessee were within +/-5% range assessee treated the international transactions to be at arms length.

2.3. The Ld.TPO dissatisfied with the analysis carried out by Sissy shortlisted new set of compatibles for ITeS and SWD segment which are as under:

SWD segment

SI. No.	Company Name	F.Year wise OP/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
1	Rheal Software Pvt. Ltd.	-12.27	3.28	3.01	-1.85
2	KaIs Information Systems Ltd	1.37	3.97	5.77	3.62
3	Infomile Technologies Ltd.	10.22	9.91	11.12	10.43
4	Harbinger Systems Pvt Ltd	12.28	12.69	17.18	14.1
5	C G-V A K Software & Exports Ltd.	11.65	16.95	17.3	15.09
6	Larsen & Toubro Infotech Ltd.	20.78	19.21	23.98	21.14
7	Great Software Laboratory Pvt. Ltd.	27.18	20.24	10.67	21.24
8	Mindtree Ltd.	20.12	26.11	27.51	24.17
9	R Systems International Ltd.	16.74	31.05	26.44	24.40
10	Persistent Systems Ltd.	25.05	23.95	30.39	26.17
11	Tata Elxsi Ltd.	24.90	29.13	24.45	26.19

12	Infobeans Technologies Ltd.	23.89	34.98	20.46	26.44
13	Aptus Software Labs Pvt. Ltd.	24.83	27.67	26.72	26.46
14	Nihilent Ltd.	34.26	24.46	30.80	29.82
16	OFS Technologies Ltd.	19.88	26.47	67.57	29.93
15	Cygnnet Infotech Pvt. Ltd.	25.24	30.45	36.61	30.19
17	Infosys Ltd.	38.79	38.30	41.40	39.50
18	Treesixty Logica Testing Services Pvt.	36.63	48.46	42.02	41.94
19	Cybage Software Pvt. Ltd.	41.89	62.90	68.68	57.82
20	Consilient Technologies Pvt.	54.85	71.82	69.51	65.14
	35th Percentile				21.24
	Median				26.18
	65th Percentile				26.46

ITeS Segment

SI. No.	Company Name	F. Year wise OP/OC (%)			Wt. Average
		2016-17	2015-16	2014-15	
1	Sundaram Business Services Ltd.	9.21	0.99	-3.95	2.08
2	Jindal Intellicom Ltd.	8.66	2.78	-11.07	7.41
3	Fuzen Software Pvt. Ltd	15.07	16.06	16.98	15.93
4	Microland Ltd.(seg)	18.72	14.02	19.30	17.53
5	Tech Mahindra Business Services Ltd.	18.51	19.09	29.92	22.37
6	Datamatics Business Solutions Ltd.	6.21	33.46	36.22	22.64
7	Infosys B P M Services Pvt. Ltd.	22.35	24.41	26.77	24.37

8	Vitae International Accounting. Services Pvt Ltd.	27.00	27.25	No data available	27.13
9	Manipal Digital Systems Pvt. Ltd.	30.16	22.65	29.89	27.41
10	CES Ltd.	31.21	34.18	27.93	31.45
11	Ultramarine & Pigment Ltd. (Seg.)	46.63	30.27	27.26	34.41
12	S P I Technologies India Pvt. Ltd.	37.61	40.70	32.18	36.95
13	Inteq B P O Services Pvt. Ltd:	36.64	48.47	32.81	39.51
35th Percentile					22.37
Median					24.37
65th Percentile					27.41

2.4. The Ld. TPO proposed adjustment as under: -

Particulars	As per TP Order dated 22.01.2021	As per rectification Order u/s 154
Adjustment in respect of Software Development segment	4,47,949,052	20,17,03,783
Adjustment in respect of ITeS segment	2,06,66,030	2,06,66,030
Total TP adjustment	468,615,082	22,23,69,813

3. On receipt of the transfer pricing order, the Ld.AO passed the draft assessment order by incorporating the proposed transfer pricing addition. The Ld.AO further made addition in respect of the disallowance of interest under section 201(1A) and depreciation on goodwill claimed by the assessee.

