

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

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

IT(TP)A No.2846/Bang/2017
Assessment Year: 2013-14

M/s. Dell International Services India Pvt. Ltd. 12/1, 12/2A, 13/1A, Divyashree Gardens Challagutta Village, Varthur Hobli Bangalore 560 071 PAN NO : AAACH1925Q	Vs.	Addl. CIT LTPU Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Tanmayee Rajkumar, A.R.
Respondent by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	03.08.2023
Date of Pronouncement	:	07.08.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against assessment order passed by Additional CIT, Large Tax Payers Unit, Bangalore for the assessment year 2013-14 dated 31.10.2017. The assessee has raised following grounds:-

- a) *The order issued by the Additional Commissioner of Income-tax ('ACIT), Large Tax Payers Unit ('LTU'), Bangalore [('Assessing Officer') or ('AO')], under section 143(3) read with section 144C, pursuant to the directions issued by the Hon'ble Dispute Resolution Panel ['DRP' / Ld. Panel], is bad in law and on facts and is in violation of the principles of natural justice*

Without prejudice to the generality of the above, the order issued by the Ld. AO is bad in law insofar as the fact that the Ld. AO did not issue to Dell International Services India Private Limited, a show cause notice, as per proviso to section 92C(3) of the Income-tax Act, 1961 ['the Act'].

- b) *The directions issued by the Ld. Dispute Resolution Panel ('DRP/ Ld. Panel/Hon'ble DRP') did not take cognizance of the objections raised*

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by the Appellant in relation to the transfer pricing matters while issuing the directions under Section 144C(5).

- c) On the facts and in the circumstances of the case and in law, the Ld. Panel and Ld. AO/ Ld. TPO erred in not demonstrating that the motive of the Appellant was to shift profits outside India by manipulating the prices charged in the international transaction, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act.*
- d) The order passed by the Ld. AO is without jurisdiction, inter cilia, insofar as it **purports to** give effect to an invalid order of the Ld. Panel.*
- e) The directions issued by the Ld. Panel and the order passed by the Ld. AO is **without** jurisdiction, inter alia, in so far as it purports to give effect to an invalid order of the Ld. TPO.*

2. Comparability Analysis adopted by the TPO for determination of arm's length price for the software development services segment

- a) The Ld. Panel and Ld. AO/ Ld. TPO erred in rejecting the value of international transaction of provision of software development services, as recorded in the books of account, as the*
- b) The Ld. Panel and the Ld. AO/Ld. TPO erred in determining a new arm's length price in substitution of the arm's length price determined by the Appellant.*
- c) The Ld. pod and the Ld. AO/Ld. TPO erred in law in holding that the fresh comparability analysis using non contemporaneous data conducted by the Ld. TPO and further substituting the Appellant's analysis with fresh benchmarking analysis on his own conjectures and surmises. Thus, the Appellant prays that the fresh benchmarking analysis conducted by the Ld. TPO is liable to be quashed.*
- d) The Ld. AO/Ld. TPO grossly erred on facts in benchmarking the transactions of the IT Services Segment of the Appellant with companies operating as full-fledged entrepreneurs without considering the differences in the functions performed, assets employed and risk undertaken by the Appellant vis-à-vis comparable companies. The Ld. Panel erred in upholding the actions of the Ld. AO/Ld. TPO.*
- e) The Ld. AO/Ld. TPO erred on facts in rejecting the comparable companies arrived at in the Transfer Pricing Study without considering the functional and risk analysis of the Appellant and the Ld. Panel also erred in confirming the same.*
- f) The Ld. Panel and the Ld. AO/Ld. TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Appellant, without establishing functional comparability, such as, (i) companies whose data for financial year (TY') 2012-13 was not available, (ii) companies with software development service revenue*

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less than 75% of total operating revenue, (iii) companies with related party transactions greater than 25% of sales (iv) companies with export service income is less than 75% of total sales, (v) companies with employee cost less than 25% of turnover, and (vi) companies with different financial year ending (i.e. other than 31 March 2013).

- g) The Ld. AO/Ld. TPO erred in considering data obtained u/s 133(6). The Ld. Panel erred in confirming the same.*
- h) The Ld. AO/ Ld. TPO also erred in treating provisions for doubtful debts as non-operating in nature while calculating the net margins of the comparable companies: The Ld. Panel also erred in confirming the same.*
- i) The Ld. AO/Ld. TPO also erred on facts in erroneously computing the margins of a certain companies identified as comparable by the Ld. TPO. The Ld. Panel erred in confirming the same.*
- j) The Ld. AO/Ld. TPO erred in rejecting 1) Akshay Software Technologies Ltd, 2) Helios & Matheson Information Technology Ltd., 3) Evoke Technologies Limited, 4) Spry Resources Limited, 5) Cigniti Technologies Limited despite these companies being functionally comparable. The Ld. Panel also erred in confirming the same.*
- k) The Ld. AO/ Ld. TPO erred in including CG-VAK Software Exports Limited, 2) ICRA Techno Analytics Limited 3) Larsen Toubro Infotech Limited, 4) Mindtree Limited and 5) Persistent Systems Limited as comparable despite these companies being functionally dissimilar to the Appellant. The Ld. Panel also erred in confirming the same.*
- l) The Ld. AO/Ld. TPO, while applying the said turnover filter at the lower limit so as to reject companies having turnovers less than INR 1 crore in FY 2012-13, erred in not applying the said filter at the upper end so as to reject high turnover companies as well. The Ld. Panel also erred in confirming the same.*
- m) The Ld. AO Ld. TPO erred on facts in arbitrarily accepting companies without considering the turnover and size of the Appellant and comparables. The Ld. Panel also erred in confirming the same.*
- n) The Ld. AO /Ld. TPO erred in not applying the turnover range at the lower and upper limit so as to reject high turnover companies.*

3. Erroneous data used by the TPO

- a) The Ld. Panel and the Ld. AO/Ld. TPO erred in law in using data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.*

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- b) *The Ld. Panel and the Ld. AO/Ld. TPO erred in law and on facts in disregarding the application of multiple-year data while computing the margins of comparable companies.*

4. Negative working capital adjustment

- a) *The Ld. AO/Ld. TPO erred in law in not giving adequate opportunity to the Appellant before making an adjustment on account of negative working capital.*
- b) *The Ld. AO/Ld. TPO erred in making a negative working capital adjustment without appreciating the fact that the Appellant is a captive service provider and does not bear any working capital risks. The Ld. Panel erred in confirming the same.*

5. Non-allowance of appropriate adjustments to the comparable companies, by the AO/TPO

The Ld. AO/Ld. TPO erred in law and on facts in not allowing appropriate adjustments under Rule 10B of the Rules to account for, inter alia, differences in (a) accounting practices, (b) depreciation adjustment, (c) marketing expenditure, (d) research and development expenditure and (e) risk profile between the Appellant and the comparable companies. The Ld. Panel erred in confirming the same.

6. Variation of 3% from the arithmetic mean

The Ld. AO/Ld. TPO erred in law in not granting the benefits of proviso to section 92C(2) of the Act available to the Appellant. The Ld. Panel erred in confirming the same.

B. Corporate Tax

7. Disallowance of deduction claimed under section 10AA of the Act — Chennai SEZ unit - Rs. 181,403,235

- a) *The Ld. AO has erred in denying the deduction under Section 10AA of the Act amounting to Rs.181,403,235 claimed by the Appellant, by relying on the assessment order and order of Commissioner of Income-tax (Appeals) ['CIT-(A)'] for AY 2010-11.*
- b) *The Ld. AO ought to have appreciated that the Appellant had submitted the listing of invoices along with relent FIRC's and endorsed softex forms for Chennai SEZ unit and hence, was eligible for deduction under section 10AA of the Act.*
- c) *The Ld. AO has erred in not considering the submissions made by the Appellant during the assessment proceedings, wherein the Appellant had furnished all the records/documents substantiating its claim.*

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- d) *The Ld. AO has erred in not following the directions provided by the Hon'ble DRP vide its order dated 19 September 2017, wherein the Hon'ble DRP had directed to verify the records and provide relief accordingly.*
- e) *The Ld. AO has erred in not considering the submission dated 18 October 2017, wherein the Appellant had furnished all the records/documents substantiating its claim.*
- 8. Re-computation of deduction under section 10AA of the Act — Coimbatore SEZ unit - Rs. 63,570**
- a) *The Hon'ble DRP and Ld. AO has erred in re-computing the deduction under Section 10AA of the Act of Coimbatore SEZ unit by reducing expenses incurred in foreign currency and the communication expenses only from export turnover without corresponding deduction from the total turnover.*
- b) *The Hon'ble DRP and Ld. AO ought to have appreciated that the said communication expense is not attributable to the delivery of computer software outside India and also that the travelling expenses in foreign currency is not incurred for rendering any technical services outside India.*
- c) *The Hon'ble DRP and Ld. AO has erred in not reducing the aforesaid expenditure from total turnover as well, considering the decision of the Hon'ble Karnataka High Court in the case of CIT vs. M/s. Tata Elxsi Ltd. (2012) 247 CTR 334 (Karnataka I-IC).*
- 9. Disallowance of claim under section 40(a)(ia) of the Act — Rs. 115,236,103**
- a) *The Ld. AO has erred in disallowing Rs. 115,236,103 under section 40(a)(ia) of the Act on the contention that the Appellant has not provided details/ documentary evidences of tax deduction at source.*
- b) *The Hon'ble DRP and Ld. AO has erred in not considering the submission made that the Appellant had added back the said provision amount in the computation of income of AY 2012-13 and the same was consequently claimed as a deduction in the computation of income of AY 2013-14 on reversal basis.*
- c) *The Hon'ble DRP and Ld. AO has erred in disallowing the expenses without appreciating tie fact ' that the same had already suffered tax in AY 2012-13 and disallowing the same again in AY 201314 amounts to double taxation of such provision for expenses.*
- 10. Disallowance of payment against the provision for extension charges for non- construction of building on leasehold land — Rs. 30,343,629**

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- a) *The Ld. AO has erred in disallowing the amount of Rs. 30,343,629 on the contention that the payment made by the Appellant towards extension charges in respect of development of land are not revenue in nature.*
- b) *The Hon'ble DRP and Ld. AO has erred in holding that enduring benefit has been obtained by the Appellant Company by payment of such charges and not appreciating the submission made by the Appellant that the payment is not towards acquisition of any asset and therefore, no enduring benefit has been received on payment of such extension charges.*
- c) *The Hon'ble DRP and the Ld. AO erred in not relying on the judicial precedents put forth by the Appellant.*
- d) *Without prejudice to the above, the Hon'ble DRP has erred in not directing the Ld. AO to provide tax depreciation on the same in the year in which such asset is put to use.*

11. Disallowance under section 40(a)(ia) of the Act for short deduction of tax — Rs. 17,562,147

- a) *The Ld. AO has erred in disallowing an amount of Rs. 17,562,147 under section 40(a)(ia) of the Act for short-deduction of taxes.*
- b) *The Hon'ble DRP and Ld. AO erred in not appreciating that section 40(a)(ia) of the Act is attracted in cases of non-deduction of taxes or for non-payment of taxes after deduction within the specified time as per the provisions of the Act.*
- c) *The Hon'ble DRP and the Ld. AO erred in not relying on the judicial precedents put forth by the Appellant.*
- d) *Without prejudice to the above, the Hon'ble DRP has erred in not directing the Ld. AO to allow deduction to the Appellant in the year of payment (i.e. AY 2015-16).*

12. Denial of MAT credit — Rs. 320,912,940

- a) *The Ld. AO has erred in denying the claim made by the Appellant in the return of income with respect to MAT credit amounting to Rs. 320,912,940.*

2. Ground Nos.1 & 2 (a) to (j) are general in nature, which do not require any adjudication.

2.1 With regard to TP matter, it has been confirmed by the Id. A.R. vide his letter dated 3.8.2023 with Ref. no.TR:MG:D-9614/2020 that assessee not gone for mutual agreement procedure under DTAA in respect of international transaction for the assessment year 2013-14. Hence, T.P. issues are adjudicated on merits.

3. Next ground No.2(k), wherein the assessee seeks exclusion of following comparables:

- a) CG-VAK Software Exports Limited
- b) Larsen & Toubro Infotech Limited
- c) Persistent Systems Limited

CG-VAK Software Exports Limited:

3.1 The Id. A.R. submitted that this company was selected by the TPO and objected to by the Assessee *inter alia* on the grounds that the company is functionally different and segmental details as regards the various services rendered by it are not available. However, without appreciating the contentions of the Assessee, the DRP upheld the inclusion of the company.

3.2 The Id. A.R. submitted that this company is engaged in rendering outsourced product development services along with provision of software services, as opposed to the Assessee who is engaged in provision of software development. The company reports its services under two segments being software development services and BPO services without any segmental details as regards the diverse services, particularly the outsourced product development services. Therefore, in the absence of segmental details, the comparability of the company cannot be determined. Also, the company is involved in Research and Development activities. The

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company is developing application engines, re-usable codes and libraries as a part of its R&D activities. Further, and in any event, the TPO has considered the revenue from entire operations, i.e., both software development services and BPO services without appreciating that the BPO services rendered by the company cannot be compared to the software development services rendered by the Assessee. The TPO has held that since the revenue generated by the BPO segment was insignificant, the same could be taken into consideration. Relevant extracts in this regard can be found at pages 18 of the transfer pricing order. The DRP upheld the action of the TPO. In this regard, she submitted that the TPO and DRP erred in failing to appreciate that in the absence of segmental details for the software development service being provided, the company cannot be taken as a comparable. In view of the above, as the company cannot be held as a comparable to the Assessee, it ought to stand excluded from the final list of comparables. Also, on account of the revenue recognition policy adopted by the company, its margin fluctuates on a year-on-year basis. Therefore, this company cannot be taken as a comparable to the Assessee.

3.3 In this regard she placed reliance on the decision of (i) the Hon'ble High Court of Delhi in the case of *Steria India Ltd. v. DCIT* (reported in [2018] 92 taxmann.com 120 (Delhi)); (ii) the decision of this Tribunal in the case of *NXP India Pvt. Ltd. v. DCIT* (reported in [2020] 116 taxmann.com 421 (Bangalore - Trib.)); (iii) the decision of this Tribunal in the case of *Dell International Services India Private Limited (for the merged entity Sonicwall Info Security Private Limited) v. ACIT* (reported in [2022] 140 taxmann.com 259 (Bangalore - Trib.)) and (iv) the decision of the Hyderabad Bench of this Tribunal in *EPAM Systems India (P.) Ltd. v. ACIT* (reported in [2018] 100 taxmann.com 335 (Hyd-Trib) wherein in the cases of similarly placed assesseees, the exclusion of this company came to be upheld/company was directed to be excluded.

4. The ld. D.R. relied on the order of ld. DRP

5. We have heard the rival submissions and perused the materials available on record. This comparable has been considered in the case of NXP India Pvt. Ltd. in IT(TP)A No.692 & 2861/Bang/2017 for the assessment year 2012-13 & 2013-14 vide order dated 27.4.2020, wherein held as under:

“24. The learned AR submitted that this company should be excluded for the reason that C G VAX Software & Exports Limited is engaged in software development and sale of products which involves high degree of R & D expenditure and to demonstrate the same, he drew our attention to the paper book page Nos.1018 and 1034 and submitted that the nature of the business of software development involves inbuilt, constant Research and Development as a part of its process of manufacturing (development). The company is developing applications engines, re-usable codes and libraries as a part of its R & D activities. Further, it has intangible assets as shown in the financial statement as on 31.03.2013 at Rs.3,03,83,536 and it is also engaged in outsource product development, as is evident from the attached notes forming part of the accounts. The learned AR also submitted that C G VAK Software & Exports Limited was not considered as a comparable in the case of M/s.EPAM Systems India Private Limited (ITA No.2122/Hyd/2017 for assessment year 20132014). Vide order dated 20.11.2018, the Tribunal held as under:-

“16. Having regard to the rival contentions and the material on record, we find that the assessee has raised its objections before 10 the TPO but he held that it is functionally similar. We have gone through the annual reports of CGVAK Software & Exports Ltd and find that the said company is having revenue from both software services and BPO services but there is no segmental data with regard to each of these transactions. Therefore, as held by the Coordinate Bench of the Tribunal in a number of cases (cited supra), we hold that this company cannot be taken as a comparable to the assessee-company. Accordingly, we direct the TPO to exclude this company from the final list of comparables.”

24.1 Similarly, in the case of M/s. ION Trading India Private Limited v. ITO (ITA No.1035/Del/2015 for the assessment year 2010-2011). The Tribunal vide its order dated 07.12.2015, held as under:-

“21. We have considered the submission of the ld. counsel for the assessee and have considered the argument of the ld. DR that the assessee is not producing any product, however, we find that

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CGVak Software and Exports Limited is not only into computer software but it is a product manufacturer too. Since assessee is not into product manufacturing and the segmental details cannot be bifurcated from the financial details, we find that the assessee and the CG-Vak Software and Exports Limited are not comparables. Therefore, we are inclined to uphold the orders of the authorities below in rejecting this company as a comparable. We direct accordingly.”

24.2 In our opinion, there is force in the argument of the learned AR. M/s. C G VAX Software & Exports Limited is not only engaged in the business of computer software development, but also engaged in product manufacturing process, whereas the present assessee is not in product manufacture activity. M/s. C G VAX Software & Exports Ltd. owns huge intangible assets and also engaged in outsourced product development. In view of the foregoing reasons, we hold that the said company cannot be considered for inclusion in the list of comparables. We, therefore, direct the TPO to exclude the said company from the list of comparables.”

5.1 In view of the above order of the Tribunal, taking a consistent view, we direct the AO/TPO to exclude this company M/s. CG-VAK Software Exports Ltd. from the list of comparables.

Persistent

Larsen & Toubro Infotech Limited:

6. The Id. A.R. submitted that this company was selected by the TPO and objected to by the Assessee on the basis that it was functionally incomparable to the Assessee on various counts.

6.1 She submitted that this company is a global IT services and solutions provider. It is involved in a diverse range of activities from application development, architectural services, BPO, consulting, enterprise integration, infrastructure management services, integrated engineering services, mobility services, oracle services, SAP services etc., which is not comparable to the Assessee which is engaged in the business of rendering routine software development services. Additionally, the company is involved in resale of products and derives revenues from this activity. During the year under

consideration, the company re-organized its business into three segments:

Segment	Services Cluster	Industrials Cluster	Telecom
Services	Banking, financial services, insurance, media and entertainment, travel and logistics and healthcare	Hi Tech and consumer electronics, consumer, retail and pharma, energy and process, automobile and aerospace, plant and equipment and industrial machinery, utilities and E&C	Product engineering services

6.2 She submitted that as there are no details made available in respect to the software development services, the company cannot be held as a comparable to the Assessee. In the show cause notice dated 11.08.2016, the TPO acknowledged the fact that the company re-organized its business and renders product engineering services.

6.3 Further, she submitted that the company is also into trading in products and owns several intangibles and enjoys significant brand value. The company develops in-house intangibles and owns proprietary software products. Some of the products developed and owned by the company are Unitrax (R), ACCURUSI, Service First TM. Further, as a result of high brand value, the company enjoys a high bargaining power in the market. The company has also incurred significant expenses in foreign currency amounting to 41.37% of its total sales which suggests that the company operated on a business model different from that of the Assessee. This company has been

consistently excluded from the final list of comparables in cases of assesseees similar to the Assessee.

6.4 In this regard, the ld. A.R. placed reliance on the decisions of this Tribunal in the cases of (i) *Dell International Services India Private Limited (for the merged entity Sonicwall Info Security Private Limited) v. ACIT* (reported in [2022] 140 taxmann.com 259 (Bangalore - Trib.)); and (ii) *NXP India Pvt. Ltd. v. DCIT* (reported in [2020] 116 taxmann.com 421 (Bangalore - Trib.)) and the decision of the Hyderabad Bench of this Tribunal in *EPAM Systems India (P.) Ltd. v. ACIT* (reported in [2018] 100 taxmann.com 335 (Hyd-Trib), where in the cases of similarly placed assesseees, the company was directed to be excluded. In view of the above, she submitted that this company ought to stand excluded from the final list of comparables.

7. The ld. D.R. relied on the order of ld. DRP.

8. We have heard the rival submissions and perused the materials available on record. We are of the opinion that this comparable has been considered by the coordinate bench of this Tribunal in the case of *NXP India Pvt. Ltd. vs. DCIT* cited (supra), wherein held as under:

“22. The learned AR relied on the order of the co-ordinate Bench in the case of M/s. Metric Steam Infotech (India) Pvt. Ltd. v. DCIT in IT(TP)A No.1418 & 2735/Bang/2017 for the assessment year 2013-2014, order dated 27.02.2019, wherein the Tribunal held as under:-

“11. As far as L&T Infotech Ltd. and Persistent Systems Ltd. are concerned, our attention was drawn to the decision of ITAT Hyderabad Bench in the case of M/s. EPAM Systems (I) P. Ltd. v. ACIT, ITA No.2122/Hyd/2017 for AY 2013-14, order dated 20.11.2017. Vide para 12 of the decision, the Tribunal took the view that Persistent Systems Ltd. was into software products and software solutions and no segmental details were available and therefore the profit margin in the software development services segment could not be compared with the assessee’s profit margin. As far as L&T Infotech Ltd. is concerned, the Tribunal vide para

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17 of the aforesaid order came to a similar conclusion to hold that L&T Infotech should not be regarded as a comparable company. In the light of judicial precedents which remain uncontroverted, we are of the view that the aforesaid two comparable companies should be excluded from the list of comparable companies.”

22.1 It was also brought to our notice that in earlier year, Larsen & Toubro Infotech Limited has incurred expenditure on “cost of brought out items for resale at Rs.27,10,89,274 for which he drew our attention to the financial statement of Larsen & Toubro Infotech Limited placed at paper book page No.1081, which is absent in the case of present assessee. He also submitted that it has huge intangible assets and brand value in software at Rs.143,61,95,196 and it has intangible

asset in the form of business rights to the tune of Rs.153,42,45,196 as shown in the Fixed Assets as on 31.03.2013 placed at paper book page No.1078. Being so, in our opinion, it cannot be compared with the assessee’s case. Accordingly, we direct the TPO to exclude the same from the list of comparables.”

8.1 In view of the above order of the Tribunal, taking a consistent view, we direct the AO/TPO to exclude this company M/s. Larsen & Toubro Infotech Ltd. from the list of comparables.

Persistent Systems Limited:

9. The Id. A.R. submitted that the Assessee objected to the inclusion of this company on the ground that it is functionally incomparable due to various reasons, which was not appreciated by the TPO and the DRP.

9.1 The Id. A.R. submitted that this company is functionally dissimilar to it as it is engaged in software products, services and technology innovation. The company primarily focuses on rendering end-to-end software product development services to IT product companies and offers complete product life cycle services. The company focuses on next generation technology centered on four main themes- Cloud computing, Analytics, Social enterprise and Enterprise Mobility. The company also focuses on establishing a strong IP portfolio and the IP led business of the company saw a

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significant boost during the year under consideration due to two product acquisitions by its subsidiaries. Further, during the year under consideration, the company also concluded a contract to take over IBM's TNPM product road map, which would help the company strengthen its position in relation to the IP led business. As per the press release of the Company, the company launched Pax Pharma – a compliance-based Design to Print (D2P) automation solution designed specifically for pharmaceutical packaging and product lifecycle management. The company also announced the launch of its newly developed AppExchange application in 2012 from which it is evident that the Company has been launching application and products throughout the year which is not comparable to the Assessee. Also, the company focuses on licensing and sale of products.

9.2 The ld. A.R. further submitted that the company also undertakes significant research and development operations, approved by the government, as evidenced by intangible assets capitalized by the company, and has spent Rs. 27.87 million in FY 2012-13 towards Research and Development activity. Such Research and Development costs have also been capitalized owing to future economic benefits arising out of the same. Therefore, this company cannot be compared to the Assessee who is engaged in the provision of routine IT services. The company also renders significant on-site services suggesting that it adopts a business model different from that of the Assessee, and therefore it ought to be excluded from the final list of comparables. Further, the company reports its segmental details on the basis of type or class of customers and geography and not on the basis of services rendered. Therefore, she submitted that in the absence of segmental details with respect to its software development services segment being made available, the company

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cannot be held as a comparable to the Assessee. Further, this company has been consistently excluded from the final list of comparables in cases of assessee's placed similarly to the Assessee.

9.3 In this regard, she placed reliance on the decisions of this Tribunal in the cases of (i) *Dell International Services India Private Limited (for the merged entity Sonicwall Info Security Private Limited) v. ACIT* (reported in [2022] 140 taxmann.com 259 (Bangalore - Trib.)); and (ii) *NXP India Pvt. Ltd. v. DCIT* (reported in [2020] 116 taxmann.com 421 (Bangalore - Trib.)) and the decision of the Hyderabad Bench of this Tribunal in *EPAM Systems India (P.) Ltd. v. ACIT* (reported in [2018] 100 taxmann.com 335 (Hyd-Trib)), where in the cases of similarly placed assessees, this company was directed to be excluded. Further reliance is placed on the decision of the Hon'ble Delhi High Court in the case of *PCIT v. Cashedge India Pvt. Ltd.* (Order dated 04.05.2016 passed by the Hon'ble High Court of Delhi in ITA No. 279/2016) wherein, in the case of a similarly placed assessees, the exclusion of the company came to be upheld. Therefore, this company ought to be excluded from the final list of comparables.

10. The ld. D.R. relied on the order of ld. DRP.

11. We have heard the rival submissions and perused the materials available on record. We are of the opinion that this comparable has been considered by the coordinate bench of this Tribunal in the case of *NXP India Pvt. Ltd. vs. DCIT* cited (supra), wherein held as under:

“23. As discussed in earlier year, Persistent Systems Limited is engaged in product engineering services, platforms and solutions, IP and related business, which is functionally different from assessee's case and it has earned revenue from R & D activities. Persistent Systems Limited also owns intellectual properties. Further, segmental data is not available as seen from the Notes forming part of financial statements under the head “Revenue from operations (net)”, placed at paper book page No.1260 and it has net income from sale of software services as discussed in

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earlier year. It is also to be noted that Persistent Systems Limited is considered as a comparable by various orders of the Tribunal in the following case of NXP Semiconductor Private Limited [IT(TP)A No.1634/Bang/2014 for assessment year 2009-2010. Vide order dated 22.07.2015, the Tribunal observed as under:-

“13.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decision cited. We find that a co-ordinate bench of this Tribunal in the assessee's own case (supra) for Assessment Year 2008-09 has held that this company being engaged in product development and product design and analysis service is functionally different from a pure software service provider and therefore excluded it from the list of comparables for software development services; holding as under at para 17.3 of its order:-

“17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (supra) that in the absence of segmental details / information a company cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.”

13.4.2 Following the decision of the co-ordinate bench of this Tribunal in the assessee's own case (supra) for Assessment Year 2008-09, we direct the TPO to exclude this company from the list of comparables as it is functionally different (viz. being engaged in product development and product design services) from the assessee in the case on hand which is rendering software development services. It is ordered accordingly.”

23.1 Therefore, Persistent Systems Limited cannot be compared with the assessee's case. Accordingly, we direct the TPO to exclude the said company from the list of comparables, with the similar directions given in the above order of the Tribunal (supra).”

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11.1 In view of the above order of the Tribunal, taking a consistent view, we direct the AO/TPO to exclude this company M/s. Persistent Systems Ltd. from the list of comparables.

12. Next ground No.3 in this appeal is general in nature, which do not require any adjudication.

13. Ground No.4 is with regard to negative working capital adjustment.

13.1 The ld. A.R. submitted that vide this ground, the Assessee is challenging the action of the TPO in determining a negative working capital adjustment, which came to be upheld by the DRP. In this regard, the ld. A.R. submitted that working capital adjustment is made for the time value of money lost when credit time is given to the customers. The Assessee however is not an entrepreneur but a captive service provider which is entirely funded by the AEs. This being so, the Assessee does not stand to lose anything as it is compensated on a total cost-plus basis. The Assessee is running the business without any working capital risk as compared to the comparables. Therefore, requirement for adjustment of negative working capital does not arise.

13.2 In this regard, she placed reliance on the decisions of this Tribunal in the cases of (i) *Lam Research (India) Pvt. Ltd. v. DCIT* (Order dated 30.04.2015 in ITA No. 1473 and 1385/Bang/2014); (ii) *DCIT v. Software AG Bangalore Technologies Pvt. Ltd.* (Order dated 31.03.2016 passed in ITA No. 1628/Bang/2014) and (iii) *Tivo Tech Private Limited [Formerly Veveo (India) Pvt. Ltd.] v. DCIT* (Order dated 12.06.2020 in IT(TP)A No.1619/Bang/2017), wherein it has been held that negative working capital adjustment shall not be made in case of a captive service provider as there is no risk and it is compensated on a total cost plus basis.

14. The ld. D.R. relied on the order of the ld. DRP.

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15. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that this issue came for consideration before this Tribunal in the case of M/s. Lam Research (India) Pvt. Ltd. Vs. DCIT in ITA Nos.1473 & 1385/Bang/2014 dated 30.4.2015, wherein held as under:

25. We have perused the orders and considered the rival contentions. In the case of Adaptec (India) P. Ltd., (supra), for A. Y. 2009-10, this Tribunal held as under at para 10 and 11 of its order:

"10. Ground No.8 pertains to the issue of negative working capital. As briefly stated above, after arriving at the arithmetic mean of all comparables at 22.03%, the A.O. worked out negative working capital adjustment of 3.22% thereby, making arms' length price at 25.25%. Even though, DRP refused to interfere with the objections of the assessee in its order, we were informed that DRP has directed the TPO/A.O. not to make any negative working capital adjustment in some of the cases in the next assessment year, in the cases of Market Tools Research P. Ltd., and Mega Systems Worldwide India P. Ltd., assessee placed on record copies of orders of DRP, In that DRP considered the issue and directed the TPO as under:

"14. Ground No.11 : Negative Working Capital adjustment Making a negative working capital adjustment without appreciating the fact that the company does not bear any working capital risks. On this issue, the assessee submitted as under:

"The learned TPO determined the ALP for the international transactions with A.Es by making a negative working capital adjustment for the differences in working capital between the assessee and the companies considered as comparables. The assessee does not agree with the learned TPO as the company does not bear any working capital risk since it is been fully funded by it's A.E. from its inception and has no working capital contingencies. • The company has never taken any loans till date from the date of incorporation nor has incurred any expense for meeting the working capital requirement."

We have gone through the submissions and the order of the TPO. The assessee pleaded that the DRP has acceded such a plea in some other case. On examination, we find that the DRP, Hyderabad in the case of Cordys Software India P. Ltd., for A.Y. 2008-09 in its directions dated 03.08.2012 has given a finding as under:

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"7.7.4 Thus, working capital adjustment is made for the time value of money lost when credit time is provided to the customers. The applicant is not an entrepreneur but a captive service provider. Its entire funding needs are provided by the A.E. This being so, the applicant does not stand to lose anything as it is compensated on a total cost plus basis. The TPO probably was carried away by the large amount of receivables appearing in the books of the applicant. But the applicant is running its business without any working capital risk while comparable companies have such a risk for them. If at all any working capital adjustment is to be made to this situation, only a positive adjustment has to be made to the comparables so that they are brought on par with the applicant. In view of the same, the Panel directs that negative working capital adjustment to the arithmetic mean margin of the comparables shall not be made." In view of the above, the Panel directs that negative working capital adjustment to the arithmetic mean margin of the comparables shall not be made."

11. In view of the above, we are of the opinion that assessee's case being similar, there is no need for making any negative working capital adjustment when assessee does not carry any working capital risk. In fact, TPO should have done necessary working capital adjustment to the profits of the selected comparables so as to make them comparable to the ITA.No.206/Hyd/20 Adaptec (India) P. Ltd., Hyderabad.

In view of this, we direct the TPO not to make negative working capital adjustment."

26. This Tribunal had held that negative working capital adjustment cannot be carried out, where the assessee was a captive service provider. Here also it is an admitted position that assessee was a captive service provider and its services are entirely rendered to its AE abroad. Its share capital was entirely sourced from its AE abroad. Therefore, in our opinion, the view taken by this Tribunal in the case of Adaptec (India) P. Ltd., will squarely apply here. We, therefore, direct that no negative working capital adjustment shall be carried out on the average PLI of the final set of comparables."

15.1 In view of the above order, we direct the AO that no negative working capital adjustment shall be carried out in the light of above order of the Tribunal. Ordered accordingly.

16. With regard to Ground Nos.5 & 6, no argument has been put before us by the Id. A.R., hence not considered for adjudication.

17. Ground No.7 is with regard to disallowance of deduction claimed u/s 10AA of the Act in respect of Chennai SEZ Unit.

17.1 The Id. A.R. submitted that the assessee had claimed a sum of Rs. 18,14,03,235/- as deduction under Section 10AA of the Act in respect of its SEZ unit at Chennai. It is submitted that the claim for deduction under Section 10AA of the Act commenced in the year 2010-11 when the Chennai unit was part of the erstwhile company i.e., Perot Systems Business Process Solutions India Pvt. Ltd. which was subsequently merged with the Assessee's company.

17.2 She submitted that the Perot was engaged in the business of process outsourcing services in the nature of data processing and software development since 1998. Until 2009, Perot had two units, one in Chennai and one in Coimbatore. Perot later set up a third unit in Chennai in a Special Economic Zone ("SEZ") and was registered with the SEZ authorities in 2008 and the said unit commenced its activities in the year 2009. Thereby, FY 2009-10 was the first year of claim of deduction under Section 10AA of the Act for the Chennai SEZ unit. The claim of Perot came to be disallowed by the Assessing Officer in the year AY 2010-11 on the ground that (i) the Softex forms were not certified by the SEZ/STPI authorities; (ii) the Chennai unit was formed by splitting up or reconstruction of a business already in existence and; (iii) the unit did not export any computer software. Following the order for AY 2010-11, the Assessing Officer disallowed the claim for the present assessment year also, on the basis that there was no change in the facts. The DRP remanded the issue to the Assessing Officer with a direction to verify the information furnished by the Assessee and thereafter make a disallowance, if any deficiencies were found in the information furnished.

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17.3 She further submitted that similar disallowance was made in the Assessee's case for assessment year 2012-13 on the basis of the order for assessment year 2010-11. She submitted that this Tribunal *vide* its order dated 14.11.2022 in *Dell International Services India Private Limited, (for the merged entity Dell India Private Limited) v. JCIT* for the assessment year 2012-13 in IT(TP)A No. 932/Bang/2017 held that submission of Softex form and certification of the said form by the STIP authorities is a post facto procedure prescribed by the Reserve Bank of India and not a pre-requisite under Section 10AA. With respect of the denial of claim on the ground that the Chennai Unit was formed by splitting up of the existing units, this Tribunal held that condition set out in Section 10(4) of the Act regarding formation are to be established only in the year of formation. With respect to denial of claim on the ground that no evidence for data transmission or export of computer software was given by the Assessee, this Hon'ble Tribunal held that the denial of export benefits merely due to non-availability of International Private Leased Circuit connection when the evidence for rendering of services, invoicing for the services done and realisation of foreign currency are established, is not justified.

17.4 She further submitted that for the year under consideration, the Assessee has furnished copies of the invoices evidencing the nature of the services rendered. Copies of the endorsed softex forms evidencing the export of software development services by the Chennai unit and also FIRC's evidencing the inward remittance of foreign exchange were also furnished before the Assessing Officer. In light of the same, she requested that the ground of appeal is to be decided in favour of the Assessee.

18. The ld. D.R. relied on the order of lower authorities.

19. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case for the assessment year 2012-13 in IT(TP)A No.844/Bang/2017 & 932/Bang/2017 vide order dated 14.11.2022, wherein held as under:

“55. We heard the rival submissions and perused the material on record. According to the provisions of section 10AA the benefit in respect of newly established Industrial Undertaking in SEZ is available to all Assesseees on export of certain articles or things or software subject to certain conditions. The term export turnover is defined to mean the consideration in respect of export by the undertaking, being the Unit of articles or things or services received in, or brought into, India by the assessee but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things outside India or expenses, if any, incurred in foreign exchange in rendering of services (including computer software) outside India. From the definition it is clear that for the purpose claiming the deduction u/s.10AA, the proceeds of the export turnover should have been brought into India. We notice that the Hon'ble Tribunal in the case of Microsemi India (P.) Ltd (supra) has held that the furnishing of the SOFTEX Form and certification of the said form by STPI is a post-facto procedure prescribed by the Reserve Bank of India to ensure timely and appropriate collection of export proceeds and that the deduction u/s.10A is to be granted based on the receipt of export proceeds into India in convertible foreign exchange.

56. In assessee's case details of the invoices along with the corresponding FIRC's mapping are furnished by the assessee before the lower authorities to substantiate that the export proceeds are received by the assessee (pages 958-977 of the paper book). We also notice that the AO has denied the deduction, based on the findings of AY 2010-11 by stating that some of the SOFTEX forms are not certified and that the Bank of America has not sent any reply. However, there was no adverse finding recorded by the AO with regard to the SOFTEX forms and there is no discussion of the documents submitted by the assessee for the year under consideration. Further, copies of the invoices and softex forms submitted to the authorities and the letters addressed to them requesting endorsement are furnished by the assessee before is in the additional evidence (pages 1-42 of the additional evidence compilation). In view of this we remit the issue to the AO to verify the evidences submitted keeping in mind the ratio laid down by the Hon'ble Tribunal in the case of Microsemi India (P.) Ltd (supra) that submission of Softex Form and certification of the said form by STPI is a post facto procedure prescribed by the Reserve Bank of India to ensure timely and appropriate collection of export proceeds and is not a pre-requisite under Section 10AA.

57. Next we will consider the issue of denial of claim of the Assessee on the ground that the Chennai unit was formed by splitting up of the existing units. Para

2 & 3 of the CBDT Circular No.14/2014 [F.NO.178/84/2012-ITA.I] dated 18.10.2014 reads as follows:-

“2. Representations have been received stating that the aforesaid limit of 20% is inadequate and restrictive since it impacts the competitiveness of Indian Software Industry in global market in terms of quality of product and delivery time-lines. Global competitiveness can be ensured only when highly skilled and experienced manpower is deployed for software development. Requests have, therefore, been made seeking enhancement of the limit of 20% in line with the recommendation of Rangachary Committee, which was set up to review the taxation of IT Sector and Development Centers.

*3. The matter has been re-examined by the Board. In supersession of the Circular No. 12/2014 dated 18th July, 2014, it has now been decided that the transfer or re-deployment of technical manpower from existing unit(s) to a new unit located in SEZ, **in the first year of commencement of business**, shall not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred as at the end of the financial year does not exceed 50 per cent of the total technical manpower actually engaged in development of software or IT enabled products in the new unit.”* (emphasis supplied)

58. *In terms of the above circular, it is clear that the test is to be performed on the first year of commencement of business. It is noticed that the coordinate bench of the Tribunal in the case of IBM India (P.) Ltd vs ACIT [2020] 120 taxmann.com 424 (Bangalore - Trib.) has considered a similar issue and held that that the satisfaction of conditions in section 10AA(4) regarding formation are required to be established only in the year of formation.*

59. *In assessee’s case the Chennai unit is formed in the year 2009 and the first year of claiming the deduction u/s.10AA is AY 2010-11. We therefore direct the AO to keep in mind in the remand proceedings that conditions in section 10AA(4) regarding formation are required to be established only in the year of formation.”*

19.1 In view of the above order of the Tribunal, we remit this issue to the file of AO to examine the issue in the light of above order of the Tribunal.

20. Ground No.8 is with regard to re-computation of deduction u/s 10AA of the Act in respect of Coimbatore SEZ unit.

20.1 The ld. A.R. submitted that ground pertaining to re-computation of deduction under Section 10AA of the Act by reducing

expenses towards telecommunication charges in foreign currency from the export turnover and also from the total turnover is covered in favour of the Assessee by the decision of the Hon'ble High Court of Karnataka in the case of *CIT v. Tata Elxsi Ltd.* (reported in [2012] 17 taxmann.com 100 (Karnataka)), which is affirmed by the Hon'ble Supreme Court in *CIT v. HCL Technologies* (reported in [2018] 404 ITR 719).

21. The ld. D.R. relied on the order of lower authorities.

22. After hearing both the parties, we are of the opinion that this issue is squarely covered by the judgement of Hon'ble Supreme Court in the case of *CIT Vs. HCL Technologies Ltd.* (404 ITR 719), wherein held as under:

“Neither section 10A nor section 2 of the Income-tax Act, 1961 defines the term “total turnover”. The term “total turnover” is defined in clause (ba) of the Explanation to section 80HHC of the Act. Explanation 2(iv) to section 10A of the Act defines “export turnover” to mean the consideration that has been received for export of articles, things or computer software. Normally the consideration would include the freight, telecommunication charges and insurance which had been incurred to deliver the articles, things or computer software outside India. However Explanation 2(iv) specifically seeks to exclude these three categories of expenditure incurred for delivering the export of articles, things or computer software. It also seeks to exclude expenses for providing technical service, etc. outside India. Where an Indian technician goes abroad and receives fees for services, the foreign client will normally be required to reimburse the expenses as well. Therefore, out of the consideration received, the portion representing reimbursement of expenditure has to be excluded.

“Total turnover” has been defined in sections 80HHC and 80HHE only to exclude additional items given under section. But for this additional exclusion, there was no need to define “total turnover”. Export turnover is a component of total turnover. If the entire turnover represents export proceeds, then the export turnover and the total turnover are identical. It is clear that any exclusion in the export turnover in the numerator will automatically imply exclusion in the denominator as well because export turnover is always a component of total turnover.”

Accordingly, this ground of appeal of the assessee is allowed.

23. Ground No.9 is with regard to disallowance of claim u/s 40(a)(ia) of the Act.

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23.1 The Id. A.R. submitted that the Assessing Officer disallowed a sum of Rs. 11,52,36,103/- under Section 40(a)(ia) of the Act on the ground that the Assessee had not furnished details of the tax deducted at source. The DRP upheld the disallowance made by the Assessing Officer.

23.2 She submitted that an amount of Rs. 11,52,36,103/- represents provision of expenses created in the earlier year, where the Assessee would not have received the invoices at the year end and therefore based on a reasonable estimate, a provision is created. The entire provision for expenses created is reversed in the current year and taxes wherever applicable would be withheld as and when the invoices are received. Since in the year of creation of the provision, the same was disallowed, on reversal in the current year, the same was claimed as an allowable deduction under Section 40(a)(ia) of the Act. The Assessing Officer nevertheless insisted on production of proof of TDS.

23.3 She further submitted that the Assessee has furnished evidences towards making remittance of TDS to the extent of Rs. 37,64,00,031/-. She submitted that the provision created was already disallowed in the previous year under Section 40(a)(ia) of the Act and the disallowance of the same in the current year would amount to double disallowance of the same amount. In view of the above, she submitted that the disallowance of Rs. 11,52,36,103/- ought to be set aside.

23.4 In this regard, she placed reliance on the decision of this Tribunal in assessee's own case (ITA Nos. 1151/Bang/2015 and ITA No.1644/Bang/2014 for assessment year 2012-13 vide common order dated 25.03.2022) wherein this Tribunal held that the Assessee cannot be treated as an 'assessee in default' under Section 201(1) of

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the Act as the Assessee had made a *suo moto* disallowance of the entire provision amount in the year of creation of the provision. Reliance is also placed on the decision of the Hon'ble High Court of Karnataka in the case of *Subex Ltd. v. DCIT* (Order dated 22.12.2022 in ITA No. 787/2017)

24. The ld. D.R. relied on the order of lower authorities.

25. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in ITA No.1151/Bang/2015 & 1644/Bang/2014 for the assessment year 2012-13 dated 25.3.2022, wherein held as under:

"9. Admittedly, the entire provisioned amount being Rs.158,25,21,633/- has been suo moto disallowed by the assessee in the computation income for the year under consideration u/s. 40(a)(ia) of the Act. Under such circumstances, no benefit has accrued to the assessee to that extent which already stands disallowed while computing the taxable income.

10. It is not the case of the revenue that with the help of the provisioned amount assessee has been able to reduce the profits thereby any benefit has been drawn. We place reliance on the decision of Coordinate Bench of this Tribunal in case of Robert Bosch Engineering and Business Solutions Pvt. Ltd. v. ITO (supra) wherein on identical situations this Tribunal observed as under:

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

9.1. Before us the assessee concerned is the deductor of TDS.

For AY 2012-13:

Total Provision created : Rs.4,48,04,866/-

TDS deducted on receipt of

Invoice and paid in the FY:2013-14 :Rs.3,25,21,444/-

Balance on which no TDS effectuated :Rs.1,22,83,222/-

For AY:2013-14:

Total Provision :Rs.1,65,77,388/-

TDS deducted and paid in the same year : Rs.1,01,59,588/-

Balance on which no TDS effectuated:

The amount of Rs.1,01,59,588/-, inadvertently was retained in the provision. However, upon noticing the error, it was reversed as on 31/03/2014.

Before we advert to the main issue of levy of interest, under section 201(1)/(IA) of the Act, there is a direction by the Ld.CIT(A) for both

the years under consideration to exclude such payments which has suffered TDS. We also note that for financial year 2011-12, there is payment made by assessee to ESI corporation for which TDS liability does not arise which also needs to be ignored from the alleged quantum.

10. *It is the submission of the Ld. Counsel that the entire provision stands disallowed under section 40(a)/(i)/(ia) while filing the return of income and therefore for non deduction of TDS. What needs to be ascertained is, under such circumstances; whether the assessee(deductor) could be treated to be "assessee in default" under the provisions of Sec.201(1) of the Act ? Whether interest under section 201(1A) deserves to be levied?*

11. *The said section reads as under:*

Section 201

(1) Where any person, including the principal officer of a company,—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) The recipient has paid the tax due on the income declared by him in such return of income;

And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

As the section 201(1) is to be read, one must keep in mind that these provisions seeks to make good any loss of revenue, from an assessee who is the payee, on account of any lapse by the recipient of such income. We draw our support from the decision of Hon'ble Kolkata Tribunal in case of Ramkrishna Vedanta Math vs. ITO reported in (2012) 24 taxmann.com 29. Hon'ble Kolkata Tribunal also held as under:

"9. It is important to bear in mind that the lapse on account of non-deduction of tax at source is to be visited with three different

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*consequences - penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in Section 271C. So far as penal provisions are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. The provisions regarding interest in delay in depositing the taxes are set out in Section 201(1A). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. **As far as recovery provisions are concerned, these provisions are set out in Section 201(1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon.** In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact.....”* *Emphasis supplied*

13. In the present facts of the case we note that present assessee filed details of bifurcation of amount estimated in respect of each payee, the month in which the actual invoice was received and the TDS deducted coupled with details of it being deposited with the Government account. The Ld.ITO(TDS) did not consider the same by observing that it is voluminous and impossible to be verified. On verification of the list of payees placed in the paper book at pages 75-80, we note that assessee has deducted TDS between May 2012 to December 2012 (F.Y: 2012-13). Thus it is an admitted fact that TDS has been deducted at the time of making payment in respect of the provision amounting to Rs.3,25,21,444/- made as on 31/03/2012 and the same has been deposited to the Government account. On identical facts and similar circumstances this Tribunal in case of IBM ltd.(supra), appreciated the arguments advanced by assessee therein to discharge assessee from the from being called as, ‘assessee in default’, under section 201(1) of the Act to the extent the TDS was effectuated. This Tribunal in case of IBM(supra) observed and held as under:

“The learned counsel for the Assessee at the outset brought to our notice that pending disposal of the appeals, the Assessee had furnished before the AO, details regarding the actual payment of

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TDS in subsequent financial year, on the provisions made in the various financial years. These details were verified by the AO. The AO has addressed a letter to the DR in which the AO after verification has found that the Assessee had deducted tax at source at the time when the provision made in one financial year is subsequently reversed and the expense booked in the subsequent financial year. The following are the contents of the said letter (copy filed by DR in Court) , in so far as it relates to taxes deductible at source.

“3. During the course of appellate proceedings before the Hon’ble ITAT the assessee company took the same plea that it had deducted tax at source in the subsequent year on all the amounts that was disallowed u/s. 40a(i) and 40a(ia) as and when these amounts were paid. The Hon’ble ITAT therefore directed that such details be produced before the Income Tax Officer (TDS) for verification.

*4. At the remand stage the assessee company has now submitted year wise details of rental charges paid, professional charges paid, contract amounts paid and details of other payments. The details of year end provisions as per tax audit report (disallowed u/s. 40a(i) and 40a(ia)), payments made in subsequent year in respect of these provisions and details of tax deducted at source on such payments along with proof of deposit of such TDS into Govt. account were called for and systematically verified. Since, the transactions were enormous in respect of these four assessment years, verifications were carried out randomly for different months for these assessment years. **After thorough verification of the transactions in respect of the months selected randomly and after analysis of consolidated annual figures separately for each sections of TDS, it is seen that the amounts which were shown as provisions as on 31 March of a particular year, whether either liquidated by way of payment or was added back to the profit and loss account in subsequent year. Wherever payments were made tax has been deducted at source under the relevant provisions of the IT Act and remitted to the Govt. account.***

5. Though, the tax has been deducted at source at the time of payments in respect of provisions made as on 31 March, it is be stated that it was the assessee company’s responsibility to deduct tax at source and remit it to the Govt. account as soon as item of expenditure is debited by it in the books of accounts. Reference is invited to sub section 2 of section 194C, which mandates that the any amount credited to any account whether called “suspense account” or by any other name, in the books of accounts such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. Similar provisions / explanation is also to be found

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in other sections relating to TDS. Thus, it can be seen that the assessee company has failed to deduct tax at source on the provisions made by it as at 31st March within the stipulated time. The assessee company has deducted tax at source on these amounts in the subsequent year as and when the same were paid by it. Thus, it is liable for charging of interest u/s. 201(1A) for delayed deduction and remittance of tax to Govt. account.”
(emphasis supplied)

24. In view of the above, the demand on account of tax u/s.201(1) of the Act, in our view, will no longer survive. However the appeals will survive with regard to the liability of the Assessee to interest u/s.201(1A) of the Act.

Therefore the appeals in so far as it relates to challenge to order u/s.201(1) of the Act have to be allowed.”

Respectfully following the same we also hold the present assessee cannot be treated to be an “assessee in default” to the extent TDS has been effectuated though in subsequent financial year.

14. Now the issue that needs to be considered is in a situation where the assessee has not been treated to be an assessee in default, interest under section 201(1A) deserves be levied.

In our humble opinion, the provision of TDS provisions cannot applicable where there is no claim of expenditure made by the assessee. In the present facts assessee made suo motu disallowance of the entire provision under Section 40(a)(i)/(ia) of the Act. Once the amount is disallowed u/s. 40(a)(i)/(ia) for non-deduction of tax, it cannot be subject to TDS provisions again so as to make the assessee liable to interest u/s. 201(1A). In our considerate view, the assessee(deductor) gets exonerated from the applicability of TDS provisions on disallowance of the expenditure in question under section 40(a)(i)/(ia) of the Act. This rational is based on the scheme of Section 40(a)(i)/(ia), which is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee(deductor) in a situation in which income embedded in such expenditure remained untaxed due to tax withholding lapses by such assessee(deductor).

A legal fiction has been appreciated by Hon’ble Delhi High Court in case of CIT vs. Ansal Landmark Township Pvt. Ltd reported in (2013) 61 Taxmann.com 45. Hon’ble Court referred to a decision of Hon’ble Agra bench of this Tribunal in case of Rajiv Kumar Agarwal vs. ACIT in ITA No.337/Agra/2013. The issue for consideration before the Tribunal was in respect of retrospective application of second proviso to section 40(a)(ia) of the Act. Hon’ble Delhi High Court while deciding the case of CIT vs. Ansal Landmark Township Pvt. Ltd(supra), observed as under:

“9. It is seen that the second proviso to Section 40(a) (ia) was inserted by the Finance Act 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-Section (1) of Section 201 of the Act, then, in such event, “it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso”

15. Hon’ble Delhi High Court after referring to section 201(1) of the Act, held as under:

“11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITAT in *Rajiv Kumar Agarwal v. ACIT (supra)*, the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

“On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken

into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincestivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincestivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assesseees for non deduction of tax at source by declining the deduction in respect of related payments, even

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when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004."

Emphasis supplied

16. *We place reliance on the above decision to emphasize on the interpretation of the scheme under section 40(a)(i)/(ia) of the Act. Hon'ble Delhi High Court also explains that the intention of the legislature is not to obviate unintended hardship. It also appreciated the object of scheme under section 40(a)(ia), as on the statute, to examine the provisions on a "fair, just and equitable" interpretation of law.*

The Hon'ble Karnataka High Court in some of its decisions opined regarding on yearend provisions that were reversed in the next accounting year.

16.1. *In case of Karnataka Power transmission corporation Ltd., vs. DCIT(TDS) reported in (2016) 383 ITR 59*

In this case Hon'ble Court observed that the assessee was the deductor and in their profit and loss account treated the amount of provision as expenditure to arrive at profit. However, in the returns of income filed for the said assessment years, no expenditure was claimed, corresponding reversal entries were made in the books of accounts during the financial year 2007 for the assessment years 2005-06 and 2006-07 indicating that the subject amounts of provision towards contingent interest would never be paid. Similarly for the financial year ending on 31.03.2007, a similar provision towards contingent interest payable on belated payments were created but at the end of the year, the said amount treated as expenditure in the profit and loss account was not excluded to arrive at the taxable income in the return of income filed for the assessment year 2007-08. Further, the said entry was reversed. In that context, this Court has held that the existence or absence of entries in the books of accounts is not decisive or conclusive factor in deciding the right of the assessee claiming deduction. The reasoning of the Tribunal that the deductor nor the deductee had paid the tax on the provision amount and the provisions of Sections 201 and 201(1) of the Act are attracted is held to be not acceptable. Thus, it has been held that if no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor. The interest being not paid to the payees/suppliers and the same having been reversed in the books of accounts, it was categorically observed that there would be no liability to deduct tax as no income accrued to the payees.

16.2. *In a recent decision on similar facts before Hon'ble Karnataka High Court in case of Volvo India Pvt.Ltd vs. ITO(TDS), in ITA no. 369/2018 by order dated 15/11/2021, the Revenue argued regarding interplay of Section 40(a)(ia) and 194C would make it clear that the default by a person in compliance of the requirements of the provisions contained in Part B of Chapter-XVII of the Act leads, that when the obligation of Section 194C of the Act is not complied with, the consequences under Section 40[a][ia] will operate. The Revenue sought to rely on the decision of Hon'ble Supreme Court in case of Shree Choudhary Transport Company vs.ITO reported in (2021) 118 taxmann.com 47. Hon'ble Karnataka High Court considered the decision of Hon'ble Supreme Court in favour of assessee by observing as under:*

“10. It is ex-facie apparent that the contention of the assessee inasmuch as non-identification of the payees in the provisions and the disallowance of deduction expenditure under Section 40(a)(ia) of the Act has not been rightly appreciated by the Tribunal. In this scenario, the judgment of the Hon'ble Apex Court in the case of Shree Choudhary Transport Company': would not be of any assistance to the Revenue unless the material aspects are considered with respect to Section 40(a)(ia) of the Act read with Sections 194C, 194H, 194I, 194J — relevant Sections under which TDS was required to be deducted by the assessee. These factors necessarily requires to be addressed by the Tribunal keeping in mind the provisions of the Act as well as the legal principles enunciated by the Hon'ble Courts. If the deduction is not claimed for the expenditures made in the provision even in the return submitted and the same is offered to tax in the subsequent year after reversing the entries pursuant to the receipt of the bills/invoices by the payees, the matter has to be analyzed having regard to, whether income has accrued to the payees to deduct tax at source. In the given circumstances, we deem it appropriate to set aside the impugned order and remand the matter for fresh consideration by the Tribunal.”

17. *At this juncture it is relevant to note the analysis of provisions of section 40(a)(i)/(ia) by Hon'ble Supreme Court in case of Shree Choudhary Transport Company(supra) observed as under: “16. While taking up the question of interpretation of section 40(a)(ia), it may be usefully noticed that section 194C is placed in Chapter XVII of the Act on the subject "Collection and Recovery of Tax"; and specific provisions are made in the Act to ensure that the requirements of section 194C are met and complied with, while also providing for the consequences of default. As noticed, section 200 specifically provides for the duties of the person deducting tax to deposit and submit the*

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statement to that effect. The consequences of failure to deduct or pay the tax are then provided in section 201 of the Act which, as noticed, puts such defaulting person in the category of "the assessee in default in respect of the tax" apart from other consequences which he or it may incur. **The aspect relevant for the present purpose is that section 40 of the Act, and particularly the provision contained in sub-clause (ia) of clause (a) thereof, indeed provides for one of such consequences.**

16.1 section 40(a)(ia) provides for the consequences of default in the case where tax is deductible at source on any interest, commission, brokerage or fees but had not been so deducted, or had not been paid after deduction (during the previous year or in the subsequent year before expiry of the prescribed time) in the manner that the amount of such interest, commission, brokerage or fees shall not be deducted in computing the income chargeable under "profits and gains of business or profession". In other words, it shall be computed as income of the assessee because of his default in not deducting the tax at source.

16.2 In the overall scheme of the provisions relating to collection and recovery of tax, it is evident that the object of legislature in introduction of the provisions like sub-clause (ia) of clause (a) of section 40 had been to ensure strict and punctual compliance of the requirement of deducting tax at source. In other words, the consequences, as provided therein, had the underlying objective of ensuring compliance of the requirements of TDS. **It is also noteworthy that in the proviso added to clause (ia) of section 40(a) of the Act, it was provided that where in respect of the sum referable to TDS requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after the expiry of the time prescribed in section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.**

16.3 **The purpose and coverage of this provision as also protection therein have been tersely explained by this Court in the case of Calcutta Export Co. (supra), which has been cited by learned counsel for the appellant in support of another limb of submissions which we shall be dealing with in the next question. For the present purpose, we may notice the relevant observations of this Court in Calcutta Export Company as regards section 40(a)(ia) of the Act as follows (at p. 662 of ITR):-**

"16. The purpose is very much clear from the above referred explanation by the Memorandum that it came with a purpose to ensure tax compliance. The fact that the intention of the Legislature was not to punish the assessee is further reflected from a bare reading of the provisions of section 40(a)(ia) of

the Income-tax Act. It only results in shifting of the year in which the expenditure can be claimed as deduction. In a case where the tax deducted at source was duly deposited with the Government within the prescribed time, the said amount can be claimed as a deduction from the income in the previous year in which the TDS was deducted. However, when the amount deducted in the form of TDS was deposited with the Government after the expiry of period allowed for such deposit then the deductions can be claimed for such deposited TDS amount only in the previous year in which such payment was made to the Government."

We note that the above decisions by Hon'ble Supreme Court and Hon'ble Karnataka High Court were not available before this Tribunal while considering similar issue on identical facts in case of IBM India Pvt.Ltd vs. ITO (TDS)(LTU) (supra) and Agreenco Fiber Foam (p.) Ltd vs. ITO(TDS) (supra) relied by the Ld.Sr.DR.

18. Further Hon'ble Kolkata Tribunal in case of Ramkrishna Vedanta Math vs. ITO reported in (2013) 55 SOT 417 decided an issue whether, a demand under section 201(1A) r.w.s. 194 C can be enforced even in a situation in which the recipient of income embedded in the payments has paid due taxes thereon, and, if not, who has the onus to demonstrate that status about payment of such taxes.

Relying on decision of Hon'ble Allahabad High Court's judgment in the case of Jagran Prakashan Ltd Vs DCIT reported in (2012) 21 taxmann.com 489, the Counsel for the assessee argued that the onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primary liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Ld.Counsel therein contended that once all the details of the persons to whom payments have been made, it is for the Assessing Officer, who has all the powers to requisition the information from such payers and from the income tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld. It was the submission of the Ld. Counsel therein that, as a result of decision of Hon'ble Allahabad High Court's judgment in the case of Jagaran Prakashan (supra), there is a paradigm shift in the interpretation of Section 201(1).

Hon'ble Kolkata Tribunal observed as under:

"8. The plea is indeed well taken. Learned counsel is quite right in his submission that, as a result of the judgment of Hon'ble Allahabad High Court in Jagran Prakashan's case (supra) and

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*in the absence of anything contrary thereto from Hon'ble jurisdictional High Court, there is a paradigm shift in the manner in which recovery provisions under section 201(1) can be invoked. As observed by Their Lordships, the provisions of Section 201(1) cannot be invoked and the "tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly". **Once this finding about the non payment of taxes by the recipient is held to a condition precedent to invoking Section 201(1), the onus is on the Assessing Officer to demonstrate that the condition is satisfied. No doubt the assessee has to submit all such information about the recipient as he is obliged to maintain under the law, once this information is submitted, it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient of income. This approach, in our humble understanding, is in consonance with the law laid down by Hon'ble Allahabad High Court.***

9. It is important to bear in mind that the lapse on account of non deduction of tax at source is to be visited with three different consequences—penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in Section 271 C. So far as penal provisions are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. **The provisions regarding interest in delay in depositing the taxes are set out in Section 201(1A). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. As far as recovery provisions are concerned, these provisions are set out in Section 201(1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon. In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact. On the other hand, once assessee furnishes the requisite basic information, the Assessing Officer can very well ascertain the related facts about payment of taxes on income of the recipient directly from the recipients of income. It is not the revenue's case before us that, on the facts**

of this case, such an exercise by the Assessing Officer is not possible. It does put an additional burden on the Assessing Officer before he can invoke Section 201(1) but that's how Hon'ble High Court has visualized the scheme of Act and that's how, therefore, it meets the end of justice."

18. Hon'ble Mumbai Tribunal in case of Pfizer Ltd vs.ITO(TDS)(OSD)(supra) on identical issue and similar facts held as under:

"12. As already explained and evidenced from the computation of income as well as the orders of AO in the assessment proceedings, the entire provision has been disallowed under section 40(a)(ia) and section 40(a)(i). Once the amount has been disallowed under the provisions of section 40(a)(i) on the reason that tax has not been deducted, it is surprising that AO holds that the said amounts are subject to TDS provisions again so as to demand the tax under the provisions of section 201 and also levy interest under section 201(1A). We are unable to understand the logic of AO in considering the same as covered by the provisions of section 194C to 194J. Assessee as stated has already disallowed the entire amount in the computation of income as no TDS has been made. Once an amount was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same amount cannot be subject to the provisions of TDS under section 201(1) on the reason that assessee should have deducted the tax. If the order of AO were to be accepted then disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and provisions to that extent may become otiose. In view of the actual disallowance under section 40(a)(i) by assessee having been accepted by AO, we are of the opinion that the same amount cannot be considered as amount covered by the provisions of section 194C to 194J so as to raise TDS demand again under section 201 and levy of interest under section 201(1A). Therefore, assessee's ground on this issue are to be allowed as the entire amount has been disallowed under the provisions of section 40(a)(i)/(ia) in the computation of income on the reason that TDS was not made. For this reason alone assessee's grounds can to be allowed. Considering the facts and reasons stated above assessee's grounds are allowed.

13. Assessee has raised one more contention that interest under section 201(1A) should be levied till the date of payment and not till the date of order. Anyhow this issue became academic in nature, as we have already held that demand under section 201 cannot be raised once the entire amount has been disallowed in the computation of income under section 40(a)(i) and 40(a)(ia). In view of this even though the contention is correct being a legal issue, there is no need for adjudicating the matter as the grounds

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raised have been held in favour of assessee. AO is directed to delete the said demand so raised. Appeal is accordingly allowed.”

In the present facts, there is no loss to the revenue in the year in which provision is created, since the assessee before us is stated to have disallowed the entire provision under section 40(a)(i)/(ia) of the Act on which TDS could not be effectuated. All details of payee and the details regarding when subsequently the actual payments were effectuated on receipt of Invoice/bill, was submitted before the Ld.AO. The Ld.AO without verifying the same levied interest under section 201(1A) of the Act. Then, the question that arises to our minds that, is it logical to put such assessee(deductor) into double jeopardy by casting the liability under chapter XVII-B on an assumption of non payment of taxes on income embedded in the receipt by an assessee(payee)? We answer this question in negative.

20. *On the amount on which TDS could not be effectuated due to non receipt of invoices, the Ld.AO will first have to ascertain if the payee has paid taxes on the income embedded therein. This is the pre condition for levying interest u/s. 201(1A) of the Act.*

21. *In our considered opinion applicability of section 201(1A) needs verification of payment of tax by the recipient (payee) at the end of the Ld.AO since the Ld.AO failed to carry out necessary verification in respect of the payees, the details of which were provided by assessee. In the interest of justice, we direct the Ld.AO to verify the details filed by assessee in respect of the payee in accordance with the principles laid down by Hon'ble Supreme Court in case of Hindustan Coco Cola reported in (2007) 163 Taxman 355 and keeping in view the intention of the legislature envisaged under section 40(a)(i)/(ia) of the Act. Assessee is directed to file all the relevant details once again, details of TDS deducted and paid to the Government account on payment being made in the subsequent year on reversal of the provision. At this juncture we caution the Ld.AO provisions of section 201(1) cannot be invoked, in view of the fact that there is no loss to the revenue in the present facts of the case as observed by us in the preceding paras.*

22. *In case the assessee has not added back the provision created towards the expenditure to the total income in the statement of income and took advantage of provision by reducing the income of assessee then assessee is liable for interest u/s. 201(1)&(1A) of the Act.*

Accordingly, the grounds raised by assessee in both the appeals stands allowed for statistical purposes.”

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From the above, it is clear that assessee cannot be held liable u/s. 201(1) if no benefit has accrued to assessee.

11. It is pertinent to note that the Ld.CIT(A) for assessment year 2013-14, the Ld.CIT(A) has dealt with in detail the applicability of section 201(1)/(1A) having regards to the scheme of the Act and various decisions by Hon'ble Karnataka High Court as well as various decisions of coordinate bench. We have reproduced the findings of the Ld.CIT(A) in the preceding paragraphs. And the same stands upheld based on the discussions herein above.

12. We therefore, are of the view that the entire provision cannot be subjected to the rigours of section 201 for a default that is not been committed by assessee. We confer with the view taken by the Ld.CIT(A) for assessment year 2013-14 to be applied for all the assessment years under consideration.

13. On the issue of applicability of TDS provisions on the commission and Rebate payment by assessee, we note that the relevant observations of the agreement has not been looked into by the Ld.AO. It is the submissions of the Ld. Counsel that it is a nonexclusive right granted to the dealer on principal-to-principal basis and that there is no principal agent relationship, for which provisions of TDS could be applied on such payments. It is also noted that wherever the payment of commission included the element of income in the hands of the recipient, TDS has been effectuated by assessee. Coordinate Benches of this Tribunal.

14. However, in respect of the amount shown as rebate and commissioned to the dealers, the agreement has not been looked into by the authorities below. In the event any amount provisioned as commission / rebate falls under the purview of TDS provisions, the disallowance cannot be simply made for the reason that no TDS has been effectuated as the assessee has suo moto disallowed the entire provisioned amount for each year under consideration u/s. 40(a)(ia) of the Act.

15. We also draw our support from the decision of Hon'ble Supreme Court in case of Hindustan Coca Cola Beverage P. Ltd., Vs. Commissioner of Income Tax reported in (2007) 293 ITR 226 (SC) has held that in the event the payee has paid taxes, the deductor cannot be held liable for not deducting the TDS. As the Ld.AO has not verified this aspect and considering the fact that assessee has paid taxes by suo moto disallowance of the entire provisioned amount, it is difficult to agree with the orders passed by the authorities below.

16. Accordingly, in the interest of justice, we remand the amounts that has been provisioned by assessee pertaining to the commission / rebates extended to the dealers to be verified based on the agreement entered into between the parties in the light of the decisions relied upon by the assessee reproduced hereinabove in para no. 8.

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The Ld.AO is also directed to verify the issue in accordance with the principle laid down by Hon'ble Supreme Court in case of Hindustan Coca Cola Beverage P .Ltd., Vs. Commissioner of Income Tax (supra) in respect of the provisions that has been considered by the Ld.AO for computing interest u/s. 201(1A) of the Act.

In the result the appeals filed by assessee and revenue for A.Ys. 2012-13 and 2013-14 stands allowed for statistical purposes.”

25.1 In view of the above order of Tribunal, we remit this issue to the file of AO on similar directions.

26. Ground No.10 is with regard to disallowance of payment against provisions for extension charges for non-construction of building on leased land.

26.1 The ld. A.R. submitted that the assessee had entered into an agreement with NOIDA and KIADB authorities to lease certain portion of land in Noida and Bangalore respectively for an agreed consideration. The said land was obtained on lease, for the purpose of undertaking civil construction to carry on the business of the Assessee. In terms of the agreement, the Assessee was required to complete the construction within a stipulated time, failing which an extension would be granted subject to levy of premium at a prescribed rate. Since the Assessee failed to complete the construction within the stipulated time, the assessee sought for an extension as per the terms of the agreement and made a provision towards the estimated amount of premium that may have to be paid to the authorities, in case the authorities were to grant an extension of time. The provision was disallowed in the year of creation of the provision in the computation of income in respective assessment years and therefore, offered to tax.

26.2 For the assessment year in question, while computing the income of the Assessee, the said payment of Rs. 3,03,43,629/- was

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claimed under the head payment against the provision for development of the land. Since the expenditure was incurred purely for business purpose, the same was claimed as an allowable revenue expenditure under Section 37 of the Act. However, though the Assessing Officer, did not question the commercial exigency, he disallowed the same on the ground that on completion of the construction, the building would become the asset of the Assessee and the extension charges would add to the cost of acquisition of the building and thus, a capital expenditure and since the building was not put to use during the year, no depreciation is allowable. The DRP upheld the disallowance and concluded the expenditure to be a capital expenditure. However, the DRP failed to adjudicate on the alternate ground for claim of depreciation raised by the Assessee.

26.3 The Id. A.R. submitted that a reference to 'Note (i) to schedule 10' of the financial statements for assessment year 2013-14 wherein the movement of the provision created and utilized during the year is provided. Thus, the Assessee has discharged a part of the liability i.e., Rs. 3,03,43,629/- during the assessment year, and deduction for the same was claimed.

26.4 In this regard, she submitted that the AO and the DRP failed to appreciate that the Assessee had taken the land on lease for the development and furtherance of its business in view of commercial expediency and that the Assessee did not own the land and has not claimed it as a capital asset in its books of accounts. Further, the Assessee also incurred rental expenditure on the leased land. Therefore, the payment is essentially towards the lease of land and is not in the nature of capital expenditure, for the reason that payment was purely made for the purpose of extension of time and not towards the acquisition of the asset. She submitted that the Assessee has not received any enduring benefit for payment of such extension

charges. Therefore, this expenditure on account of business exigencies cannot be treated as capital expenditure. Without prejudice, she submitted that depreciation ought to be allowed on such expenditure.

26.5 In this regard, she placed reliance on the decision of the Hon'ble Gujarat High Court in the case of *PCIT v. Mazda Ltd.* (reported in [2017] 86 taxmann.com 27 (Gujarat)).

27. The Id. D.R. submitted that the leased agreement has been entered by assessee on 4.9.2001. As per this agreement, the assessee has to pay last instalment of the premium on or before 14.2.2006 and as per clause no.8 of the said agreement, the assessee is required to start the construction and implement the project within 6 months from the date of possession and will construct the complete area as per byelaws of the Lessor as applicable for building and put the same in operation as per plans approved by the Lessor within the period of 5 years from the actual date of execution of lease deed or due date of lease deed, whichever is earlier and shall obtain the completion certificate from building cell, failing which levy of 4% premium cost per annum or part there of as applicable will be charged as extension charges being allowed by Chief Executive Officer of the Lessor or his duly authorized officer. According to her, in view of this clause 8 of the lease deed, the assessee is not required to incur any expenditure towards penalty for non-construction of building on lease hold land, as such, it cannot be in the assessment year under consideration. Even as a capital expenditure or there is no question of liability of depreciation or liability of expenditure as revenue u/s 37 of the Act.

28. We have heard the rival submissions and perused the materials available on record. We have carefully gone through the lease deed executed by the assessee on 4.9.2001 with New Okhla

Industrial Development Authority. As per this, clause No.(1) stipulates payment of premium towards the land and the last and 10th instalment falls due only on 14.2.2006. The relevant clauses 8 & 11 reads as follows:

8. *“That the Lessee will start construction and implement the project within six months from the date of possession and will construct complete area as per bye-laws of the Lessor as applicable for buildings and put the same in operation as per plans approved by the Lessor within a period of five years from the actual date of execution of lease deed or due date of lease deed, whichever is earlier and shall obtain the completion certificate from buildings cell failing which a levy of 4% of premium cost per annum or part thereof as applicable will be charged as extension charges being allowed by Chief Executive Officer of the Lessor or his duly authorised officer. The rate of extension charges, as mentioned above may be reviewed by the Lessor. In the event of extension not being granted, cancellation may be effected if site remains vacant after five years of possession and the Lessor may resume possession or demise it again, provided that the Lessee will be at liberty to remove construction, if any, in such eventuality.*

.....
.....

11. *That the Lessee shall not make or permit to make any alteration in or in addition to the said buildings or their erections that would be erected in terms of Clause 7 on the Demised Plot, without the prior permission, the Lessor and except in accordance with the terms of the plan, approved by the Lessor or any officer authorised by the Lessor or if such authorised Officer requiring it to correct such deviations as aforesaid, shall correct it and if the Lessee shall neglect to correct such deviations within a period of a calendar month after the receipt of such notice, then it shall be lawful for the Lessor to cause such deviation to be corrected at the expenses of the Lessee, which expenses the Lessee hereby agrees to reimburse by paying to the Lessor such amount as decided by the Lessor (whose decision shall be final).”*

28.1 Now the assessment year involved herein is 2013-14. The assessee has not produced any documents to suggest that the assessee has incurred any expenditure as per the clause 8 & 11 of

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the lease deed in the assessment year under consideration. First of all, to claim the expenditure either capital or revenue, assessee is to establish that this expenditure has been incurred by the assessee and the said expenditure has been accrued in the assessment year under consideration. The assessee has not placed any evidence to suggest that this expenditure has been accrued in the assessment year under consideration. It is the duty of the assessee to show that this expenditure accrued in the assessment year under consideration by producing necessary evidence in support of the same. The assessee has made oral argument that the Lessor has invoked the clause 8 of the above lease deed and accordingly, the assessee has made payment for the same. In our opinion, even if the Lessor made a claim for the same, the whole expenditure cannot be allowed in the assessment year under consideration. The expenditure relating to the assessment year is only 4% of the premium cost per annum. The assessee also was not able to establish the accrual of the expenditure and also not able to establish the quantification of this expenditure in the assessment year under consideration. The only argument of the assessee is that in the earlier assessment, assessee made a provision for some expenditure and on later date the same was reversed, as such it should be allowed in the assessment year when the assessee actually incurred this expenditure. This argument holds no merit as the assessee has not placed any evidence to show that how the Lessor invoked this clause in lease deed after a long lapse of 12 years. As such, we are not in a position to appreciate the argument of Id. A.R. In our opinion, the liability to incur this expenditure will arise only as per clause 8 and as per the clause 8, the assessee has to construct complete area within 5 years from the actual date of execution of lease deeds or due date of lease deeds, whichever is earlier and shall obtain Completion Certificate from the Building Cell. This liability of the expenditure cannot be considered

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as a contractual liability as per the clause 8 of the lease, being so, this expenditure cannot be allowed as accrued in the assessment year under consideration. Accordingly, this ground of appeal of assessee is rejected.

29. Ground No.11 is with regard to disallowance u/s 40(a)(ia) of the Act due to short deduction. The ld. A.R. submitted that the Assessing Officer disallowed a sum of Rs. 1,75,62,147/- on account of short deduction of tax.

29.1 The ld. A.R. submitted that as per Section 40(a)(ia) of the Act, disallowance is attracted in cases where tax is deductible under Chapter XVII-B and *such tax has not been deducted or after deduction has not been paid within the specified time*. In the present case, there is no non-deduction of tax or non-payment of taxes deducted but is only a case of short deduction of tax. She submitted that short deduction of tax would not attract disallowance under Section 40(a)(ia) of the Act. In any event, she submitted that the Assessee has subsequently paid the short deduction amount or necessary clarifications were filed with the Income Tax Officer during the assessment proceedings. Without prejudice, she submitted that the expenditure ought to be allowed as a deduction in the year of payment viz., assessment year 2015-16.

29.2 In this regard she placed reliance on the decision of this Tribunal in *Dell International Services India Private Limited v. ACIT* (Order dated 20.01.2023 passed in IT(TP)A No. 2835/Bang/2017 for assessment year 2012-13) wherein this Tribunal deleted the disallowance made under Section 40(a)(ia) of the Act holding that short deduction of tax would not attract disallowance under Section 40(a)(ia) of the Act and also on the decision of the Hon'ble High Court of Calcutta in the case of *CIT v. S.K. Tekriwal* (reported in [2014] 46 taxmann.com 444 (Calcutta)) and the decision of Tribunal- Mumbai

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Bench in the case of *Highlight Pictures (India) (P.) Ltd. V. ACIT* (reported in [2014] 49 taxmann.com 187 (Mumbai)).

30. The ld. D.R. relied on the order of lower authorities.

31. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, similar issue came for consideration in assessee's own case in IT(TP)A No.1151/Bang/2015, 1644/Bang/2014 & ITA No.2035/Bang/2016 dated 25.3.2022 as reproduced in earlier para of this order.

31.1 In view of the above order of the Tribunal discussed in ground no.9 herein, this issue is remitted to the file of AO on similar direction.

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

Order pronounced in the open court on 7th Aug, 2023

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 7th Aug, 2023.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore