

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

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

IT(TP)A No. 245/Bang/2023
Assessment Year : 2012-13

M/s. OnMobile Global Ltd., Tower #1, 94/1C and 94/2, Veerasandra Village, Attibele Hobli, Anekal Taluk, Electronic city Phase – 1, Bangalore – 560 100. PAN: AAACO3900E	Vs.	The Deputy Commissioner of Income Tax, Circle – 5(1)(2), Bangalore.
APPELLANT		RESPONDENT

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ITA No. 254/Bang/2023
Assessment Year : 2012-13

The Deputy Commissioner of Income Tax, Central Circle – 1(2), Bangalore.	Vs.	M/s. OnMobile Global Ltd., Tower #1, 94/1C and 94/2, Veerasandra Village, Attibele Hobli, Anekal Taluk, Electronic city Phase – 1, Bangalore – 560 100. PAN: AAACO3900E
APPELLANT		RESPONDENT

Assessee by	:	Shri T. Suryanarayana, Senior Advocate
Revenue by	:	Shri D.K. Mishra, CIT-DR

Date of Hearing	:	08-11-2023
Date of Pronouncement	:	22 -12-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals arises out of order dated 30.01.2023 passed by the Ld.CIT(A)-12, Bangalore for A.Y. 2012-13 on following grounds of appeal:

Grounds of appeal (Assessee):

“The following grounds and sub-grounds are independent of and without prejudice to one another:

I. Transfer Pricing

1. The learned Assessing Officer (learned AO), learned Transfer Pricing Officer (learned TPO) and the Honourable Commissioner of Income Tax (Appeals) (‘Hon'ble CIT(A)’) grossly erred in determining an adjustment of INR 44,32,02,099 in respect of the Appellant's international transactions with its Associated Enterprises (‘AEs’) under section 92CA of the Income-tax Act, 1961 (‘the Act’).

2. The learned AO/ learned TPO/ Hon'ble CIT(A) has erred in law and in facts by ignoring the submissions filed by the Appellant in relation to the business model of the Appellant.

3. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in holding that the payments made for availing business development services are not at arm's length.

4. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in not appreciating the fact that the appellant, being an entrepreneurial entity, undertakes all strategic decisions for rendering the services and therefore, the related cost has to be borne by the same.

5. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in not appreciating the facts that services were rendered by Onmobile USA LLC to the customers of the Appellant on behalf of the Appellant, and therefore are not received by the subsidiaries in Latin American countries, and therefore in the absence of any service being availed by the

subsidiaries in Latin American countries, no portion of the cost can be apportioned to the said entities.

6. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in not appreciating the fact that the Latin American subsidiaries are mere captive service providers with limited risks and perform the business activities on behalf of the Appellant and are compensated on a cost-plus mark-up.

7. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in not appreciating that if the business development expenses are apportioned to the Latin American subsidiaries, such costs would be cross charged back to the Appellant with mark-up, thereby resulting in additional loss of income to the Appellant in India and tax base erosion in India.

8. That therefore, the adjustment determined by the learned TPO runs counter to the provisions of Section 92(3) of the Act.

9. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in ignoring the fact that the reason for setting up of data centres/ servers/warehousing facilities in the Latin American countries are purely based on commercial expediency and a business-centric decision taken by the Appellant, and that in fact, the subsidiaries are set up after conclusion of contract between the Appellant and third party customers.

10. That in any event, the adjustment determined by the learned TPO in an adhoc manner, without following any method prescribed under the Act and the Rules made thereunder is without jurisdiction and thus liable to be set aside.

II. Corporate Tax

11. Penalty Proceedings

i) The learned AO erred in recording satisfaction for initiating penalty proceedings under section 271(1)(c) of the Act.

ii) The learned AO erred in concluding that the Appellant has furnished inaccurate particulars of such income.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

Grounds of appeal (Revenue):

“1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in holding that the assessee is eligible for depreciation @ 60% on NMS CG/Tx cards, switches etc., by classifying the same as "Computers" whereas all the technical systems linked to computer cannot be termed as "Computers" eligible for higher depreciation and the same are to be treated only as "plant & machinery"?

2. Whether the Honourable CIT(A) was correct in allowing deduction of tax paid outside India by holding that tax paid outside India would be outside the scope of Section 40(a)(ii) of the Income tax Act?

3. Whether the Hon'ble CIT(A) has erred in not following the binding decision of the Hon'ble Karnataka High Court in the case of Kirloskar Electric Co. Ltd., vs CIT [1997] 228 ITR 676, in which it was held that tax paid outside India on profits and gains of any business cannot be deducted in view of provisions of Section 40(a)(ii) of the Income tax Act?"

Brief facts of the case are as under:

2. Assessee is a telecommunication operator in India and abroad that provides mobile value added services. The Ld.AO has noted that the services include ring back tones (RBT).

A. The Assessee provides mobile value added services (“MVAS”) to telecommunication operators in India and abroad. The services include ring back tones (“RBT”), contests, joke and cricket alerts, etc., which enable subscribers to personalize their mobile phones and thereby enhance user experience. The Assessee enters into contracts with telecom operators in India and abroad, for providing services to customers of telecom operators. In respect of customers situated outside India, once the contract is signed with the customer, the Assessee establishes subsidiaries in the respective countries for furtherance of its business. The subsidiaries retain a return on cost for the services provided and transfer the rest of the proceeds to the Assessee. The subsidiaries operate on a cost plus model for the services rendered.

**DETAILS OF THE RELEVANT INTERNATIONAL
TRANSACTIONS ENTERED INTO BY THE ASSESSEE:**

Services	Value	Outcome of the TP Order
Receipt of business development services from Onmobile USA	Rs. 55,40,02,623/-	Adjustment of Rs. 19,53,70,849/-
Receipt of technical support services from LATAM affiliates	Rs. 21,62,80,953/-	Accepted to be at arm’s length.

B. On a reference made by the Assessing Officer (“AO”) to the TPO, the TPO passed an order dated 29.01.2016 under Section 92CA of the Income-tax Act, 1961 (‘the Act’) determining ALP of the transaction.

C. It is submitted that the assessee enters into contracts with telecom operators in India and abroad, for providing services to customers of telecom operators. Once the contract is signed with the customer abroad for rendering services abroad, the Assessee establishes subsidiaries in the respective countries for furtherance of its business. In line with its business model, the Assessee entered into contracts with third party telecom companies situated in Latin American countries, for provision of RBT services. Pursuant thereto, the Assessee established its subsidiaries in the said countries for carrying on the business of providing RBT services in the said countries. The AEs in the LATAM countries merely provide limited technical support services to the customers of the AEs on the Assessee's behalf, and are compensated on a cost plus mark up of 5-7%. Admittedly, the transactions with the AEs in LATAM are accepted as being at arm's length by the Ld.TPO.

Regarding the services received by the Assessee from the Onmobile USA

D. Onmobile USA was set up with the objective of rendering services to the Assessee's customers in LATAM countries. The company renders data storage and data warehousing services for the Assessee's customers in LATAM countries, on behalf of the Assessee. The company is a captive service provider and caters exclusively to the customers of the Assessee in LATAM countries. The company is compensated by the Assessee at a cost plus mark-up of 6%.

E. The Assessee selected Onmobile USA as the tested party and adopted TNMM method as the most appropriate method. Upon applying appropriate filters, the Assessee selected a set of comparable companies. The mean of the net cost plus mark up charged by the comparables stood at 11.77%. Accordingly, the mark up of 6% on costs paid by the Assessee was treated to be at arm's length.

Re services received from LATAM affiliates:

F. The Assessee selected the LATAM affiliates as the tested party, and adopted TNMM method as the most appropriate method. Upon applying appropriate filters, the Assessee selected a set of comparable companies. The mean of the net cost plus mark up charged by the comparables stood at 8.03%. Accordingly, the mark up of 5-7% on costs paid by the Assessee was treated to be at arm's length.

G. ANALYSIS DONE BY THE TPO

The TPO held that the services of Onmobile USA are availed not just by the Assessee, but also by the other affiliates, and therefore, the costs incurred in that regard are to be shared by the 4 entities. Accordingly, the TPO apportioned 1/5th of the expenses to the Assessee and determined the remaining 4/5th of the consideration paid as a TP adjustment.

H. The CIT(A) vide the order dated 30.01.2023 rejected the contentions of the Assessee, by holding that Onmobile USA is

providing services to LATAM subsidiaries, and that the services of Onmobile USA are required by the LATNAM subsidiaries in order to carry out the Assessee's business in those territories. Therefore, the TPO's action in apportioning the costs was upheld. The Ld.TPO thus proposed an adjustment of Rs.44,32,02,099/-.

On receipt of the transfer pricing order, the draft assessment order was passed by the Ld.AO.

A draft assessment order dated 30.03.2016 was passed by the Ld.AO incorporating the aforesaid TP adjustment. The Ld.AO also proposed to disallow the depreciation claimed at the rate of 60% on certain computer equipments and instead proposed to allow the same at 15%, which later culminated into a final assessment order dated 20.04.2016.

Aggrieved by the order of the Ld.AO, assessee filed appeal before the Ld.CIT(A) who, vide an order dated 30.01.2023 dismissed the Assessee's grounds of appeal challenging the TP adjustment.

I. The CIT(A) vide the order dated 30.01.2023 rejected the contentions of the Assessee, by holding that Onmobile USA is providing services to LATAM subsidiaries, and that the services of Onmobile USA are required by the LATNAM subsidiaries in order to carry out the Assessee's business in those territories. Therefore, the TPO's action in apportioning the costs was upheld.

As regards the corporate tax adjustments, the CIT(A) accepted the contentions of the Assessee and granted relief to the Assessee.

Aggrieved by the Ld.CIT(A)'s order to the extent the TP adjustment was sustained, the Assessee filed the appeal before this *Tribunal*. To the extent relief was granted to the assessee, the Revenue filed appeal before this *Tribunal*.

Assessee's appeal:

3. The Ld.AR submitted that **ground nos. 1 to 4** are general in nature and therefore do not require adjudication.

4. It is submitted that **Ground nos. 5-7 and 9-10** are in respect of transfer pricing adjustment made by apportioning the expenses of assessee's affiliates.

4.1 The Ld.AR submitted that, adjustment were determined by the Ld.TPO by holding that, the costs ought to have been shared by the LATAM affiliates. It is submitted by the Ld.AR that, the object behind inserting the transfer pricing provisions is to avoid shifting out of profits by manipulating prices charged or paid in international transactions, thereby eroding the country's tax base. It is thus submitted by the Ld.AR that the assumption of the authorities below runs contrary to the intent and purpose of the transfer pricing provisions.

4.2 It is submitted that the subsidiaries of the assessee work on a cost plus model, and assuming that the costs incurred by the assessee towards receipt of services from Onmobile USA, which in itself bears a mark-up, is apportioned to the LATAM affiliates, the LATAM affiliates would recover the said costs from the assessee, with a further mark up of 5-7%. This would lead to reduction in the income of the assessee in India, and shifting of the same to foreign country, which is contrary to the transfer pricing provisions. In fact, Section 92(3) of the Act, specifically prohibits determination of TP adjustment which has the effect of reducing the income chargeable to tax in India. By virtue of the adjustment, the Ld.TPO has in effect acted contrary to Section 92(3) of the Act. The Ld.AR submitted that the adjustments made u/s. 92CA are without understanding the business model of assessee. Reliance in this regard is placed on the decision of the *Hon'ble Bombay High Court* in the case of *CIT v. Merck Ltd.* reported in [2016] 73 *taxmann.com* 23 and the decision of the *Hon'ble Delhi Bench of this Tribunal* in the case of *Mercer Consulting India (P.) Ltd. v. DCIT* reported in [2016] 72 *taxmann.com* 323.

4.3 The Ld.AR further submitted that the method followed by the assessee has resulted in more profits being retained in India, and therefore, the assumption of shifting of profits is without any basis. It is submitted that if cost of availing business development services are apportioned to the LATAM subsidiaries, such costs would be cross charged back to the assessee with

mark-up to that extent. If done so, the Assessee would be liable to pay the LATAM subsidiaries an additional amount of Rs. 47,02,37,426/-, the computation of which is as under:

Particulars	Amount in Rs.
Amount paid by the Assessee to OGL USA (A)	55,40,02,623/-
Amount apportioned to the Assessee by the TPO (of the amount paid to OGL USA) (B=1/5 th of 55,40,02,623)	11,08,00,524/-
Amount apportioned to the LATAM subsidiaries (C)	44,32,02,098/-
Above amount (C) recharged back to the Assessee by LATAM entities at cost plus mark-up (D= C + 6.10%)	47,02,37,426/-
Income lost for Assessee (C+B)-A	2,70,35,328/-

4.4 Secondly, it is submitted that Onmobile USA renders the services to the assessee's customer, on behalf of the assessee. The contracts by the customers in LATAM countries are entered into with the assessee, and subsidiaries merely render services to the customers, purely on behalf of the assessee. Therefore, no services are availed by the LATAM subsidiaries. The subsidiaries are in fact established only after the contracts with the customers are finalised, demonstrating that no services are received by the subsidiaries. The subsidiaries are mere captive entities who work on a cost plus model. Therefore, the subsidiaries not having received the services, no portion of the costs can be apportioned to the subsidiaries. The Ld.AR relied on the relevant agreements entered into with the AE in USA and the AEs in LATAM countries are placed at pages 408 - 453 of the paperbook.

4.5 Thirdly, it was submitted that the adjustment determined by the Ld.TPO is wholly erroneous and contrary to the provisions of the Act. It is submitted that in terms of Section 92C of the Act, the arm's length price of an international transaction shall be determined by any of the method prescribed thereunder. The Ld.TPO in the present case has determined the adjustment in an adhoc manner, without adhering to the statutory provisions. It is submitted that the adjustment determined in an adhoc manner is without jurisdiction and therefore ought to be set aside.

4.6 Reliance in this regard is placed on the following decisions:

- *CIT v. Johnson & Johnson Ltd. reported in [2017] 80 taxmann.com 337 (Bombay);*
- *Merck Ltd. (supra); and*
- *CIT v. Kodak India (P.) Ltd. reported in [2017] 79 taxmann.com 362 (Bombay).*

4.7 The Ld.DR on the contrary relied on the orders passed by authorities below.

He submitted that all these details that have been argued by the Ld.AR has not been considered by the Ld.TPO and therefore it needs verification.

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

4.8 We note that the Ld.TPO has not considered the agreements between the assessee and its AE and the nature of the transaction entered into, the services rendered by the assessee to its AE and the benchmarking method adopted by the assessee on a consistent basis. In the interest of justice, we remand this issue back to the Ld.AO/TPO to consider the claim of assessee by analysing all the details vis-à-vis the contracts and the functions performed by the assessee in respect of the services rendered.

4.9 It is also noted that the assessee has received certain services from its AE which has been treated by the Ld.TPO at arms length by the assessee. However, the Ld.TPO has apportioned 1/5th of the expenses once again to the assessee and proposed a TP adjustment which in our view amounts to double addition. Such kind of computation of adjustment is not in accordance to the sound principles of transfer pricing rules. We direct the Ld.AO/TPO to consider the segments of the assessee under the receipt of business development services from its AE *denovo* in accordance with law. Needless to say that proper opportunity of being heard must be granted to assessee.

Accordingly, ground nos. 5-7 and 9-10 stands allowed for statistical purposes.

Revenue's appeal:

5. Ground no. 1 – It is submitted by the Ld.DR that the revenue is challenging the action of the Ld.CIT(A) in directing grant of depreciation at the rate of 60% on NMS CG/TX Cards, switches,

etc., on the ground that these items do not come within the definition of “computers”.

5.1 At the outset, the Ld.AR submitted that this issue is squarely covered in favour of assessee in assessee’s own case for various assessment years as under:

- Assessment year 2008-09: Order dated 21.02.2014 passed by this Hon'ble Tribunal in ITA No. 1175/Bang/2012;
- Assessment year 2009-10: Order dated 13.11.2015 passed by this Hon'ble Tribunal in ITA No. 987/Bang/2015; and
- Assessment year 2010-11: Order dated 26.08.2016 passed by this Hon'ble Tribunal in ITA No. 1513/Bang/2015.
- Assessment year 2011-12: Order dated 29.04.2022 passed by this Hon'ble Tribunal in cross appeals in IT(TP)A Nos. 523/Bang/2016 and 535/Bang/2016.
- Assessment year 2014-15: Order dated 10.08.2022 passed by this Hon'ble Tribunal in ITA No.139/Bang/2019.
- Assessment year 2015-16: Order dated 10.08.2022 passed by this Hon'ble Tribunal in ITA No.2560/Bang/2019.

It is submitted that the order passed by this *Tribunal* for the assessment year 2008-09 (supra) is affirmed by the *Hon'ble High Court of Karnataka vide order dated 18.01.2021 in ITA No. 340.2021.*

The Ld.DR thus supported the order of Ld.CIT(A) in granting relief to the assessee.

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

5.2 We note that identical issue has been considered by *Coordinate Bench of this Tribunal* for A.Y. 2015-16 (supra) by observing as under:

"24. During the year under consideration, the assessee has claimed depreciation @ 60% towards the addition made to the block of assets "Computers". These additions included items like NMS CG/TX cards, switches, etc. The AO following the earlier years orders, allowed depreciation only @ 15% treating the additions as part of telecom equipment as they relate to functioning of mobile phones. The DRP confirmed the disallowance.

25. The ld. AR submitted that the issue is covered by the decision of coordinate Bench of the Tribunal in assessee's own case for the AY 2008-09 to 2011-12 and the Hon'ble High Court of Karnataka has affirmed the decision of the Tribunal for AY 2008-09.

26. We have considered the rival submissions and perused the material on record. The coordinate Benches of the Tribunal have been consistently holding that CG/TX cards and switches, etc. are part of computers and therefore depreciation is to be allowed @ 60%. The relevant observations of the Tribunal in assessee's own case for AY 2008-09 which is confirmed by the jurisdictional High Court is extracted below:-

"10.6.1 We have heard both parties and perused and carefully considered the material on record including the judicial decisions cited. The issue for our consideration is whether MRBs are to be classified as 'plant and machinery' or 'computers' for the purposes of depreciation. In this regard, it would be relevant to understand the term 'computer'. While 'computer' has not been defined in the Income Tax Act, 1961, the term 'Computer System' has been defined under Explanation (a) to section 36(1)(xi) of the Act as under :

'(a) "computer system" means a device or collection of devices including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, or more of which contain computer programmes, electronic instructions, input data and output data, that performs functions including, but not limited to, logic, arithmetic, data storage and retrieval, communication and control;' From the above definition, it follows that a

computer system would encompass a collection of devices including input and output support devices that perform functions including, but not limited to, logic, arithmetic, data storage and retrieval communication and control.

10.6.2 In the light of the above definition of 'Computer System', the functions of MRBs require to be examined. From the details on record, it appears that the function of MRBs is to support a combination of functions, performed in conjunction with the computer and servers. The MRBs are boards which are connected to computer servers which assist in receiving calls and would function only when attached to the computer. The MRBs increase the working capacity of the computers to the extent the computers receive calls and convert them into digital form. The MRBs work in conjunction with and as a part of the computer servers and cannot, in any way, be called as 'telecom equipment'. We also find that the facts of this issue in the case on hand, is similar to the facts of the case Datacraft India Ltd. (supra) wherein the Special Bench of the Mumbai Tribunal of this order held as under :

'31. Now we have to consider whether a 'router' can be considered as "computer hardware" or a "computer component". Computer hardware refers to the physical parts of a computer and related devices. Internal hardware devices include motherboards, hard drives, and RAM. External hardware devices include monitors, keyboards, mouse, printers, and scanners. The internal hardware parts of a computer are often referred to as 'components', while external hardware devices are usually called 'peripherals'. Together, they all fall under the category of computer hardware. 'Software', on the other hand, consist of the programs and applications that run on computers. Because software runs on computer hardware, software programs often have 'system requirements', that list the minimum hardware required for the software to run.

31.1 In short, "Router" is a hardware device that routes data (hence the name) from a local area network (LAN) to another network connection. A router acts like a coin sorting machine, allowing only authorized machines to connect to other computer systems. Most routers also keep log files about the local network activity. Now the question is whether this "machine" can be used independent of Computer. If yes, then it cannot be called "Computer Hardware" in all circumstances.

31.2 When "Computer Hardware", is used as a component of the computer, it becomes part and parcel of the computer, as in the case of operating software in the computer. In such a situation, hardware in question can be considered as a part of a computer and hence a 'computer'. Per contra, when the machine is not used as a necessary assessor or in combination with a Computer, it cannot be called a 'Computer component.'

31.3 Coming to the Routers, it is seen that these can also be used with a Television and in such use, no computer is required. These are also called T.V. routers. Similarly, "Internet Service Providers", give connectivity, by installing a router in the premises of the persons/institutions availing the internet connection. In these cases the router is not used along with a computer. In such a situation, it would be a "Stand alone" equipment. In such cases this cannot be considered a component of a computer or computer Hardware. Giving another example, a computer software can be used in many devices including washing machine, televisions, telephone equipment etc. When such software is used in those devices, it integrates with that particular devices. The predominant function of the device determines its classification. Only if the Computer software, resides in a computer, then it become a part and parcel of a computer and, as long as it is as integral part of a computer, it is classified as a 'Computer'.

31.4 In view of the above discussion, we are of the considered view that router and switches can be classified as a computer Hardware when they are used along with a computer and when their functions are integrated with a 'computer' In other words, when a device is used as part of the computer in its functions, then it would be termed as a computer.

32. Now we will advert to the decisions relied on by the rival parties. We have set out above the cases decided by various Benches of the Tribunal in favour of the assessee. The lead order is in the case of Samiran Majumdar (supra) which has been followed, directly or indirectly, in most of the subsequent cases. We will take up this case for discussion, in which the question was whether printer and scanner could be allowed a higher rate of depreciation as applicable to computers. The Bench noticed that the printer and scanner cannot be used without computer. It was on this appreciation of the factual position that the printer and scanners were

held to be part of computer qualifying for depreciation at the rate applicable to computer. In the opposition the orders taking view in favour of the Revenue are led by the case of router mania Technologies (supra). In this case it was observed that the router is a device which links or connects the computers for the exchange of relevant data. In reaching the conclusion that router is not eligible for depreciation at the rate applicable to computer, the Bench noticed that the router at its own does not perform any logical, arithmetical or memory functions by manipulations of electronic, magnetic or optical impulses.

33. We prefer the view taken in the case of Samiran Majumdar (supra) over that in the case of Router mania Technologies (supra) ; With utmost respect, the Mumbai Bench had taken a narrow view on this issue, by holding that only a device which can perform logical, arithmetical or memory functions by manipulations of electronic impulses etc. is computer. It has restricted the meaning of computer only to the CPU of the computer and pulled out the input and output devices from the ambit of computer. No doubt the function of the computer, as one composite unit, is to perform logical, arithmetical or memory functions etc., but it is not only the equipment which performs such functions that can be called as computer ; All the input and output devices, as discussed above, which support in the receipt of input and outflow of the output are also part of computer. CPU alone, in our opinion, cannot be considered as synonymous to the expression 'Computer'. The function of CPU is akin to the brain playing a pivotal role in the conduct of the body. As we do not call the brain alone as the body, similarly the CPU alone cannot be described as computer. Thus the computer has to necessarily include the input and output devices within its scope, subject to their exclusive user with the computer, as discussed above. If we constrict the definition of computer only to processing unit, as has been held in the case of Router mania (supra), then even the keyboard and mouse etc. will not qualify to be called as computer because these equipments also do not perform logical, arithmetical or memory functions. In the light of the meaning of 'computer' discussed in earlier paras, we are inclined to agree with the view taken by the Kolkata Bench in Samiran Majumdar (supra).

34. We therefore answer the question referred to this Special Bench in affirmative by holding that the routers and switches in the circumstances of the case, are to be included in the block of 'Computer' entitled to depreciation at the rate of 60%.' 10.6.3 The above decision of the ITAT, Mumbai Special Bench in the case of Datacraft India Ltd. (supra) has been followed by the Delhi Tribunal in the case of Microsoft Corpn. India (P.) Ltd. (supra) wherein at para 16 of the order, it was held that :

"16. ... it is clear that the above equipment primarily include the routers, switches, modems, etc. which are in the nature of input and output support devices which performs the functions including communication and control and, thus, they are computer hardware when they are used along with computer and when their functions are integrated with 'computer.' Such devices used as part of the computer in its functions and, thus, it can be termed as 'computer' only, therefore, eligible for depreciation @ 60%. Therefore, also we find no infirmity in the claim of the assessee of depreciation @ 60% of ITG networking equipments."

10.6-4 A similar view was adopted by a co-ordinate bench of this Tribunal in the case of NCR Corpn. (P.) Ltd. (supra) wherein at para 10 thereof it was held as under :

"10. Having heard both the parties and having gone through the material on record, we find that this issue is more or less covered by the decision of the Special Bench in the case of Datacraft India Ltd. (cited supra) wherein it has been held that as long as the functions of the computer are performed along with other functions and the other functions are dependent upon the functions of the computer it is a computer entitled to the higher rate of depreciation. The Special Bench has also stated that all the input and output devices of the computer such as key board, mouse, monitor, etc are to form part of the block of computers. In the case before us also the ATM machine is doing both the logical, arithmetic and memory functions by manipulations of electronic magnetic or optical impulses giving debit or credit cash and thereafter dispenses the cash and gives a printed receipt. Thus as can be seen, the computer is an integral part of the ATM machine and on the basis of the information processed by the ITA No.353(Bang)/2010, computer in the ATM machine only, the mechanical functions of the dispensation of cash or

deposit of cash is done. Its functions are not limited to the location at which it is placed but it also records the increase or decrease of the balance in the assessee's account in the bank consequent to such deposit or withdrawal and all this is done instantly. Thus it involves the use of internet facilities also to discharge the above functions."

10.6-5 In the above cases, a distinction has been drawn between a computer component being a necessary accessory to be called a "computer component" and not being a necessary component. The MRBs operate along with the servers and computers and are a necessary component of the "computer system". The MRB cannot function without the computers and the computers cannot perform the necessary functions required in the case on hand without the presence of the MRBs. In this view of the matter, we are of the opinion that MRBs fit into the definition of a "computer component" as explained above and therefore the decision of the ITAT Special Bench of Mumbai in the case of Datacraft India Ltd. (supra) rendered in respect of "routers" is equally applicable to the "MRBs" used by the assessee. Following the principle as explained in afore-cited decision of the Special Bench of the ITAT, Mumbai (supra), we hold that the MRBs are to be classified as "computers" for the purposes of the claim of depreciation @ 60%. Accordingly, the grounds raised by the assessee at S.Nos.2 (a) & (b) are allowed."

27. Respectfully following the above decision of the Tribunal, we hold that depreciation is to be allowed @ 60% on the CG/TX cards and switches, etc. This ground is allowed in favour of assessee."

Respectfully following the above view, we direct the Ld.AO to allow the depreciation at 16% on the CG/TX Cards, switches etc.

Accordingly, ground no. 1 raised by the revenue stands dismissed.

6. Ground nos. 2-3 has been raised by revenue challenging the action of the Ld.CIT(A) in directing grant of deduction of tax paid outside India in respect of which no foreign tax credit is eligible

in India by holding that the same would be outside the scope of Section 40(a)(ii) of the Act. It is submitted that during the year under consideration, the Assessee had discharged taxes in foreign countries to the extent of Rs. 7,74,61,101/-, and claimed foreign tax credit of Rs. 3,97,38,075/-.

6.1 At the outset, the Ld.AR submitted that as regards the foreign taxes paid to the extent of Rs.3,77,23,026/- (7,74,61,101 less 3,97,38,075), no deduction was claimed by the Assessee. It is submitted that to the extent no credit is available to the Assessee under Sections 90, 90A, 91 of the Act read with Rule 128 of the Income Tax Rules, 1962, deduction of the unclaimed foreign tax paid, ought to be allowed. It is submitted that taxes paid outside India in respect of which no credit is claimed in India does not constitute taxes on income as defined under explanation 2 to Section 40(a)(ii) of the Act. Accordingly, the Assessee is rightly entitled to the claim of deduction, as allowed by the CIT(A).

Reliance in this regard is placed on the following decisions:

- *Reliance Infrastructure Ltd. v. CIT*: reported in (2016) 76 taxmann.com 257 (Bombay) at pages 44 and 45 of the case law compilation;
- *Virmati Software and Telecommunication Ltd. v. DCIT*: Order dated 05.03.2020 passed by the Ahmedabad Bench of Hon'ble Tribunal in ITA No. 1135/Ahd/2017 at page 56 of the case law compilation; and

- *Tata Consultancy Services Ltd. v. ADIT*: reported in (2020) 121 taxmann.com 190 (Mumbai-Trib.) at pages 71 and 72 of the case law compilation.

Further reliance is also placed on the decision of this *Tribunal* in the *Assessee's own case for the assessment years 2014-15 and 2015-16* by order dated 10.08.2022 in *IT(TP)A Nos. 139 & 2560/Bang/2019*, and on the *directions dated 26.12.2022 passed by the Dispute Resolution Panel, for the assessment year 2019-20*

6.2 At the outset, the Ld.AR submitted that:

- (i) with effect from 01.06.2006, *Explanation 1 and 2* were inserted to Section 40(a)(ii) of the Act, which specifically states that taxes paid outside India in respect of which credit is available in India would be treated as taxes on income for the purpose of Section 40(a)(ii) of the Act and hence, not eligible for deduction.
- (ii) It is submitted that, after the aforementioned insertion of *Explanation* to Section 40(a)(ii) of the Act, it is more evident that deduction in respect of taxes paid outside India in respect of which no credit is allowable in India would not be considered as taxes for the purpose of Section 40(a)(ii) of the Act. Therefore, the *Assessee's claim of deduction towards taxes paid outside India in respect of which no credit was granted is allowed as deduction as observed by the Ld.CIT(A).*

(iii) He further submitted that, the decision of *Hon'ble Karnataka High Court* in case of *Kirloskar Electric Ltd v. CIT* reported in (1997) 228 ITR 676 relied upon by the Revenue which is pronounced with respect to Assessment year 1982-83 is prior to insertion of *Explanation 1 and 2* to Section 40(a)(ii) of the Act, is not applicable to the facts of the present case of the assessee.

The Ld.DR on the contrary relied on the orders passed by the authorities below.

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

6.3 We note that this issue has been considered by this *Tribunal* in assessee's own case for A.Ys. 2014-15 and 2015-16 (supra) held as under:

"48. We heard the ld DR. We notice that the Hon'ble Bombay High Court in the case of Reliance Infrastructure Ltd (supra) has considered a similar issue and held that - (h) Before dealing with the rival contentions, it would be useful to reproduce the statutory provision arising for our consideration to decide this issue.

"Definitions

2. In this Act, unless the context otherwise requires, -

*(1) to (42)** ** ***

43. "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under Section 115WA] "Amounts not deductible

40. Notwithstanding anything to the contrary in Section 30 to the following amounts shall not be deducted in

computing the income chargeable under the head "Profits and gains of business or profession".

(a) In the case of any assessee -

*(i), (ia), (ib), (ic)** ** ***

(ii) Any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits and gains.

[Explanation 1. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under Section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.] [Explanation 2. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under Section 90A.]"

*(i) We have considered the rival submissions. So far as the question relating to the Tribunal not following its order in the case of the applicant itself for A.Y. 1979-80, we find that there is a justification for the same. This is so as the decision of this Court in *S. Inder Singh Gill (supra)* was noted by the Tribunal on an identical issue while passing the order for the subject assessment year. Thus, the Tribunal had not erred in not following its order for A.Y. 1979-80. In fact, the decisions of this Court in *South East Asia Shipping Co. (supra)* and *Tata Sons Ltd. (supra)*, which are being relied upon in preference to *Inder Singh Gill (supra)* cannot be accepted as both the orders being relied upon by the applicant was rendered not at the final hearing but on applications under Section 256(2) of the Act and at the stage of admission under Section 260A of the Act. This unlike the judgment rendered in a Reference by this Court in *S. Inder Singh Gill (supra)*. Moreover, the decision in *South East Asia Shipping Co. (supra)* is not available in its entirety. Therefore, it would not be safe to rely upon it as all facts and on what consideration of law, it was rendered is not known. Similarly, the decision of this Court in *Tata Sons (supra)* being Income Tax Appeal No.209 of 2001 produced before us, dismissed the appeal of the Revenue by order dated 2nd April, 2004 by merely following its order dated 23rd March, 1993 rejecting the Revenue's application for Reference under Section 256(2) of the Act. Thus, it also cannot be relied upon to decide the controversy. Moreover, the order of this Court in*

Tata Sons Ltd. (supra) as produced before us for Assessment Year 1985-86 had not noticed the decision of this Court in S. Inder Singh Gill (supra) on a Reference. Therefore, it is rendered per incuriam.

(j) This Court in S. Inder Singh Gill (supra) was required to answer the question whether for the purpose of computing total world income of the assessee as defined in Section 2(15) of the I. T. Act, the income accruing in Uganda has to be reduced by the tax paid to the Uganda Government in respect of such income? The Court while answering the question in the negative observed that it is not aware of any commercial principle/practice which lays down that the tax paid by one on one's income is allowed as a deduction in determining the income for the purposes of taxation.

(k) It is axiomatic that income tax is a charge on the profits/ income. The payment of income tax is not a payment made/incurred to earn profits and gains of business. Therefore, it cannot be allowed as an expenditure to determine the profits of the business. Taxes such as Excise Duty, Customs Duty, Octroi etc., are incurred for the purpose of doing business and earning profits and/or gains from business or profession. Therefore, such expenditure is allowable as a deduction to determine the profits of the business. It is only after deducting all expenses incurred for the purpose of business from the total receipts that profits and/or gains of business/ profession are determined. It is this determined profits or gains of business/profession which are subject to tax as income tax under the Act. The main part of Section 40(a)(ii) of the Act does not allow deduction in computing the income i.e. profits and gains of business chargeable to tax to the extent, the tax is levied/ paid on the profits/ gains of business. Therefore, it was on the aforesaid general principle, universally accepted, that this Court answered the question posed to it in S. Inder Singh Gill (supra) in favour of the Revenue.

(l) We would have answered the question posed for our consideration by following the decision of this Court in S. Inder Singh Gill (supra). However, we notice that the decision of this Court in S. Inder Singh Gill (supra) was rendered under the Indian Income Tax Act, 1922 and not under the Act. We further note that just as Section 40(a)(ii) of the Act does not allow deduction on tax paid on profit and/or gain of business. The Indian Income Tax Act, 1922 Act also contains a similar provision in Section 10(4) thereof. However, the Indian Income Tax Act, 1922

contains no definition of "tax" as provided in Section 2(43) of the Act. Consequently, the tax paid on income/profits and gains of business/profession anywhere in the world would not be allowed as deduction for determining the profits/gains of the business under Section 10(4) of the Indian Income Tax Act, 1922. Therefore, on the state of the statutory provisions as found in the Indian Income Tax Act, 1922 the decision of this Court in *S. Inder Singh Gill (supra)* would be unexceptionable.

However, the ratio of the aforesaid decision in *S. Inder Singh Gill (supra)* cannot be applied to the present facts in view of the fact that the Act defines "tax" as income tax chargeable under the provisions of this Act. Thus, by definition, the tax which is payable under the Act alone on the profits and gains of business are not allowed to be deducted notwithstanding Sections 30 to 38 of the Act.

(m) It therefore, follows that the tax which has been paid abroad would not be covered within the meaning of Section 40(a) (ii) of the Act in view of the definition of the word 'tax' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2(43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.

(n) However, to the extent tax is paid abroad, the Explanation to Section 40(a)(ii) of the Act provides/clarifies that whenever an Assessee is otherwise entitled to the benefit of double income tax relief under Sections 90 or 91 of the Act, then the tax paid abroad would be governed by Section 40(a)(ii) of the Act. The occasion to insert the Explanation to Section 40(a)(ii) of the Act arose as Assessee was claiming to be entitled to obtain necessary credit to the extent of the tax paid abroad under Sections 90 or 91 of the Act and also claim the benefit of tax paid abroad as expenditure on account of not being covered by Section 40(a)(ii) of the Act. This is evident from the Explanatory notes to the Finance Act, 2006 as recorded in Circular No.14 of 2006 dated 28th December, 2006 issued by the CBDT. The above circular inter alia, records the fact

that some of the assessee who are eligible for credit against the tax payable in India on the global income to the extent the tax has been paid outside India under Sections 90 or 91 of the Act, were also claiming deduction of the tax paid abroad as it was not tax under the Act. In view of the above, Explanation inserted in 2006 to Section 40(a)(ii) of the Act, would require in the context thereof that the definition of the word "tax" under the Act to mean also the tax which is eligible to the benefit of Sections 90 and 91 of the Act. However, this departure from the meaning of the word "tax" as defined in the Act is only restricted to the above and gives no license to widen the meaning of the word "tax" as defined in the Act to include all taxes on income/profits paid abroad.

(o) Therefore, on the Explanation being inserted in Section 40(a)(ii) of the Act, the tax paid in Saudi Arabia on income which has accrued and/or arisen in India is not eligible to deduction under Section 91 of the Act. Therefore, not hit by Section 40(a)(ii) of the Act. Section 91 of the Act, itself excludes income which is deemed to accrue or arise in India. Thus, the benefit of the Explanation would now be available and on application of real income theory, the quantum of tax paid in Saudi Arabia, attributable to income arising or accruing in India would be reduced for the purposes of computing the income on which tax is payable in India.

(p) It is not disputed before us that some part of the income on which the tax has been paid abroad is on the income accrued or arisen in India. Therefore, to the extent, the tax is paid abroad on income which has accrued and/or arisen in India, the benefit of Section 91 of the Act is not available. In such a case, an Assessee such as the applicant assessee is entitled to a deduction under Section 40(a)(ii) of the Act. This is so as it is a tax which has been paid abroad for the purpose of arriving global income on which the tax payable in India. Therefore, to the extent the payment of tax in Saudi Arabia on income which has arisen/accrued in India has to be considered in the nature of expenditure incurred or arisen to earn income and not hit by the provisions of Section 40(a)(ii) of the Act.

(q) The Explanation to Section 40(a)(ii) of the Act was inserted into the Act by Finance Act, 2006. However, the use of the words "for removal of doubts" it is hereby declared "...." in the Explanation inserted in Section 40(a)(ii) of the Act, makes it clear that it is declaratory in nature and would have retrospective effect. This is not even disputed by the Revenue before us as the issue of the

nature of such declaratory statutes stands considered by the decision of the Supreme Court in CIT v. Vatika Township (P) Ltd. [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 and CIT v. Gold Coin Health Foods (P.) Ltd. [2008] 304 ITR 308/172 Taxman 386 (SC). (r) In the above facts and circumstances, question (iii)(a) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee. Question (iii)(b) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee.

49. The Hon'ble Bombay High Court in the case of Reliance Infrastructure Ltd (supra) has laid down the ratio that to the extent tax paid in foreign country on income which has arisen/accrued in India, has to be considered in the nature of expenditure incurred or arisen to earn income and is to be allowed as a deduction. In the given case it is submitted that out of the foreign taxes paid no credit was claimed to an extent of Rs.9,32,85,133/-. Of the said foreign tax paid how much is attributable to the income accrues / arises in India needs to be verified in order to arrive at the extent of allowability. This issue is raised as additional ground before the Tribunal and the issue is not factually verified by the lower authorities. We therefore remit this issue back to the AO. The AO is directed to verify the amount of foreign tax credit paid that is attributable to the income accruing / arising in India and allow the same accordingly in the light of the decision of the Hon'ble Bombay High Court in the case of Reliance Infrastructure Ltd (supra) after giving reasonable opportunity of being heard. The assessee is directed to provide necessary information to the AO and cooperate with the proceedings. It is ordered accordingly. This ground is allowed in favour of the assessee for statistical purposes.”

Respectfully following the above view, we direct the Ld.AO to verify the amount of foreign tax credit paid that is attributable to the income accruing / arising in India and to allow the same. Accordingly in the light of the decisions relied by *Coordinate Bench of this Tribunal* hereinabove in assessee's own case.

Accordingly, **Ground nos. 2-3** raised by revenue is remanded to the Ld.AO to consider the claim in accordance with law. Needless

to say that proper opportunity of being heard must be granted to assessee.

In the result, the appeals filed by the assessee as well as revenue stands partly allowed for statistical purposes.

Order pronounced in the open court on 22nd December, 2023.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 22nd December, 2023.
/MS /

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| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | |

By order

Assistant Registrar,
ITAT, Bangalore