3.1. On receipt of the draft assessment order, the assessee preferred objections before the DRP. The DRP passed certain directions by accepting the contentions of the assessee in respect of some of the comparables. However, on the issue of corporate taxes additions the DRP upheld the observations of the Ld. AO.

3.2. On receipt of the DRP direction, the Ld.AO passed the impugned order. The Ld.AO restricted the transfer pricing upward adjustment under SWD segment and no adjustment was made in under the ITeS segment. The other additions proposed on corporate tax issues were confirmed by the Ld.AO.

Aggrieved by the order of the Ld. AO, the assessee filed the present appeal before this *Tribunal*.

4. It is submitted that **Ground No.1** is general in nature and not require any adjudication.

4.1. It is submitted by the Ld.AR that the assessee do not wish to press **Ground No. 5**. Accordingly was ground raised stands dismissed as not pressed.

4.2. Ground No.2 is raised by the assessee, alleging that the directions of the DRP were not followed and the Ld.AO did not verify the operating margins of the comparables selected. We therefore direct Ld.AO to compute the margins of the compatibles correctly in accordance with the DRP directions.

Accordingly this ground no.2 raised by the raised by the assessee stands allowed for statistical purposes.

4.4. The Ld.AR submitted that **Ground No.3-3.6** are general in nature and therefore do not require adjudication.

4.5. The Ld.AR also submitted that, in **Ground No.3.9**, the assessee wish to seek exclusion of only one comparable being Infosys Ltd. The Ld.AR submitted that all of the comparables may be kept open considered in an appropriate circumstances.

5. Accordingly we only adjudicate for exclusion of Infosys Ltd in Ground number 3.9 as under:

5.1. M/s Infosys Technology Ltd.: At the outset it is submitted that this company is functionally dissimilar to the Assessee on various counts and therefore it ought to be rejected from the final list of comparables. It is submitted that the TPO and DRP erred in not appreciating the contentions of the Assessee and consequently erred in upholding the inclusion of the company in the final list of comparables.

5.2. It is submitted that Infosys renders services like infrastructure management, business process management, and other high end services like analytics and digital transformation, apart from sale of products and therefore is a full fledged risk bearing entrepreneur who cannot be compared to the Assessee who renders routine IT services. It is submitted that this company earns income from both rendering software services and development of products, there are no segmental details in respect of the services rendered. Further, the services rendered by the company are not functionally comparable to the routine SWD services rendered by the Assessee. The company owns seven Edge products/platforms and six other product based solutions. The company leverages on its premium banking solution 'Finnacle ®'. Also, the company has significant

intangibles as a part of its fixed assets in the nature of intellectual property. The company owns significant brand value, and focuses immensely on brand building. For this purpose it incurs significant brand building expenses, which goes to help the company have a premium pricing for its services. The company has also incurred significant selling and marketing expenses. The company derives more than 50.4% of its revenue from onsite activities and places high reliance on the onsite activities as they generate higher revenue when compared to services performed at their own facilities. The company also heavily focuses on research and development activity and incurs significant expenditure for this account. For the concerned financial year the company has incurred research and development expenses of Rs. 605 crores. The company for the relevant financial year has earned abnormally high profit with margin of 38.61%, which makes it incomparable to the Assessee. In any event, the turnover of the company is much higher when compared to the Assessee's, and hence it ought to be excluded from the list of comparables. Detailed submissions in this regard are placed at pages 638-661 and 1140-1159 of the paper book. In view of the above difference, the company ought to be excluded from the final list of comparables.

5.3. It is submitted that this company is consistently excluded from the final list of comparables in cases of assessee's placed similar to the Assessee. The Ld.AR relied on the *decision of coordinate bench of this Tribunal* in the cases of *Yahoo Software Development India Pvt. Ltd. v. JCIT* by order dated 28.02.2020 passed in IT(TP)A No.

2365/Bang/2019, wherein the company was directed to be excluded from the final list of comparables.

5.4. Our attention was also drawn to the decision of the *Hon'ble Delhi High Court* in the case of *CIT v. Agnity India Technologies Pvt. Ltd.* reported in *(2013)36 taxmann.com 289*, wherein *Hon'ble Court* after considering the risk profile, nature of services, revenue, ownership of branded/proprietary products, onsite v. Offshore revenue's, expenditure on advertising/sales promotion and brand building, expenditure on research & development of M/s Infosys Ltd. (supra) with software service provider by name M/s.Agnity India Technologies (P.) Ltd. (supra) cannot be compared with a small service software provider.

5.5. On the contrary, the Ld. DR relied on the observations of the DRP/TPO.

We have considered the rival submissions by both sides.

5.6. We note that this company owns intellectual properties, incurs significant R&D costs & onsite activity. We also note that it is engaged in diversified business activities, and involved in development of software products in addition to software services. For the annual report we observe that this company owns products such as Finacle, Edge Verve and other product based solutions and commands substantial brand value. There is no segmental profit & loss account not available. Even otherwise the turnover of this company is Rs.59,257 crores and therefore exceeds the upper limit of the turnover filter of Rs.200 crs. For all the above reasons we do

not find this company to be comparable with a captive service provider like that of the assessee before us.

Accordingly this ground of assessee stands partly allowed.

6. Ground No.4 is raised by the assessee for disallowance made on depreciation on Goodwill.

6.1. During the year under consideration the assessee had acquired entire equity share capital of ARRIS India Pvt. Ltd. ['AIPL'] for Rs.39,96,80,000/-, whereby AIPL became wholly owned subsidiary of the assessee. At the time of acquisition, the shares of AIPL were valued by adopting the Discounted Cash Flow method and a Valuation Report was obtained which factored in the future revenue generation capacity of the AIPL inter-alia considering the intangibles like, skilled manpower, actual customer contracts, etc.

6.2. It was submitted by the Ld.AR that later on, it was decided to integrate the Indian entities of the Group viz. the assessee and AIPL and hence, there was an amalgamation in the nature of merger between the assessee and its subsidiary AIPL ["transferee company" or "amalgamating company"]. The Ld.AR submitted that, the scheme of arrangement was approved by the National Company Law Board of Bengaluru Bench, vide an Order dated 29/09/2017 w.e.f. 01/04/2016.

6.3. The Ld.AR submitted that, as per the scheme of amalgamation, the assessee acquired the entire equity share capital of AIPL for Rs.39,96,80,000/-. After considering the value of the assets and liabilities taken over by the assessee from AIPL, there was an excess

purchase consideration paid over the net worth of AIPL, amounting to Rs.11,89,41,232/-, being paid towards Goodwill of AIPL - the valuation as per the valuation report dated 27/11/2017 placed at page 447 to 454 of the paper book has been demonstrated by the assessee as under::

Particulars	Amount (in Rs.)	
Value of Assets taken over	60,55,00,679	A
Value of business liabilities taken over	32,47,61,911	B
Net Assets taken over	28,07,38,768	C = A - B
Purchase Consideration	39,96,80,000	D
Goodwill	11,89,41,232	E = D - C

6.4. It is submitted that the assessee, in its scheme of amalgamation, chose to follow the 'purchase method' as prescribed in Accounting Standard (AS) 14 "Accounting for Amalgamations', pursuant which the assessee recorded the excess consideration paid over and above the net assets taken over as Goodwill and has accordingly, claimed depreciation u/s. 32 of the Act.

6.5. In the draft assessment Order, the Ld.AO disallowed the depreciation claimed on the aforesaid goodwill relying on 6th proviso to section 32 of the Act.

6.6. The DRP held that the assessee is not entitled to depreciation on Goodwill as it has not satisfied the mandatory conditions as specified in 6th proviso to section 32(1) and Explanation 3 and 7 to section 43(1) of the Act. The DRP relied on the following decisions:

- a) Decision of the Panaji Bench of the ITAT in the case of Chowgule & Co. Pvt. Ltd. v/s. ACIT reported in [2011] 10 taxmann.com 224; and*

b) *Decision of the Bangalore Bench of the ITAT in the case of United Breweries Ltd. v/s. Addl. CIT in ITA nos. 722, 801 and 1065/Bang/2014*

6.7. The assessee however placed reliance on the decision of the *Hon'ble Supreme Court* in the case of *CIT v/s. Smifs Securities Ltd. reported in [2012] 348 ITR 302*. Reference was also made to the amendment by the Finance Act, 2021 vis-à-vis the allowability of depreciation on Goodwill which was negated by the DRP.

6.8. The Ld.AR submitted that though 'goodwill' is arrived by calculating excess of purchase consideration over the value of business assets and business liabilities taken over, however, it represents goodwill in connection with the business of AIPL, together with exclusive right of the assessee to represent themselves as carrying business in succession to AIPL which *inter-alia* includes skilled employees, brands, contracts, technical know-how, etc. It was submitted that the assessee has actually made a payment for acquisition for the aforementioned goodwill and which is represented in the form of intangibles like, skilled manpower, actual customer contracts, etc. and hence, depreciation ought to be allowed u/s. 32 of the Act.

6.8. The Ld.AR submitted that the issue vis-vis the allowability of depreciation on Goodwill stands covered in favor of the assessee by the decision of the *Hon'ble Supreme Court* in the case of *CIT v/s. Smifs Securities Ltd.* (supra). He also submitted that similar view has been taken by the following decisions:

a) Decision of the Bangalore Bench of the ITAT in the case of Altimetrik India (P.) Ltd. v/s. DCIT [2022] 194 ITD 124 (Bangalore - Trib.);

b) Decision of the Mumbai Bench of the ITAT in the case of Keva Fragrances Pvt. Ltd. v/s. DCIT [ITA No. 334/M/2020];

(c) Decision of the Hyderabad Bench of the ITAT in the case of Mylan Laboratories Ltd. v/s. DCIT [2020] 180 ITD 558; and

6.9. The Ld.AR submitted that proviso to section 32 do not apply, as in the present facts it was not a case where the amalgamating company had goodwill as an asset. Goodwill arose in the hands of the assessee company for the first time on account of the merger. It was submitted that the entire proviso stipulates that the depreciation claimed after amalgamation should not exceed the deduction calculated at the prescribed rate in respect of the assets, and the apportionment of depreciation between the amalgamating and amalgamated company can be in the ratio of the number of days for which the assets were used by them. He thus submitted that the goodwill arose for the first time in the books of the assessee as a result of the amalgamation. Therefore, the question of apportionment between the amalgamating company and the amalgamated company in the ratio of the number of days for which the assets were used by them does not arise. He placed reliance on the following decisions in support.

Decieion of Hon'ble Supreme Court in case of CIT v. Smifs Securities Ltd. reported in (2012) 24 taxmann.com 222

Decision of Hon'ble Delhi Tribunal in case of Aricent Technologies (Holdings) Ltd. v. Dy. CIT reported in (2019) 109 taxmann.com 47

Decision of Hon'ble Hydrabad Tribunal in case of Mylan Laboratories Ltd. v. Dy. CIT (2020) 113 taxmann.com 6

6.10. The Ld.DR on the contrary placed reliance on the orders passed by authorities below. He also placed reliance on the decision of *Coordinate Bench of this Tribunal* in case of *United Breweries Ltd. v. ACIT* reported in (2016) 76 *taxmann.com* 103 .

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

6.11. The decision relied by the Ld.DR does not support the case of revenue, for the reason that, in the case of *United Breweries Ltd. (supra)*, the assessee therein (being the United Breweries) was an amalgamating company or the transferor company who already had goodwill in its books of account, prior to the merger. The assessee in the present case is the transferee company who do not have any goodwill in the books of account prior to amalgamation and it is post amalgamation that the assessee acquired goodwill. This aspect has been considered by the *Hon'ble Delhi Tribunal* in the case of *Aricent Technologies (Holdings) Ltd. (supra)*:

"60. The DR further emphasized that if the 6th proviso to section 32 (i) is considered the depreciation under this provision is to be restricted to the amount considering that amalgamation has not taken place and since in the hands of the amalgamating companies the depreciation on goodwill would have been zero there cannot be deprecation in the hand of the amalgamated company. In support reliance was placed on the decision of the coordinate bench of the Tribunal Bangalore in ITA No. 722, 801 and 1065/Bang/2014. Once again the DR is not appreciating the facts of the case in hand in their true perspective. It has to be understood that there was no goodwill in the books of amalgamating companies and only after the scheme of amalgamation, when the amalgamating companies amalgamated, goodwill came into existence being the difference between the consideration paid by amalgamated company over and above the net asset value of the amalgamating companies. The reliance placed on the judgment of coordinate bench is misplaced in as much as in that case the

value of the goodwill in the books of amalgamating company was only Rs. 7.45 crores which has been shown by the assessee at Rs. 62.30 crores and on this it was held by the appellate authority that the assessee has failed to justify the valuation of goodwill at Rs. 62.30 crores. The facts of the case in hand clearly show the valuation of goodwill as per the valuation report and there is no quarrel in so far as the net asset value of the amalgamating companies is concerned. The same has the sanction of the Hon'ble High Court.

61. Another argument of the DR is that the assessee has not paid anything for the goodwill acquired in business reconstruction. No consideration can be ascribed to acquisition of goodwill. There was no goodwill before amalgamation. Hence, it is not a case that goodwill has been bought or purchased and therefore, the cost of acquisition of such goodwill in the hands of the assessee should be taken as nil. Once again the DR has erred in not understanding the scheme of amalgamation. In the order of the Hon'ble High Court itself it is clearly mentioned that anything paid over and above the net asset value of the amalgamating companies shall be towards goodwill.

The Ld.DR further referred to the decision relied upon by the counsel in the case of Smifs Securities 348 ITR 302 and stated that the Hon'ble Supreme Court has only laid down the ratio that goodwill is an intangible asset and eligible for depreciation but has nowhere the Hon'ble Supreme Court has given any finding in respect of depreciation on goodwill in the case of amalgamation. We do not find any merit in this contention of the DR. A conspectus reading of the Judgment of the Hon'ble Supreme Court clearly show that the Hon'ble Supreme Court was seized with the facts of amalgamation of one company with the assessee company and has held that the excess consideration paid by it over value of net asset acquired of the amalgamating company amounted to goodwill for which the depreciation was to be allowed. The Hon'ble Delhi High Court in the case of Hindustan Coca Cola Beverages Private Limited reported in 331 ITR 192 has upheld the findings of the Tribunal that payments made towards business acquired on slum price and a part of the price so paid was allocated to the intangible asset covered under the head goodwill."

6.12. Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra) while considering an identical issue, held that goodwill arising on amalgamation to be a capital asset eligible for

depreciation. The consideration paid by the amalgamated company over and above the net assets of the amalgamating company should be considered as goodwill arising on amalgamation.

6.13. Based on the above observations by *Hon'ble Supreme Court* in case of *Smifs Securities Ltd. (supra)*, we direct the Ld.AO to carry out necessary verification in accordance with law. In the event goodwill is arising on amalgamation, Ld.AO is directed to compute depreciation in accordance with the principles laid down in case of *Smifs Securities Ltd. (supra)*.

Accordingly, Ground no.4 raised by assessee stands allowed for statistical purposes.

7. Ground No.6-7 are raised by the assessee for short grant of TDS deducted and Advance tax paid.

7.1. Ground no.8-10 are in respect of erroneous levy of interest under section 234 A and excessive levy of interest under section 234B/C. We direct the Ld.AO to verify the same and consider the claim in accordance with law.

Accordingly, Ground no.6-10 raised by assessee stands allowed for statistical purposes.

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

Order pronounced on 20th January, 2023.

Sd/-

(Chandra Poojari)
Accountant Member

Sd/-

Beena Pillai
Judicial Member

Bengaluru, Dated: 20th January, 2023

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -*
4. *The CIT -*
5. *The DR, ITAT, Bengaluru*
6. *Guard File*

By Order

//True Copy//

*Assistant Registrar
ITAT, Bengaluru*

n.p.