IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I': NEW DELHI

BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.1026/DEL/2015
(Assessment Year: 2010-11)

M/s. Sony India Private Limited, A-18, Mohan Cooperative Indl. Estate, New Delhi – 110 044. **(PAN : AABCS1571Q)**	vs.	DCIT, Circle 24 (1), New Delhi.

ITA No.1166/DEL/2015
(Assessment Year: 2010-11)

DCIT, Circle 24 (1), New Delhi.	vs.	M/s. Sony India Private Limited, A-18, Mohan Cooperative Indl. Estate, New Delhi – 110 044. **(PAN : AABCS1571Q)**
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Advocate
Shri Parth, Advocate
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 19.06.2024
Date of Order : .08.2024

ORDER

PER S.RIFAUR RAHMAN,AM:

The above cross appeals have been filed by the Assessee as well as Revenue against the final assessment order dated 30.01.2015 passed u/s 143(3) r.w.s.144C of the Income Tax Act, 1961 (hereinafter called 'the Act')

subsequent to the direction of the Ld. Dispute Resolution Panel (DRP)/TPO vide order dated 27/01/2014 for Assessment Year 2010-11.

2. Both the cross appeals are interconnected having common issues. Hence, both the appeals are heard together and disposed off by this common order.

3. Brief facts of the case are, assessee filed its return of income declaring an amount of Rs.148,87,46,020/- as taxable income on 29.09.2010. Subsequently, a revised return was filed declaring an amount of Rs.148,63,60,592/- on 29.03.2012. The return was processed under section 143 (1) of the Income-tax Act, 1961 (for short 'the Act'). The case was selected for scrutiny and notices under section 143(2)/142(1) of the Act were issued and served on the assessee. In response, ld. AR of the assessee attended and submitted the relevant information as called for.

4. The assessee is a wholly owned subsidiary of Sony Corporation, Japan. During the year under consideration, the assessee is engaged primarily in import and distribution of authorised Sony products (audio/visual entertainment products) in the Indian market. The assessee had undertaken international transactions with its Associated Enterprises (AE) and it has entered into international transactions which was more than Rs.15 crores. By following approval process under section 92CA of the Act, the case was referred to TPO u/s 92CA (3) of the Act). Before TPO, documentation prescribed under Rule 10D of the Income-tax Rules, 1962 was submitted.

5. After considering the documents submitted by the assessee, ld. TPO observed that the assessee has entered into international transactions mainly engaged in import and distribution of various Sony consumer electronic products in India and it has also rendered software services through Software Architecture Design (SARD) established in 1998 and SID's Software Centre (SISC) established in 1997 which are specialised in software development in real time embedded software for the internal requirements of Sony Corporation, specialised in software development enhancement and support/maintenance of mission critical business application for Sony Group companies in the Asia Pacific region.

6. The assessee has entered into following international transactions :-

S.No.	Type of International Transaction	Method Selected		Total value of transaction (Rs.)
1	Import of finished goods for resale	TNMM	OP/OR	23,581,287,735
2	Export of slow moving goods	TNMM	OP/OR	93,348,663
3	Payment of royalty	TNMM	OP/OR	19,480,560
4	Provision of management accounting report analysis services	TNMM	OP/OR	1,477,024
5	Receipt of marketing/ management support services	TNMM	OP/OR	64,060,599
6	Receipt of information technology IT Services	TNMM	OP/OR	49,896,309
7	Receipt of advertising costs incurred on behalf of AEs	TNMM	OP/OR	5,044,649
8	Purchase of fixed assets	TNMM	OP/OR	2,043,124
9	Provision of application software services	TNMM	OP/OR	886,573,312
10	Provision of embedded software services	TNMM	OP/OR	462,198,730
11	Provision of advisory services	TNMM	OP/OR	130,514,088
12	Provision of warranty services	TNMM	-	4,303,221
13	Reimbursement of paid by SID to the AEs	NA	-	116,387,212
14	Reimbursement of received by SID from its AEs	NA	-	230,033,580

7. The assessee also submitted separate operating profit margin relating to software division as under :-

Particulars	SISC	SARD	Total software
Software services	886,573,311	462,198,730	1,348,772,041
Segmental expenses	771,888,218	394,558,680	1,166,446,898
Operating Profit	114,943,004	67,683,500	182,626,504
OP/OC (%)	14.89%	17.15%	16.02%

8. TPO considered the transfer pricing study and filters adopted by the assessee for selection of comparables for software development segment and it has selected 19 comparables in SISC Division and 7 comparables in SARD Division. After considering the selection process in the comparables and filters applied by the assessee, the AO rejected the same and selected the final comparables and benchmarked the same. For the sake clarity, the same are reproduced below :-

No.	Name of the Company	OP/OC (%)	After Working capital adjustment OP/OC (%)
i.	Akshay Software Technologies Ltd.	-1.04	-1.31
ii.	E-Infochips Bangalore Ltd.	72,69	65.25
iii.	Evoke Technologies Ltd.	19.02	18.78
iv.	E-Zest Solutions	18.66	13.93
v.	Infinite Data Systems Pvt. Ltd. (Merged)	88.25	83.85
vi.	Infosys Ltd.	45.08	45.51
vii.	Larsen & Toubro Infortech Ltd.	20.48	20.09
viii.	LGS Global Ltd.	12.79	7.57
ix.	Mindtree Ltd.	16.62	14.61
x.	Persistent Systems Pvt. Ltd.	30.50	27.96
xi.	Persistent Systems and Solutions Ltd.	15.38	11.95
xii.	RS Software (India) Ltd.	10.29	10.28
xiii.	Sasken Communication Tech. Ltd.	17.54	17.97
xiv.	Tata Elxsi Ltd.	19.82	17.14
xv.	Thinksoft Global Services Ltd.	17.35	13.73
xvi.	Thirdware Solutions	41.63	38.16
	Average	27.82%	25.34%

and determined the Arms Length Price (ALP) adjustment as under :-

Particulars	Amount in INR
Operating Cost	1142325818
Arm's length margin (%)	25.34%
Arm's length margin (Rs.)	289,465,362
Arm's length Price	1,431,791,180
Price charged by the assessee	1,348,772,041
105% of Price charged in international transaction	1,416,210,643
Difference between ALP and Price charged by assessee	83,019,139

9. Further, the TPO observed that assessee is a distributor of Sony electronic products in India and thus primarily engaged in import and distribution of Sony products in the Indian market. He observed that transfer pricing report and other documents furnished during the assessment, the international transaction relating to receipt of advertisement cost from AE have been benchmarked aggregating with the other transactions and analysing the same under Transactional Net Margin Method (TNMM). In this regard, TPO observed that after careful examination of receipt of marketing cost incurred on behalf of the assessee, he noticed, the function performed by the assessee as mention in para 4.07 page 44 of the report are as under :-

> "During FY 2009-10, SEAP agreed to reimburse cost incurred by SID on sale promotional activities and seminars organized by SID for its dealers and distributors to showcase new products, improved features etc.
>
> Such reimbursements are ongoing and totally dependent upon SID's performance of certain operating activities and achieving certain milestones. To qualify for such supports, SID is required to perform certain marketing tasks (i.e holding dealer conference, running promotional schemes etc.) and/or promote new product launches. Further,

> SID is required to demonstrate through invoices or other documentation that it had incurred such expenses: SID would not have incurred such expenses in the absence of such reimbursement being received from SEAP. During the year ended March 31, 2010, SID received Rs. 2,494,820 form SEAP towards reimbursement of the above mentioned marketing expenditure.
>
> Further, during the year, SID paid for the marketing survey for its consumer electronics business. In view of the expected benefits being available to its Group entities, SID shared the cost of such market survey expenses with SEAP in the ratio of benefit available to SID and its Group entities. During FY 2009-10, SID received Rs. 2,549,829/- from SEAP towards such marketing survey reports."

10. Further, he observed that the assessee company does not own any intangible assets. Further, he observed that the benchmarking of receipt of marketing cost incurred on behalf of the AE required to be analysed separately and he analysed the marketing and distribution function performed by the assessee and from the audited financial reports of the assessee company, he observed that it does not own any intangibles in the nature of brand name, trade mark or any other market intangibles. Accordingly, he issued a show-cause notice to submit expenses incurred by the assessee on Advertisement, Marketing and Promotion (AMP) for sale of products of its assessee and basis for reimbursement only part of such expenses. The TPO analysed the whole agreement and the transactions entered by the assessee with its AE relating to AMP expenditure and relevant agreements entered with them. TPO rejected the submissions of the assessee and proceeded to adopt Bright Line Test (BLT) for benchmarking the AMP expenses and selected 9 comparables and benchmarked the same as under :-

Particulars	Amount in INR
Advertisement and sales promotion	2,584,217,000
Rebates of discount including commission on sales	1,287,705,032
Reimbursement of marketing expenses	5,044,649
Reimbursement of share of advertisement expenses received from Intel and Microsoft	72,435,827
Expenses i.r.o Receipt of marketing support services	64,060,599
Total expenditure on AMP	4,013,463,107
Value of Gross Sales	37,050,888,068
AMP/Sales of assesse (%)	10.83

Particulars	Amount in INR
Total Sales	37,050,888,068
Arm's length level of AMP exp (% of sale)	3.58%
Arm's length AMP	1,326,421,793
Amount actually spent on AMP exp.	4,013,463,107
Amount spent in excess of 'bright line' and on creation of marketing intangible	2,687,041,314
Mark-up @ 12.25%	329,162,561
The amount by which the assessee company should have been reimbursed by A.E. and for which the adjustment is proposed to be made	3,016,203,875
Reimbursement receipt from AEs (5044649 + 72435827)	77,480,476
Adjustment required to be made i.r.o. AMP Exp.	2,938,723,399

and based on the above computation, the TPO made the adjustment of Rs.293,87,23,399/- towards AMP expenses.

11. Based on the above proposition of TPO, the Assessing Officer proceeded to make the above said TP adjustments in the draft assessment order and further, he proceeded to make corporate additions as under :-

(a) **Depreciation on Dharuhera Unit :** During assessment proceedings, the Assessing Officer observed that assessee has claimed depreciation of Rs.92,34,278/- on residuary WDV of assets of Dharuhera unit (exclusive of depreciation on motor vehicles and software belonging to Dharuhera unit). Assessing Officer asked the assessee to explain, in response assessee has submitted as under :-

> "The submissions of the assessee against the subject disallowance are summarized hereunder:
>
> (i) As per the provision of section 32 of the Act, depreciation is calculated at the rate applicable to the WDV of the respective 'block of assets".
>
> (ii) For the purpose of computing WDV under section 43(6)(c) of the Act, 'money payable' for any asset, which is sold or discarded or disposed off during the year, is to be essentially reduced from the opening WDV of the block to which such asset belongs.
>
> The WDV of 'block of asset' is to be calculated as follows:
>
> | | |
> |---|---|
> | Opening WDV of the block of asset | xxx |
> | Add: | |
> | Actual cost of any asset falling within that block Acquired during the year | xxx |
> | Less: | |
> | Moneys payable in respect of any asset, falling within that block, sold or discarded or destroyed during the year | xxx |
> | Closing WDV | xxx |

(iii) In view of above statutory provisions, if some of the assets of the block are sold and the WDV computed in accordance with section 43(6)(c) is positive (i.e. the moneys payable in respect of assets sold / disposed-off is less than the WDV of the block), depreciation would still be available as long as the block continues to exist (i.e. the block consists of even a single asset).

(iv) It is an undisputed fact that assets of Dharuhera 'unit formed part of respective 'block of assets' viz. furniture & fittings, building, plant & machinery etc along with other items of assets in these blocks belonging to the assessee. Further, it is also not in dispute that upon sale of assets of Dharuhera unit, the 'block of asset' does not cease to exist, as the assessee had other assets in the block belonging to other units of the assessee.

(v) Accordingly, following the 'block of asset' concept, the assessee reduced the sales price of assets disposed-off during the year from the WDV of the respective block of assets, and claimed depreciation on such residuary WDV.

(vi) The above method of computing depreciation is in accordance with the scheme enshrined in the law.

(vii) The Act nowhere stipulates that, the assessee would not be eligible to claim depreciation in respect of a particular asset if he is not the owner of such asset for the entire year or on the last day of the year. Further, there is nothing in the aforesaid provisions to interpret that the use of particular asset is a requirement of law for claiming the depreciation. Reliance in this regard can be placed on following judicial precedents.

- CIT vs Bharat Aluminium [Delhi HC in ITA No. 659/2007 and 1484/2006}
- CIT vs. Oswal Agro Mills Ltd. [ITA No. 161 of 2006}
- Anand and Anand vs AC/T [2009} 33 SOT 148 (Del)

(viii) Once a particular asset is merged into the block of assets, such asset loses its identity and only the block survives. Therefore, the test of use has to be applied on the block as a whole instead of on an individual asset. Reliance can be placed upon following decisions.

- Packwell Printers vs ACIT [1996} 59 ITO 340 (Jabalpur)
- Nathani Steel Ltd vs Dy CIT [1996} 56 ITJ 240 (Mum)
- Inductotherm (India) Ltd vs DCIT [2000] 73 ITO 329 (Ahmedabad)
- Yamaha Motor India (P) Ltd vs ACIT [2008] 24 SOT 76 (Del)
- Asst CIT vs SRF Ltd [2008} 21 SOT 122 (Del)
- Natco Exports vs DCIT [2003} 861TO 445 (Hyderabad)

(ix) In view of above, for claiming depreciation under the new scheme, the 'ownership' and 'use' criteria has to be essentially satisfied only at the initial

stage when the asset actually forms part of a particular 'block of asset', and therefore, individual assets lose their identity and depreciation is to be allowed on WOV of the block as increased / reduced by any additions / deletions during the year.

(x) The decision relied upon by the AO in the case of Vinyl Chemicals [2008] 25 SOT 235 (Mum), infact supports the claim of the assessee, since in the said decision, it has nowhere been held that depreciation shall not be available in respect of assets sold / discorded.

In view of above, it is respectfully submitted that depreciation claimed by the assessee on the residuary WOV of assets of Dharuhera unit should not be disallowed."

After considering the submissions of the assessee, Assessing Officer rejected the same and observed that even after 'block of asset' concept, the 'ownership' of the asset as on the end of the year when the depreciation is worked out and 'use' of the asset during the year are still fundamental requirements to be satisfied u/s 32 of the Act for allowance of depreciation. He distinguished the case laws relied upon by the assessee and further observed that it is completely inconceivable that the assessee can be allowed to claim depreciation in respect of the unit which is no longer owns and which it has already transferred. With the above observation, the Assessing Officer disallowed the same to the extent of Rs.92,34,278/-.

12. Further Assessing Officer made other corporate disallowances in advertisement and selling expenses of Rs.25,84,21,700/-, excess depreciation of licence fee of Rs.111,82,572/- and disallowance of proportionate expenses of Rs.10,96,31,427/-.

13. Aggrieved with the above draft assessment order, assessee filed objections before the ld. Dispute Resolution Panel (DRP) and ld. DRP after considering the submissions of the assessee deleted the disallowance out of advertisement and selling expenses and disallowance of excess depreciation on licence fee and sustained the other disallowance made by the Assessing Officer/TPO.

14. Aggrieved with the above assessment order and order of ld. DRP, assessee as well as Revenue is in appeal before us raising following grounds of appeal :-

ITA NO.1026/Del/2015 (Assessee's appeal)

The following grounds of appeal are mutually exclusive of and without prejudice to each another.

Re: General Grounds

1. That on the facts and circumstances of the case and in law, Assessing Officer ("Ld. AO") erred in assessing the income of the Appellant atINR465,93,68,008/-as against the returned income of INR 148,63,60,592/-.

2. That on the facts and circumstances of the case and in law, the Final Assessment order passed under section 143(3) read with 144C of the Income Tax Act, 1961 ("the Act") by the Ld. AO is bad in law and calls for being quashed.

TRANSFRR PRICING GROUNDS

Re: Transfer Pricing Adjustment in respect of Advertisement, Marketing and Promotion Expenses("AMP Expenses")

3. That on the facts and circumstances of the case and in law, the Ld. AO/ Transfer Pricing Officer ("Ld.TPO")/ Dispute Resolution Panel ("Hon'ble DRP") erred in enhancing the income of the Appellant by INR293,87,23,399/-for the assessment year under consideration by making a Transfer Pricing adjustment on account of reimbursement of "alleged excessive" AMP expenses incurred by the Appellant.

4. That the Ld.AO/Ld.TPO/ Hon'ble DRP has erred in not appreciating that AMP expenses incurred by the Appellant in the normal course of its business were not for the sole benefit of its associated enterprise and thus did not fall within the purview of an "international transaction" pertaining to rendition of service, as defined in section 92B of the Act, distinct from its functional profile and responsibility as a distributor.

5. That the Ld. AO/ Ld. TPO/ Hon'ble DRP erred in not appreciating that the AMP expenses were incurred by the Appellant as part of its distribution business and not for the purpose of providing sole benefit to its associated enterprise and thus could not be considered to be a transaction under section 92F(v) of the Act, since there was no understanding or arrangement or action in concert for provision of service.

6. That the Ld. AO/ Ld. TPO/ Hon'ble DRP failed to appreciate that AMP is one of the functions performed along with other functions such as purchase, inventory management, dealer management, after sales, etc. by the appellant in conducting the "International Transaction" which is import &distribution and in view of the appellant's functional profile, it cannot be benchmarked and compensated separate from the international transaction of import of products.

7. That the Ld.AO/Ld.TPO/Hon'ble DRP erred in not appreciating that the functions performed by the Appellant had been compensated by the AE in such a way that the gross margin earned by the appellant was sufficient enough to cover all costs incurred including AMP expenses.

8. That the Ld. AO/ Ld. TPO/ Hon'ble DRP failed to appreciate that once the net operating margins of the Appellant had met the arm's length test, it was erroneous to conclude that the Appellant had performed any non-routine function or had incurred non-routine AMP expenditure.

9. Without prejudice to above, the Ld. TPO/ Ld. AO/Hon'ble DRP erred in applying the 'bright line method' to determine the excessive/non-routine AMP expenses in complete disregard of the Transfer Pricing Regulations in India and commercial circumstances of the case.

10. Without prejudice, even if AMP expenses are held to be "non-routine" and" excessive", the Appellant was not required to be reimbursed compensated by its AE, considering that the purported benefit caused to the AE on account of incurring of A&M expenses by the Appellant was only incidental.

11. That the Ld.AO/Ld.TPO/Hon'ble DRP have selectively applied the principles laid down by the LG Special Bench and ignoring the fact that the 'sales promotion expenses' could not partake the character of AMP

expenses for the purposes of making any adjustment on account of alleged excessive AMP expenses.

12. That the Ld.AO/Ld.TPO/Hon'ble DRP erred in concluding that the non-routine functions (being the alleged excessive AMP expenditure) amounted to a 'service' being rendered by the Appellant to its AE and that a mark-up of 12.25% was required to be charged in respect of such services.

13. Without prejudice, even if AMP expenses are held to be a separate transaction, transaction of incurrence of AMP expenses should be benchmarked along with the main transaction of import and distribution of goods under the combined transaction approach.

Re:Transfer pricing adjustment on account of Software services

14. That on the facts and circumstances of the case and in law, the Ld. AO/ Ld.TPO/ Hon'ble DRP erred in enhancing the income of the Appellant by INR8,30,19,139/- for the assessment year under consideration by benchmarking the SISC (Application software) and SARD (Embedded software) software divisions of the Appellant company together.

15. That the Ld. AO/ Ld. TPO acted contrary to the directions of the Hon'ble DRP as the arithmetical errors in the computation of the Arms' Length Margin in respect to the provision of software development services segment were not rectified and the original adjustment was retained.

16. That the Ld. TPO has erred in law and on facts and circumstances of the case, by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules.

17. That the Ld.TPO has erred, in law and on facts and circumstances of the case, by benchmarking the SISC and SARD software divisions of the software segment together.

18. That the TPO has erred, in law and on facts and circumstances of the case, by accepting companies that are not appropriate as comparables vis-a-vis the Appellant and should have been rejected.

19. That the Ld. TPO has erred by inappropriately rejecting companies based on either factually incorrect reasons or by applying inappropriate filters.

20. That on the facts and circumstances of the case and in law, the Hon'ble DRP has grossly erred in following the approach ofLd.TPO of not

accepting the use of multiple year data and determining the arm's length margins using data pertaining only to FY2009-10.

21. Without prejudice to above, the Hon'ble DRP has erred in upholding the decision of Ld. TPO/Ld.AO of not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies.

CORPORATE TAX GROUNDS

Re: Depreciation on Daruhera unit

22. That on the facts and circumstances of the case and in law, the Ld.AO erred in disallowing INR92,34,278/-,being depreciation on residuary Written Down Value **("WDV")** of the assets pertaining to the factory at Daruhera, Haryana, which was closed down during the Financial Year 2004-05.

23. That on the facts and circumstances of the case and in law, the Ld. Assessing Officer failed to appreciate that as per the *'Block of Asset'* concept, the ownership and usage of the asset is relevant only in the year of acquisition.

24. That the Ld.AO failed to appreciate that once an asset forms part of block of assets it loses its individual identity and thus the test of 'use' has to be applied to the block of asset instead of the individual assets.

Re: Disallowance of deduction under section 10AAof the Act

25. That on the facts and circumstances of the case and in law, the Ld.AO/Hon'ble DRP have grossly erred in disallowing INR 7,10,15,300/- being deduction claimed under section 10AA of the Act by Special Economic Zone ("SEZ") unit, by allocating additional expenses of INR 10,96,31,427 to the SEZ unit.

26. That on the facts and circumstances of the case and in law, the Ld.AO/Hon'ble DRP have grossly erred by allocating additional expenses to the SEZ unit merely on the ground that income of the SEZ unit is disproportionately high vis-a-vis the income of the non-SEZ units.

26.1 That on the facts and circumstances of the case and in law, the Ld. AO/ Hon'ble DRP failed to appreciate that the SEZ unit was an independent unit having a separate and identifiable set of facility, manpower and infrastructure and therefore, no portion of the common indirect expenses set off against the profits of the SEZ unit by Ld. AO, could, in reality, be attributed/ linked to functioning of the SEZ unit.

26.2 Without prejudice to the above, while computing the proportionate common indirect expenses to the SEZ unit, The Hon'ble DRP *I* Ld. AO

have erred in considering expenses which were already considered by the Appellant for the purpose of computing profits of its SEZ unit, thereby resulting in double addition to the income of the Appellant.

26.3 Without prejudice to the above, that on the facts and circumstances of the case and in law, Hon'ble DRP *I* Ld. AO have erred in adding back the deduction claimed by the Appellant under section 10AA of the Act as well the allocated expenses to the income of non-SEZ unit which has resulted in double addition.

27. That on the facts and circumstances of the case and in law, the Hon'ble DRP /Ld.AO have erred in allocating expenses such as provision for doubtful debts, loss on sale of assets, contracting charges etc., which were not even incurred by the SEZ unit of the Appellant during the subject year.

28. That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld.AO have erred in allocating expenses of sales and distribution expenses of INR 468,52,81,500, which were not even incurred by the SEZ unit of the Appellant during the subject year as it was engaged in the business of provision of IT/ITES services only to its associated enterprises and was not required to (directly or indirectly) incur any advertisement and sales promotion expenses to market its services to its AEs.

Without prejudice

29. Without prejudice, that on the facts and circumstances of the case and in law, the allocation of expenses of INR.10,96,31,427 to the SEZ unit suffers from the following fallacies:-

a) While computing proportionate expenses, the Ld. Assessing Officer has erroneously considered the amount of *"Communication expenses"* at INR 34,51,15,000/- instead of the correct amount of INR 12,11,64,671/-.

b) While computing proportionate expenses, the Ld. AO has erroneously considered the "Total turnover of the Business" at INR 36,97,98,73,000/- instead of the correct amount of INR 38,68,65,15,988/-.

30. Without prejudice to above, that on the facts and circumstances of the case and in law, the Hon'ble DRP /Ld.AO have erred by including 'advertisement and sales promotion expenses' and 'rebates and discounts' of INR 258,42,17,000 and INR 128,77,05,032 respectively in the allocated expenditure without considering the fact that these have already been disallowed by the Learned TPO and therefore resulting in double disallowance of INR65,82,26,745 in the hands of the Appellant.

31. That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act."

ITA No.1166/Del/2015 (Revenue's Appeal)

"On the facts and in the circumstances of the case the Hon'ble DRP-V, New Delhi has erred in law and on facts in directing to recomputed depreciation on software licence as per Item No.III (5) of Part A of Appendix 1 of the Income-tax Rules, 1962 as against depreciation allowed by the AO as per Part-B of Appendix – 1 considering it as "Intangible assets" which stand was confirmed by ITAT in ASSESSMENT YEAR 2006-07, 20007-08 and 2008-09"

15. The assessee has also raised additional ground as under :-

"1. That on the facts and circumstances of the case and in law, the assessing officer/DRP ought to have restricted the levy of the dividend distribution tax, on the dividend of Rs.588,151,791 distributed I paid to Sony Holding (Asia) B. V, Netherlands, being resident of the Netherlands, to 5 percent in terms of Article 10 and the Protocol to the DTAA between the India and Netherlands read with Article 10 of the DTAA between the India and Slovenia or any other beneficial provision of any other tax treaty instead of 16. 995 percent charged in terms of section 115-O of the Act.

2. Without prejudice to the additional ground no. 1, that on the facts and circumstances of the case and in law, the assessing officer/DRP ought to have restricted the levy of the dividend distribution tax, on the dividend of Rs.588,151,791 distributed I paid to Sony Holding (Asia) B. V, Netherlands to 10 percent in terms of Article 10 of the India-Netherlands DTAA, instead of 16.995 percent charged in terms of section 115-O of the Act.

3. That on the facts and circumstances of the case and in law, the assessing officer/DRP ought to have restricted the levy of the dividend distribution tax, on the dividend distributed I paid to Sony Gulf FZE, Dubai UAE, to 10% in terms of Article 10 of the India-UAE, instead of 16.995 percent charged in terms of section 115-O of the Act."

16. At the time of hearing , ld. AR for the assessee submitted as under :-

"Documents submitted before the Hon'ble Tribunal

- Appeal memo alongwith grounds of appeal - TPO Order (Pg 1-103), Draft assessment order (Pg 107-118), Objections in Form 35A filed

before DRP (Pg 119-405), DRP Directions (Pg 406- 442), Assessment Order (Pg 445-460)

- Paperbook (Volume 2A) - TP Report (Pg 1-265), Audited financial statement (Pg 288-323), submission dated 11.10.2013 filed before TPO (Pg 324-337), submission dated 16.12.2013 filed before TPO related to software service adjustment (Pg 362-461)

- Paperbook (Volume 2B) - submission dated 20.01.2014 filed before TPO related to AMP adjustments (Pg 470-554), detailed arguments in relation to exclusion/inclusion of companies in the software development service segment (Pg 560-587 and Pg 588-600)

- Corporate Tax Paperbook (Pg 1-229)

- Convenience compendium (Pg 1 -842)

Submissions - Contentions of the assessee

A From Final Assessment order dated 30th January 2015 - impugned order (kindly refer page 449 of Appeal set) following issues arise for kind consideration in Assessee's Appeal:

i) Grounds of appeal 3 to 13 - Transfer Pricing adjustment towards Advertising, Marketing and Promotion Expenses (AMP) - Rs. 293,87,23,399/-

ii) Grounds of Appeal 14 to 21 - Transfer pricing adjustment towards software development services Rs.8,30,19,139/-

iii) Grounds of appeal 22 to 24 - Disallowance of depreciation on Daruhera Unit Rs.92,34,278/-

iv) Grounds of appeal 25 to 30 - Disallowance of deduction relating to SEZ unit u/s 10AA & disallowance of equal amount - Rs.21,92,62,854/-

Final Computation of income can be found at page 460 of Appeal set Grounds of Appeal 1, 2 and 31 are general/ consequential.

B Transfer pricing Study: Kindly refer Paper book 2 A - page 1 to 265

Sony India Private Limited is engaged in distribution of Sony's consumer electronic products in India- Brief profile of Company and Group (refer pages 3 &7 of Paper book 2A).

As can be seen from Profit & Loss Account for FY 2009-10, (kindly refer page 295 of paperbook) Sony India sales revenue for Ay 10-11 was Rs. 3705 Crores.

Details of all international transactions entered into with associated enterprises are set out at page 4. Largest international transaction (as can be seen from page 4) was import of finished goods for resale of Rs. 2358 crores. Transactions 1 to 8 in such list are benchmarked as combined transaction.

It may kindly be noticed that 'Receipt of marketing costs incurred on behalf of AEs for Rs. 50,44,649/- is one such transaction (kindly refer page 4 of Paper book).

FAR of transactions 1 to 8 can be found at pages 31 to 47. Kind attention is invited to FAR of 'import of finished goods for resale' at page 31 to 37 - especially to page 34 wherein marketing, sales and distribution functions in the context of international transaction of import of finished goods for resale are described. Similarly, kind attention is invited to page 44 of paper book 2 A, wherein details relating to 'Receipt of Marketing cost incurred on behalf of AE's' is set out. For completion it may be mentioned that details of software development services are set out at page 47 to 58.

Economic Analysis (for combined international transaction 1 to 8) carried out is detailed from page 64 of paper book - attention is invited to conclusion on page 75.

At page 264 of paper book 2A tested party margin working can be seen, it is important to note that entire Advertisement, Marketing and promotion expenditure including discounts etc., (of Around 370 crores approx.) is considered as cost for margin determination of combined transaction as explained briefly hereinabove. Similarly, page 262 shows margin working of comparable companies.

Economic analysis for software development services can be found from page 76 and conclusion is at page 82.

C Proceedings before Transfer pricing Officer resulting in TP order dated 27th January 2014 (refer pages 1 to 103 of Appeal set)

Transfer pricing officer issued 2 Show cause notices - At page 462 of paper book 2A, SCN relating to AMP can be found and at page 338 of paper book 2A, SCN issued in connection with Software services can be seen.

Kind attention is invited to page 462 paper book 2A-show cause notice refers to "Benchmarking of REIMBUSEMENT OF MARKETING COST INCURRED ON BEHALF OF AES". Ld. TPO clearly notes at page 464, para 7 & at page 465 para 10 that there is no agreement pertaining to reimbursement of advertisement expenditure. It is worth noting that except baseless imagination there is no reference to

Advertising expenditure incurred by Sony India in the context of its international transaction of import of finished goods for resale. Reply to show cause notice relating to AMP can be seen at page 470 to 554 of paper book 2B. At page 476 of paper book, Sony explained that there is no agreement for advertisement expenditure. By reference to page 477 it was explained how margin accrues due to various functions involved in 'import of finished goods for resale' and not just 'by act of importing goods'. Most importantly by reference to Page 480 of paper book 2B (part of submission dated 20 January 2014 made before Ld. TPO) it is pointed out that all the companies accepted as comparable in the context of international transaction of import of finished goods for resale have carried out marketing as one of the functions. At paper book 2B page 485, para 5.3 it is once again explained on how marketing function carried out in the context of international transaction of import of finished goods for resale is bench marked and compensated. By reference to page 326 of paper book 2A & page 526 of paper book 2B, it was explained that full details of AMP expenditure incurred by Sony India for its distribution business was provided to Ld. TPO. It can be seen that out of the total expenditure only an amount of Rs. 132 crores is advertisement - all others fall in the category of direct selling expenditure, discounts, commission etc., which anyway are to be excluded from AMP category in view of series of decisions of Hon'ble Jurisdictional High court. Further without prejudice to other contentions, with reference to pages 487, 326 and 526 it was explained that before Ld. TPO all possible ways of analysis were submitted to establish that whichever way one looks at the margin already earned by Sony India Pvt limited from international transaction of distribution (bench marked as combined transaction) has more than adequately compensated for all AMP expenditure. The margin earned by the assessee @ 2.28% in the consumer electronics segment (refer page 264 of paperbook 2A) is higher than the average operating profit margin of the companies considered by the TPO for benchmarking the alleged transaction of AMP expenses @ (-) 5.62% (refer page 486 of the paperbook 2B). It is not the Assessee's case that expenditure towards AMP need not be taken into consideration for purposes of benchmarking, on the contrary it is Assessee's contention that AMP expenditure is already taken into consideration for benchmarking of international transaction of "import of finished goods for resale OR distribution", which have been found to be at arm's length after considering such cost. Hence, the same expenditure cannot again be considered for benchmarking another transaction viz., "reimbursement received from AE for advertising of Rs. 50.44 Lacs", especially as the cost incurred for such transaction and amount received towards it are clear and distinct.

After careful consideration of above detailed submissions Ld. TPO proceeded to benchmark international transaction of 'receipt of advertisement cost' from page 54, para 33 of his order, kindly refer Appeal set. Ld. TPO clearly notes details of the reimbursement of Rs.

50.44 lacs received at para 34 on page 55 of Appeal set. Kind attention is invited to page 59 para 10, Ld. TPO even while clearly noting that there was no agreement, proceeds to refer to an agreement dated 1.4.2005 relating to Ay 06-07 stating that same is available on assessee's record. Further at page 64 Ld. TPO extracts from such agreement pertaining to different assessment year. It was submitted in this context that the agreement was for Ay 06-07 and that amount received under such agreement was entirely offered to tax and considered for benchmarking of international transaction under chapter X for that period. Ld. TPO persisted with his reference to such agreement and conveniently ignored this aspect mentioned in form 3CEB of Ay 06-07. Reference to Ld. TPO's observations and conclusions is invited inter - alia at pages 81 & 82, para 40 wherein TPO states that aggregated transaction approach and fact that overall margins do not establish AMP expenditure was compensated. It may be useful to draw attention to para 40.7 on page 83, Appeal set. Conclusions reached therein are directly contrary to guidelines laid down by Hon'ble Jurisdictional High court in Sony Ericsson 374 ITR 118 (refer para 193 and paras 194 (v), (viii) and (Xii). By presuming that advertising services were rendered to AE Ld. TPO not only marked up entire expenditure further thus digressing totally and unjustifiably from benchmarking of receipt of advertisement expenditure of Rs. 50.44 lacs which he set out to examine.

Lastly, kind attention is invited to page 102 and 103 of Appeal set for determination of AMP adjustment by Ld. TPO. It is noteworthy that Ld. TPO returned a categorical finding at page 103 that other international transactions are found to be at arm's Length. This categorical finding can only be with reference to distribution transactions. Thus, once international transaction of distribution is found to be at arm's length after considering entire AMP expenditure as cost, multiple counting of the same cost for benchmarking receipt of advertising expenditure from AE is unjustified, invalid and impermissible.

Adoption of TNNM for benchmarking combined transaction of distribution has not been disputed.

Department has not established existence of separate international transaction of AMP, except the international transaction of reimbursement of Rs. 50.44 Lacs as reported in Form 3 CEB/Transfer pricing study. Therefore, Rs. 50.44 lacs can be benchmarked but expanding scope of this transaction by inclusion of AMP function of distribution transaction once again is unlawful and unjustified.

As far as benchmarking of software development services is concerned the approach adopted by Ld. TPO by working out tested party margin at 18.07 % and discussion relating benchmarking all related activities as one segment, observations in the context of comparable companies

etc., to reach final set of 16 comparable companies at page 54, (Appeal Set) is not being repeated herein as the same is covered by way of detailed CHART submitted and explained in detail during the hearing before Hon'ble Tribunal. This approach is being adopted in the interest of brevity.

D Draft Assessment Order: Kindly refer at page 108 of Appeal set.

E Detailed objections were filed on each of the aspects before Ld. Dispute Resolution Panel, which can be found from page 119 of Appeal set. Particular attention is invited to pages156,157, 163, 164, 185, 209 to establish the alternate submissions that in any case and any event, whichever way one looks at the details Sony India was adequately compensated for its scope including expenditure for AMP function.

F Finally DRP issued directions dated 24.12.2014 which can be found from page 406 of Appeal set. Ld. DRP dismissed the objections in a summary manner as can be seen from pages 409 to 414 of Appeal set without even referring to or dealing with all contentions raised before it, including inter- alia alternate/ without prejudice contentions as briefly explained above.

Based on such directions including the objections relating to section 10 AA disallowance (kindly refer details at page 396 to 404 of Appeal Set), double adjustment of expenditure etc., as set out at page 439 to 441, Ld. AO passed impugned assessment order as explained above. By drawing reference to DRP objections at page 396 to 400 it is submitted that such disallowance in relation to section 10 AA and further addition were totally unjustified and misconceived.

G By reference to para 61 of Bausch & Lomb Eyecare (India) private limited 381 ITR 227 it is submitted that AMP function and international transaction of distribution being bench marked are distinct (pg 749-766 of convenience compendium).

By reference to para 43 of Hon'ble High court decision in Maruti 381 ITR 117 (pg 767-791 of convenience compendium) it is submitted that Hon'ble court notes that conclusion on international transaction in Sony Ericsson case 374 ITR 118 (pg 377-452 of convenience compendium) appears to result from none of the parties questioning existence of international transaction of AMP. By reference to para 70 of Hon'ble High court decision in Maruti it is out respectful submission that burden of showing existence of international transaction of AMP is on the revenue, which in present case department has failed to discharge. By reference to paras 60 and 74 of Hon'ble High court in Maruti 3811TR 117 it is submitted that insertion of explanation under section 92 B does not automatically make AMP and international transaction. By reference to para 76 it is submitted

that in the absence of any machinery provision it was unlawful to bring to tax imaginary transaction of AMP. Lastly, by reference to para 86 it is submitted that Hon'ble High court reiterated the guidelines laid down in para 193 and 194 of Sony Ericsson.

Even while Hon'ble High court proceeded on the basis that in batch of cases involved in 374 ITR 118 international transaction of AMP existed, this cannot be taken as a universal principle being laid down that in all cases wherein expenditure is incurred towards AMP an international transaction of AMP exists invariably and that there is no necessity to establish such existence by reference to specific facts and circumstances. Further Hon'ble Court laid down several guidelines for combined / aggregated benchmarking, set off, exclusion of selling and distribution expenditure, relief to be granted when margin in TNNM is better than that of comparable companies (as is evident from para 194).

H Although similar issue was involved in ITA no 837/ Del/ 2014 relating to AY 09-10 in assessee's own case (pg 192-213 of convenience compendium), Hon'ble Tribunal by order dated July 10,2017 in that instance proceeded on certain fundamentally incorrect presumptions about earlier agreement relating to Ay 06-07 being valid and operational during Ay 9-10 and misunderstanding that it was AR's stand that AMP expenditure relating to distribution transaction is out of ambit of TP analysis etc., thus leading to non- consideration of real issues like second counting of same expenditure towards Advertising for benchmarking distribution transaction and clearly agreed reimbursement received from AE towards specific advertising activities. In this context it was also submitted that for benchmarking under chapter X it is important to consider relevant revenue and relevant cost relating to transaction being benchmarked. As in case of transaction of reimbursement received towards advertising specific cost for the particular activities agreed with AE and amount received were available, it would be incorrect to include costs incurred for some other activity to make AMP adjustment. Therefore, it was submitted that conclusion in Ay 9-10 was in appeal before Hon'ble High Court as it involved several contradictions, incorrect presumptions and vague direction. Hon'ble Tribunal order also contrary to specific and clear directions in para 193, 194 of decision in Sony Ericsson 374 ITR 118 (pg 377-452 of convenience compendium) as also para 86 of decision in Maruti Suzuki 381 ITR 118 (pg 767-791 of convenience compendium).

Detailed submissions were made by reference to para 10 and 11 of said order - where even while remanding to Ld. TPO by observing that - "in effect thus the question of whether the reimbursement of AMP by the AEs to the assessee is at arm's length or not stands remitted to file of the AO", Hon'ble Tribunal failed to provide specific directions on how to bench mark such a transaction (which is similar to transaction

for present year i.e., Ay 10-11 of reimbursement of advertisement of Rs 50.44 lacs).

I Decision of Hon'ble Tribunal dated 21.12.2018 in ITA no 4978/DEL/2011 for Ay 2007-08 in Assessee's own case held that marketing activities were undertaken by Sony India Pvt limited in furtherance of its own core business of distribution (para 8) , it cannot be said that Sony brand gained popularity only because of AMP expenditure of Sony India pvt limited (para 13) and as operating margins of appellant in distribution transaction were at arm's length it could be concluded that assessee was suitably remunerated (para 24) (pg 229-247 of convenience compendium).

J Decision of Hon'ble Tribunal dated 16.01.2019 in ITA no 6389/De1/2012 for Ay 2008-09 in assessee's own case AMP adjustment was deleted following decision in Ay 2007-08 (supra) (pg 453-484 of convenience compendium).

K Decision of Hon'ble Tribunal dated 22nd April 2019 in ITA 1764/DEL/2015 in case of Casio in similar circumstances held that FAR of casio included marketing (kindly refer page 23) and Hon'ble Tribunal concluded that no international transaction of AMP was shown to exist requiring separate benchmarking (pg 294-354 of convenience compendium).

L Recently, this Hon'ble Tribunal vide decision dated 18.05.2020 in the case of Casio (ITA 9312/Del/2019) held that there is no international transaction of AMP and deleted the adjustment (pg 493-507 of convenience compendium).

M Decision of this Hon'ble Tribunal dated 4.10.19 in case of Samsung ITA no 3248,3410/DEL/2012 in similar circumstances this Hon'ble Tribunal held at para 43, 44 and 46 that scope of reimbursement received (reported as international transaction by assessee in that case) for some activities of advertisement cannot be expanded to cover other marketing activities undertaken for assessee's own business and further that once TNNM margins for distribution business were at arm's length after considering cost of AMP expenditure a separate adjustment towards AMP would not be justified (pg 508- 708 of convenience compendium).

N Reference is invited to decision of Hon'ble Tribunal in case of Goodyear India ITA 5650/De1/2011 (paras 20 to 39) and it was submitted that even when an agreement exists it was necessary to examine if it makes in obligatory for Indian AE to incur excessive expenditure, without which it was impermissible to make Adjustment towards AMP.

O By reference to decision of Hon'ble Delhi High court in Bacardi India ITA no 417/2017 dated 24.5.2017 it is submitted that Hon'ble disapproved remand on the pretext of benefit of caselaw being not available to TPO and DRP (pg 746-748 of convenience compendium).

We have filed separate chart for Software development services hence the same are being repeated herein in the interests of brevity (pg 1-3 of convenience compendium). Similarly, on corporate tax issues it was submitted that the issue relating to depreciation for Daruhera unit has been decided by Hon'ble High court in favour of Assessee in ITA Nos. 13/2012 & 14/2012 (copy of order enclosed at pg 214-228 of convenience compendium).

As far as issue arising in the context of computation of section 10AA benefit is concerned, detailed submissions were made by reference to submission before DRP more particularly pages 396 to 400 of the appeal set, which are not being repeated in the interests of brevity. In addition, it is submitted that similar disallowance was made by the assessing officer in the subsequent assessment year 2011-12 (pg 361-364 of convenience compendium) which was initially upheld by the DRP (pg 365-371 of convenience compendium). However, on a rectification application filed by the appellant, DRP vide directions dated 30.05.2016 (pg 375- 376 of convenience compendium) while holding that no double disallowance can be made, directed the assessing officer to verify the record and compute disallowance over and above suo moto disallowance by the appellant. Consequently, the assessing officer vide rectified order dated 12.07.2016 (pg 372-374 of convenience compendium) while holding that the expenses already debited to the SEZ unit is more than the apportioned expenses, deleted the disallowance made in the original assessment order. Copy of the all orders for the assessment year 2011-12 are enclosed in part 7.

Additional ground of appeal relating to deduction of education cess (including secondary and higher education cess) of Rs.1,27,08,933 on income tax paid. Refer application for admission wherein cases deciding the issue in favour of the assessee are enclosed (pg 11-157 of convenience compendium).

Additional ground of appeal relating to dividend distribution tax. Detailed submissions are part of the application which are not being repeated in the interests of brevity (pg 184-191 of convenience compendium).

Department's Appeal challenges Ld. DRP's direction to grant depreciation on software licence as per specific entry no 5 of New Appendix I r.w., rule 5 of Income tax rules 1962.

The above synopsis is only intended to be aide memoire and not substitute for oral submission made at the hearing or appeal record. We, accordingly, pray for consideration of all the material and submissions on appeal record."

17. On the other hand, ld. DR for the Revenue objected to the submission of the assessee and after arguing the matter, he submitted as under :-

> "For exclusion of comparable companies, the assessee counsel has relied on the order of Hon'ble ITAT in the case of assessee group company i.e. Sony Mobile communication (International, AB Indian Branch) placed at Page 248-193 or convenience compendium. As argued in detail before Hon'ble Bench in physical hearings, it is stated that the decision of Hon'ble Coordinate Bench is not binding in the present case because
>
> 1. The functional profile of assessee company is different from the other company
> 2. In the case of assessee, Comparables Persistant system ltd. and Infosys Ltd. are their own comparable and in the TPSR it is clearly mentioned that the companies chosen are functionally comparable and assessee now can't take the ground of functional different unless and until it proves this fact before Hon'ble which has not been done in the case.
> 3. Third Ware Solution Ltd. as comparable company is approved by the Hon'ble Delhi High Court on similar facts i.e for software development services only for same financial year.
>
> **A. The functional profile with regard to provision of IT/Software development services**
>
> The assessee company provides software development services to its AE's through software architectural division (SARD) and software application center (SISC) to its AE's
>
> The relevant extract functional profile of the assesse company, as mentioned in the para 4.010/page 47 to 52 of TP Study/page 47 to 52 of paper book is given below:-
>
> *4.010. Provision of application software services*
>
> *4.010.1. Nature and terms of international transaction identified*
>
> *As an offs development division of SID, Software applicant center (''SISC'') carries out software development, enhancement and support and maintenance of business applicants for Sony group of companies. In respect of such services, SISC is responsible for the development of some modules in India..*
>
> *Conceptualization and scoping of project work*
>
> *SID's AEs are primarily responsible for initial conceptualization of application software development work required to be developed by SID. The scope of work*

required to be undertaken is subsequently decided upon and communicated to SID.

Project management

SID is responsible for day to day management of activities undertaken to ensure that work is carried out as per the prescribed deadlines. Under the off-shore model, the entire project is developed and managed off-site (i.e. in India) by SID. SID deputes its employees at onshore, who act as the onsite coordinator for managing the expectations of SID's AEs, communicating the same to off-shore team and acting as an interface between SID and its AEs.

Coding, testing and documentation

SID undertakes code generation in accordance with the functional specifications and protocols defined by its AEs. The code generated is thereafter tested, to ensure that the functions. SID also generates and makes available documentation for the software developed and transferred to its AEs.

Quality Assurance

SID is responsible to monitor operations and quality of the project and works in accordance with the international standards. However, SID's AEs carry out the final testing and quality assurance procedures.

Sales and marketing

SID is responsible for the development of certain modules of the entire project entered by its AEs with other Sony Group entitles. The software modules developed by SID are consumed internally by various Sony Group and are not sold to outside customers. In relation to such services, its AEs enter into agreement with other Sony Group entities and are responsible for negotiation of commercial aspects and terms and conditions of contracts signed with other Sony Group entities.

4.010.3. Risks Assumed

Listed below are some of the key risks, which are typically faced by a business organization and their applicability to SID in relation to provision of application support services.

Business risk

SID is rendering services to its AEs and such services are used by its AEs for the development of software program for other Sony Group entities. SID does not render such services to third parties. However, since SID's revenue & profits would vary according to AEs market conditions, it bears indirect market risk.

Price risk

SISC renders services to its AEs and is compensated on a pre determined hourly rates or on fixed fee basis. In relation to such services prices are determined based on the negotiation carried out by SID with its AEs. Hence, SID bears the associated price risk.

Utilisation risk

SID has invested its capital irito infrastructure and other facilities, required for the provision of software application services to its AEs. Such infrastructure facilities would depreciate over the fixed period of time.

SID is remunerated on the basis of hourly rates determined based on the estimated cost of rendering services. Hence, SID also bears the risk of fluctuation in actual and estimated cost of services. Also, SID is responsible for idle capacity of its employees and infrastructure established for the provision such services. Hence, SID bears the under-utilisation risk.

Credit and collection risk

SID provides services to its Group entities, and bears no credit and collection risk compared to the risk that independent third party service providers would bear in relation to receivables from their clients.

Service liability risk

In the agreement entered into by SID with its AEs, there is no warranty clause binding SID. However, in the event there is a quality failure, SID is responsible for rectification of the defect.

4.011. Provision of embedded software services

4.011.1. Nature and terms of international transaction identified

Software Architecture Division ("SARD") of SID renders software development services for development of 'real time embedded software' for the internal requirements of Sony Group entities. Summarized below is a brief analysis of the nature and terms of the international transaction pertaining to provision of embedded software services to Sony Corporation:

Service fee - SARD is compensated at man month rates which are computed on the basis of a budget prepared at the beginning of the financial year. Such man month rates are subject to periodic review.

This budget (on the basis of which the man month rates are determined) takes into consideration various expenses for operating the software division, such as salary costs, depreciation, professional charges paid to sub-contractors, and other day to day administration expenses.

Invoicing - SARD is required to raise the invoice on its AEs at the time of export of software to its AEs. Further, SARD is also required to submit an itemized statement of costs and man hours spent in connection with the export of the relevant product.

4.011.2. Functions Performed

Summarized below are the functional responsibilities and risks borne by SID in connection with embedded software services rendered to its AES.

Conceptualization and scoping of project work

81D's AEs are primarily responsible for initial conceptualization of the software required to be developed by SID. The scope of work required to be undertaken is subsequently decided upon and communicated to SID.

Project management

SID is responsible for day to day management of activities undertaken to ensure that work is carried out as per the prescribed deadlines. Under the off-shore model, the entire project is developed and managed off-site (i.e. in India) by SID. In some cases, an employee of SID acts as the onsite coordinator for managing the expectations of its AEs, communicating with the off-shore team and acting as an interface between SID and its AES.

Under the onsite model, which is rarely followed, an employee of SID is deputed to its AEs, where software development work is undertaken with the overseas team of its AEs.

Coding, testing and documentation

SID undertakes code generation in accordance with the functional specifications and protocols defined by its AES. The code generated is thereafter tested, to ensure that the functions performed by the code are in accordance with the protocol design and standard specifications. SID also generates and makes available documentation for the software developed and transferred to its AES.

Quality Assurance

SID is responsible to monitor operations and quality of the project and works in accordance with the international standards. However, its AEs carry out the final testing and quality assurance procedures.

Sales and marketing

SID's AEs are responsible for marketing and procurement of business and have complete authority to decide on commercial aspects of terms and conditions of contracts signed with its customers - both within and outside the group.

Further, SID's AEs are not under the obligation to subcontract the development work to SARD and the quantum of work subcontracted to SID depends upon the quality of services rendered by SID. Accordingly, SID is required to undertake certain marketing efforts to sell its services to group companies.

From the perusal of the function performed w.r.t software services, it is clearly apparent that the Technical Centre of the assessee company, provides services with regard to software development right from the inception to the completion stage i.e. from the design, coding, testing, verification, integration etc. of software services. In other words, it can be said that the assessee company is providing services of complete software development to its AEs and covers the entire spectrum of software development from designing to ultimate testing and integration with the module developed by Sony Group /AE's . From the functional profile, it is seen that the AEs role is basically confined to furnishing of requirement and the entire process of software development is done at the assessee level only.

Based on the above functional profile, the TPO has included certain comparables and the assessee has challenged the inclusion of following companies, which are discussed case by case:-

1. **Infinite Data Systems Private Limited**- The assessee has requested for its exclusion based on the following criteria
   (i) Functional dissimilarity
   (ii) High related party transaction
   (iii) Extraordinary year of operation

All the objections raised by the assessee have been duly disposed by the TPO and the DRP (Pl. refer to page 39-40 of TPOs / Page 20 of DRP)

The functional profile as mentioned in page 113 of the Annual Report paper book is mentioned below:-

Company Overview

Infinite Date Systems Private Limited ("IDS" or "The Company") was incorporated on 26 th September, 2006. The company is wholly owned subsidiary of Infinite Computer Solutions (India) Limited. It provides solutions that encompass technical consulting, design & development of software, maintenance, systems integration, implementation, testing and infrastructure management services.

Further the functional profile is reinforced in page 117 of the PB with regard to quantitative details column. It is also the fact that the assessee company is deriving its entire revenue from software tax services, as is evident from page 116 in para 17.2.7 (Page116).

Thus from the perusal of the assessee functional profile and the profile of Infinite Data Services, it is seen that both the companies are involved in software development service and undertakes complete development of the software which includes design and development of software, integration, testing and implementation. Thus the functional profile of the assessee company and M/s Infinite Data Services Ltd are similar and the assesse contentions are baseless.

B. Related Party transactions

The assessee company has alleged that M/s Infinite Data Services Ltd is the AE of M/s Fujitsu Services Ltd. and it cannot be taken as comparable. The facts are that the assessee company supplies services only to the customer i.e. Fujitsu Services Ld. Further, it is seen that the holding company of M/s Infinite Data Services Ltd i.e M/s Infinite computer solutions limited has signed an agreement to set up global delivery system in India to provide offshore delivery capabilities to Fujitsu Services Ltd and Fujitsu associated companies. However, it is respectfully submitted that the agreement was signed by the holding company for a separate purpose i.e to set up the global delivery center on built, operate and transfer model and this cannot be the basis for treating M/s Infinite Data Services Ltd. as related party. Also providing services to a single company does not make a company, associated enterprise of the other company. The assessee referred that infrastructure deficit charges of Rs31.38 Lacs was received by the assessee but that was received on account of under utilization of infrastructure resources but this in itself is also not the criteria for treating M/s Infinite Data Services Ltd as AE of other company.

The assessee has also relied on the case of Pr.CIT vs. Open Solutions Software Services Pvt. Ltd. in ITA no. 201/2018 of Delhi High Court however in that case, the facts were totally different as the comparable company i.e. Wipro Technology Services Ltd. was earlier part of the Citi group only and M/s Wipro had an agreement with a Citi group and after amalgamation, the services continued to be provided by Wipro Technology Services Ltd.(Earlier Citi Technology Services Ltd.) because of the previous agreement and in that context, the company was treated as AE which is not the fact, in the instant case.

Extraordinary/abnormal profits: The assessee has sought exclusion based on the fact that M/s Infinite Data Services Ltd earned profit margins of around 88%. M/s Infinite Data Services Ltd. is a new entity, incorporated only in 2006 and

probably it was in stabilizing phase and F.Y. 2009-10 was the first completed year of operation.

Thus , it is unfair to exclude a company based on high profits/ fluctuating profits and this issue has already been decided by the Hon'ble Delhi High Court in the case of Chrys Capital Investment advisers (India) Pvt Ltd. v/s DCIT in 56 taxmann.com 417 , 2015 (Delhi) . For ready reference, the operating part i.e para 44 is given below:-

***44**. In light of the above findings, this Court concludes as follows:*

a. The mere fact that an entity makes high/extremely high profits/losses does not, ipso facto, lead to its exclusion from the list of comparables for the purposes of determination of ALP. In such circumstances, an enquiry under Rule 10B(3) ought to be carried out, to determine as to whether the material differences between the assessee and the said entity can be eliminated. Unless such differences cannot be eliminated, the entity should be included as a comparable.

Thus this company i.e M/s Infinite Data Services Ltd is functionally comparable and also comparable on other parameters to the assessee company.

2 **Thirdware solutions ltd.:** The assessee company has requested for exclusion of this company based on the following facts:

1. Functionally different
2. Non availability of the segmental data
3. Out sourcing of services

All the objections raised by the assessee have been duly disposed by the TPO and the DRP (Pl. refer to page 42-43 of TPOs/page 21 of DRP)

From the functional profile, as mentioned in annual report of the company, it is clear that this company is engaged in software development services only.

1. Segment reporting (Page 458/459, Para 23)

The company's operation comprises of software development, implementation and support services. Primary segmental reporting s based on geographical areas, viz., Domestic = India (products & services) and international = Rest of the World (Exports-Software Services).

2. Page 440 in the qualitative details the profile is mentioned as below

The company is engaged in implementation and consulting services of software based on ERP and Business Intelligence. The implementation and consulting services of develop and traded software cannot be expressed in any generic unit Hence it is not possible to give quantitative 4C, 4D of part II of schedule VI of the Companies Act 1956.

3. Also with regard to the earning in operation exchange column / page 441 the following is mentioned

EARNING IN FOREIGN EXCHANGE :- (On mercantile basis)

Income from Software, Development } Rs. 587,931,080/-

Services and software services } (Previous Year-Rs. 641,473,049/-)

4. Further at page 459, the geographical segment wise results are mentioned, in which the results for overseas segment clearly shows the segmental details of income/expenditure from software services only.

Thus from the above, it is clear that the assessee company is solely involved in software development, implementation and other software services which are almost identical to the assessee company and hence functionally completely comparable to the assessee.

Further it is also mentioned that **the Hon'ble Delhi High Court in the case of Steria India Ltd v/s DCIT in 92 Taxmann.com 120,** on similar facts for same assessment year i.e. 2009-10 have held that this company is comparable to M/s Steria India Ltd. which is involved in software development services only.. However, the Hon'ble High Court has dealt in detail in para 10-11 about the functional profile of M/s Thirdware solution ltd. Being very pertinent, the operative part of the the judgement is reproduced below:

10. *With regard to objection of the petitioner qua inclusion of Thirdware Solutions Limited as a comparable, the ITAT observed that From the copy of Profit & Loss Account, it could be seen that there were items of income, viz., 'Sales' and 'Other income'. Bifurcation of 'Sales' as per Schedule 12 consisted of Export from SEZ units, Export from STPI unit, Revenue from subscription Sale of Licence & Software services. It was further discernible from the segment reporting, that the figures had, been given on the basis of Geographical segments, viz., 'India' comprising of Products and other services and 'Overseas' comprising of Software services. The TPO had taken only the 'Overseas' segment for the purposes of inclusion in the list of comparables, which encompassed only export of software services. As the segment of the assessee under consideration was also only Software services, said segment of Thirdware Solutions - taken by the TPO fully matched and was held to be comparable.*

11. *This court is also of the view that said Company's operation comprised of software development, implementation and support services. Primary segmental reporting is based on geographical areas. Said company's earning are to a significant extent export oriented. Separate books of account were maintained for the reported segments and wherever costs are directly identifiable with the reported segment, Revenue in the overseas segment came from export of software services, which are comparable to the assessee company. It is discernible from the segment reporting, that the figures had, been given on the basis of Geographical segments, i.e. 'India' comprising of Products and other services and 'Overseas' comprising of Software services. The TPO had taken only the 'Overseas' segment for the purposes of inclusion in the list of comparables, which encompassed only export of software services. The segment of the assessee under consideration is also only Software services, said segment of Thirdware Solutions - taken by the TPO fully matched and was held to be comparable. These are findings of facts based upon record. Consequently, taking of Thirdware Solutions Limited as a comparable was in order and cannot be interfered with.*

Thus as the functional profile and also the comments of the TPO in steria India ltd, are almost similar, this company is fully comparable to the assessee company.

3 E-Infochips Banglore Ltd.

The assessee has requested for its exclusion based on the following grounds.

1. Functional not comparable
2. Segment data not available
3. M/s E-Infochips Bangalore Ltd. is involved in diverse activities.

All the grounds raised by the assessee against E-Infochips Banglore Ltd. have already been duly answered by the TPO in Pg 36-37 of the TPO order.

E-Infochips Banglore Ltd. involved in software development services is clearly evident from the following facts

In page 36 (Financials) of paper book, it is clearly mentioned that the entire income of assessee company is from income from software services. Further in page 6 of Annexure to Directors report, it is clearly mentioned in para B, that **the company is engaged in the development of software as per the specific requirements of client,** function which is identical to the assessee company. Also at page 44 at para 9, in *notes forming part of accounts* in sub para f it is clearly mentioned that the revenue from the software service is recognize as per the terms of relevant agreements/development contracts. Further, the assessee has referred to the website of the company but the website is not true barometer of function performed. This fact is also mentioned in the recent judgment by the Hon'ble I Bench only in the case of M/s WSP Consultants. Pvt. Ltd.v/s DCIT in ita no 569/Del/2017(Para 4.2)

Even though in the segmental information at page 45, para 16 it is mentioned that the assessee company is engaged in software development and IT enabled services, however at all the other places in the annual report, it is clearly mentioned that the company is involved in development of software/ software services only. To buttress the fact that the company is not in ITES section, reference is also invited to schedule 8 of the P&L a/c where in, the communication expenses are claimed of only around 35 lakhs which is less than 1% of the turnover. As usually the ITes companies have lot of communication expenses, thus this company cannot be taken as involved in ITes functions.

Thus this company M/s E Infochips Bangalore Ltd. is functionally comparable to the assessee company.

4 Persistance systems ltd.

The assessee has requested for exclusion based on the fact that it is functionally different. The assessee has stated that this company is engaged in sale of software products and not software services. At the outset it is submitted that it is assessee's own comparable selected by itself and based on functional similarity it is accepted by TPO. The assessee has not taken the exclusion of this comparable before DRP.

Reference is invited page 252 of paper book 2A wherein in para 12 the brief business description of comparable companies for the application software services has been mentioned. It is clearly stated that this company is involved in the embedded software which is exactly similar to the services provided by assessee's company division (SARD) to its AE's as mentioned in para 4.011 / page 50 of paper book. Reference is also placed on accept / reject matrix of the assessee company wherein at serial no. 921 / page 151 of paper book it is clearly mentioned that the company is engaged in similar function.

Also whether this company is a software product development company or services company ,is a fact which has already been answered in judgments of the Hon'ble Delhi ITAT only which are mentioned below:

The Hon'ble ITAT in its order in the case of Steria India Ltd. vs. Addl.CIT in [2020] 122 taxmann.com 267 (Delhi - Trib.) has treated M/s Persistent systems ltd as comparable in software development services segment only. However more relevant are the comments about profile of Persistent systems Ltd, which has been mentioned in para 115 to 118 , and for ready reference is reproduced below……

15. *In case of Persistent Systems, limited ld AR submitted that Persistent Systems Ltd. is engaged in the business of development and sale of software products and therefore, cannot be regarded as comparable to the assessee, a routine software service provider. At page 27 (Pg 192 of Annual Report paper book) it is stated that the company specializes in building software products and the business of the company is inter-alia focused on products. Also, at page 105 (Pg 270 of annual*

report paper book) of the annual report it is stated that the company derives significant portion of its revenue from export of software services and products (IP based software products). It is further submitted that at Page 164 & 183 of the Annual report it is stated that the company specializes in software products, services and technology innovations. It is further submitted that segmental profitability of this company from provision of software services is not available in the annual report and accordingly, Persistent Systems Ltd cannot be regarded as an appropriate comparable for the purpose of benchmarking analysis.

116. *The learned departmental representative vehemently supported the order of the learned dispute resolution panel and the learned transfer-pricing officer and submitted that they have discussed the functionality of this company in detail and therefore this company is functionally comparable.*

117. *We have carefully considered the rival contentions and perused the standalone financial statement of the above company placed in the paper book at page number 110 - 153 (annual report page number 156 - 198). In its revenue stream as per page no 166 of Standalone Financial statements its revenue recognition shows that:—*

"Income from software services

Revenue from time and material engagements is recognized on time proportion basis as and when the services are rendered in accordance with the terms of the contracts with customers. In case of fixed price contracts, revenue is recognized based on the milestones achieved as specified in the contracts, on proportionate completion basis. Revenue from royalty is recognized in accordance with the terms of the relevant agreements. Revenue from maintenance contracts is recognized on a pro-rata basis over the period of the contract. Unbilled revenue represents revenue recognized in relation to work done on time and material projects and fixed price projects until the balance sheet date for which billing has not taken place. Unearned revenue represents the billing in respect of contracts for which the revenue is not recognized. The Company collects service tax and value added taxes (VAT) on behalf of the government and, therefore, these are not economic benefits flowing to the Company. Hence, they are excluded from revenue."

118. *At note no 21 Page No 181 of Standalone Financial statements it has only one stream of Revenue i.e. Sale of Software services as under:*

21. Revenue from operations (net) (In ` Million) For the year ended March 31, 2014 March 31, 2013 Sale of software services

11,841.16 9,967.51

Therefore, we do not agree with the arguments of the assessee, and hold that Persistent System Ltd. does not sale products, but it is engaged only in sale of software services. No other reasons were given to us for its exclusion; hence, we are of the view that Persistent system has rightly been included as Comparable company by ld DRP and TPO.

Thus this company is clearly held to be involved in sale of software services only and not in sale of software products. Also in the case **of Motherson Sumi infotech and Design ltd.. vs/ ACIT 112 Taxmann.com 300 (2019)** again this company was held to be involved in software services only. The para 32 of the Hon'ble ITAT order is very pertinent and reproduced below for ready reference…

32. *The Annual Report of this company is placed at pages 762 to 895 of the paper book. In its Profit and Loss account, sale of software services and products is at Rs. 31,231/- and in Schedule 11, bifurcation is given for sale of software services and products - export and domestic. Though segmental information is provided in the Annual Report, from which sale of software services can be separately known from the sale of products, but the information received by the TPO u/s. 133(6) of the Act, the company has informed that its software products sales constituted 0.73% of the Revenue which means that more than 99% of the Revenue is from software services.*

33. *The ld. counsel for the assessee vehemently stated that this company is functionally dissimilar as it is engaged in outsourced software product development services as investment in Intellectual property led sales. The ld. counsel for the assessee further stated that this company has undertaken significant restructuring and has very high turnover, but failed in convincing us the impact of these things on the overall margin of the company. Therefore, we are of the considered view that this company passes all the filters and has been rightly taken in the final set of comparables. No interference is called for.*

Thus in view of the above, it is absolutely clear that this company is involved in sale of software services only, like the assessee company and these are the findings/decisions of Hon'ble Jurisdictional ITAT only, which have a binding precedence. Also, even though the P&L account shows M/s PSL has income from sale of software services and products, however this is further clarified by schedule 15/page 325 of paper book wherein in the nature of operations it is clearly mention that the assessee company is engaged in software product development services only. Also, this issue of software product v/s services becomes redundant as it is already settled by the Hon'ble ITAT above noted decisions.

The assessee has further raised following grounds which are mentioned below:-

(ii) Segmental information not available:- the segmental information is available in para 2 (B)(b) of schedule 15 / page number 325 of paper book, wherein it is clearly mentioned that company provides Software services only in 3 sectors namely Telecom + Wireless, Life sciences + Healthcare and infrastructure + Systems. As the software services are treated as a common and single segment only by the assessee company, accordingly the assessee has treated it as single segment only. Thus the assessee contentions about no segmental information are wrong and deserves to be rejected.

5. **Infosys Limited**

1. The assessee has requested for its exclusion based on the following grounds.

1. Functional not comparable
2. Ownership of intangibles/brand
3. High turnover/higher volume of business leading to higher profitability

All the grounds raised by the assessee against have already been duly answered by the TPO in Page 44-48 of the TPO order and for the sake of brevity are not being repeated.

At the outset it is submitted that it is assessee's own comparable selected by itself and based on functional similarity it is accepted by TPO.

Reference is invited page 251 of paper book 2A wherein in para 8 the brief business description of comparable companies for the application software services has been mentioned. It is clearly stated that this company is involved in all the stages of software development services which are exactly similar to the services provided by assessee's company to its AE's as mentioned in para 4.010 / 11 of page 50 of paper book. Reference is also placed on accept / reject matrix of the assessee company wherein at serial no. 582 / page 181 of paper book it is clearly mentioned that the company is engaged in similar function.

However, for ready reference some of the points are mentioned.

1. Software product:- Revenue from sale of software product is only Rs. 925 crores out of operating revenue of 21,140 crores. i.e. only 4.38%.

2. R&D and Ownership of intangibles:- R&D expenses is only Rs. 438 crores which is only 2.07% of revenue which is negligible.

3. Brand value:- The assessee has alleged that this company has huge brand value but from the financials it is seen that this company has incurred expenses of only Rs. 72 crores which is only 0.34% of revenue. In fact Sony is bigger and much well known brand in the world market then Infosys.

(iv) High turnover. The assessee has alleged that the Infosys has turnover of 21,140 crores i.e. high as compared to the assessee company and M/s Infosys enjoys economic of scale. This fact has been answered by the TPO in detail in para 28 / page 44-48 of his order and for the sake of brevity, arguments are not repeated.

Further , it is not fair to exclude a company based on high profits/ fluctuating profits / high turnover and this issue has already been decided by the **Hon'ble Delhi High Court in the case of Chrys Capital Investment advisers (India) Pvt Ltd. v/s DCIT in 56 taxmann.com 417 , 2015 (Delhi)**

Thus based on the above analysis, this company i.e M/s Infosys is functionally similar and also comparable on all parameters/aspects to the assessee company.

B) Second issue of AMP

On the issue of AMP, the department has given the written submission on 11-04-2018 and the present submissions are in continuation of those submissions.

1) In this case, the TPO has made addition of Rs. 293.87 Cr. on the issue of incurring of AMP expense by assessee company by holding that, firstly, it is a separate international transaction and secondly, the assessee company through being a pure distributor is undertaking lot of marketing activities to promote the brand Sony and in the process developing market for products manufactured by AE in India.

In the process, the assessee company is developing marketing intangibles for Sony AE's, who own the brand and for that, assessee company was entitled to get reimbursement of cost incurred and as has got nominal amount as reimbursement, based on Bright Line Approach, adjustment on account of AMP expenses were made.

2) At the outset, it is submitted that TPO passed the under dated. 27/01/2014 and DRP passed direction s on 24/12/2014. During that time, the decision of the Hon'ble Special bench in the case of LG electronics was the reigning decision and both the TPO/DRP followed that decision and as the bright line test was upheld in LG Electronics decision, the same was duly followed.

3) However, in march 2015, the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd V/s CIT –TP, 374 ITR 118 (Delhi) has rejected the Bright line test but upheld the contention that AMP expenses are separate international transaction and also held that, being separate international transaction it has to be benchmarked separately and after considering several decision. has provided a methodology of benchmarking of AMP transaction. Thus, the assessee case is to be seen in the context of changing judicial landscape.

4) Before proceeding further, the GoA of assessee with regard to AMP are to be analyzed and being pertinent, the same are discussed below:

Re: Transfer Pricing Adjustment in respect of Advertisement, Marketing and Promotion Expenses ("AMP Expenses")

3. That on the facts and circumstances of the case and in law, the Ld. AO/ Transfer Pricing Officer ("Ld. TPO")/ Dispute Resolution Panel ("Hon'ble DRP") erred in enhancing the income of the Appellant by INR 293,87,23,399/- for the assessment year under consideration by making a Transfer Pricing adjustment on

account of reimbursement of "alleged excessive" AMP expenses incurred by the Appellant.

4. That the Ld. AO/Ld. TPO/ Hon'ble DRP has erred in not appreciating that AMP-expenses incurred by the Appellant in the normal course of its business were not for the sole benefit of its associated enterprise and thus did not fall within the purview of an "international transaction" pertaining to rendition of service, as defined in section 92B of the Act, distinct from its functional profile and responsibility as a distributor.

5. That the Ld. AO/ Ld. TPO/ Hon'ble DRP erred in not appreciating that the AMP expenses were incurred by the Appellant as part of its distribution business and not for the purpose of providing sole benefit to its associated enterprise and thus could not be considered to be a transaction under section 92F(v) of the Act, since there was no understanding or arrangement or action in concert for provision of service.

6. That the Ld. AO/ Ld. TPO/ Hon'ble DRP failed to appreciate that AMP is one of the functions performed along with other functions such as purchase, inventory management dealer management, after sales, etc. by the appellant in conducting the "International Transaction" which is import & distribution and in view of the appellant's functional profile, it cannot be benchmarked and compensated separate from the international transaction of import of products.

7. That the Ld. AO/Ld. TPO/ Hon'ble DRP erred in not appreciating that the function performed by the Appellant had been compensated by the AE in such a way that the gross margin earned by the appellant was sufficient enough to cover all costs incurred including AMP expenses.

8. That the L.d. AO/ Ld. TPO/ Hon'ble DRP failed to appreciate that once the net operating, margins of the Appellant had met the arm's length test, it was erroneous to conclude then the Appellant had performed any non-routine function or had incurred non-routine AMP expenditure.

9 Without prejudice to above, the Ld. TPO/ Ld. AO/Hon'ble DRP erred in applying the 'bright line method to determine the excessive/non-routine AMP expenses in complete disregard of the Transfer Pricing Regulations in India and commercial circumstances of the case.

10. Without prejudice, even if AMP expenses are held to be "non-routine" and "excessive", the Appellant was not required to be reimbursed compensated by its AE, considering that the purported benefit caused to the AE on account of incurring of A&M expenses by the Appellant was only incidental.

11. That the Ld. AO/Ld. TPO/ Hon'ble DRP have selectively applied the principles laid down by the LG Special Bench and ignoring the fact that the 'sales promotion expenses could not partake the character of AMP expenses for the purposes of making any adjustment on account of alleged excessive AMP expenses.

12. That the Ld. AO/ Ld. TPO/ Hon'ble DRP erred in concluding that the non-routine functions (being the alleged excessive AMP expenditure) amounted to a 'service' being rendered by the Appellant to its AE and that a mark-up of 12.25% was required to be charged in respect of such services.

13. Without prejudice, even if AMP expenses are held to be a separate transaction, transaction of incurrence of AMP expenses should be benchmarked along with the main transaction of import and distribution of goods under the combined transaction approach.

5) From the perusal of the above GoA, it is seen that the assessee has challenged the basic issue that incurring of AMP expenses in the case of assessee company , which is a pure distributor, is not a separate International transaction. In the case of assessee, it is clearly mentioned by TPO that it has incurred substantial AMP expenses for creating marketing intangibles / brand promotions of AE in India and for that it has received reimbursement of only Rs 50,44,649/- only.

6) **Whether the incurring expenses is separate international transaction or not-**

This issue has been adjudicated in the case of Sony Ericsson Mobile Communications India (P.) Ltd. Vs. CIT (55 taxmann.com 240 (Delhi)) by the Hon'ble Jurisdiction Delhi High Court after the detailed analysis and review of several case laws on the subject. The operative part of the decisions is reproduced below-

***51**. The term 'international transaction' has been defined in Section 92B. The section also had retrospective amendment which was inserted by the Finance Act, 2012 w.r.e.f. 1st April, 2002. Section 92B(1) reads as under:*

"92B Meaning of international transaction. — (1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises."

***52**. The contention that AMP expenses are not international transactions has to be rejected. There seems to be an incongruity in the submission of the assessee on the said aspect for the simple reason that in most cases the assessed have submitted that the international transactions between them and the AE, resident abroad included the cost/value of the AMP expenses, which the assessee had*

incurred in India. In other words, when the assessed raise the aforesaid argument, they accept that the declared price of the international transaction included the said element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed.

***53**. We also fail to understand the contention or argument that there is no international transaction, for the AMP expenses were incurred by the assessed in India. The question is not whether the assessed had incurred the AMP expenses in India. This is an undisputed position. The arm's length determination pertains to adequate compensation to the Indian AE for incurring and performing the functions by the domestic AE. The dispute pertains to adequacy of compensation for incurring and performing marketing and 'non-routine' AMP expenses in India by the AE. The expenses incurred or the quantum of expenditure paid by the Indian assessee to third parties in India, for incurring the AMP expenses is not in dispute or under challenge. This is not a subject matter of arm's length pricing or determination.*

For the perusal of the Hon'ble High Court decision it is clear that Hon'ble High Court categorically and unambiguously held that AMP expenses constitutes the separate international transactions and this needs to be independently benchmarked.

7) Assessee case fully covered by the decision of Hon'ble ITAT in assessee's own case for A.Y. 2009-10 in ITA no. 837/Del/2014

At the outset, it is humbly submitted that the **assessee's case is covered by the decision of Hon'ble ITAT in assessee's own case for A.Y. 2009-10 in ITA no. 837/Del/2014** . The order of Hon'ble Tribunal is placed at page 192 to 213 of paper book. For the sake of brevity, the decision is not reproduced, however the entire decision of Hon'ble ITAT was discussed in detail before the Hon'ble Bench. **The operative part of the decision in para 11 for AMP issue which is on internal page 8-9 of ITAT order and on page 199 /200 of paper book / convenience compendium.**

The facts of the case are exactly identical as in that case as there was reimbursement of nominal amount incurred by assessee for promotion of Sony brand which is owned by the AE.

Further in that case also, the assessee has raised the similar grounds of appeal with regard to AMP expenses are not a separate international transaction. The Hon'ble Bench dismissed the assessee's contention and held that reimbursement from AE constitute international transaction u/s 92B of the Act and for determination of the ALP, it was remitted back to the TPO.

8) Why order of ITAT for A.Y 2007-08 is not binding precedent-

Aggrieved with the decision of the Hon'ble Bench , the assessee filed a appeal before the Delhi High Court, and as submitted before the Hon'ble Bench, the Hon'ble Delhi High Court has not deleted the decision of the Hon'ble ITAT and neither its stay by the Hon'ble High Court. Only the passing of the consequent

final order after the Hon'ble ITAT decision is stayed. It is humbly submitted that the decision of the Hon'ble ITAT on identical facts is still valid. Further the fact that identical facts / issue is involved in A.Y 2010-11 also has not been disputed by the assessee counsel. Accordingly it is prayed that the earlier decision may be treated as binding precedent for this year also as the facts are identical.

The assessee has also relied on the ITAT decision in its own case for A.Y. 2007-08 which is placed at page 229 to 247 of the paper book. The assessee took the ground that based on its own comparables, the AMP expenses should be determined and as they are falling in even the range, the addition made by the TPO is to be deleted. As discussed in detail before the Hon'ble Bench, the decision of the Hon'ble ITAT in 2007-08 cannot be treated as binding precedent because in that case even the first and the primary issue i.e. whether AMP expenses constitute a separate international transaction has not been specifically decided by the Hon'ble Bench. It is difficult to understand that when the Hon'ble Delhi High Court in the case of Sony Ericson has held that incurring of AMP expenses is a separate international transaction, in the case of distribution company then why the same was not decided / followed by the Hon'ble ITAT. Also to the Hon'ble Bench has relied on the assessee's own comparables, however again unless the indepth analysis of a functional profile of the assessee company vis a vis the comparables is undertaken, it is difficult to arrive it ALP or the AMP expenses. Also as the decision of A.Y. 2009-10 is dated 10th July 2017 and was available for guidance of the subsequent Hon'ble bench when it decided the matter for 2007-08 but still in the decision there is no reference to the earlier decision of the Hon'ble Bench for A.Y. 2009-10 which itself is very surprising. Thus in view of the above reasons, the decision of the Hon'ble ITAT for A.Y 2007-08 can't be taken as binding precedent.

9) Reliance by Department

a) Reliance on Hon'ble ITAT decision in the case of **BMW India Pvt. Ltd. vs. DCIT, Circle-1(1), Gurgaon 88 taxmann.26.**

The facts of the present case are identical in the case of BMW India Pvt. Ltd. In that case also, M/s BMW India Pvt. Ltd. was incurring lot of expenditure on advertising, marketing and promotion activities which was incurred mainly for promotion of the BMW brand which is owned by its AE's i.e BMW Germany . Against that expenditure, the AE of BMW India, reimbursed only a nominal part of the expenditure. And the Hon'ble Tribunal after relying on the Hon'ble Delhi High Court in the case of Sony Ericsson, has held that even though a small part of expenditure is reimbursed, it proves the existence of arrangement between the assessee and the AE for promotion of BMW brand.

8. *There is another interesting aspect of the matter. One of the reported international transactions is "Reimbursement of expenses (Amount received)" amounting to Rs. 67,21,54,60/-. On being pointed out to give the nature of such Reimbursement of expenses received, the learned AR took us through page 47 of the paper book, which is a part of the assessee's Transfer Pricing study report, reading as under:—*

"Clause IV- Reimbursement of expenses from BMW Group

Under Class IV transactions, reimbursement of expenses by BMW Group to BMW India is included. During the year, such reimbursements were primarily on account of BMW Service Inclusive Package / normal warranty claims raised by BMW India on BMW Group and certain marketing and promotion expenses incurred by BMW India on behalf of BMW Group. These expenses were subsequently reimbursed by BMW Group to BMW India…."

9. *It is evident from the above extract of the Transfer Pricing Study report that the assessee received reimbursement of certain marketing and promotion expenses incurred by BMW India on behalf of BMW Group. A further detail of such reimbursements has been given in the Tax Audit Report of the assessee, whose relevant part is as under:—*

Reimbursement of marketing / business promotion / other expenses

Ultimate Holding Company	*16,869,213*
Ultimate Holding Company	*(333, 945)*
Fellow Subsidiaries	*378, 197*
Fellow Subsidiaries	*(545, 780)*

10. *The learned AR stated that the assessee received reimbursement of marketing and promotion expenses to the tune of Rs. 3,33,945/- from its AE. This shows that the assessee's holding company reimbursed AMP expenses only to the tune of Rs. 3.33 lac as against enormous amount spent by the assessee for promotion of the brand owned by its AE pursuant to the agreement dated 1.1.2006. Factum of the existence of an Agreement obliging the assessee to undertake advertisement and brand promotion in accordance with the global guidelines and the AE reimbursing AMP expenses, albeit, to a very nominal extent, goes a long way to establish the existence of arrangement between the assessee and its AE for promoting BMW brand in India.*

11. *Reliance of the learned Sr. AR on the judgment in the case of Maruti Suzuki (Supra) to fortify his point of view of there being no international transaction of AMP expenses, is misconceived. In that case, the existence of international transaction was negatived by the Hon'ble Delhi High Court on the ground that the Revenue could not demonstrate any international transactions of ALP expenses except for showing higher amount of AMP expenses incurred by that assessee vis- a-vis other independent parties. Adverting to the facts of the instant case, we find that apart from such higher AMP expenses, the TPO has elaborately referred to the relevant clauses of the Agreement between the assessee and its AE along with the TP Study report, showing the responsibility of the assessee to perform "adequate advertisement and sales promotion" in accordance with the global guidelines of the BMW Group for the use of BMW brand and further the AE also acknowledging such service of the assessee but reimbursing a minuscule part of expenses incurred by the assessee on*

advertisement marketing and promotion. It is further relevant to note that the judgment in the case of Maruti Suzuki (Supra) is based on a manufacturing company performing advertisement and promotion. In contrast, the assessee is engaged not only in the sale of manufactured goods but also the traded goods. Profit and loss accounts of the assessee shows Sale of manufactured goods at Rs. 624.66/- crore and those of traded goods of Rs.611.87 crore. Thus, it is manifest that the volume of assessee's business from trading and manufacturing is almost equal and it is not a case of manufacture alone as was there in the case of Maruti Suzuki (Supra). It is, ergo, vivid that the ratio laid down in Maruti Suzuki (Supra) is not applicable due to differentiation in the facts of the extant case.

12. *It is further relevant to note that the Tribunal in assessee's own case for immediately preceding assessment year, namely, 2009-10 has decided such issue against the assessee vide its order dated 21.10.2014 in BMW India (P.) Ltd. v. Asstt. CIT [2015] 53 taxmann.com 299 (Delhi - Trib.). It is also worthwhile to mention the learned AR's contention that the Tribunal for the assessment year 2008-09 decided such issue in assessee's favour by its order dated 16.8.2013. We find from the Tribunal order for the later A.Y. 2009-10, which was also decided at a later point of time, that the Tribunal took a conscious decision of the existence of an international transaction of AMP expenses requiring determination of ALP, after duly considering its order passed for the A.Y. 2008-09. Though the tribunal decided this issue in favour of the assessee for the A.Y. 2008-09, it was candidly admitted by the ld. AR that, on an appeal preferred by the Revenue against the tribunal order for such earlier year, a substantial question of law has been admitted by the Hon'ble High Court. In view of the foregoing discussion, we reject the assessee's contention and hold that the authorities below were justified in treating AMP as an international transaction.*

Further, after holding that AMP expenditure is a separate international transaction, the Hon'ble Bench remitted the matter back to TPO for deciding the ALP of AMP expenses based on the comparison of the functions performed by the Indian entity as well as the functions performed by the comparable. Being pertinent, the relevant extract of the order is reproduced below-

18. Further, we note that no detail of the AMP functions performed by the assessee is available on record. Similarly, there is no reference in the order of the TPO to any AMP functions performed by comparables. In fact, no such analysis or comparison has been undertaken by the TPO. The assessee has also failed to draw our attention towards any material divulging the AMP functions performed by the assessee as well as comparables. As such, it is not possible to determine the ALP of AMP expenses at our end, either in a combined or a separate approach.

b) Similar decision was arrived at by the Hon'ble Delhi ITAT in the case of **Olympus Medical System Pvt. Ltd. vs. DCIT 140 taxmann.com 520**. This decision is coincidently authored by the Hon'ble Judicial member. In this case also, in the case of distributor company i.e. Olympus Medical System Pvt. Ltd., the Hon'ble Bench has held that incurring of AMP expenditure is a separate international transactions, and this has been held in the absence of separate

agreement. The Hon'ble Bench has held that there is no essential requirement of having a separate agreement and held that that even in its absence, clear understanding, arrangement and acting in concert between the assessee and the AE for carrying out the AMP expenses, constitutes separate international transaction.

Further, in that case also the assessee counsel has relied on all the decisions which has been relied by the assessee counsel in the present case. Further the Hon'ble Bench has rejected the assessee contention and clearly held that incurring of AMP expenses is a separate international transaction which is to be benchmarked separately and for determining the ALP, the case was restored to the TPO for deciding in accordance of Sony Ericsson case.

10) Assessee's other contentions-

a) As the assessee's profit margin are more than the profit margin of the comparable companies, separate ALP expenses is not to be benchmarked.

This argument is completely mistaken and fallacious. In fact in Transfer Pricing, rule is to benchmark transactions by transactions. Only if the transactions are closely linked, then the same can be aggregated, but aggregation is more of exception, than a rule. If the Hon'ble jurisdiction High Court in the case of Sony Ericsson has held that AMP is the separate international transaction specially in the case of distribution companies, then the same is binding on Hon'ble ITAT (based on similar facts) and if the Hon'ble Bench in A.Y 2009-10 has held that AMP expenses are separate international transaction, then on identical facts (conceded by assessee counsel also) this issue of treating AMP expenses as separate international transaction is no more res-integra and being separate international transactions, AMP expenses are needed to be separately benchmarked. Thus the assessee's arguments for deciding the issue of AMP expenses based on the higher profit margins earned is without any basis and against the provisions of transfer pricing and Income Tax Act and also in violation of the Hon'ble Delhi high Court decision in the case of Sony Ericsson.

b) The companies selected by assessee as comparable are to be taken for benchmarking

The benchmarking done by TPO was only for the limited purpose for determining the ALP with regard to Bright Line Test. As the assessee company is dealing / engaging in substantial marketing functions with are not done by pure distributer accordingly it was held that amount incurred over and above the distribution cost was undertaking only for promotion of Sony Brand in India, for promoting the interest of AE because ultimately the brand is owned by Sony AE. The other companies taken as comparable for the limited purpose of finding average expenditure incurred on advertising / marketing by pure distribution companies, thus, as the functional profile of the comparable companies has not been analysed accordingly by no stretch of imagination, those companies can be taken as comparables. In Transfer Pricing the functional profile is the key criteria for comparison and unless the same is analysed, the two companies can't be taken as

comparables. The rule is to compare Apples with Apples and not with Oranges. As the Sony India Limited is engaged in distribution activities only and doing enormous expenses on marketing, its can't be compared with other companies unless it is found out that they are doing identical functions. The OECD guidelines considers functional parameters as the most important touchstone for comparability and as the functional comparability of so called comparables (which were used for limited purpose of comparison before TPO), the same can't be taken for comparison without comparing the functional profile of the assessee's company whose marketing functions / expenditure are way beyond the similar functions / expenditure incurred by distribution companies.

The above proposition has been laid down by Hon'ble ITAT in above noted cases of BMW India Private Limited and Olympus India (cited supra).

Thus based on the proposition of law laid down by Hon'ble Delhi High Court in the case of Sony Ericsson, it is conclusively proved that AMP expenses constitute a separate international transactions which is required to be separately benchmarked, as laid down by Hon'ble High Court. Further without analysing AMP functions performed by assessee and comparable companies, it is not possible to determine the ALP of AMP expenses at the level of Hon'ble tribunal, which has already decided that issue while deciding the case of assessee only for A.Y 2009-10 in ITA number 837/Del/2014. Further as the facts are identical, the decision of Hon'ble ITAT for A.Y 2009-10 is the binding precedent. For that, reliance is placed on the decision of Hon'ble Supreme Court is the case of Gammon India Ltd,. Vs. Commissioner of Customs Mumbai in Civil appeal no. 5166 of 2003 and it is prayed that the same should be followed.

24. Before parting, we wish to place on record our deep concern on the conduct of the two Benches of the Tribunal deciding appeals in the cases of IVRCL Infrastructures & Projects Ltd. (supra) & Techni Bharathi Ltd. (supra). After noticing the decision of a co-ordinate Bench in the present case, they still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty with regard to the declaration of law involved on an identical issue in respect of the same Exemption Notification. It needs to be emphasised that if a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of the institutional integrity itself. What is important is the Tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself. In this behalf, the following observations by a three Judge Bench of this Court in SubInspector Rooplal & Anr. Vs. Lt. Governor & Ors. are quite apposite :

"At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an

earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement."

We respectfully concur with these observations and are confident that all the Courts and various Tribunals in the country shall follow these salutary observations in letter and spirit

Thus it is humbly prayed that in line with the above noted decision of the Hon'ble Supreme Court, the decision of the Hon'ble coordinate bench in the case of assessee only on identical facts for A.Y 2009-10 is binding on the Hon'ble bench.

Lastly it is submitted that all the above contentions have already been made in the physical hearings and submitted in writing for the assistance on Hon'ble Bench only."

18. In rejoinder, ld. AR for the assessee submitted as under :-

"Detailed chart already placed on record has all details to support Assessee's request for exclusion of companies from comparable set. Present synopsis only supplements the same in addition to updating the case law development during pendency of appeal before Hon'ble Tribunal.

Ld. DR's submissions at hearing on 19.06.2024 fallacious, self-contradictory and not based on audited financials:

Ld. DR submitted that comparables selected by Assessee are being requested for exclusion at this stage - this is factually incorrect as exclusion of 4companieswasrequestedbefore TPO as noted in TPO's order.

Secondly, Ld. DR emphasised that exclusion of these comparables based on decision of coordinate bench of the Tribunal relating to same assessment year is incorrect as according to Ld. DR comparables cannot be excluded or included by reference to decided cases. As submitted earlier comparable set used by TPO in ***Sony Mobile Communications*** case (relied upon case-ITA 6006/Del/2014 at page 248 of convenience compendium) &present case are identical ; ***Sony Mobile Communications*** case holds the field as department has not appealed against the same; More importantly reasons given in such decision for exclusion are generic i.e., comparable is engaged in diversified business/ has product sale income and segment information is not available.

Thirdly and most ironically Ld. DR relied on some other decisions to support his contentions and did not even attempt to make out his case by reference to audited financials available on record-this approach is directly contrary to his own contention that decision in another case cannot be the basis.

Fourthly Ld. DR totally failed to consider subsequent decisions of jurisdiction High Court in case of ***Open Solutions software Services*** (decided in May 2020)-same isplacedatpage173 of case law paper book filed for software development segment-at page 184 Persistent and

Thirdware are excluded for same assessment year, whereas decision of ***Steria India ltd.*** relied on by Ld. DR is a decision of April 9, 2018. ALSO reference to decision in ***Mentor Graphics India Pvt. ltd.,*** ITA 126 of 2022 dated26.04.2022whereinfor AY 2010-11 the Hon'ble High Court has confirmed Hon'ble Tribunal's decision excluding E-infochips, Infinite and Persistent as comparables (copy is annexed and marked as **"Annexure A").**

Most importantly, it is necessary to appreciate that reference to comparable data has to be viewed in context. Same standard as may be applicable to assessee's own facts may not be valid when using comparable data available in public domain. Assessee has a responsibility for details relating to its own business NOT for comparable data, for the later one depends on availability in public domain. If there is lack of clarity, in information available incomparable company's financials (OR) due to different courts taking contrary views on same comparable, company deserves to be excluded from comparable set.

Comparative facts on record:

Final comparable set selected by Transfer pricing officer (TPO) can be found at internal page 12 para 21 of TP order in appeal set (AS).Same final set selected by TPO in ***Sony Mobile Communications*** case (relied upon case -please refer para 14 on page 269 of convenience compendium)

TPO noted Assessee’s request for exclusion of 4 companies from set of comparable companies at page 48 para 28.11 of TPO's order placed in AS. Ld. DR's repeated contention that comparables were selected by Assessee has no relevance as these were contested at very first opportunity with detailed reasons – please see pages350 to352 of Paperbook2 A.

Reference to paras 4 to 9 of SCN issued by TPO in relation to software development service (SDS) segments (page 339-340 of the PB2A) would show that two SDS segments separately benchmarked by Assessee were combined into one by Ld. TPO and treated as 'software development services'.

Reasons cited by Assessee in support of contention to exclude companies from comparable set can be found at page350 - 352 of the PB 2A. It will be noticed that companies were objected to be included as comparable companies for the reasons mentioned therein *viz.* E - lnfochips Bangalore Limited atpage350of the PB 2A (please also refer to page 401of the PB); Infinite Data Systems Pvt. Ltd.at page 351 of the PB 2A (please also refer to page 401of the PB); Thirdware Solutions Limited at page 352 of the PB (please also refer to page 403 of the PB). Further, Infosys Technologies Limited was objected to at page 562-573 of the PB 2B (the document starts at page 560 of PB 2B).

Inclusion of Persistent as comparable company is being objected to before this Hon'ble Tribunal, this fact is clear from the comparablewise detailed chart already submitted.

Our Submissions

a. **Thirdware Solutions Limited**

Financials of Thirdware Solutions Limited are placed at page 405 - 464 of the Annual Report PB. P&L is at page 423. Schedule 12 for sales is at page 426.Segmental details can be found at page 458. –It will be noticed that only geographical segment is provided. Moreover page 460 would show that the company is developing its own product by the name "PAPA". Therefore, non –availability of segment details makes this company non-comparable. Further attention is invited to the decision of the jurisdictional High Court in ***Principal Commissioner on Income-tax v. Open Solutions Software Services {P.)ltd.*** [2020] 116 taxmann.com 708 (Delhi) para 32and 33atpage 184and 185 of the Case Law PB for Software Development Segment where exclusion of Thirdware Solutions Limited as a comparable was upheld.

b. **E-lnfochips Bangalore Limited**

Detailed objections are at Pg.573-576 of Paperbook 2B.

Ld. DR relied on decision in ***EPAM Systems India {P.)Ltd. v. Deputy Commissioner of Income-tax,***[2022] 142 taxmann.com 168 (Hyd. Trib.) more particularly on para 10 of the said order where Hon'ble Tribunal notes that after Schedule 1- 6 only Schedule11 is furnished. In absence of evidence showing consultancy income, Hon'ble Tribunal rejected the request to exclude. Hon'ble Tribunal specifically notes absence of schedule 7 in case of ***EPAM*** (supra). Kindly refer to pages 29, 36, 41, 43, 44and 45 of the Annual Report PB. Schedule 7of E - lnfochips is available at page 41. Consultancy

services area different segment however no separate segment details are available on page 45 at para 16. The jurisdictional High Court in ***PC/T vs. Mentor Graphics {India) Pvt.ltd.,*** ITANo.126/2022has upheld exclusion of E-lnfochips Bangalore Limited as a comparable.(Please refer paras 4 and 5 of the said decision).

c. **Infinite Data Systems Pvt. Ltd.**

Ld. DR relied upon the decision of ***Head Strong Services India (P.)Ltd. vs. DCIT,*** [2016] 68taxmann.com 363(Delhi-Trib.).Para 13.2 of the said decision was relied upon by Ld.DR. Reference to page 107 and 113 of the Annual Report PAPER BOOK would show that the company is engaged into technical consulting, design and development of software, system integration and infrastructure management service. However, page 117 would show that no segmental details are available. We rely on the decision of the jurisdictional High Court in ***PCIT vs. Mentor Graphics (India) Pvt. ltd.,*** ITA No. 126/2022 wherein exclusion of Infinite Data Systems Pvt. Ltd. was upheld.

d. **Infosys Technologies Limited**

Against exclusion of Infosys Technologies Limited, Ld. DR relied upon the decision in ***Chrys Capital Investment Advisors {India) Pvt. Ltd.*** (376ITR 183),more particularly on the principle that no company which is functionally similar can be excluded on the basis of turnover (para 33 of the said decision). However, Ld. DR totally ignored to note that the exclusion of this company was sought for not just on the basis that it has a higher turnover as would be evident from detailed reasons submitted at pages 562-575 of the PB2B. Further attention is invited to audited accounts placed at page 120 of the Annual Report PB. Kindly refer to page 149 of the Annual Report PB where sale of software products is shown as INR 925 crores. The different activities from which Revenue was earned during the year can be seen from para24 at page 176 of the Annual Report PB. Item 11 at page 174 would show that subcontracting work was got done of INR 372 crores (this by itself shows a different business model) which by itself warrants exclusion as per ***Rampgreen Solutions Pvt. ltd. vs. CIT*** (2015) 377 ITR 533 - Para 38.Segmental details are not available in the financials as can be seen from page 183 of the Annual Report PB. All these factors have been taken into account in ***Sony Mobile Communications International AB*** in relation to assessment year AY 2010-11 as also in the case of ***Kaplan India Pvt. Ltd vs ITO.,*** ITA No. 1481/Del/2015 placed at pages 72-99 of the Case Law PB for Software Development Segment at page 92.

e. **Persistent Systems Ltd.**

Reasons for excluding this company (this was not requested for exclusion before DRP as is indicated in detailed chart) can be seen if one refers to financials placed at page 216 to 404 of Annual Report PB. P &L of company can be found at page 316 of the Annual Report PB which shows sale of software services and products; Schedule 11 at page 323 shows sale of

products and services; at page 325 para 2(B)(b) the business segments are mentioned; page 326 item 'I' showing income from software services also indicated revenue from licensing of products. There are no segmental details as is evident from page 329. These very aspects are discussed at para 30onpage 278of the Convenience Compendium in the case of ***Sony Mobile Communications International AB*** in relation to assessment year AY 2010-11. We request kind attention to details mentioned in comparables chart filed on record wherein all the above aspects are set out. Attention is also invited to para 32 and 33 at page 184 and 185of the Case Law PAPER BOOK for Software Development Segment where exclusion of Persistent Systems Ltd., was upheld.

As pointed out above, objections to the comparables were raised before the Ld. TPO except (Persistent Systems Ltd). Objections to inclusion of Persistent Systems Ltd. are raised before this Hon'ble Tribunal as permitted in law. kindly refer decision of special bench in ***DCIT vs. Quark systems Pvt limited*** **38SOT 207 (CHD)** and Hon'ble Punjab &Haryana High court in ***CIT vs .Quark Systems India Pvt. ltd.,*** [2011] 11taxmann.com 427.

Thus these 5 comparables requested for exclusion may kindly be excluded by following Coordinate Bench decision for same Assessment year in ***Sony Mobile Communications International AB***(supra)or by reference to the decisions of the jurisdictional High Court in ***Open Solutions Software Services(P.) ltd. (supra)*** and ***Mentor Graphics (India) Pvt.ltd*** (supra) or by reference to audited financials, details of which are mentioned hereinabove.

Adjustment pertaining to Advertisement, Marketing and Promotion Expenses

Detailed synopsis (3) were already filed before Hon'ble Tribunal on earlier occasions. For ease of reference, assessee is giving herein below details of the said submissions:

1. Brief synopsis filed on 6th January 2020(Kindly refer to pages 4-10oftheConvenience Compendium)

2. Brief synopsis filed on 8th August 2020 (Kindly refer to pages 485-492 of the Convenience Compendium)

3. Brief synopsis filed on 29.09.2020(The said synopsis was separately filed during course of hearing and is part of Hon'ble Tribunal's record)

Further as submitted during the hearing, enclosed are copies of following orders for kind reference:

1. Reference is drawn to para 10 &11 of order dated 28.01.2016 of jurisdictional High Court in the case of ***Sony Ericsson Mobile Communications India Pvt. Ltd. vs. DCIT,*** ITA 638/2015 - (annexed and marked herewith as **Annexure 'B'),** whereby even after decision in374ITR 118issue of whether AMP is international transaction or not is year and fact specific.

2. Reference is drawn to para 15 to 20 of order dated 13.12.2023 of jurisdictional High Court dismissing departments appeal against ITAT order dated 21.12.2018 for AY 2007- 08 in the case of assessee.- (annexed and marked herewith as **Annexure 'C').**

3. As explained during oral hearing - it was never the case of assessee that reimbursement transaction OR AMP function need not be evaluated for arm's length. It is our submission that AMP function and related cost is already evaluated for Transfer pricing as part of distribution transaction (kindly see page 264 of paper book 2A and detailed explanation in synopsis mentioned above) which is accepted to be at arm's length by TPO and is therefore, neither open to second evaluation by misconception nor is subject matter of present appeal before the Hon'ble Tribunal. SCN at page 462 of paper book 2A, TPO order at para 33 on internal page 54 would show the subject matter of appeals is confined to benchmarking of INR 50,44,649 being receipt of advertisement cost from AE. This transaction of receipt of reimbursement of INR 50,44,649 is declared as international transaction by assessee itself in its TP documents. If not satisfied with cost-to-cost reimbursement this amount of INR 50,44,649 can be evaluated for appropriate mark-up but in the garb of doing so transaction of distribution and AMP function cost cannot be counted and re-counted multiple times. Categorical finding on page 103 of TPO order that - no adverse inference is drawn in respect of other transactions can only mean distribution transaction as ALP of software development and receipt of reimbursement are disputed by TPO.

4. It is not in dispute between parties that margin earned on distribution after considering AMP costs is better than comparables who themselves have admittedly undertaken marketing function (refer pages 485 to 487, 326, 526 of paper book 2B and para 40 on page 81 of TP order would show). TPO and Tribunal in AY2009-10 - refer para 11, 199 last line continued on next page) view to the contrary is directly in conflict with para 193 of jurisdictional High Court decision in 374 ITR 118 as also coordinate bench decision in assessee's own case for AY 2007-08 (copy in convenience compendium as item 8) .

5. Although, in the present case, reimbursement of expenses received of INR 50.44 lacs is already declared as international transaction by Assessee and is the only transaction chosen by TPO for evaluation as evident from SCN at page 462 to TP order, issue of whether international transaction is

existent or not does not arise to this extent. However, Ld. DR repeatedly referred to paras 51 to 53 of decision of Hon'ble High Court in ***Sony Ericsson Mobile Communications India Pvt. ltd.,*** 374 ITR 118, it may be clarified that the Hon'ble High Court kindly clarified that such finding are confined to particular case and cannot be generalised -kindly refer to paras 45 &46onpage 783/ 784 of convenience compendium being decision of Hon'ble High Court in ***Maruti Suzuki.*** Bright line test method applied in present case is invalidated by Hon'ble High Court in decision ***Sony Ericsson*** (supra) (para 113 to para 122 at pages 425 to 431of convenience compendium) as noted in para 47 of Maruti case at page 784.

6. It is settled principle that Court does not make law it only declares – kindly refer paras 35 &36 of ***Assistant Commissioner of Income Tax vs. Saurashtra Kutch Stock Exchange limited*** [2008] 14SCC171.There is no justification for any remand in the present case as all facts were always before the Ld. TPO and Ld. DRP. In this context kind attention is also invited to decision of Hon'ble Jurisdictional High Court in ***Bacardi India Pvt. ltd.*** -para 6 at para 747 of convenience compendium. Also decision of coordinate bench in ***Samsung India Electronics*** (refer paras 43 & 44 on pages 553 and 554 of convenience compendium) while dealing with similar facts directly supports present appellant's contentions.

Corporate Tax issues

7. As already submitted only 3 corporate tax issues survive-Ground no's 22 to 24 relating to depreciation - issue covered by Hon'ble Delhi High Court decision in assessee's own case copy of which is placed at pages 225 to 228 of convenience compendium; Ground no's 25 to 30 relating to disallowance for purposes of section 10AA benefit quantification -as appropriate disallowance of expenditure was already made by assessee attention was invited to identical mistake by lower authorities in ASSESSMENT YEAR 2011-12 which was rectified, similar relief was prayed for-kindly refer items 12, 13 and 14 of the convenience compendium pages 361 to 374 in relation to AY 2011-12. Similar relief if allowed would be in interest of justice and fairplay AND; lastly issue relating to dividend tax rate raised by additional grounds of appeal filed on 15th November 2019. A separate synopsis is filed during the hearing on DDT rate of tax issue post decision of the Special bench. Appellant requests consideration of all the above material for deciding the issues in appeal in addition to 3 synopsis already filed as indicated hereinabove."

19. At the time of hearing, ld. AR for the assessee heavily relied on the assessee's own group concern Sony Mobile BPO case and submitted that the issue under consideration is squarely covered and the Bench directed to submit

a note on similarity and functions as well as transaction model with the group concern i.e. Sony Mobile BPO. In this regard, ld. AR submitted as under :-

1. Sony India Private Limited ('Sony India') benchmarked captive software development services ('SDS') provided by itself. Kindly refer pages 47 and 50 - paras 4.010 of TP study placed in paper book 2A. Ld. TPO issued show cause notice ('SCN') which can be found a page 338 paper book 2A. Reference to paras 4 to 9 would show that Ld. TPO benchmarked the 2 separate segments together. Para 10 further confirms that transactions are characterised as software Development services (50S). Reference to para 17 on page 344 of paper book 2A will show that updated margins were sought by Ld. TPO. Details of comparables are discussed in subsequent paragraphs after para 17 of such SCN.

2. Same comparables selected by Ld. TPO to benchmark 50S in Sony India ere also there in case of Sony Mobile Communications International AB (India Branch Office) ('Sony Mobile BO') which is being relied upon by Assessee herein. Sony Mobile's case is also for same Assessment Year 2010- 11 and copy of the Hon'ble Tribunal's order is placed at page 248 of convenience compendium.

3. Detailed comparable chart having reference to other decided cases also may kindly be referred.

	Sony India	Sony Mobile BO
Same comparables selected by Ld. TPO to benchmark software services. Comparables requested to be excluded in present appeal	Final set of Comparables proposed by ld. TPO are mentioned at internal page 12 para 21. i. Infosys Ltd. ii. E-Infochips Bangalore Ltd. iii. Thirdware Solutions iv. Infinite Data Systems Private Limited v. Persistent Systems Ltd. (Page 53 and 54 of Appeal Set)	Final set of Comparables proposed by Ld. TPO are mentioned at para 16 on page 270 of compendium. i. Infosys Ltd. (para 41 to 45 on page 284 of compendium) ii.E - Infochips Bangalore Ltd (paras 22 to 25 at page 274 of compendium) iii. Thirdware solutions (paras 33 to 34 at page 281 of compendium) iv. Infinite Data Systems Private Limited (para 26 to 29 on page 277 of compendium)

		v. Persistent Systems Ltd. (paras 30 to 32 at page 278 of compendium)

A. Similarity in functions performed by Sony India and Sony Mobile BO

Function in relation to Software Development	Sony India	Sony Mobile BO
Design/ Conceptualisation	Yes (Page 48 and 51 of Paper book 2A)	Yes (para 5 of ITAT order on running, page 253, 254 and para 21 on page 272 of compendium)
Coding and Testing	Yes (Page 48 and 51 of Paper book 2A)	Yes (para 5 of ITAT order on running, page 253, 254 and para 21 on page 272 of compendium)
Development	Yes (Page 48 and 51 of Paper book 2A)	Yes (para 5 of ITAT order on running, page 253, 254 and para 21 on page 272 of compendium)
Upgradation/ Enhancement	Yes (Page 48 and 51 of Paper book 2A)	Yes (para 5 of ITAT order on running, page 253, 254 and para 21 on page 272 of compendium)
Maintenance	Yes (Page 48 and 51 of Paper book 2A)	Yes (para 5 of ITAT order on running, page 253, 254 and para 21 on page 272 of compendium)

B. Similarity in transaction model

	Sony India	Sony Mobile BO
Offshore Centre	Yes - SISC and SARD (Para 4.010.1 and 4.011.1 on page 47 of Paper book	Yes - Branch office of Sony Mobile Communications

	2A)	International AB in SEZ in India (Para 5 on page 253 of compendium)
Customers	Associated Enterprises ('AE')	ASSESSEE
Intangibles	Not owned by Sony India (Para 4.016, Para 5.02.2, Para 5.03.2 on pages 63, 76 and 83 of Paper book 2A respectively)	Not owned by Sony Mobile BO (Page 255 of compendium)
Entity Characterisation	Software Development Service Provider (Para 10.3 on page 16 of Appeal Set)	Software Development Service Provider (Para 5.1 of ITAT order, compendium page 255)

20. Considered the rival submissions and material placed on record. We observed from the record that the assessee is wholly owned subsidiary of Sony Corporation, Japan and it is primarily engaged in import and distribution of Sony products in Indian market and also rendered Software Development services to its AEs through Software Architecture Design and real time embedded Software. We observe from the submissions made before us that the assessee has already declared the list of International Transactions and also submitted Transfer Pricing report and analysis before AO/TPO. The authorities have already observed that the assessee is primarily deals with Import and distribution of various Sony Consumer Products in India and also rendered Software Services to its AEs. We shall first deal with the issue of AMP transactions and it is relevant to note that the issue under consideration has checkered history and in AY 2007-08, the issue of AMP was considered as part

of distribution business of the assessee and also the assessee has incurred AMP expenditures, the TPO has considered and bench marked the distribution activities and found that the margin declared by the assessee is lesser than the margin determined in the comparative studies by adopting TNM method, however, he further proceeded to bench mark the AMP expenses separately by adopting bright line test dicta. The Hon'ble High Court of Delhi in the case of assessee's own case in ITA 7/2023 vide order dated 13.12.2023, held as under:

> "15. Having heard the learned counsel for the parties, and examined the record, the only issue, as noted at the outset, which arises for consideration, is whether the respondent/assessee was adequately compensated for expenses incurred for AMP activities carried out in India.
>
> 16. Before one answers the issue, one way or the other, one must bear in mind the following undisputed facts which obtain in the instant case:
>
> (i) First, the respondent/assessee had shut down its manufacturing activity in India with effect from 01.07.2004.
>
> (ii) Second, in the period in issue, i.e., FY 2006-07 (AY 2007-08), there was no advertising agreement obtaining between the respondent/assessee and its AE. The last agreement was entered into on 01.04.2005, which apparently, had come to an end.
>
> (iii) Third, the TPO had used comparables furnished by the respondent/assessee for employing the BLT tool, in ascertaining the ALP qua AMP activities.
>
> (iv) Fourth, concededly, the respondent's/assessee's net operating margin was 3.29%, whereas, the arithmetic mean of the net operating margin of comparables chosen by the TPO was 2.09%.
>
> (v) Fifth, the TPO had accepted other international transactions under the TNM method employed by the respondent/assessee, except for AMP activities.
>
> 17. Given the aforesaid facts, what emerges is that, in the period in issue, the respondent/assessee was only in the business of import and distribution of Sony products. The amount spent on AMP activities by the respondent/assessee in the relevant FY was Rs. 119,54,43,600/-.

17.1 The compensation for this expense was, according to the Tribunal, received by the respondent/assessee in terms of higher profitability for the product sold.

17.2 Furthermore, even according to the TPO, the AMP expenditure incurred by the respondent/assessee resulted in increased sales in India for products, albeit developed by the AE but sold by the respondent/assessee.

18. The fact that the comparables chosen by the TPO had a net margin lower than that registered by the respondent/assessee would persuade us to hold that no upward adjustment concerning AMP expenses ought to have been made.

19. Lastly, the application of the BLT tool, by the TPO, in determining ALP, injected the order issued by him, which was incidentally approved by the DRP, with a legal error. [See Sony Ericsson Mobile Communications India case].

Conclusion:

20. Thus, for the foregoing reasons, we are not inclined to interfere with the impugned order passed by the Tribunal, as no substantial question of law arises for our consideration."

21. Considering the above decision on record, we are of the view that exact similar issue is involved in the present case, wherein, the TPO has bench marked the distribution activities by adopting TNM method and found that it is within the ALP, hence accepted the same as proper, however proceeded to bench mark the declared reimbursement of marketing expenses from its AE and drifted to bench mark the AMP expenses by adopting BLT and ended up disallowing the whole AMP expenses. Since the facts in this AY are exactly similar to AY 2007-08, we are inclined to follow the above decision wherein it was clearly held that in the case of distribution business, when there is no ALP adjustment made by the TPO/AO, separate AMP adjustment is uncalled for.

22. However, in the subsequent AYs in assessee's own case, coordinate bench has considered the similar issue and remitted the issue back to file of AO/TPO to verify the reimbursement of Marketing expenses after verification of AMP expenses afresh. When the above decision passed by the coordinate bench, the issue under consideration was not settled. In our view, now the decision of Hon'ble High Court is before us, therefore, we need to follow the same. Ld DR has made submissions that recent decision of coordinate bench has to be followed and remit this issue back to file of AO/TPO to bench the mark the AMP separately. We are not inclined to agree with the submissions made by Ld DR and inclined to follow the decision of higher wisdom. Further observed that the issue raised in the subsequent AYs are subjudice before Hon'ble High Court, we refrain from commenting on the issue raised by the assessee before Hon'ble high court. In our view, coordinate bench has not commented anything on merit on the issue of AMP vis-a-vis BLT and remitted the issue back to AO/TPO. Since the facts in the present appeal and facts in the AY 2007-08 are exactly similar where the assessee has carried on the similar nature of business and there is no deviation observed from the submissions made by the parties, we are inclined allow the grounds raised by the assessee that separate AMP adjustment is uncalled for when the distribution business of the assessee are already bench marked separately.

23. Coming to the issue of bench marking of reimbursement of marketing expenses, we observe that the TPO has proceeded to make the bench marking based on the disclosure made by the assessee as a International transaction, he proceeded to make bench marking of the AMP expenses based on the BLT, however, the same is not the proper way. However, we observed that coordinate bench has not given any finding on this issue but remitted the issue back to the file of AO/TPO to verify the AMP expenses. We cannot refer this issue to special bench as suggested by the Ld DR since the issue is not adjudicated by the coordinate bench in subsequent AY 2009-10. After careful consideration, in our view, the issue has to be addressed such a way that the parties to come to terms to resolve the issue rather than keeping it alive infinitely. In our view, after decision of Hon'ble High Court, what remains is the bench marking of reimbursement of marketing expenses. The TPO proceeded to bench mark the AMP, at that point of time, BLT was considered as proper method, failed to address the real issue of bench marking of international transaction entered by the assessee relating to reimbursement of marketing expenses. In our view, we are dealing with the issue relating to AY 2010-11, considerable time has already elapsed. The TPO should have bench marked only the international transaction involving reimbursement of marketing expenses. Since he failed to do so, in our considered view, there may be certain adjustment or verification has to be done, it is unfair to remit this issue back to AO/TPO as considerable time has already

passed and also to the assessee at this stage, in our endeavor to resolve the issue under consideration and also cost involved to both the sides, the issue under consideration is only to bench mark the reimbursement cost, to our considered view, to meet the ends of justice, we would like to add 20% of the reimbursement of expenses towards ALP adjustments to resolve the long pending issue. Accordingly, we direct AO/TPO to add 20% of the reimbursement of expenses and complete the bench marking of the international transaction. Accordingly, the ground raised by the assessee is partly allowed.

24. Next coming to the issue of bench marking the ALP relating to software division of the assessee, we heard both sides and considered each of the submissions made by both parties, we observe that the issue under consideration is, the assessee has selected its own comparables to make the TP analysis, however, the TPO rejected the same by adopting certain common filters and selected 16 comparables to bench mark the ALP at 25.34%. Before us, the assessee filed a chart with the prayer to exclude comparables selected by the TPO, they are E-Infochips, Infinite Data systems, Infosys Ltd, Persistent systems and Thirdware Solutions. Further prayed to include Quintegra Solutions. However, at the time of hearing, Ld AR submitted that the assessee do not want to press the ground on inclusion of Quitegra Solutions. Accordingly, it is not adjudicated.

25. After considering the submissions of both sides, we observe that the coordinate bench has already considered the above issues in assessee's group concern Sony Mobile Communications International. When the bench asked for the similarities in the functions and activities of the both the group concerns, the assessee has filed comparative chart before us, the same is reproduced in this order elsewhere, we have convinced that both the concerns having similar activities and functions, we are inclined to follow the decision of coordinate bench in selecting the comparables. Accordingly, we direct the AO/TPO to follow the same and relevant decisions of the coordinate bench are reproduced below: (**in AY 2010-11, which is relevant for the current assessment year under consideration)**

"**E-Infochips Bangalore Ltd.**

24. Having considered the rival submissions, we find that the co-ordinate Bench of ITAT, in the identical facts and circumstances has considered this company as excludable from the final set of comparables in the case of Sunlife India Services Centre Pvt. Ltd. vs. DCIT (ITA No. 750/Del./2015- order dated 27.06.2016) on the basis of functional disparity observing as under :

> "10.3. After considering the rival contentions and perusing the annual reports placed on record, we are of the opinion that this company cannot be selected as comparable for TP analysis, because it is engaged in both software development as well as ITes. Assessee being characterized as a routine service provider, the above company cannot be considered as comparable on functional basis.
>
> 10.4. As this company is functionally different from assessee and in absence of segmental information we direct the AO/TPO to exclude this company from the final list of comparables."

25. Respectfully following the decision of coordinate Bench, we direct the AO/TPO to exclude this comparable from the list of comparables selected by the TPO."

"Infinite Data Systems Pvt. Ltd.

28. After hearing both the sides and perusing the materials available on record, we are of the opinion that this company has no sufficient segmental information and functionally dissimilar. We rely on the judgment of ITAT in 6006 & 6751/Del./2014 31 the case of Sun Life India Service (supra) wherein while dealing with this company on the comparability test, it has been observed as under :

> "10.8. After considering the rival contentions and perusing the annual reports placed on record, we are of the opinion that this company cannot be selected as comparable for TP analysis. A perusal of the annual report of this company for assessment year 2010-11, suggests that it is a full fledged IT consulting organization and provides services in the nature of technical consulting, design and development of software, maintenance, system irrigation, implementation, testing and infrastructure management service. Further this company as a sole customer, Jujitsu Services Ltd., and accordingly is exposed to significant single customer risk. The above company cannot be considered as comparable on functional basis.
>
> 10.9. As this company is functionally different from assessee and in absence of segmental information, we direct the AO/TPO to exclude this company from the final list of comparables."

29. Respectfully following the decision of coordinate Bench, we direct the AO/TPO to exclude this comparable from the list of comparables selected by the TPO."

"Infosys Technologies Ltd.

44. Having considered the rival submissions of both the parties, we find that in the case of assessee itself for A.Y. 2009-10, the coordinate bench of 6006 & 6751/Del./2014 39 ITAT, Delhi has excluded this company from the set of comparables vide order dated 29.04.2016 observing as under :

> "6.3. Turning to the functional comparability, we find that the assessee is simply a captive unit rendering services to its AE alone without acquiring any intellectual property rights in the work done by it in the development of software. The Hon'ble Delhi High Court in CIT vs. Agnity India Technologies (P) Ltd. (2013) 219 Taxmann 26 (Del) considered the giantness of Infosys Ltd., in terms of risk profile, nature of services, number of employees, ownership of branded products and brand related profits, etc. in comparison with the factors prevailing in the case of Agnity India Technologies Pvt. Ltd., being, a captive unit providing software development services without having any IP rights in the work done by it. After making comparison of various factors as enumerated above, the Hon'ble Delhi High Court held Infosys Ltd. to be incomparable with Agnity India Technologies Pvt. Ltd. The facts of the instant case are more or less similar inasmuch as the extant assessee is also a captive service provider and also not owning any branded products with no expenditure of

its own on R&D etc. When we consider the above factors in a holistic manner, there remains absolutely no doubt in our minds that Infosys Technologies Ltd. is non-comparable with the assessee company. Respectfully following the judgment of the Hon'ble jurisdictional High Court in Agnity India (supra), we hold that Infosys Technologies Ltd., cannot be treated as comparable with the assessee company. This company is, therefore, directed to be excluded from the list of comparables."

45. Respectfully following the decision of co-ordinate Bench, we find no good reason to interfere with the directions of ld. DRP with regard to exclusion of this company from the final set of comparables. Therefore, the appeal of the Revenue is liable to fail."

"Persistent Systems Limited

31. After hearing the submissions of both the sides and perusing the material available on record and we find that this comparable company has been considered by ITAT in the case of Cash Edge (supra) wherein it has not considered as a comparable company in the identical facts and circumstances of the case observing as under :

"16. We have considered the rival submission and perused the material on record. A co-ordinate Bench of the Delhi Tribunal in the case of Ciena India Pvt. Ltd. v. DCIT in ITA Nos. 2948, 3324/Del/2013, has held as under :

"9.2. We have heard the rival submissions and perused the relevant material on record. It can be seen from the information supplied by this company u/s 133(6) of the Act, a part of which has been reproduced in the TPO's order, that this company 'has developed a few of its own products in the area of identity management connectors.' Revenue from product licences stands at Rs.288.93 million as against the revenue from software development services at Rs.4829.57 millions. Though this company is more engaged in software development services, but, is also a software product company, which is evident from the information supplied by it to the TPO. Thus, the total profits of the company on entity level also, inter alia, include revenue from product licences. As there is no separate segmental information and it has been considered as comparable on entity level, it implies that the total revenue considered also consist of some part from product licences. In such circumstances, it is not possible to ascertain the impact of such revenue on the total revenue of this company. Further, there is no information available from the Annual report of this company or the data collected by the TPO u/s 133(6) of the Act to divulge the amount of revenue from software development services alone to the exclusion of revenue from product licences. As the assessee is not engaged in the sale of any software products, this company on entity level, cannot be considered as comparable. The Delhi Bench of the Tribunal in the case of Toluna India Pvt. Ltd. vs. ACIT (ITA

> No.5645/Del/2011, vide its order dated 26.8.2014 has 6006 & 6751/Del./2014 33 held Persistent Systems Ltd. to be incomparable with Toluna India Pvt. Ltd., also a company engaged in providing software development services to its related parties alone. Similar view has been taken by the Tribunal in Lear Automotive India Pvt. Ltd. vs. ACIT (ITA No.5612/Del/2011) vide its order dated 22.12.2014. The ld. DR could not point out any distinguishing feature in the factual matrix of the assessee in question and Toluna India Pvt. Ltd., and Lear Automotive India Pvt. Ltd. Since both these companies are also engaged in the business of providing software development services to its AEs, similar to the activity done by the assessee, respectfully following the precedents, we order for the exclusion of this company from the list of comparables."
>
> Similarly, in the case of assessee's group company, viz., Fiserv India Pvt. Ltd. for AY 2010-11, which company is also in the business of software development services, a co-ordinate Bench of the Delhi Tribunal in ITA No.6737/Del/2014 deleted Persistent from the list of comparables.
>
> 17. Further a perusal of page 484 (PB-2) Annual Report of Persistent reveals that it is not only engaged in the business of software development services but also manufacture and sale of software products and owns significant intangibles and that segmental data for services and products is not available and the ld DR, could not controvert this fact, so we concur with the order of co-ordinate bench of the Tribunal, and we direct exclusion of Persistent Systems Ltd. from the list of comparables."

32. The Hon'ble jurisdictional High Court has affirmed the above decision of Tribunal in ITA No. 279 of 2016 observing as under :

> "6. As far as the first company, i.e., Persistent Systems Ltd. is concerned, the material on record - as found by the ITAT - shows that this company was involved in software development, software products and marketing. Furthermore and perhaps more importantly published segmental data was not available. In these circumstances, having regard to the specificity of the Transfer Pricing Rules under Rule 10(b) to 10(e) of the Income Tax Rules, the data of the said firm, i.e., Persistent Systems Ltd. could not have been included."

Respectfully following this decision of Tribunal and the Hon'ble jurisdictional High Court who have considered the functional dissimilarity 6006 & 6751/Del./2014 34 of this comparable, we direct the AO/TPO to exclude this comparable from the final set of comparables."

"Thirdware Solutions

34. Having considered the submissions of both the parties, we find that the comparability test of this company has been well examined by ITAT Delhi Bench in the case of Sun Life India Service Centre Pvt. Ltd. (supra) observing as under :

> "10.12. After considering the rival contentions and pursuing the annual reports placed on record, we are of the opinion that this company cannot be selected as comparable for TP analysis. Here it is pertinent to mention that this company was considered by the ld.TPO as a comparable in the immediately preceding year in ITA No. 1489/del/2014 for assessment year 2009-10 as well. The Tribunal by aforenoted order has held it to be incomparable. Since no distinguishing features of the functional profile of this company and the assessee for the current year vis-a-vis the preceding year have been 6006 & 6751/Del./2014 35 brought out to our notice, following the preceding, we direct the TPO/AO for removal of this company from the list of comparables."

In view of the above decision, this company is directed to be excluded from the final set of comparables."

26. In the result, we direct the AO/TPO to exclude the 5 comparables as per the findings of coordinate bench as discussed in the above paragraph. Accordingly, the relevant grounds raised by the assessee are allowed.

27. With regard to ground nos.22-24 on Depreciation on Dharuhera Unit, at the time of hearing both the parties agreed that this issue is covered issue and brought to our notice page 214 of the paper book wherein the Hon'ble High court considered the relevant issue and decided the issue as under:

> "11. In Ansal Properties (supra), the facts indicated – in para 4 are that the assessee had sold the entire plant and machinery of its paper division and stopped and seized to carry on its business. Likewise, in Oswal (supra) too, the assessee had claimed depreciation of its various assets, including a claim in respect of closed unit at Bhopal. It is thus clear that in both the judgments, the Court had occasion to deal with certain fact situations – in Ansal Properties (supra), the facts were closely proximate to the circumstances of this case. After discussing the relevant provisions in Ansal Properties (supra) , the Court stated that Section 50 would apply where any block of assets ceases to exist and stated inter alia as follows:

> "18. Section 50(2) applies where any block of assets ceases to exist. The term ―block of assets‖ therein will mean the assets carrying same rate of depreciation fixed in the schedule. In case the block of assets, i.e., all assets exigible to same rate of 2017:DHC:443-DB ITA 13 /2012 & 14/2012 Page 12 depreciation in the schedule ceases to exist because of transfer/sale, sub-section (2) to Section 50 gets initiated and is accordingly applied. The requirement and pre-condition stipulated is that the block of asset should cease to exist. The block of asset should stand completely depleted and no asset should remain in the block.
>
> 19. In the present case, there is no finding of the Assessing Officer or the appellate authorities that the block of assets carrying the same rate of depreciation ceased to exist or that after adding the three elements mentioned in Section 50, there was surplus on the full value of consideration received or accruing as a result of transfer of plant and machinery or the building. It is not the finding of the Assessing Officer that the block of assets entitled to the same percentage of depreciation ceased to exist or there was a surplus in the block of assets carrying the same rate of depreciation. The Assessing Officer has proceeded on the basis that the division itself constitutes a separate and an independent block of assets. Appendix to the Rules as noticed above, is not a unit/division specific but is rate of depreciation specific, as all assets prescribed the same rate of depreciation are clubbed and are a part of the same block of assets. The view we have taken finds resonance and acceptance in two decisions of the Delhi High Court in Commissioner of Income Tax versus Eastman Industries Limited, 174 Taxman 344 and Commissioner of Income Tax versus Oswal Agro Mills Limited, (2012) 341 ITR 467 (Del.)."

12. The Court thereafter took into consideration the Direct Taxes Circular no. 469 issued on 23.09.1986. The same reads as follows:

> "6.3 As mentioned by the Economic Administration Reforms Commission (Report No. 12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate bookkeeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregated has to be the record-keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation lump sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets, namely, buildings, machinery, plant and furniture."

13. In Oswal (supra) and Ansal Properties (supra), it was noticed that the Parliament had deleted the provision for terminal depreciation in respect of each

asset that was previously allowed under Section 32(1)(c) and the taxation of balancing charge under Section 41(2) in the year when the sale was concluded. The Court noticed in Oswal (supra) as follows:

> "Instead of these two provisions, now whatever is the sale proceed of sale of any depreciable asset, it has to be reduced from the block of assets. This amendment was made because now the assessees are not required to maintain particulars of each asset separately and in the absence of such particular, it cannot be ascertained whether on sale of any asset, there was any profit liable to be taxed under section 41(2) or terminal loss allowable under section 32(1)(iii). This amendment also strengthen the claim that now only detail for "block of assets" has to be maintained and not separately for each asset.
>
> 33. Having regard to this legislative intent contained in the aforesaid amendment, it is difficult to accept the submission of the learned counsel for the Revenue that for allowing the depreciation, user of each and every asset is essential even when a particular asset forms part of "block of assets". Acceptance of this contention would mean that the assessee is to be directed to maintain the details of each asset separately and that would frustrate the very purpose for which the amendment was brought about. It is also essential to point out that the Revenue is not put to any loss by adopting such method and allowing depreciation on a particular asset, forming part of the "block of assets" even when that particular asset is not used in the relevant assessment year. Whenever such an asset is sold, it would result in short term capital gain, which would be exigible to tax and for this reason, we say that there is no loss to Revenue either.
>
> 34. The upshot of the aforesaid discussion is that though we are not entirely agreeing with the reasoning of the Tribunal contained in the impugned judgment, we are upholding the conclusion of the Tribunal based on the "block of assets" as discussed above. The consequence would be to dismiss these appeals. However, there will be no order as to costs."

14. Rejecting the contention similar to the one advanced with respect to interpretation of Section 32, the Division Bench in Ansal Properties (supra) observed as follows:

> "26. Learned counsel for the Revenue has relied upon Section 32 of the Act and has submitted that the effect of the said Section should be examined while computing short term capital gains and interpreting Section 50. It is not possible to accept the said contention. Capital gains is chargeable to tax under Chapter IV-E. The provisions of the said Chapter are independent and separate. The provisions of the said chapter relating to capital gains have to be examined and interpreted. Only if there is a contradiction or conflict, we have to harmoniously interpret the two provisions. Section 50 incorporates a deeming fiction and has to be given and interpreted accordingly. Section 32 forms part of Chapter IV-D and relates to computation of income from profession and business. It is not the case of the Revenue that the gain on transfer of the block of assets is taxable as business income. The two sections operate in their own field and there is no conflict. In these circumstances, we do not think we should

> refer and rely upon Section 32 and accordingly compute and decide whether short term capital gains is payable under Chapter IV-E."
>
> 15. In view of the above discussion, this Court is of the opinion that the reliance placed upon Allied Electronics (supra) cannot be of assistance to the Revenue. That did not take into account the changes brought about through the amendment and appears to have been on an appreciation of Maharashtra Minerals Corporation Ltd. v. CIT 1995 (216) ITR 575. That decision was in the context of law prevailing in 1972-73 – obviously before the amendments were made to the Act prior to the introduction of the concept of block assets.
>
> 15. For the foregoing reasons, both the questions of law are answered in favor of the assessee and against the Revenue."

Respectfully, following the above decision and we direct the AO to follow the same ratio and allow the claim of the assessee. Accordingly, the grounds raised by the assessee are allowed.

28. With regard to ground nos.25 to 30, during the hearing both the counsels agreed that this issue has to go back to the file of AO for verification. It is brought to our notice that in AY 2011-12, similar issue was considered by the ld. DRP and based on the direction of the ld. DRP, assessment order was passed by the Assessing Officer with the following findings :-

> "3. The details of expenses of the Sony India Pvt. Ltd. (which includes the expenses of SSIC Global Delivery Centre i.e SEZ unit of Sony India Pvt. Ltd.) and the expenses separately debited to the accounts of SSIC Global Delivery Centre (material for the purpose of determination of available deduction u/s 10AA) have been examined. It is seen that the assessee, on a gross basis, has already debited expenses of Rs.77.39 crores in the books of the SEZ unit against the respective expense heads considered by the Assessing Officer. As against this, apportion expenses based on the turnover of the SEZ unit and non-SEZ unit as computed by the Assessing Officer is Rs.22.14 crore. Since, the expenses already debited to the SF7 unit under the various heads taken together is more than the apportioned expenses, the disallowance out of the 10AA claim of the assessee, in view of the above mentioned directions of the Hon'bIe ORP, cannot be made. In view of the above, and in compliance with the directions of the Hon'ble DRP issued vide order dated 10/05/2016 under Rule 13 of the Income Tax (ORP) Rules, 2009. The income of the assessee is re-computed as below:

Income as per order dated 02/03/2016 u/ s 154/143(3)	Rs.342,58,24,445/-
Less: Relief as per discussion above.	Rs. 22,14,23,852/-
Revised total income:	Rs.320,44,00,593/-

Based on the above submissions and on acceptance of both the parties, we are inclined to remit this issue to the file of AO to verify the calculations submitted and allow the claim of the assessee after verification as per law. Therefore, the grounds raised by the assessee are allowed for statistical purpose.

29. Coming to the additional grounds raised by the assessee, the relevant submission of the assessee are given below:

> "1. Submission supporting claim of refund of Dividend Distribution Tax, ('DDT') paid in excess of the rate prescribed under the applicable Double Tax Avoidance Agreement (DTAA).
>
> 1.1. Hon'ble Mumbai ITAT (Special Bench) in Total Oil India Private Limited (ITA No.6997/Mum/2019) has denied the claim of refund of DDT paid u/s 115-o on certain grounds. These grounds along with our submissions are as under:
>
> a) Sovereign has the prerogative to tax dividend either in the hands of recipient or otherwise and there is nothing in the fundamental concepts of income-tax to pervert the imposition of immediate and apparent incidence of the tax on a person other than {he person whose income is to be assessed (Para No. 55 & 78).
>
> Our submission:
>
> - Memorandum to any new provision assist in reaching effective interpretation of the provision. In-the instant case, while the Act has fixed responsibility of disposition of dividend tax liability on the distributing company, however the fact remains that dividend income is an income of the shareholder which is to be taxed in the form of DDT. It is only the mechanism of collection which has been amended vide the provision of Section 115-0 to put in place a more convenient model of tax collection. This view is supported from the Memorandum to Finance Bill. 2020.
>
> - Further, even in case the argument is accepted that DOT u/s 115-O is a separate levy of tax on distributed profits of the company. then it may be

noted that it shall lead to double taxation of the same income i.e. once at the time of accrual of income and another at the time of its distribution. This double taxation can never be an intent of the legislation and therefore vide the Finance Act, 2020 the provisions of Sec. 115-0 was amended to shift the incidence of tax on dividend on the recipient shareholder.

b) The objective of Memorandum was not confined to shifting the charge for administrative convenience, but also to encourage shareholder's investments in domestic company (Para No. 56)

Our Submission:

- The argument that since there is no tax incidence on dividend income in the hands of shareholders and therefore it shall encourage investment in shares of demesne companies is not tenable. Even if it is accepted that DDT is a tax on the profits distributed by the company and it has nothing to do with the income of the shareholder, then also, DDT shall act as a burden on the reserves of the company which is directly proportional to the value of the investments. Therefore, collection of tax either from the hands of shareholders or from the company, should ideally not make any difference in investment related decisions.

- Further, Explanatory Memorandum to Finance Bill 2020 does not speak about any such objective of the legislation and rather it focuses on the following objective for introduction of DDT Provision:

  > "The present system of taxation of dividend in the hands of company/ mutual funds was reintroduced by the Finance Act. 2003 (with effect from the assessment year 200.J-Oj) since it was easier to collect tax at a single point and the new system was leading to increase in compliance burden. However, with the advent of technology and easy tracking system available, the justification for current system of taxation of dividend has outlived itself."

- Therefore, the primary & rightful intent behind introduction of Section 115-O was to achieve ease in tax collection mechanism & administrative convenience.

c) Sec. 115-O is a code by itself in so far as levy and collection of tax on distributed profits are concerned. Non-obstante clause of Sec. 115-O indicates that this section is independent and divorced from the concept of 'total income' (Para No. 58)

Our Submission:

- Hon'ble Supreme Court in Tata Tea [2017] 398 ITR 260 while upholding the constitutional validity of Sec. 115-O referred to the provisions of Sec. 2(24) of the Act (i.e.. definition of income) read with Entry 82 of List I of the Constitution of India (union list). Hon'ble SC held that under Entry 82 since Central Govt. has power to charge taxes on income other than

agricultural income and dividend forms part of income us 2(24) of the Act, therefore levy of tax on such income by Central Govt. is constitutionally valid.

- Accordingly, Sec. 4 of the Act which creates chargeability of income tax on every person, evenly applies to levy of DDT u/s 115-0 of the Act as well. Divorcing DDT from concept of 'total income' is contrary to the established ruling that the same represents income under section 2(24) of the Act. The provisions of Section 115-0 of the Act cannot be seen in an isolation. In case Section 115-0 of the Act was to stand on its own without reference to its genesis in Section 4, then the levy of tax under the former section would not be constitutionally valid.

- Further, it may be noted that creation of charge should be read with the statutory interpretation flowing from the explanatory memorandum stated above.

d) The law is well settled that a judicial precedent is only 'an authority for what if actually decides and not what may come to follow from some observations which .11m! place therein', The Hon'ble Supreme Court was not dealing with the nature of DDT as to whether it is Tax on the company or a tax on the shareholder. Thus, decision rendered in case of Toto Tea (supra) does not support the cause of assessee.

Our Submission:

- Hon’ble courts on various occasions have defined the term 'ratio decidendi' as 'opinion which are important / relevant for taking a decision.' Thus, where the principles or analogy are such that it forms the basis of passing an order, it should be interpreted in even manner for usage as precent in subsequent cases,

- Without the principle of ratio decidendi any reliance on precedents, so long as it is not squarely applicable to the matter, can be turned down. Precedents cannot necessarily be result oriented as the reason basis which the order is issued are equally important.

- Without prejudice it may be noted that, Hon'ble Supreme Court in Godrej & Boyce [2017] 81 taxmann.com 111 (SC) were dealing on the issue of applicability of section 14A on dividend income. However, Hon'ble Mumbai ITA T while disposing the appeal on claim of refund of DDT paid u/s 115-0 heavily relied on this ruling even though going by the principle of 'an authority for what it actually decides and not what may come 10 follow from some observations which find place therein', this decision ought to have been distinguished in lines similar to Tata Tea (supra).

e) Hon'ble Bombay High Court in case of Godrej & Boyce has held that DDT was not a tax on income of the shareholder but was instead a tax on

Company. Also, Hon'ble SC while did not conclude on whether it is a tax on Company or shareholder. it did not disturb the conclusion That 'DDT is nor a payment on behalf of the shareholder' (para No.71 to 74)

Our Submission:

- Hon'ble Bombay High Court or even Hon'ble Supreme Court for that matter in the case of Godrej & Boyce (supra) did not convey any contrary or contradictory principles with respect to the provisions of Section 115-0. Instead, the issue before the Hon'ble Courts pertained to applicability of provision of Section 14A on the dividend income of a shareholder. Therefore, since the Hon'ble courts never decided on the nature of levy u/s 115-O of the Act - It should not be considered to disregard the finding of the Hon 'ble Supreme Court in Tata Tea (supra) wherein the nature of levy of Section 115-0 was specifically addressed.

- Further, attention is also drawn towards the decision of Hon'ble Kolkata ITAT in Indian Oil Petronas (2021) 127 taxmann.com 389 wherein after evaluating the principles of both the decisions of Hon'ble Supreme Court in Tata Tea (supra) & Godrej & Boyce (Supra) it was held that the two rulings do not convey contrary a rod contradictory principles.

  i. SC in Tata Tea held that dividend distributed by a company is not impressed with the character of the income from which the same is distributed.

  ii. SC in Godrej & Boyce. dealing with the applicability, of Sec.14A, held that since dividend income did not form part of total income of shareholder u/s 10(33), the taxpayer shall not be absolved from disallowance u/s 14A.

  iii. However. SC, in Godrej & Boyce, did not hold that dividend income per se is not taxable. Basis above provisions, Hon 'ble ITA T allowed the claim of re fund of DDT paid u/s 115-O in excess of the rate of lax as prescribed in the lax treaty Therefore, the action of Hon'ble Mumbai ITAT in outrightly distinguishing the principle established in the case of Tata Tea (supra) & placing heavy reliance on Godrej & Boyce (supra) is not warranted.

f) Hon'ble Bombay High Court in case of Small Industries Development Bank of India -vs.- Central Board of Direct Taxes J 33 taxmann.com 158 has held (hat charge u/s 115-O is on the Company's profits and nor income in the hands of the shareholder. (Para No. 75)

Our Submission:

- In the aforesaid case, the Small Industries Development Bank of India (‘SIDBI') was specifically exempted from the provisions of Income Tax Act, 1961 by virtue of the provisions of Sec. 50 of the Small Industries

Development Bank of India Act, 1989. An assessee formed under a separate legislation and having specific exemption cannot be relied as a general guiding principle on all the assessee.

- Thus, the decision of Hon'ble Bombay High Court in SIDBI 133 taxmann.corn 158, a specific entity governed under a separate Act, should not be referred to test the taxability of all the assesses in general.

g) Section 115-o(3) and 115-o(1) clarifies that the taxes paid are final payment of tax and no credit shall be claimed by the Company or any other person (para No. 77)

Our Submission:

- As per the provisions of section 115-00), only incidence of DDT payable on dividend income is made on the dividend distributing company, however, in substance it is tax on the dividend income of the recipient shareholder.

- Further, Sec. 191 of the Act states that in case there is no provision for withholding of taxes in respect of any taxable income then such income tax shall be payable by the assessee directly. Therefore. had it been the intent of legislation that DDT is a tax on the company, there was no need for specific inclusion of Sec. 115-O(3) & Sec. 115-O(4) - which going by the interpretation of Hon'ble Special Bench shall stand redundant as the same effect is provided under Section 191 of the Act.

h) DDT is a tax not on the shareholder but on the income of the company and thus, (here is no double taxation and thus. DTAA does not apply (Pam No. 79 & 80)

Our Submission:

- Memorandum to Finance Bill 2020 has neither been discussed nor evaluated by the Hon'ble Mumbai Tribunal Special Bench while issuing the order in case of Total Oil (supra). The memorandum clearly provides for the objective of introduction of Section 115-O - "now with technology advent, tracking is easier and hence, charge of company which was created initially is irrelevant and is restored to (he shareholders"

- Explanatory Memorandum to Finance Bill 2020 states that shifting of incidence of taxability of dividend income to dividend distributing companies was for the sake of administrative convenience and therefore, it cannot be said to be a tax on the income of the company. Thus, Dividend Distribution Tax is essentially a tax on the dividend income of the shareholder, mere incidence of which is shifted to the distributing company for the sake of administrative convenience.

- Without Prejudice, in case it is assumed that DDT U/S 115-O is a tax on the profits of the company, then it shall lead to a double taxation in the hands of company itself i.e. first at the time of accrual of income and then again at the time of distribution of the same profit. Therefore, once the above argument is accepted and it is held that DDT is a tax on the dividend income of the shareholder, the above argument becomes infructuous.

i) If domestic company has to enter the domain of DTAA, the countries should specifically extend the treaty protection to DDT (para No. 81)

Our Submission:

- Express clause in a particular tax treaty (India-Hungary tax treaty) cannot be construed as leading to its automatic exclusion in the other tax treaties. Specific provision may not always be necessitated when the general provisions are wide enough to cover the same. In our case, relying on Article 10 of India- Netherlands tax treaty, it is amply clear that dividend income can be taxed in the other contracting state subject to a maximum rate of 10% and therefore specific extension of tax treaty to DDT is not warranted.

Thus, basis the above provisions and judicial precedents it is humbly prayed that DDT is a tax on dividend income of recipient shareholder and therefore benefit of Article 10 of India-Netherlands tax treaty should be allowed to the appellant.

Above aspects appear to have gone unnoticed by Hon'ble Special Bench of Hon'ble Tribunal while reaching conclusions. It is therefore, prayed that above aspects may kindly taken on record and appropriately considered for deciding additional grounds raised on 15.11.2019 in present case."

30. On the other hand, Ld DR objected to the above submissions and submitted that this issue is already covered in the case of Total Oil India Pvt Ltd.

31. Considered the rival submissions and material placed on record. We observe that this issue is already considered by the Special Bench in the case of Total Oil India Pvt Ltd, supra, wherein it is held as under:

"83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income Tax (Tax on

> Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly."

32. Respectfully, following the above decision, we are inclined to dismiss the additional grounds raised by the assessee.

33. Finally, the appeal filed by the assessee is partly allowed.

34. Coming to the appeal filed by the revenue, we observed from the record that the issue is relating to claim of depreciation on license fees paid by the assessee for various software licenses, which are grouped under the head Computers including computer softwares. The issue raised by the AO is whether the assessee is eligible to claim the depreciation as per the category of computers @ 60% or it should be treated as intangible assets and eligible to claim the depreciation @ 25%. The same issue was considered by the Ld DRP in its order at pages 31 to 33 and they have remitted the issue back to AO to verify and recompute the depreciation on computer software as per Item no. III(5) of part A of new appendix I of the Income Tax Rules, 1962.

35. After considering the submissions of both the parties, we are inclined to dismiss the grounds raised by the revenue as the same is covered issue in assessee's own case in the earlier assessment years 2006-07 to 2008-09.

36. Accordingly, appeal filed by the revenue is dismissed.

37. In the result, appeal filed by the assessee is partly allowed as indicated above and appeal filed by the revenue is dismissed.

Order pronounced in the open court on this 30th day of August, 2024.

Sd/-	sd/-
(YOGESH KUMAR U.S.)	**(S.RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 30.08.2024
TS

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals).
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI