IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)

ITA Nos. 1637 & 1638/MUM/2021
Assessment Years: 2012-13 & 2013-14

DCIT, Circle-8(2)(1), Room No. 624, 6th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	***Vs.***	M/s Ogilvy and Mather Pvt. Ltd., 14th Floor Commerz, International Business Park, Off. Express Highway Goregaon (E)- 400063. **PAN No. AAACO 0427 A**
Appellant		**Respondent**

ITA Nos. 1324 to 1326/MUM/2021
Assessment Years: 2012-13, 2013-14 & 2016-17

M/s Ogilvy and Mather Pvt. Ltd., 5th floor, The ORB, Village Marol, Andheri (East), Mumbai-400099. **PAN No. AAACO 0427 A**	***Vs.***	The Dy. CIT-7(3)(1) (now assessed with Asst. CIT- 8(2)(1), Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		**Respondent**

CO. Nos. 38 & 39/MUM/2022
(Arising out of ITA Nos. 1637 & 1638/MUM/2021)
Assessment Years: 2012-13 & 2013-14

M/s Ogilvy and Mather Pvt. Ltd., 5th floor, The ORB, Village Marol, Andheri (East), Mumbai-400099. **PAN No. AAACO 0427 A**	***Vs.***	DCIT, Circle-8(2)(1), Room No. 624, 6th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		**Respondent**

Assessee by : Mr. Ajit Shah/Hetal Sangani

Revenue by	:	Mr. M P Ahuja, DR
Date of Hearing	:	10/05/2023
Date of pronouncement	:	29/05/2023

ORDER

PER BENCH:

These cross appeals and cross objections are directed against separate orders passed by the Ld. Commissioner of Income-(Appeals) for assessment year 2012-13, 2013-14 and 2016-17 respectively. The facts and circumstances in these appeals and cross objections being identical, samewere heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. Firstly, we take up the cross appeals of the assessee and Revenue and cross objections of the assessee for assessment year 2012-13. The relevant grounds raised in cross appeals and cross objections are reproduced as under:

Assessee's Ground

1. Claim of Education Cess of Rs. 1,04,06,747/-

In the facts and circumstances of the case, and in Law the Learned Assessing Officer (AO) / Commissioner of Income Tax (Appeals) ought to have allowed the deduction for Education Cess of Rs. 1,04,06,747/- (inadvertently mentioned as Rs.as expenditure u/s 37 and other applicable provisions of the Income Tax Act, 1961 (the Act).

2. Refund of Dividend Distribution Tax of Rs. 2,99,38,207/-

In the facts and circumstances of the case, and in law it should be held that the dividend distribution tax paid us 115-0 of the Act by the appellant on the dividend distributed/paid to Foreign Shareholders should be restricted to the respectiverates as per relevant Article 10/11 -"Dividends" of the Double Taxation Avoidance Agreement (DTAA) between India and the country of respective foreign shareholder is a resident i.e. Netherlands, United Kingdom, and Mauritius and the excess corporate dividend distribution tax paid should be held as refundable to the appellant.

Note:

The aforesaid ground has been raised for the first time. Since involves question of law it is humbly prayed that the same should be considered and dealt with and decided in accordance with the provisions of law and merits of the claim.

3. It is humbly prayed that the reliefs as prayed for hereinabove and or/such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted.

Revenue's ground of appeal

1. *Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that a computer software bought off the shelf is a tangible asset and hence eligible for depreciation at the rate of 60% .*
2. *Whether on facts and circumstances of the case and in law, Ld. CIT(A) erred in delegating the addition made us 154 of the Act on the ground that depreciation on software is allowable at the rate 60% or 25% is a debatable issue and hence cannot be rectified.*
3. *Whether on facts and circumstance of the case and in law, the Ld. CIT(A) erred in holding that the Assessing Officer is not justified in making rectification on a substantive issue.*

Cross Objections raised by the Assessee

1. In the facts and circumstances of the case and in law:

(a) The Ld. CIT(A) rightly held that off the shelf computer software bought were tangible assets and eligible for depreciation @ 60%.

(b) The Ld. CIT(A) rightly held as to whether computer software is eligible for depreciation @ 60% or 25% is a debatable issue and hence allowance of depreciation at 60% could not be construed as a mistake apparent from record which could be rectified us. 154 of the Act.

(c) The Ld. CIT (A) did not err in holding that the Assessing Officer was not justified in passing the order of rectification us. 154 of the Act involving substantive issue as to whether the correct rate of depreciation in respect of software is 60% or 25%.

(d)The Appellate Order passed by the Ld. CIT (A) should be upheld wherein he has held that computer software are eligible for depreciation @ 60%.

1.1 Without prejudice to each of the earlier Cross Objections, in the facts and circumstances of the case and in law the appeal filed by the Department for impugned assessment year 2012-13 should be dismissed as the tax effect mentioned in the Form 36 filed along with the Grounds of Appeal is Rs.19,53,430/- which is less than Rs. 50 lakhs as per the InstructionsNo. 17/2019 dated 08/08/2019 issued by the Central Board of Direct Taxes as regards the appeal by the Department.

2. It is humbly prayed that the reliefs prayed for hereinabove and/or such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted.

3. Briefly stated, facts of the case are that the assessee company was engaged in the business of advertising. The assessee filed its original return of income on 20.11.2012 declaring total income at Rs.109,55,38,640/-, which was subsequently revised to Rs.110,12,43,050/- on 26.03.2014. In the return of income, for the purpose of the income tax, the assessee claimed depreciation on software expenses at the rate of the 60% of written down value.The return of income filed by the assessee was selected for scrutiny and

statutory notices under the Act were issued and complied with. The assessment u/s 143(3) of the Act was completed on 26.03.2016. In the assessment completed the claim of depreciation on software was allowed. However, subsequently the Assessing Officer noted that the assessee should have been allowed depreciation only at the rate of 25% instead of 60% claimed by the assessee. Accordingly, in the rectification order passed under section 154 of the Act on 30/03/2019, the Assessing Officer withdrawn the excess depreciation amounting to ₹ 58, 60, 877/-. On further appeal, the Ld. CIT(A)held that, firstly, the Assessing Officer was not justified in rectification on a substantive issue and secondly, the assessee to be entitled for depreciation at the rate of the 60% with effect from 01/04/2003. Before the Ld. CIT(A), the assessee also raised additional ground claiming deduction for education cess, which was dismissed by the Ld. CIT(A). Aggrieved, both of the Revenue and the assessee are before the Tribunal by way of raising respective grounds.

4. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record.

4.1 As far as ground No. 1 of the appeal of the assessee is concerned, we find that the Ld. CIT(A) relying on the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income-tax vs K Srinivasan (1972) 83 ITR 346**read with memorandum to finance bill of 2004, held thateducation cess is ultimately a part of

the Income-tax and hence not allowable. We find that Hon'ble Parliament has amended the section 40(a)(ii) of the Act by way of Finance act ,2022 and an Explanation-3 has been introduced with effect from 01/04/2005, which reads as under:

> *"(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proposition of, or otherwise on the basis of, any such profits or gains.*
>
> *[Explanation 1. – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian Income-tax payable under section 91.]*
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> *[Explanation 2. – For the removal of doubts, it is hereby declared that for the purpose of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A.]*
>
> ***[Explanation 3. – For the removal of doubts, it is hereby clarified that for the purposes of this sub-clause, the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax;]****"*

4.2 In view ofabove retrospective amendment, the claim of education cess was not pressed before us by the learned Counsel of the assessee.

4.3 Further, we note that the **Hon'ble Supreme Court in the case of CIT Vs Chambal Fertilizersand chemicals Ltd in SLP© No. 7379 /2019** has upheld the retrospective amendment and

confirmed that education cess is not allowable deduction. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> *"Learned senior advocate appearing on behalf of the respondent-assessee states that in view of the amendment vide the Finance Act, 2022 with retrospective effect from 01.04.2005 to Section 40(a) (ii) of the Income Tax Act, 1961, the present appeal has to be allowed.*
>
> *In view of the statement made, we direct that the Education cess paid by the respondent-assessee would not be allowed as an expenditure under Section 37 read with 40 (a) (ii) of the Income Tax Act, 1961. Learned senior advocate appearing on behalf of the respondent-assessee states that they have also paid the applicable tax on the disallowance.*
>
> *Recording the above, the appeal is allowed in the aforesaid terms, without any order as to costs."*

4.4 Respectfully, in view of decision in the case of Hon'ble Supreme Court of Chambal Fertilizer (supra), the ground No. 1 of appeal of the assessee is dismissed.

5.1 The ground No. 2 of the appeal, which is raised as an additional ground, relates to dividend distribution of tax of Rs.2,99,38,207/-. This ground was admitted as additional ground

in view of the settled principle of law being purely legal in nature and no investigation of the fresh facts was required. In support of ground, the Ld. Counsel of the assessee relied on the following decisions:

1. **Asst. CIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 219 CTR 90 (SC)**
2. **Asst. Commissioner of Income tax – CC 8(2), Mumbai v. I-Flex Solutions Ltd. [2010] 42 SOT 7 (Mum)**
3. **National Collateral Management Services P. Ltd. v. Addl. CIT Rg. 7(1) Mumbai (ITA No. 2237/Mum/2013)**
4. **Arkema Chemicals India P. Ltd. v. ACIT (2022) ITA No. 1032/Mum/2021 (Mum Trib.)**
5. **Computer Age Management Services (P.) Ltd. [2019] 109 taxmann.com 134 (Madras High Court)**

5.2 The Ld. Counsel however fairly accepted that the Tribunal Special Bench in the case of **DCIT, Mumbai Vs Total Oil India P Ltd in ITA No. 6997/Mum/2019 for AY 2016-17**has held *that dividend distribution tax on domestic companies has to be levied as per the provisions of the Income-tax Act, and no benefit of the DTAA can be allowed.* The relevant finding of the special bench of the Tribunal (supra) is reproduced as under:

"CONCLUSION:

83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income Tax (Tax on Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax applicable to the non-resident

shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly."

5.3 In view of issue in dispute,beingcovered against the assessee by the decision of the special bench of the Tribunal (supra), the additional ground raised by the assessee is dismissed.

6. Now we take up the ground raised by the Revenue in its appeal. All the three rounds raised are in relation to depreciation on the computer software allowed by the Ld. CIT(A) @ 60% of the written down value. The relevant finding of the Ld. CIT(A) is reproduced as under:

"6.3 The first issue in the present case is whether the computer software is a tangible or intangible asset and whether the assesses get ownership right by acquiring the same. In this case the computer software is acquired off the shelf. The agreement under which software is commonly acquired, the assesses acquire only a licence to use the computer software for their own purpose and there is as such no acquisition of any asset. The intellectual property rights in computer software is recognized and protected by the Copyright Act and as per the provisions of s. 14(b) of the said statute, the use of a computer software under a licence is not exercise of a copyright. The acquisition of computer software under licence could be considered as a purchase of a copyrighted article wherein no intangible property is transferred asper the Copyright Act. The ratio laid down by the Hon'ble Supreme Court in the case of TCS (2004) 271 ITR 401 (SC) holding that computer software put in a medium of disk would be goods may lead to the inference that purchase of such disk is acquiring a tangible asset. If the disk, tape or floppy or other

electronic medium in which the software is stored is by itself goods, then the assessee who acquires the same, acquires a tangible asset. Computer software has not been defined in the Act, but in Note 7 to Appendix I to the IT Rules, it has been explained to include computer program recorded on any disk, tape, perforated media or other information storage device. Therefore computer software in canned form is goods and a tangible asset by itself. These are covered in Note 7 to Appendix I to the IT Rules and eligible for depreciation @ 60%.

6.4 Canned software contained in a medium are bought and sold. It is an article of value. It is sold in various forms like floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc. A program containing instructions in computer language is subject-matter of a licence. It has its value to the buyer. It is useful to the person who intends to use the hardware, viz., the computer in an effective manner so as to enable him to obtain the desired results. It indisputably becomes an object of trade and commerce.

'Canned software means that is not specifically created for a particular consumer. The sale or lease of, or granting a license to use, canned software is not automatic data processing and computer services, but is the sale of tangible personal property. When the software marketed is canned software being a tangible property would be exigible to sales-tax. These are eligible for depreciation @ 60%.

6.5 It appears the software is acquired off the shelf. These are the kind of software purchased to run the hardware. Basically, there are two types of software programs.The first is an operational program which controls the hardware and actually makes the machine run; it is fundamental and necessary to the functioning of the computer hardware itself. Secondly, there is an applicational program which is a type of program designed to perform specific functions, such as preparation of the employee payroll, preparation of a loan amortization schedule, or any other specific job which the computer is capable of performing. Applicational programs instruct the central processing unit of the computer to perform the fundamental computations, comparisons, and sequential steps required to take incoming information and compute the desired output. [Commerce Union Bank vs. Tidwell 538 SW. 2d 405].

The 60% rate for depreciation is stipulated for i. computer software acquired off the shelf, if. operational software that controls

hardware, i. where the software is an integral part of the related hardware etc. In these cases these software which are recorded in any medium becomes tangible asset.

6.6 In the present case software purchased by the assessee for operationalpurpose. The expenditure incurred by the assessee on purchase of softwarescapital in nature. In AMWAY INDIA ENTERPRISES vs. DCIT (2008) 114 TTJ 0476(SB) : (2008) 4 DTR 0001 (SB) : (2008) 111 ITD 0112, the ITAT special bench opinedthat computer software is a tangible property. Though a licensee, the personpurchasing the disk or other medium containing the software is owner to the extent ofthe rights comprised in the license. Software contained in a disk is tangible propertyby itself. The use by the assessee of such software in his business is enough to allowthe claim for depreciation. The rights which an assessee acquires by purchasing thedisk or magnetic medium containing the computer software with limited or absoluteright to use the same by itself would satisfy the requirements of the plant. Theassessee's ownership of limited right over the tangible asset is sufficient to concludethat the assessee is the owner of the plant. With effect from 1st April, 2003, computersoftware has been classified as a tangible asset under the heading "Plant" inAppendix I to the IT Rules entitled to depreciation at 60 per cent. The assesseewould be entitled to depreciation at 60 per cent from 1st April, 2003.

6.7 Further, I have found that on the identical issue for AY 2014-15 and 2015-16,the decision was taken by my predecessor i.e., Commissioner of Income Tax(Appeals)-13, Mumbai. In both the assessment years, the CIT(A) held that the issueis covered in favour of the appellant by the decision of Special Bench, ITAT, Delhi inthe case of Amway India Enterprises vs. DCIT 111 ITD 112. Respectfully followingthe same, the CIT(A) has directed the Assessing Officer to allow the depreciation @60% for both the Assessment years. In the present year also, facts are identical.Hence, maintaining the consistency and also the reasons I have delineated above, itis held that the assessee is entitled for depreciation @ 60% for the computersoftware for the AY 2016-17.I also rely on the following jurisdictional pronouncements:

1. Amway India Enterprises V/s DCIT (2008) 111 ITD 112 New Delhi

2. MakeMy Trip (India) Pvt Ltd Vs DCIT 6(1) ITA No. 6055/Del/2010 dated 30.07.2018.

3. ACIT Vs Zyndus Infrastructure (P} Ltd [2016] 72 taxmann.com 199 (Ahmadabad

Tribunal)

4. Ushodaya Enterprises Ltd V ACIT [2014] 149 ITD 352 (Hyderabad)

5. Maruti Udyog Ltd. Vs DCIT [2005] 92 ITD 119 (Delhi)

6. National Collateral Management Services P. Ltd Vs Add CIT Rg 7(1) Mumbai (ITA No.2237/Mum/2013)

7. Sec. 154(1) of the Act confers power on the IT authorities, as enumerated insection 116 of the Act, to amend any order passed by it under the provisions of theAct. The power can be exercised, "to rectify any mistake apparent on record." Theexercise of power under s. 154(1) of the Act by the IT authorities are subject to the condition that there is a mistake apparent from the record. In Asst. CIT vs.Saurashtra Kutch Stock Exchange Ltd. (2008) 219 CTR (SC) 90, the Supreme Court, while dealing with a case arising under s. 254 of the Act, considered the scope of the words and phrase "mistake apparent on the face of the record". The hon'ble Supreme Court held:

"In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not.An error apparent on the face of the record means an error which strikes on mere looking and does not need, long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record". (emphasis supplied)

In the present case, considering facts and circumstances, I hold that the Assessing Officer is not justified in making a rectification on a substantive issue."

7. The Ld. DR submitted that computer software that if the software is embedded in computer hardware itself then only depreciation would be allowed @ 60%,otherwise it should be restricted to 25% same, treating it to be 'Plant'.

8. On the contrary, the Ld. Counsel of the assessee relied on the finding of the Ld. CIT(A).

8.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Ld. CIT(A) in view of the decision of the special bench of the Tribunal in the case of **Amway India Enterprises Vs DCIT (2008) 114 TTJ 476 (SB)** allowed the claim of the assessee of depreciation at the rate of the 60% on computer software being a tangible property. Further,we find that under rule 5 of the Income tax Rules, 1962, depreciation on any block of assets is to be calculated, at the percentage specified in the second column of the table in the appendix I to those rules, on the written down value of such block of assets. From assessment year 2006-07 onward new Appendix I has been made effective. In the part A of said appendix under the head "tangible assets", list of assets has been prescribed under three sub head. Under the sub head of 'Machinery and Plant', at Sr No. 5,**item of computers including computer software has been prescribed for depreciation rate of 60% which has been amended to 40% w**ith effect from 01/04/2017. Since assessment year before us is 2012-13, therefore during relevant period

depreciation rate prescribed was of 60%.Further,a note7 below the appendix has been provided, which reads that **computer software meansany computer program recorded on any disk, tape, perforated media or other information storage device.**In our opinion, the ld CIT(A) has correctly allowed the depreciation after verification of Rules and law on the issue and we don't find any infirmity in the order of the Ld. CIT(A) on issue in dispute and accordingly, we uphold the same. The ground No. 1 and 2 of the Revenue are accordingly dismissed.

10. In ground No. 3, the Revenue is agitated for not considering the issue of depreciation rate of computer software for the purpose of rectification. In this regard the Ld. CIT(A) in detailed finding held as under:

> *"7. Sec. 154(1) of the Act confers power on the IT authorities, as enumerated insection 116 of the Act, to amend any order passed by it under the provisions of theAct. The power can be exercised, "to rectify any mistake apparent on record." Theexercise of power under s. 154(1) of the Act by the IT authorities are subject to the condition that there is a mistake apparent from the record. In Asst. CIT vs.Saurashtra Kutch Stock Exchange Ltd. (2008) 219 CTR (SC) 90, the Supreme Court, while dealing with a case arising under s. 254 of the Act, considered the scope of the words and phrase "mistake apparent on the face of the record". The hon'ble Supreme Court held:*
>
> *"In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not.An error apparent on the face of the record means an error which strikes on mere looking and does not need, long drawn*

out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record". (emphasis supplied)

In the present case, considering facts and circumstances, I hold that the Assessing Officer is not justified in making a rectification on a substantive issue."

11. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In our opinion, whether the computer software should be subject to depreciation @ 60% or 25% ,cannot be a matter of rectification as there are no apparent mistake of record pointed out by the Ld. DR. Accordingly, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and we uphold the same. The ground No. 3 of the appeal of the Revenue is dismissed.

12. In the cross objection, the assessee has supported the finding of the Ld. CIT(A) on the issue of depreciation of computer software. Since, we have already dismissed the ground of the Revenue on this issue therefore, this ground is rendered merely academic and hence, same is dismissed as infructuous.

12.1 The grounds raised in cross appeals for AY 2013-14 and cross objection by the assessee for AY 2012-13 are identical to grounds raised in cross appeals for assessment year 2012-13 and cross

objection of the assessee, therefore, same are decided mutatis mutandis.

13. In assessment year 2016-17, the assessee is only in appeal. The grounds raised in the appeal of the assessee are identical to grounds raised in the assessment year 2012-13 and therefore, same are decided mutatis mutandis.

14. In the result, the cross appeals of the assessee and Revenue are dismissed. The cross objections of the assessee are also dismissed.

Order pronounced in the open Court on 29/05/2023.

Sd/-	**Sd/-**
(NARENDER KUMAR CHOUDHRY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 29/05/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai