IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

BEFORE SMT. BEENA PILLAI (JUDICIAL MEMBER)
&
SHRI GIRISH AGRAWAL, (ACCOUNTANT MEMBER)

I.T.A. No. 3432/Mum/2019
Assessment Year: 2008-09

Oracle Financial Services Software Limited Oracle Park, Off Western Express Highway Goregaon(East) Mumbai - 400063 **[PAN: AAACC1448B]**	Vs.	**Assistant Commissioner of Income Tax, Range 13(1)(1), Mumbai**
(Appellant)		**(Respondent)**

I.T.A. No. 3995/Mum/2019
Assessment Year: 2008-09

Assistant Commissioner of Income Tax, Range 13(1)(1), Mumbai	Vs.	**Oracle Financial Services Software Limited** Oracle Park, Off Western Express Highway Goregaon(East) Mumbai - 400063 **[PAN: AAACC1448B]**
(Appellant)		**(Respondent)**

Assessee by	Shri G.C. Srivastava/Shri Sukhsagar Syal, A/Rs
Revenue by	Shri Pankaj Kumar, CIT D/R

Date of Hearing	27.01.2026
Date of Pronouncement	19.02.2026

ORDER

Per Smt. Beena Pillai, JM:

The present cross-appeals arise out of the order dated 01/03/2019 passed by the Ld. CIT(A)-57 (hereinafter referred to as the "Ld. CIT(A")] for A.Y. 2008-09 on the following grounds of appeal:-

2. The assessee has raised the following grounds of appeal:-

*"**GROUNDS OF APPEAL***

The grounds of appeals (including sub-grounds) set below are distinct, separate and without prejudice to each other:

Ground No. 1 – Order bad in law

***1.1** The impugned order passed by learned CIT(A) is bad in law to the extent the CIT(A) has affirmed the addition made in the assessment order.*

Ground No. 2 – Disallowance under section 14A of the Act

***2.1** On the facts and circumstances of the case and in law, the CIT(A) erred in upholding disallowance of Rs. 165,615 under section 14A of the Act read with Rule 8D of the Income Tax Rules ("the Rules") by treating the said amount as attributable to earning of exempt interest income without appreciating the fact that no expenditure was actually incurred to earn interest income claimed exempt while computing total income.*

Ground No. 3 – Retention of revenues by overseas subsidiaries in Singapore and Netherlands

***3.1** The learned CIT(A) erred in rejecting the value of international transaction as recorded in the books of accounts and determining a new arm's length price in substitution of the arm's length price determined by the Appellant.*

***3.2** On facts of the case and in law, the CIT(A) erred and violated the principle of natural justice by not giving due cognizance to the detailed analysis of comparable companies submitted by the Appellant in its TP Study report.*

***3.3** The learned CIT(A) erred in considering Net Profit Margin (NPM) of 23.40% as against NPM of 22.31% earned by the Appellant as per the TP study report, resulting in upholding of TP adjustment to the extent of Rs. 255,428,000.*

***3.4** After accepting the Appellant as the tested party, the learned CIT(A) ought to have relied upon benchmarking carried out by the appellant in the Transfer Pricing Study. However, the CIT(A) erred in rejecting some of the companies, which were selected by the Appellant and considering some additional companies as comparable to the Appellant without providing any cogent reasons in the Order.*

3.5 *The CIT(A) considered five additional companies as comparable to the Appellant out of 11 companies which were considered as comparable in the CIT(A) order in the case of the Appellant for AY 2006-07 and AY 2007-08. The rest of the 6 companies considered as comparable by the CIT(A) in order in case of the Appellant for AY 2006-07 and AY 2007-08 were rejected for the reason of data insufficiency. The additional five companies considered as comparable by the CIT(A) are listed below:*

1. *Helios and Matheson Information Technologies Limited*
2. *ICSA Limited*
3. *KALS Information Systems Limited*
4. *Saksoft Limited*
5. *Megasoft Limited*

3.6 *The CIT(A) has erred in not providing methodology followed or benchmarking analysis performed for searching the additional five comparable companies. The CIT(A) has erred in considering five additional companies as comparable to the Appellant without clarifying how the Functions, Assets and Risks of these companies was comparable to the Functions, Assets and Risks of the Appellant.*

3.7 *The CIT(A) erred in rejecting certain companies from the final set of comparable companies as per TP Study Report prepared by the Appellant on an ad-hoc and unscientific basis.*

3.8 *The CIT(A) erred in using single year NPM for arriving at the appropriate Arm's Length Margin and thereby rejecting 2 functionally comparable companies out of 16 comparables used by the Appellant in its TP Study report stating that the sufficient data relating to companies was not available. The said 2 comparables are as listed below:*

1. *Akshay Software Technologies Limited*
2. *R Systems International Limited*

3.9 *The CIT(A) erred in rejecting 9 comparable companies concluding that the said comparables are consistent loss making or are earning returns not comparable to the appellant. The said 9 comparables are as listed below:*

1. *B2B Software Technologies Ltd*
2. *Birla Technologies Ltd*
3. *Compulink Systems Ltd*
4. *Exensys Software Solutions Limited*
5. *Kale Consultants Ltd*
6. *Maars Software International Ltd*
7. *PS I Data Systems Ltd*
8. *Sasken Communication Technologies Ltd*
9. *Tata Elxsi Ltd*

3.10 *The CIT(A) erred in cherry picking comparables to reach pre-conceived conclusions, with the sole object of rejecting comparables selected by the Appellant and arriving at skewed results.*

3.11 *The CIT(A) erred in arbitrarily selecting certain companies which are earning super normal profits and not functionally comparable to the appellant and adding those in the final set of comparables on an ad hoc basis.*

Ground No. 4 – The benefit of +/- 5% variation computed on Arm's length Price

4.1 *Without prejudice to the above, the learned CIT(A) failed to provide the benefit of variation / reduction of 5 percent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act while determining Arm's Length Price for the adjustment made to the international transaction of the Appellant.*

The appellant craves leave to add, to amend, alter, vary, omit, or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal."

2.1. The revenue has raised the following grounds of appeal:-

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to consider training income of Rs. 27,99,71,864/- for computing deduction u/s 10A of the I.T. Act without considering the fact that the training was not on account of export of software but the training was after the delivery of software and it was in the nature of additional service not eligible for Section 10A computation.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO not to exclude telecommunication expenses of Rs. 1,83,31,155/- from the export turnover, without considering the specific provision of the Act given in Clause (iv) of Explanation 2 to Section 10A that the Export Turnover is taken after reducing the amount of telecommunication expenses relating to the various 10A units. The assessee has incurred the above telecommunication expenses in foreign currency in connection with the development & export of its software and just because no separate invoice is raised on the customers towards these expenses, the assessee cannot include it in export turnover.

3.1 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing to restrict the TP adjustment on account of retention of excess revenue by the foreign AEs of the assessee of Rs. 25,54,58,000/- as against Rs. 62,25,55,098/- charged by the TPO without

appreciating the facts and circumstances of the case and analyzing the same on the basis of FAR analysis?

3.2 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not upholding the decision of the TPO in adopting AEs as tested party disregarding the finding of the TPO that the functions performed by the assessee are more complex as compared to the functions performed by the AEs?

3.3 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that the assessee performs complex functions being a provider of comprehensive information technology solutions to the global financial services industry through a comprehensive range of products and customized service offerings, whereas the AEs perform very simple function of marketing support services abroad for the products and services of the assessee and that comparability, if assessee performing complex functions is taken as tested party, would lead to skewed and suboptimal results compared to that for AEs performing simple functions and hence, in such circumstances, it is always advisable to choose the AEs as tested party which would lead to easier and near-optimal comparability results?

3.4 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that the Assessee is transacting with its AEs who are merely marketing entities and all the complex functions are being carried out by the Assessee?

3.5 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that the assessee incurs substantial expenditure for the purpose of recruitment of employees and such recruited employees have been deputed to the rolls of AEs without being appropriately compensated for such cost of recruitment incurred by the Assessee?

3.6 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that during the year the assessee has reimbursed huge amounts to its AEs on account of reimbursement of cost of salary paid by the AEs to assessee's employees which indicates that the Assessee routinely sends its employees for onsite work to various countries, where the AEs actually conclude the deal on behalf of the Assessee, which clearly gives a picture that the salary of the employees paid by the AEs are reimbursed by the Assessee, which shows that the AEs are merely conduit companies without carrying out any substantial activities?

3.7 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that the invoices raised by the AEs to their customers have been raised back to back as and when the same

have been raised by the Assessee on AEs, which itself discloses that there is no actual value addition done by these AEs and they are merely acting as conduit between the Assesse and the end customers?

3.8 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that there were differences in the retention percentages within the AEs which is not uniform and the said retention percentage is not decided on scientific basis and the same is arbitrary?

3.9 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that the revenue earned by the assessee during the year is majorly coming from existing customers and thus evinced that the AEs are involved in very few fresh license deals and thereby the remuneration taken by them do not commensurate with the FAR activities carried out by them?

3.10 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in ignoring the principle enunciated by the OECD in its guidelines 2010 at paragraph No.7.36 that in what is essentially an agency function, the pass-through cost should be excluded and the agency functions are to be compensated only on cost plus basis?

3.11 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in holding that 'there are several challenges in accessing reliable and readily available data in case of the AEs despite they being lesser complex entities', though the assessee is duty-bound to produce the financials of the AEs under Rule 10D(3)(d) which the assessee has duly produced and that there is no difficulty in accessing the reliable data pertaining to AEs?

3.12 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not upholding the adoption of AEs as tested party in view of the facts and circumstances in the above grounds and as the AEs have simply performed marketing agent function for the assessee and it is ideal to remunerate them on simple cost plus method being the most appropriate method under the facts and circumstances, instead of taking assessee performing complex functions as tested party and using the least appropriate method of TNMM under the given facts and circumstances?

3.13 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in holding that the 'TPO imposed secret comparables without confronting them to the assessee and without providing an opportunity to the assessee to examine in a gross travesty of natural justice', despite the fact that the TPO listed the comparables very well in his order and without prejudice, if felt adequate opportunity has not been provided to assessee, nothing prevented the CIT(A) to herself giving the opportunity, powers being coterminous with that of the TPO or calling for a remand report

from TPO u/s 250(4) r.w.r. 46A with a direction to give opportunity to the assessee?

3.14 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the facts that the retention percentage allowed to the Oracle entities by the TPO was more than fair enough to allow mark up of 10% over cost to the AEs on a consistent basis year-on-year and in view of the above facts, whether the CIT(A) is justified in observing that 'the TPO has randomly considered benchmarking results and arrived at adhoc margin of cost plus 10%'?

3.15 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in choosing the assessee as tested party without giving any cogent reasons?

3.16 Whether on the facts and circumstances of the case and in law, without prejudice, after having taken the assessee as the tested party, the Ld. CIT(A) is correct in herself adopting ten comparables, choosing five from assessee's list of sixteen comparables, with her own five comparables, without giving cogent reasons and without giving opportunity to the TPO, thus violating Rule 46A?

3.17 Whether on the facts and circumstances of the case and in law, without prejudice, after having taken the assessee as the tested party and after having chosen five comparables herself under external TNMM for benchmarking the transaction, the Ld. CIT(A) is correct in not furnishing the entire working for arriving at the adjustment of Rs. 25,54,58,000/-?

4.1 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the adjustment of Rs. 1,97,93,267/- made on account of interest chargeable on receivables from AEs on the pretext that 'Nil interest has been charged by the assessee on the receivables from Non-AEs which could be taken as existing internal CUP and therefore no interest can be charged in the case of AE, without analyzing and comparing the facts of quantum and period of such receivables relating to non-AEs and on what similar grounds they could be taken as internal CUP?

4.2 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the interest on receivables without appreciating the facts that the AE had already collected the receivables from the end customers and have huge cash balances at bank, earning huge amount of interest on such balances from their bank accounts at the cost of assessee, without paying the amounts due to the assessee in time and without compensating the assessee?

4.3 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the interest on receivables without appreciating the facts that two of the AEs were remitting the proceeds within normal

credit period of 60 days, whereas the third one was causing inordinate delay in making payments without any cogent reason, on which interest has been charged?

4.4 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the interest on receivables without appreciating the facts that the AE has earned interest on the bank balance which was built up from collections made from the customers on behalf of assessee since the AE just functions as a marketing agent of the assessee without by itself making any value addition?

4.5 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in observing that the TPO has come to an erroneous conclusion that the rates of interest charged for both the AEs in Mauritius and USA have to be same', whereas the TPO in his order has worked out the same on the basis of the interest charged by the Assessee from its AEs plus 200 basis points?

5.1 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the interest Rs. 1,46,58,952/- charged on capital contribution being loan in nature given to the AE – OFSS America, without appreciating the facts and basic tenets of transfer pricing?

5.2 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not remanding the case u/r 46A when she observed in her order that 'the appellant also submitted a copy of share certificate received by the Appellant from its AE; the AE, who is WOS of the Appellant has confirmed via letter that the capital contribution received by them is in the nature of additional paid-in capital, which forms a part of the stockholder's equity which amounts to admitting new evidence without giving opportunity to the TPO and more so, when the TPO clearly observed in his order that no share certificate was issued to the assessee towards the capital contribution and that the assessee has failed to bring any evidence on record?

5.3 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in observing that the 'TPO erroneously characterized the transaction as a loan transaction without adducing any factual evidence to support same', ignoring the facts provided by the TPO in his order that the authorized share capital of the AE is only $100 and the value of one share issued so far is $1 remained as it is constant from earlier years and even if taken that the capital contribution is towards remaining authorized share capital of $99, there is no way the capital contribution of $119,99,901 ($120,000 – $99) could be taken as capital contribution towards paid-up equity shares as the authorized share capital and so, the remaining capital contribution ($119,99,901) to AE which cannot be towards equity has to be necessarily considered as loan and interest to be charged, otherwise it leads to base erosion to India?

5.4 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in relying on RBI permission to make capital contribution, as it cannot be stamp on ALP determination and erred in not adhering to the decision of Hon'ble Punjab & Haryana High Court in Coca Cola India Inc. v. ACIT (309 ITR 194) wherein it has been held that the Income tax Authorities are not bound by the RBI for determining ALP?

5.5 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in relying on the decisions in the cases of S.A. Builders Ltd. CIT (2007) 158 Taxman 82 (SC) and Sony India (P) Ltd. vs DCIT (2008-TIOL-439-ITAT-DEL) which are distinguishable on facts?

6.1 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the addition made of Rs. 3,17,08,761/- u/s. 92CA(4) of the I.T. Act, 1961 on account of fees paid to AEs for marketing of customization work of the assessee company without appreciating the facts of the case and the findings made by the Transfer Pricing Officer?

6.2 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the addition made on account of fees paid to AEs for marketing of customization work of the assessee company without appreciating that the customization assignments do not require any marketing efforts by the AEs as the end customer has already been identified by the AEs for the sale of the product?

6.3 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the addition made on account of fees paid to AEs for marketing of customization work of the assessee company without appreciating that during the TP proceedings the assessee failed to bring on record any material substantiating the efforts taken by the AEs for marketing the customization assignment?

6.4 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the addition made on account of fees paid to AEs for marketing of customization work of the assessee company without appreciating that the assessee has not been remunerating the third party distributors for the marketing customization, nor any material has been brought on record to prove that in case of third party distributors, marketing of customization assignment had been done by the assessee itself?

7. The appellant prays that the order of CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

8. The appellant craves leave to add, amend or alter all or any of the grounds of appeal which may be necessary."

3. Brief facts of the case are as under:-

The assessee company is a subsidiary of M/s Oracle Global (Mauritius) Ltd. and is engaged in providing comprehensive information technology solutions to the global financial services industry through a wide range of software products and customized service offerings. The assessee filed its e-return of income on 29/09/2008 declaring total income of ₹41,35,59,943/- under the normal provisions of the Income-tax Act, 1961 and book profit of ₹419,75,16,583/- u/s 115JB of the Act. The return was filed through the e-filing module and was accompanied by the Balance Sheet, Profit & Loss Account and Tax Audit Report u/s 44AB. The return was processed u/s 143(1) on 03/06/2009.

3.1. Subsequently, the case was selected for scrutiny and notice u/s 143(2) was issued on 04/08/2009. Thereafter, notice u/s 142(1) dated 04/07/2011 was issued. In response, the assessee's authorised representatives, attended the proceedings from time to time and furnished the details called for. The case was discussed during the course of assessment proceedings.

3.2. The Ld. AO noted that the assessee had entered into international transactions with its Associate Enterprise [AE] exceeding the threshold limit. Reference was, therefore, made to the Transfer Pricing Officer [TPO] to determine the Arm's Length price [ALP] of the transactions. The Ld. TPO, upon receipt of the reference, called upon the assessee to furnish economic details of the international transactions in Form 3CEB. From the details furnished, the Ld. TPO noted that the assessee had entered into the following international transactions:-

Sr. No.	*Nature of international transactions*	*Amount (Rs. in '000s)*
1	*Sale / purchase of banking software product licenses*	*6,061,927*
2	*IT solutions and consulting services rendered / availed*	*6,167,807*
3	*Interest on loan granted to AEs*	*22,193*
4	*Reimbursement / recovery of expenses*	*4,716,709*
5	*Capital contribution*	*1,224,129*

4. After calling for various details in respect of the services rendered by the assessee, the Ld. TPO proposed adjustment of ₹69,81,44,206/- as under:-

Sr. No.	Transaction	International Transaction Value	Arm's Length Price	Adjustment
1	Excess retention of revenues by the Associated Enterprises in Singapore & Netherlands	Nil	62,25,55,098	62,25,55,098
2	Customization fees	27,42,03,387	Nil	3,17,08,761
3	Interest on accounts receivable	Nil	1,97,93,267	1,97,93,267
4	Interest undercharge on loan to Associated Enterprises	2,21,93,373	3,16,21,501	94,28,128
5	Interest on capital contribution treated as loan	Nil	1,46,58,952	1,46,58,952

4.1. Upon receipt of the order passed u/s 92CA(3), the Ld. AO issued notice to the assessee dated 09/11/2011 seeking an explanation as to why the adjustment proposed by the Ld. TPO should not be made. The assessee filed its detailed submission dated 16/10/2017 in reply to the notice issued by the Ld. AO. The Ld. AO observed that the submissions furnished by assessee were the same as those made before the Ld. TPO and, since the Ld. TPO had already taken into consideration the contentions of assessee, the suggested adjustments were held to be in accordance with the provisions of section 92CA(4) of the Act. The Ld. AO thus passed the assessment

order making adjustment in the hands of assessee as proposed in the order passed u/s 92CA(3).

Aggrieved, by the order of the Ld. AO, assessee preferred an appeal before the Ld. CIT(A).

5. The Ld. CIT(A), after dealing with the issues raised by assessee and taking into consideration various orders passed in assessee's own case on identical issues, partly allowed the appeal.

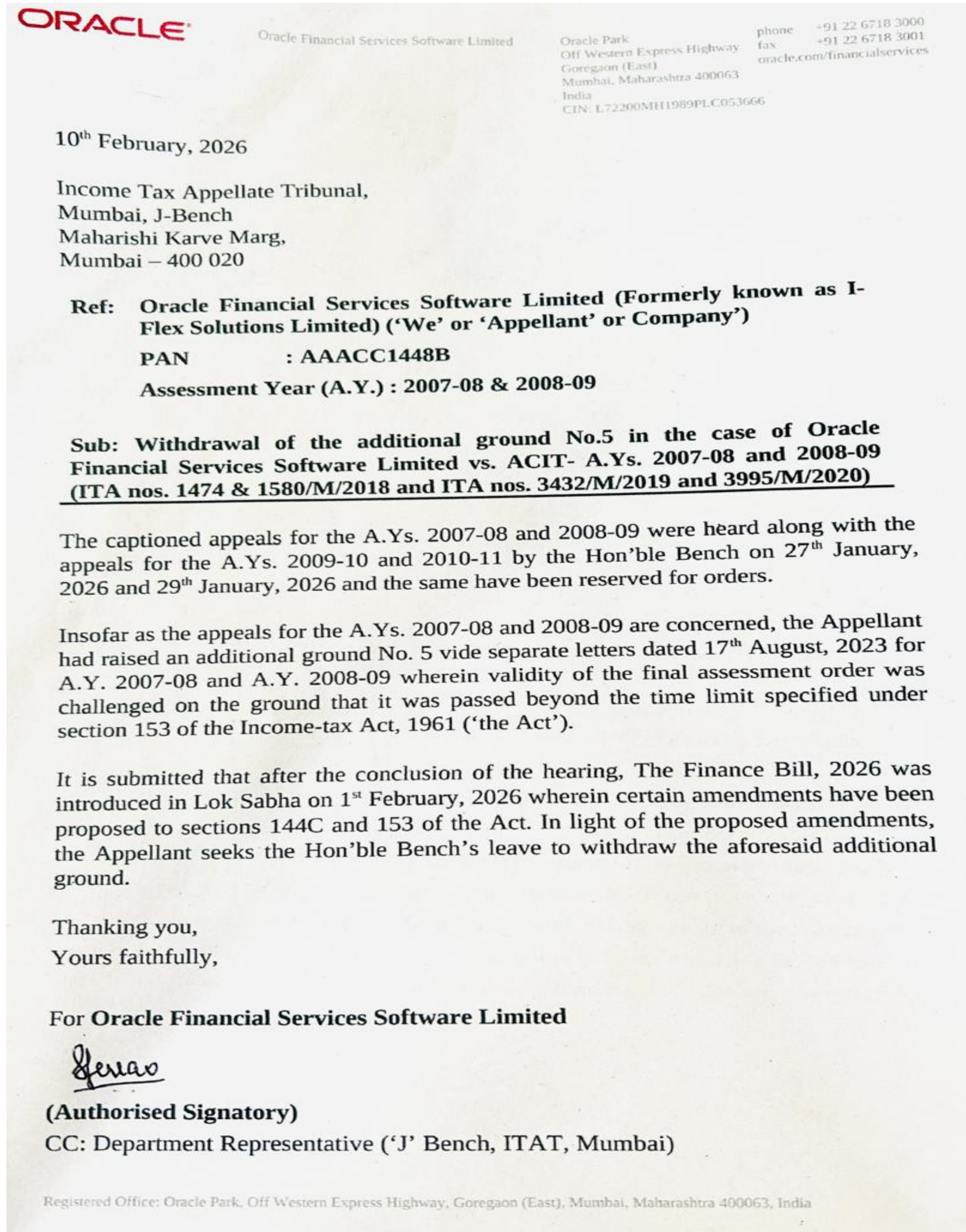
Aggrieved by the order of the Ld. CIT(A), both the Revenue as well as assessee are in appeal before the *Tribunal*.

Assessee's Appeal

6. At the outset, the Ld. AR submitted that, in so far as the appeal filed by assessee is concerned, assessee does not wish to press **Ground No. 1** and **Ground No. 5**.

6.1. It is submitted that Ground No. 1 is general in nature.

6.1.1. In respect of Ground No. 5, assessee filed following letter seeking withdrawal of the same, which is scanned and reproduced as under:-



ORACLE

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10th February, 2026

Income Tax Appellate Tribunal,
Mumbai, J-Bench
Maharishi Karve Marg,
Mumbai – 400 020

Ref: Oracle Financial Services Software Limited (Formerly known as I-Flex Solutions Limited) ('We' or 'Appellant' or Company')

PAN : AAACC1448B

Assessment Year (A.Y.) : 2007-08 & 2008-09

Sub: Withdrawal of the additional ground No.5 in the case of Oracle Financial Services Software Limited vs. ACIT- A.Ys. 2007-08 and 2008-09 (ITA nos. 1474 & 1580/M/2018 and ITA nos. 3432/M/2019 and 3995/M/2020)

The captioned appeals for the A.Ys. 2007-08 and 2008-09 were heard along with the appeals for the A.Ys. 2009-10 and 2010-11 by the Hon'ble Bench on 27th January, 2026 and 29th January, 2026 and the same have been reserved for orders.

Insofar as the appeals for the A.Ys. 2007-08 and 2008-09 are concerned, the Appellant had raised an additional ground No. 5 vide separate letters dated 17th August, 2023 for A.Y. 2007-08 and A.Y. 2008-09 wherein validity of the final assessment order was challenged on the ground that it was passed beyond the time limit specified under section 153 of the Income-tax Act, 1961 ('the Act').

It is submitted that after the conclusion of the hearing, The Finance Bill, 2026 was introduced in Lok Sabha on 1st February, 2026 wherein certain amendments have been proposed to sections 144C and 153 of the Act. In light of the proposed amendments, the Appellant seeks the Hon'ble Bench's leave to withdraw the aforesaid additional ground.

Thanking you,
Yours faithfully,

For **Oracle Financial Services Software Limited**

(Authorised Signatory)
CC: Department Representative ('J' Bench, ITAT, Mumbai)

Registered Office: Oracle Park, Off Western Express Highway, Goregaon (East), Mumbai, Maharashtra 400063, India

Accordingly, Ground No. 1 and Additional Ground No. 5 raised by the assessee stand dismissed.

7. Ground No. 2 raised by the assessee relates to disallowance u/s 14A in respect of interest expenditure. The Ld. AR submitted that considering the smallness of the amount involved, the assessee does not wish to press this ground for the year under consideration. However, liberty was sought to contest the issue in appropriate circumstances in any other assessment year.

In view of the submission of the Ld. AR, Ground No. 2 is dismissed as not pressed, with liberty as aforesaid.

8. **Ground Nos. 3 & 4** relates to the issue of retention of revenue by overseas subsidiaries located in Singapore and Netherlands. The Ld. AR submitted that this issue also arises in Ground Nos. 3.1. to 3.17, raised by the Revenue.

<u>Brief facts leading to the issue are as under:</u>

8.1. It is submitted that, the assessee is engaged in providing information technology solutions to the global financial services industry through a comprehensive range of proprietary software products and customized services. The assessee designs, develops and markets software products and also provides software development services. The Ld. AR submitted that the assessee has subsidiaries in the USA, Netherlands and Singapore, which are engaged in marketing, sales and distribution of software products developed by assessee and customized solutions in their respective jurisdictions. These associated enterprises (AEs) enter into contracts with third-party customers in their own names and subsequently outsource the execution of such contracts to the assessee. It is noted

that, for rendition of such services, the AEs have entered into Marketing Services Agreements and License Agreements with the assessee governing these transactions.

8.2. Referring to the agreements and the details of the AEs, the Ld. AR submitted that the business model followed by the assessee for the transaction is revenue retention model, wherein the AEs retain 30% to 50% of the total contract value for performing marketing, distribution, administrative and brand management functions in their respective territories, while the balance revenue is remitted to the assessee for execution of software development and related services.

8.3. For benchmarking the international transactions, the assessee adopted the Transactional Net Margin Method (TNMM) as the most appropriate method and reported a net profit margin of 22.31% for the year under consideration. The assessee treated itself to be the tested party and selected 16 comparable companies with an arithmetic mean margin of 12.63% and, accordingly, concluded that the transactions with its AEs to be at arm's length.

8.4. The Ld. AR submitted that the Ld.TPO, however, disregarded the assessee as the tested party and instead considered the AEs located in the overseas jurisdictions as the tested parties, treating them as entities performing significant entrepreneurial and distribution functions. The Ld.AR submitted that such an approach adopted by the Ld.TPO is contrary to transfer pricing principles as the functional profile of the AEs involved are not verifiable. The Ld. TPO arrived at the above conclusion on the premise that the AEs

directly enter into contracts with third-party customers and are responsible for execution and performance of those contracts.

8.4.1. It is submitted by Ld.AR that, the Ld. TPO also presumed that the AEs were rendering only marketing support services and held that for such functions they should earn only a 10% margin on marketing costs.

8.5. Accordingly, the Ld. TPO concluded that the AEs in the Netherlands and Singapore were earning profit margins of 73.27% and 35.82%, respectively, on apportioned marketing costs. At this juncture, the Ld. TPO ignored the AE based in the USA on the ground that it had incurred losses during the year.

8.6. The Ld. AR submitted that the assessee granted its AEs the right to distribute its products to end customers in their respective jurisdictions under license agreements. It is submitted that, the AEs enter into contracts with end customers and sold the assessee's products. He submitted that the AEs, being marketing and distribution entities, performed value-added functions and were incentivized to generate business and expansion and ensured significant market presence. It was further submitted that since the contracts were entered into by the AEs with end customers in their jurisdictions, the entire contract value was received and recorded as revenue in the books of the AEs, thereafter as per the Master Service Agreement, the AEs retained an agreed percentage of revenue towards the functions performed by them and remitted the balance to the assessee as consideration for subcontracted work. In the books of the AEs, the retained portion was accounted for as cost of sales.

8.7. The Ld. AR submitted that the transfer pricing study report categorized the assessee as a full-fledged risk-bearing entity, whereas the AEs were exposed primarily to market risks in their respective jurisdictions. He submitted that the assessee derived and executed the projects, while the AEs coordinated the projects and provided on-site services through the employees of assessee. It was submitted that, necessary employees of the assessee were deputed to the AEs for on-site services, and the assessee reimbursed the entire cost of such employees.

8.8. The Ld. AR further submitted that an identical issue arose in the assessee's own case for *A.Y. 2006-07 in ITA No. 1473/Mum/2018, order dated 23/06/2023*, wherein the *Tribunal*, after considering similar facts, accepted the benchmarking adopted by the assessee by treating assessee to be the tested party. This *Tribunal* accepted the net profit margin of the assessee on the ground that it fell within the permissible tolerance range vis-à-vis comparables. The Ld.AR submitted that though the Revenue preferred an appeal before the *Hon'ble Bombay High Court* on various issues, this issue was not contested therein and, therefore, the view taken by the *Tribunal* stands accepted by the Department and has attained finality.

8.9. On the other hand, the Ld. DR relied on the orders of the authorities below.

We have perused the submissions advanced by both sides in light of the material placed before the *Tribunal*.

9. It is an admitted position that the benchmarking approach adopted by the Ld. TPO for A.Y. 2006-07 has been identically followed for the year under consideration. The Ld. TPO rejected the assessee as the tested party on the premise that the AEs were performing simple marketing and customization functions. It is not in dispute that the revenue model for the year under consideration is identical to that in A.Y. 2006-07. Following the earlier approach, the Ld. TPO treated payments to AEs at cost plus 10% markup as the arm's length price.

9.1. It is further noted that the Ld. TPO did not reject the comparables adopted by the assessee. However, the Ld.CIT(A), while adjudicating the issue, restricted the comparable set to 11 companies (consistent with A.Y. 2016-17). The arithmetic mean margin of these 11 comparables was computed at 23.40% as against the assessee's margin of 22.31%. The Ld.CIT(A) accordingly restricted the adjustment to ₹25,54,28,000/-.

9.2. Under the transfer pricing provisions, the "tested party" is the entity to which the transfer pricing method is applied for the purpose of benchmarking an international transaction or a specified domestic transaction. Although the term "tested party" is not expressly defined in the Act, the concept is recognized in Rule 10B and the OECD Transfer Pricing Guidelines and has been consistently followed in Indian jurisprudence. The tested party is ordinarily the entity which is the least complex of the associated enterprises involved in the transaction and for which reliable and comparable uncontrolled data is available. In selecting the tested party, regard must be had to the

nature of functions performed, assets employed, and risks assumed (FAR analysis). Generally, the entity with a simpler functional profile, limited risks, and no ownership of unique intangibles is chosen as the tested party, since its margins can be more reliably benchmarked using external comparables. While in most cases the Indian entity is selected as the tested party, there is no legal bar to selecting the foreign associated enterprise as the tested party, provided adequate and reliable data relating to comparables in the relevant foreign jurisdiction is available and the selection leads to a more reliable determination of the arm's length price. The selection of the tested party must, therefore, be guided by the principle of availability of reliable data and the degree of comparability, with the overarching objective of arriving at the most appropriate method and the most reliable measure of arm's length results.

9.3. In the present case, the AEs of the assessee are located in the Netherlands and Singapore and are stated to be rendering services in relation to marketing, sales and distribution of software products developed by the assessee, as well as facilitating customised solutions to end users through the employees of the assessee. The Ld. TPO, however, selected the AEs as the tested party. It is an accepted principle that the tested party should ordinarily be the least complex entity for which reliable and comparable uncontrolled data is available. While it is true that the AEs are stated to be performing marketing and distribution support functions in their respective jurisdictions and the assessee is the developer and owner of the software products undertaking significant functions, the selection of the foreign AEs as the tested party would necessarily require the

availability of reliable and verifiable comparable data in the respective foreign markets.

9.4. On perusal of the record, it is noted that the Ld. TPO has not brought on record any comparable uncontrolled transactions pertaining to entities operating in the Netherlands or Singapore. On the contrary, the Ld. TPO has proceeded to accept and rely upon the comparables selected by the assesse from the Indian jurisdiction. This approach, in our considered view, is inherently inconsistent with the selection of the foreign AE's as the tested party. Once the AE's are chosen as the tested party, the benchmarking exercise ought to have been carried out with reference to comparables operating in similar economic and geographical markets as those of the AE's. In the absence of such an exercise and in the absence of reliable foreign comparables, the selection of the AE's as the tested party does not satisfy the requirement of arriving at the most reliable arm's length result.

Accordingly, we hold that the Ld. TPO erred in selecting the foreign Aes as the tested party in the facts of the present case.

9.5. We find that the Ld. CIT(A), while granting partial relief to the assessee, restricted the transfer pricing adjustment only to the extent of the difference between the margin of the assessee and that of the comparables. However, the Ld. CIT(A) failed to extend the benefit of the tolerance band of ±5% as provided under the proviso to section 92C(2) of the Act. The statutory proviso clearly mandates that where the variation between the arm's length price determined and the price at which the international transaction has actually been undertaken

does not exceed the prescribed tolerance range, the transaction price shall be deemed to be at arm's length.

9.6. We note that the margin of the assessee has been computed at 22.31%, whereas the margin of the comparables has been determined at 23.40%. The difference between the two margins thus works out to 1.09%. In terms of the proviso to section 92C(2) of the Act, where the variation between the arm's length margin and the margin declared by the assessee does not exceed the prescribed tolerance band of ±5%, the transaction price is required to be accepted as being at arm's length. Since the variation in the present case is well within the permissible range, no transfer pricing adjustment is called for.

The Ld. CIT(A), therefore, was not justified in restricting the addition to the difference in margins without granting the benefit of the tolerance band. We accordingly direct the deletion of the transfer pricing adjustment.

Accordingly, Ground Nos. 3 and 4 raised by the assessee are allowed and Ground Nos. 3.1 to 3.17 raised by the Revenue stand dismissed.

Revenue's Appeal

10. In the Revenue's appeal, **Ground Nos. 1 and 2** are directed against the deduction allowed by the Ld. CIT(A) under section 10A of the Act.

10.1. Both sides submitted that the issue is squarely covered by the decision of the co-ordinate Bench of the *Tribunal* in assessee's own case for A.Ys. 2002–03 to 2005–06. The Ld. AR submitted that relevant orders passed by this *Tribunal* on this issue are placed in Paper Book, Volume-2. It was further submitted that the Revenue had preferred appeal before the *Hon'ble Bombay High Court* against *Tribunal* order for *A.Y. 2002–03 in ITA No. 2352/2011*, and a copy of the order passed by the *Hon'ble High Court* is placed at page 3 of Paper Book, Volume-2 wherein the *Hon'ble High Court* dismissed the ground on this issue. The Ld. AR submitted that thereafter the revenue has accepted the position regarding computation of deduction under section 10A of the Act. He placed also reliance on the decision of the *Hon'ble Supreme Court* in the case of *CIT vs. HCL Technologies Ltd.* reported in *(2018) 404 ITR 719 (SC).*

10.2. On the contrary, the Ld. DR relied on the orders of the authorities below.

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

11. The Ld.AR submitted that, Ld.AO during the draft assessment stage disallowed following while computing deduction u/s 10A of the Act:-

a) Training income received.
b) Telecommunication expenses.

It is submitted that, these were excluded from export turnover for purpose of computing deduction u/s 10A of the Act.

11.1. The Ld.AR submitted that, Ld. AO during the assessment proceedings, held that, training income should be excluded for the purposes of computing deduction under section 10A of the Act. The assessee contended that the training income was intrinsically linked to the business of the undertaking and was earned in the course of its eligible business operations. It was explained that training forms an integral part of the software products sold to customers, as effective use of the software requires proper training; without such training, the usability and commercial viability of the products would be adversely affected. It was further submitted before the Ld. AO that there exists a direct nexus between the software products, the profits and gains of the undertaking, and the income derived from training activities. The assessee thus submitted that the training income is eligible for deduction u/s 10A of the Act.

11.2. The submissions of the assessee were not accepted by the Ld. AO, and disallowed the claim in respect of training income while computing the deduction u/s 10A of the Act by excluding the same from the export turnover. The assessee submitted that although such expenses were incurred, they were not recovered separately from customers. It was contended that no adjustment on this account was warranted either in the export turnover or in the total turnover for the purpose of computing deduction u/s 10A of the Act.

11.3. The Ld.AR submitted that, the Ld. AO, while computing the deduction u/s 10A in the hands of the assessee, excluded the amount of telecommunication expenses relating to various 10A units

from the export turnover, without reducing the same from the total turnover.

11.4. Before the Ld.CIT(A), the assessee's contention was considered in the light of various decisions of the *Hon'ble Supreme Court* as well as the co-ordinate Bench decision in the case of the assessee for the preceding assessment years. In respect of the income earned by the assessee from training activity, the *Tribunal*, for A.Y. 2002–03, decided the issue in *ITA No. 3699/Mum/2006 and CO No. 366/Mum/2006* vide order dated *31/08/2010*, wherein it was held that income derived from training given to customers for use of software developed by the assessee was inextricably connected to the export of software and, therefore, had to form part of both total turnover as well as export turnover for computing deduction u/s 10A of the Act. The said order was upheld by the *Hon'ble Bombay High Court* vide order dated *24/03/2014 in ITA No. 2352/2011*. The Ld. AR emphasized that the assessee was erstwhile known as *i-Flex Solutions Ltd.*, at the time when the *Hon'ble High Court* passed the aforesaid order.

11.5. In respect of telecommunication expenses forming part of export turnover, the issue is no longer *res integra* and is covered by the ratio laid down by *Hon'ble Supreme Court* in the case of *CIT vs. HCL Technlogies Ltd. (supra).*

11.6. In view of the aforesaid observations of the co-ordinate Bench of the *Tribunal* in the assessee's own case, as well as the decision of the *Hon'ble High Court* affirming the view taken by the *Tribunal* on both the issues, we do not find any force in the grounds

raised by the Revenue and the view taken by Ld.CIT(A) is upheld. The Ld.AO/TPO is thus directed to compute the deduction under section 10A as per the ratio laid down by *Hon'ble Supreme Court* in case of *CIT vs. HCL Technlogies Ltd. (supra)* .

Accordingly, Ground Nos. 1 and 2 raised by the Revenue stand dismissed.

12. Ground Nos. 4.1 to 4.6 raised by the Revenue relate to deletion of :

- Notional interest receivable on delayed receivables and,
- Interest charged in respect of loan to AE.

Notional interest receivable on delayed receivables

Brief facts leading to the issue are as under:

12.1. The Ld.TPO noted that in respect of recivables from Netherland and Singapore AE's, the Ld.TPO noted that most of the outstanding amounts were received by the assesse within the credit period of 60 days. However there was delay in remitting the recivables by the US AE. It was submitted that the amounts remained outstanding from the US subsidiary because the subsidiaries had not collected the dues from the end customers and, therefore, the same did not represent any advantage conferred upon the overseas subsidiaries.

12.2. It is submitted that the Ld.TPO considered the time lag between the payment received by the AE's from the end customers and the remittance made by the AE's to the assesse. The Ld.TPO rejected

internal CUP, since the assesse charged NIL interest to third parties in case of delay in payment by them beyond the payment terms. The adjustment was proposed by the Ld.TPO on the premise that subsidiaries have delayed in remitting the dues after having collected the same from the end customers.

12.3. It is submitted that the adjustment was computed by adding 200 basis points on *ad hoc* basis to the rate of interest, i.e., 5.18%, charged by the assesse in its own case of loan granted to one of its AE. The Ld.TPO thus considered the average quarterly bank balance of the US AE at the rate of 7.18%. The Ld.TPO thus proposed addition of ₹1,97,93,267/- on account of notional interest receivable from the US AE on the outstanding balances lying with them. The said proposed adjustment was incorporated by the Ld.AO in the draft assessment order as well as the final assessment order.

Aggrieved by the order of the Ld.AO, the assesse preferred appeal before the Ld.CIT(A).

13. The Ld.CIT(A), after considering various submissions of the assesse observed and held as under:

> *"I have perused the facts of the case and the TPO's order. It is seen that Nil rate of interest has been charged by the appellant in an uncontrolled transaction involving a third party and so an Internal CUP exists to establish that there is no need to levy interest on outstanding with AEs.*
>
> *It is also seen that the AEs also did not charge interest to third party customers so as to pay corresponding interest to the appellant. The longer outstanding period is interalia, the result of AEs not having collected the accounts from final end-customers and do not represent any advantage conferred on the AEs. These material facts have escaped the attention of the TPO leading to an erroneous conclusion on his part.*

> *It has also to be accepted that the Appellant operates in a service industry where emphasis is on building long term relationship with the customers and payment terms are not, accorded same level of importance as in other business.*
>
> *In view of the facts stated, this action of the Learned TPO/ Assistant CIT is not reasonable and as the facts being the same and covered by the order of my predecessor in the office, the adjustment made on notional interest is deleted."*

Aggrieved by the order of Ld.CIT(A), the revenue is in appeal before this *Tribunal*.

14. The Ld. DR submitted that, in certain instances, the AEs remitted amounts to the assessee after considerable delay even though the same had already been realized from the end customers. The Ld. DR, therefore, supported the reasoning of the Ld. TPO and contended that the delay in remittance, despite recovery from end users, justified the adjustment on account of notional interest. The Ld. DR further emphasized that the Ld.CIT(A) did not examine these aspects in detail and, therefore, the view adopted by the Ld.CIT(A) was not based on proper appreciation of the factual matrix.

14.1. Ld.AR submitted that the assessee operates in the software development industry, where emphasis is placed on building long-term relationships with customers and payment terms are not accorded the same level of strategic importance as in certain other businesses. The Ld.AR emphasized that no interest was charged by the assessee to third-party customers for any delay in payments and, therefore, the Ld.TPO was not justified in attributing notional interest on outstanding receivables from the subsidiaries. He submitted that the longer outstanding period was, *inter alia*, the result of the US-AE

not having collected amounts from the end customers and did not represent any advantage conferred on the US-AE.

14.2. He further submitted that an identical issue arose in the assessee's own case for *A.Y. 2006–07 in ITA No. 1473/Mum/2018 and ITA No. 1579/Mum/2018*, wherein the *Tribunal*, vide order dated *23/06/2023*, decided the issue by observing as under:-

> *"9.3 We heard the rival submissions on this issue and perused the record. In A.Y. 2003-04 the Tribunal has accepted the contention of the assessee that the delay in realization from AEs has occurred for the reason that there was corresponding delay in realization of debts by the AEs from their customers.*
>
> *However, on a perusal of the details furnished by the assessee in page No. 635 to 865 of the paper book, we noticed that the AEs have remitted money to the assessee with delay ranging from 1 day to a period exceeding 1 year, after realization from their debtors. Hence the reasoning given by the Tribunal, as rightly pointed by Ld D.R, would not apply to the facts of the year under consideration.*
>
> *9.4 We also noticed that the TPO has computed the interest by taking average quarterly balances. In our view, the same is not correct method of computing interest on delayed receivables. Since the details of realization of individual bills are available, it will be possible for the assessee/TPO to compute interest individually after allowing accepted credit period.*
>
> *9.5 In view of the above said discussions, we are of the view that this issue requires fresh examination at the end of the Assessing Officer/TPO.*
>
> *Accordingly we set aside the order passed by the learned CIT(A) on this issue and restore the same to this file for examining this issue afresh in the light of discussions made supra."*

14.3. The Ld.AR submitted that the Ld.TPO adopted *ad hoc* rate of interest earned on loan for computing the notional interest instead of considering the interest rates prevailing in the international market. He argued that no notional interest was chargeable in the facts of the case; however, without prejudice to the same, adopting an erroneous

approach or methodology for computing the notional interest receivable from the overseas subsidiaries is contrary to established transfer pricing principles.

14.4. He submitted that the methodology adopted by the Ld.TPO is an adhoc arbitrary method and not prescribed under the Act. It is further submitted that, while passing the order, the Ld.TPO computed adjustment considering the rate of interest charged by the assessee in its own case on loan granted to one of its AE which is a controlled transaction and added an ad-hoc 200 basis point to it.

14.5. The Ld.AR submitted that while determining ALP for the said transactions the Ld.TPO has not even examined the applicability of any other method prescribed under Section 92C(1) of the Act. Based on a controlled transaction, the Ld.TPO proceeded to adopt arbitrary 5.18% plus adhoc 200 basis points as the arm's length compensation for interest on delayed receipts from AEs.

14.6. The Ld.AR submitted that the use of controlled transactions for the application of the CUP method by the Ld.TPO is flawed that disregards the provisions of the law.

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

15. Considering the rival submissions and the material on record, we note that this issue was examined by the *Tribunal* in the assessee’s own case for A.Y. 2006–07 *(supra)*, wherein the observations made in A.Ys. 2003–04 to 2005–06 were also taken into

consideration. This *Tribunal* has remitted the issue back to the Ld.AO/TPO by observing as under:

> *9.3. We heard the rival submissions on this issue and perused the record. In A.Y. 2003-04 the Tribunal has accepted the contention of the assessee that the delay in realization from AEs has occurred for the reason that there was corresponding delay in realization of debts by the AEs from their customers. However, on a perusal of the details furnished by the assessee in page No. 635 to 865 of the paper book, we noticed that the AEs have remitted money to the assessee with delay ranging from 1 day to a period exceeding 1 year, after realization from their debtors. Hence the reasoning given by the Tribunal, as rightly pointed by Ld D.R, would not apply to the facts of the year under consideration.*
>
> *9.4 We also noticed that the TPO has computed the interest by taking average quarterly balances. In our view, the same is not correct method of computing interest on delayed receivables. Since the details of realization of individual bills are available, it will be possible for the assessee/TPO to compute interest individually after allowing accepted credit period."*

Admittedly, the delay in realization of receivables by the assessee from its US AE was, partially attributable to the AEs not having recovered the amounts from the end customers. However, from the details furnished in the paper book (pages 646 to 1511), it is noticed, on a random verification of invoice dates, that there are instances where the U/S. AE remitted receivables to the assessee with delay even after the dues had been realized by them from the end customers.

15.1. In view of the above factual position, we are of the opinion that the reliance placed by the Ld. AR on the observations of the *Tribunal* for A.Ys. 2003–04 to 2005–06 cannot be mechanically applied to the year under consideration. The facts for the year under consideration are more akin to those noted by the *Tribunal* for A.Y. 2006–07, as

reproduced in the preceding paragraphs. Accordingly, we direct the Ld. AO/TPO to examine this issue afresh in accordance with law and transfer pricing principles. The Ld. TPO shall compute interest, if any, on the outstanding receivables based on the LIBOR rate. The assessee is directed to furnish details of realization of individual invoices by the US AE and to identify such receivables that was outstanding even after the same being received by the US AE from the end customer. The Ld. TPO shall allow the accepted credit period of 60 days while computing such delay.

Interest charged in respect of loan to AE

Brief Fact leading to this issue is as under:

16. The assesse granted loan to the US AE being Oracle Financial Services Software America Inc.(hereinafter referred to as OFSS), (formerly known as i-flex America Inc.) and ISP Internet Mauritius Company(hereinafter referred to as ISP Mauritius) at different period of time under different terms and condition. The details of the loan advanced by the assesse are as under:

Name of the AEs	Date of disbursement of loan	Quantum of loan	Rate of interest	Date of determination of LIBOR	Nature of rate of interest	Amount (in Rs.)
OFSS America	1 January 2004	USD 10,000,000	6 month LIBOR plus 50 basis points	As adjusted from time to time**	Fluctuating rate	20,855,274
ISP Mauritius	22 December 2004	USD 950,000	12 month LIBOR	LIBOR prevalent as of two days	Fixed rate	1,338,099

Name of the AEs	Date of disburseme nt of loan	Quantum of loan	Rate of interes t	Date of determinati on of LIBOR	Nature of rate of interest	Amount (in Rs.)
			plus 50 basis points	prior to the date of disbursement of the loan		

Based on the above terms and conditions, the rate of interest earned during the year under the consideration on the loan provided to OFSS America was 5.18 percent and ISP Mauritius was 3.54 percent.

16.1. In the transfer pricing documentation the assessee, stated that the above loans were duly approved by Reserve Bank of India ('RBI'), and served as an appropriate benchmark for determining the arm's length standard and accordingly, the receipt of interest by the assessee on loan granted to its AEs was considered to be compliant with the arm's length principle.

16.2. It was submitted that to determine the arm's length rate of interest in respect of the loans granted, the assessee had obtained an independent letter from HDFC Bank Limited (an independent third party), which quoted an interest rate of LIBOR plus 50 basis points for the USD denominated loans, which was furnished before the Ld.TPO.

16.3. In view of the fact that the interest rate offered by the assessee on the loans given to subsidiaries are in line with interest rate charged by the bank on foreign currency loans, by the assessee, the transaction was held to be at Arm's Length price.

16.4. The Ld.TPO made an adjustment on interest on loan charged to its AE alleging that if the AE goes bankrupt or defaults in making the payment, the assessee would be liable to bear the loss as it may not be in a position to recover that money from the AE. Such a situation warrants a higher rate of interest that the assessee should charge from the AE. To cover this risk, the Ld.TPO applied *ad-hoc* mark up of 200 basis points on the rate charged by the assessee on the loan provided to its AE and thereby arrived at the rate of 7.18%. The Ld.TPO thus made addition of Rs.9,428,128 on account of interest undercharged by the assessee for loan granted to USA and Mauritius.

Based on the order passed by the Ld.TPO under Section 92CA(3) of the Act, the AO proposed addition of Rs.9,428,128 to the total income of the assessee in respect of interest on loan granted to its AEs.

The said proposed adjustment was incorporated by the Ld.AO in the draft assessment order as well as the final assessment order.

Aggrieved by the order of the Ld.AO, the assesse preferred appeal before the Ld.CIT(A).

17. The Ld.CIT(A), after considering various submissions of the assesse observed and held as under:

> *"I have gone through the order of the Learned TPO/ Additional CIT, the detailed submissions and arguments made by the Appellant's ARs. I do not agree with the stand taken by the Learned TPO/ Additional CIT. Comparison of controlled transaction with other controlled transactions is not permitted under Indian transfer pricing legislation as it distorts the very principle of transfer pricing. Transfer pricing legislation in India is based on sound economic logic. In arriving at such arm's length outcomes, transfer pricing legislation seeks to disregard "Controlled" situations by a process of*

benchmarking these transactions with "Uncontrolled Transactions" between "Unrelated Parties". The arm's length price has to be established by comparing controlled transactions with uncontrolled transactions and not comparison of controlled transactions with other controlled transactions. The Learned TPO/ Additional CIT have not given due weightage to this fundamental principle which goes at the root of the transfer pricing legislation. Even on merits, parameters such as geographical region amount of loan, currency of loan, underlying security and creditworthiness of the borrower are relevant factors in determining interest rate. Even a quotation given by a third party i.e. a banker has only persuasive value, however it does not constitute a CUP since it is a quotation and not an actual uncontrolled "transaction".

In the present case, the geography is very wide as one AE is in Mauritius while another in USA. There is nothing on the record of the TPO to suggest that the amount of loan, security and tenure are identical. The TPO has ignored these crucial factors and hence come to an erroneous conclusion that the rates of interest charged for both the AE's have to be same.

Instead of seeking clarification he jumped to the conclusion that this was the effective rate on which interest should have been charged.

Accordingly, following the order of my predecessor this Ground is disposed as being allowed in favour of the Appellant and the Assistant CIT is directed to delete the transfer pricing adjustment (combined) of INR94,28, 128.”

Aggrieved by to order of the Ld.CIT(A), the revenue is in appeal before this *Tribunal*.

18. The Ld.DR relied on the orders passed by Ld.TPO/Ld.AO.

18.1. On the contrary, the Ld.AR relied on orders passed by Ld.CIT(A). He also place reliance on following decisions of coordinate bench of this *Tribunal* in assessee’s own case foe preceeding years:

Order of this Tribunal for assessment year 2004-05 in ITA no. 5078/Mum/2010 vide order dated 12/10/2021

Order of this Tribunal for assessment year 2005-06 in ITA no. 5079/Mum/2010 vide order dated 16/01/2023

Order of this Tribunal for assessment year 2006-07 in ITA no. 1579/Mum/2018 vide order dated 23/06/2023

18.2. The Ld.AR further submitted that the department has accepted the consistent view adopted by this Tribunal as this issue was not challenged by the revenue before *Hon'ble Bombay High Court* in appeal filed for assessment year 2004-05 and 2005-06.

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

19. We have considered the rival submissions and perused the material available on record. It is an undisputed fact that the assessee has charged interest from its AEs located in the USA and Mauritius at different rates, namely 5.10% and 3.54% respectively, and that such rates have been determined by adopting LIBOR plus 50 basis points. The assessee has benchmarked the said international transactions by applying the internal CUP method on the basis of a letter issued by HDFC Bank evidencing the rate of interest charged by the bank on a loan advanced to one of its subsidiaries. The said comparable is internal in nature and represents the rate at which an independent party has extended credit under comparable circumstances. The rate adopted by the assessee is also in conformity with the internationally accepted benchmark for foreign currency denominated inter-company loans.

19.2. It is a settled principle that where a reliable internal CUP is available, the same deserves to be given precedence over external comparables, as it provides a more direct and accurate measure of the arm's length price, provided the transactions are comparable in

terms of currency, tenure, and risk profile. In the present case, no material has been brought on record by the Ld. TPO to demonstrate any material differences between the bank loan and the loans advanced to the AEs which would have a bearing on the pricing. Nor has the Revenue brought on record any better external comparable.

19.3. The Ld. CIT(A), while adjudicating the issue, has followed the orders of the Tribunal in the assessee's own case for the preceding assessment years wherein, on identical facts, the benchmarking of interest by adopting LIBOR plus an appropriate basis point spread and applying the internal CUP method was accepted. No distinguishing feature in facts or in law has been brought to our notice for the year under consideration. In such circumstances, the principle of consistency also warrants that a similar view be taken.

19.4. In view of the foregoing, and respectfully following the view adopted by this Tribunal in preceding assessment years, we find no infirmity in the action of the Ld. CIT(A) in accepting the interest charged to the AEs as being at arm's length by applying the internal CUP method.

Accordingly, Ground Nos. 4.1 to 4.6 raised by the Revenue are allowed for statistical purposes.

20. Ground Nos. 5.1 to 5.4 relate to the deletion of interest charged on capital contribution made to the AEs.

<u>Brief facts leading to the issue are as under:</u>

20.1. The assessee has wholly owned subsidiary by the name Oracle Financial Services Software America Inc. (OFSS America Inc., earlier known as I-flex America Inc.) in Delaware, USA during financial year 2004-05. It is submitted that OFSS America Inc. is principally engaged in the business of providing information technology solutions to the financial services industry in the USA. As per its Certificate of Incorporation, OFSS America Inc. was authorized to issue 100 shares with a face value of USD 0.01 per share. Out of these authorized shares, OFSS America Inc. issued one share to the assessee at the time of incorporation, making the assessee its sole shareholder. Accordingly, OFSS America Inc. became a 100% wholly owned subsidiary of the assessee.

20.1.1. It is submitted that, the assessee, being the only shareholder, infused capital into OFSS America Inc. over the years. The assessee contributed capital of USD 61.5 million in the financial year relevant to A.Y. 2007–08 and further capital of USD 12.16 million in the financial year relevant to A.Y. 2008–09. It is a settled position that no additional shares were issued by OFSS America Inc. to the assessee during these years when the capital was infused. The Ld. AR submitted that the assessee continues to be the sole shareholder of OFSS America Inc., holding one share therein.

20.2. The Ld. AR further submitted that the capital contributions made during the financial years relevant to A.Ys. 2007–08 and 2008–09 were infused to facilitate strategic acquisition in the USA of Castek Software Inc., USA, a company specializing in delivery of enterprise software solutions and provision of related services to the insurance

industry. He emphasized that details regarding utilization of the funds infused as capital contribution into OFSS America Inc. fort the year under consideration is placed at pages 395 to 396 of the paper book and also formed part of the submissions made before the Ld. CIT(A) on this issue.

20.3. It is submitted that the Ld. TPO treated the capital contribution made during the financial year relevant to A.Y. 2008–09 amounting to USD 12.16 million as an interest-free loan to OFSS America Inc. The Ld. TPO was of the opinion that, since the funds were infused in the form of capital, OFSS America Inc. ought to have issued further shares in lieu thereof, which had not been done in the present case. The Ld.TPO observed that OFSS America Inc. was authorized to issue 100 shares, out of which only one share had been issued to the assessee at the time of incorporation.

20.4. The Ld.TPO also was of the opinion that OFSS America Inc. could have issued, at the most, 99 additional shares at USD 1 each and, therefore, could have received only USD 99 as capital contribution towards share capital. The Ld. TPO thus held that the difference between USD 12 million and USD 99 represented loan on which the assessee ought to have earned interest income at the rate of 16% per annum.

Accordingly, the Ld.TPO proposed adjustment of ₹9,76,70,392/- in the hands of the assessee. The said proposed adjustment was incorporated by the Ld.AO in the draft assessment order as well as the final assessment order.

Aggrieved by the order of the Ld.AO, the assesse preferred appeal before the Ld.CIT(A).

21. On appeal before the Ld.CIT(A), the addition was deleted by holding that the Ld.TPO failed to consider the submissions of the assessee that, as per US Treasury Regulations and US Court Rulings, a company incorporated in the USA which is a wholly owned subsidiary of another company need not issue further shares on receipt of additional capital, as issuance of shares in such circumstances would be a 'meaningless gesture'. The Ld.CIT(A) further held that the Ld. TPO failed to bring any evidence on record to support its stand that the capital contribution could be re-characterized as a loan attracting interest. It was also held that the Ld. TPO could not step into the shoes of the assessee to rewrite the transaction entered into between the parties.

Aggrieved by the order of the Ld.CIT(A), the revenue is in appeal before this *Tribunal.*

22. The Ld.DR relied on the written submissions filed on 15/02/2024. The Ld.DR submitted that a company cannot issue shares beyond the number of shares authorized in its articles and, therefore, supported the observations of the Ld.TPO in re-characterizing the transaction of capital contribution as loan advanced to the AE.

22.1. The Ld.AR on the contrary relied on the observation of the Ld.CIT(A). He submitted that the assessee is the sole shareholder of OFSS America Inc., holding only one share, which constitutes 100%

of the issued share capital of the company. It is an admitted fact that, over the years, the assessee infused capital into OFSS America Inc., and no further shares were issued at the time of such capital infusions. The Ld. AR emphasized that despite the infusion of capital, the assessee continued to hold the same one share and retained 100% ownership in OFSS America Inc. The Ld.AR vehemently objected to the deletion of the TPO's adjustment on following propositions:-

> *"i. Department is not entitled to recharacterize the assessee's transaction.*
>
> *ii. Department cannot call into question the decision of the assessee to invest in equity or debt.*
>
> *iii. Application of doctrine of meaningless gesture.*
>
> *iv. OFSS America Inc. has not breached the limit of its authorised shares.*
>
> *v. Even if further shares were issued, there would be no breach of authorised shares.*
>
> *vi. US regulations cited by the ld. DR have no bearing on the facts of the case.*
>
> *vii. Other instances of doctrine of meaningless gesture available in public domain.*
>
> *viii. Other evidence showing that USD 12 million is capital contribution.*
>
> *ix. The assessee could not have had any incentive to shift profits out of India."*

21.2. The Ld.AR also placed reliance on following decisions to support its argument that, the Department is not entitled to re-characterise a capital contribution transaction as a loan transaction:-

- *Hon'ble High Court of Bombay* in the case of *Aegis Ltd. Vs. PCIT [2019] taxmann.com 495 (Bom.)*

- Decision of the co-ordinate Bench of the *Tribunal* in *ITO vs. Sterling Oil Resources Ltd.* reported in *(2016) 179 TTJ 298*. [This decision has since been confirmed by the *Hon'ble Bombay High Court* in *[2019]108 taxmann.com 645.]*

21.3. The Ld.AR submitted that US courts and their Internal Revenue Service (IRS) recognizes the doctrine of a "meaningless gesture," which is founded on the principle that issuance of additional stock to a shareholder who is the sole shareholder of a corporation has no economic significance. He submitted that since all the shares are owned by a single shareholder, any further issue of shares to the same shareholder would be a futile exercise, as the shareholder's rights and benefits would remain unchanged even if additional shares were issued. The Ld. AR further placed reliance on US IRS Memorandum No. AM 2020-005 dated 29/05/2020, which recognizes this principle by observing as under:-

> *"Shareholders transfer to corporation of money (situation 1) or appreciated property (situation 2) on August 1, year 1 (each a subsequent transfer) is also a transfer to which section 351 applies, even though shareholder does not receive any additional stock. Lessinger us. Commissioner, 872 F .2d 519, 522 (2d Cir. 1989), the exchange requirements of section 351 are met where a soul stockholder transfers property to a wholly owned corporation even though no stock or securities are issued therefore. Issuance of new stock in this situation would be a meaningless gesture."*

21.4. The Ld.AR submitted that the observation of the Ld.TPO that the assessee could have contributed only USD 99 towards capital, being the balance authorized share capital, and that the remaining

contribution should be treated as a loan, is factually incorrect. It was emphasized that the assessee is the sole shareholder of OFSS America Inc., exercises exclusive control rights as shareholder, and enjoys all benefits arising from its ownership. Thus, even though no further shares were issued against the capital contribution infused by the assessee during the year under consideration, the same has no relevance in view of the doctrine of “meaningless gesture.” It was also submitted that OFSS America Inc. has not breached the limit of its authorized share capital.

21.5. The Ld.AR, referred to sections 152 and 153 of the Delaware General Corporation Law, which was also relied by the Ld.DR in his written submissions and submitted that, section 152 permits the Board of Directors to determine the consideration at which shares are to be issued. Secondly, section 153 provides that shares having a par value have to be issued for a consideration, which should not be less than the par value. Therefore, the regulations require a Delaware company to issue shares at a price, which should not be less than the par value. In the instant case, the par value of each share of OFSS America Inc. was USD o.01 (wrongly noted as USD 1 by the ld. DR) is the minimum price for which the shares can be issued and not the maximum price, as alleged by the ld. DR. He thus submitted that the Ld.DR's assertion that OFSS America Inc. was capable of receiving only USD 99 as capital, and therefore, the rest has to be characterised as a loan, gives a complete go by to the concept of issue of shares at a premium, and is ex facie contrary to sections 152 and 153 of the General Corporation Law.

21.6. He further submitted that, OFSS America Inc. had two options while receiving capital contribution of USD 12 million from the assessee. The first option was to invoke the doctrine of meaningless gesture and not issue any further shares and the second option was to issue any number of shares it wanted, as long as such number did not exceed 99, i.e. the remaining authorised shares and receive the capital contribution of US 12 million. OFSS America Inc. chose the first option. The essence of the Department's case is that had it chosen the second option, it could have received only USD 99 by issuing 99 shares at USD 1 each, which is completely erroneous as section 152 gives the company the right to choose the issue price and it places no fetter on the maximum price at which shares can be issued.

21.7. The Ld.AR thus submitted that the Department's contention that par value is the maximum price at which the shares can be issued is wholly flawed. He then submitted that assuming, for the sake of argument, that OFSS America Inc. had chosen the second option, it could have issued any number of shares(say for example 5 shares), and received USD 12 million. In such a case, the par value of such further shares would have been USD 0.05 (i.e., USD 0.01 X 5), and USD 11,999,999.95 would have been the securities premium. Therefore, the whole construct of the Department's argument is contrary to the Delaware General Corporation Law and has no legs to stand on.

21.8. As regards the Ld. DR's reliance on section 161 the Corporation Law and Chapter 6 of Model Business Corporation Act, 2000, the

Ld.AR submitted that, there can be no doubt that additional stock cannot be issued beyond the limit of authorised capital. In the case of OFSS America Inc., no such breach has taken place. It is reiterated that OFSS America Inc. was authorised to issue 100 shares, out of which it had issued 1 share to the assessee at the relevant time. It is further submitted that it is not for an Income tax Authority to allege a violation of corporate law, when the regulator under that law has not alleged such a violation. Such an allegation on the part of the Ld.DR is wholly without jurisdiction. In any event, the assessee does not doubt the sanctity of section 161 of the Corporation law, but the same has no relevance to the facts of the case.

21.9. The submissions of the Ld. DR placing reliance on Section 158 of the Corporation Law and Clause 6.26 of the Model Business Corporation Act are misconceived and factually inapplicable to the present case. The entire edifice of the Ld. DR's argument proceeds on an erroneous assumption that the assessee has claimed issuance of uncertificated shares in respect of the capital contribution of USD 12 million. This is not the case of the assessee. The assessee has never contended that no shares were issued or that the investment remained unallotted; rather, the capital contribution stands duly recorded and recognized in the books of the assesse as well as of OFSS America Inc..

21.10. The requirement of passing a Board resolution, as referred to by the Ld. DR, would arise only in a situation where a company elects to issue shares in uncertificated form. Since no such case has been made out by the assessee, the question of invoking the said provision

does not arise at all. The reliance on the Model Business Corporation Act is, in any event, misplaced, as it is only a model legislation framed by the American Bar Association and has no binding applicability unless specifically adopted by the relevant State law.

21.11. Further, the assessee is the sole and 100% shareholder of OFSS America Inc. In such a wholly owned structure, the question of prejudice, dilution, or any third-party shareholder rights does not arise. The objection raised by the Ld. DR is therefore purely academic, divorced from the factual matrix, and does not impinge upon the validity of the capital contribution or its recognition in the books.

21.12. The Ld.AR also placed on record the documents filed by it before the Reserve Bank of India (RBI) in compliance of Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004, for making equity capital contribution of USD 12 million in OFSS America Inc. The Ld.AR invited our attention to the following-

- The board resolution dated 4/10/2007, wherein the Board had accorded its approval for investing capital of USD 12 million in OSS America Inc.
- Letter of confirmation from OFSS America Inc. (pg. 1507 of the paperbook) was also filed confirming the fact that USD 12 million was an addition to the equity capital of the assessee.

He submitted that both, the assessee and OFSS America Inc, in their respective financial statements have recorded the investment as an investment towards equity.

21.13. The Ld.AR submitted that the capital infusion was in compliance with the applicable corporate law provisions. He further submitted that the assessee had filed relevant documents evidencing compliance with RBI requirements under FEMA Regulations, 2004 for making equity capital contribution of USD 12 million in OFSS America Inc. He submitted that, assessee had furnished:

- In Section A of Form ODI, the assessee has selected the option "proposed investment is in Existing Project (Acquisition of stake in an already existing JV/WOS overseas promoted by an Indian party”

- In Section C of Form ODI, the assessee has selected the purpose of supplementary investment as "Enhancement of Equity in existing JV/WOS overseas"

- Section D of Form ODI shows that investment has been made in equity share capital

- The assessee has also filed a compliance confirmation statement as per FEMA regulations with regards to the investment by subscribing USD 12,000,000 to equity shares" in the capital of OFSS America Inc.

• In Form A2 (application cum declaration for drawal of foreign exchange), the purpose is mentioned as "Enhancement of Equity in existing WOS"

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

22. We have considered the rival submissions and perused the material on record. It is an admitted position that the assessee is the sole shareholder of OFSS America Inc. holding 100% of its equity and that the amount of USD 12 million was infused as capital contribution. No additional shares were issued at the time of such infusion and the assessee continued to hold the same one share representing the entire issued share capital. The Ld.TPO re-characterized the said capital contribution as loan on the premise that the authorised share capital was limited and, therefore, the excess amount partook the character of a loan carrying interest.

22.1. In our considered view, the Ld. CIT(A) was justified in deleting the adjustment. Firstly, the Revenue has not brought any material on record to demonstrate that the transaction was, in substance, in the nature of a loan or that there existed any obligation for repayment or payment of interest. In the absence of any such characteristic, a capital contribution cannot be re-characterized as a loan merely on presumptions. It is well settled that the Ld.TPO cannot step into the shoes of the assessee and re-write the transaction entered into by the parties.

22.2. Secondly, the fact that no further shares were issued to a 100% shareholder does not, by itself, alter the character of the transaction. The doctrine of "meaningless gesture," as recognized in the context of wholly owned subsidiaries, supports the position that issuance of additional shares to the sole shareholder does not have any economic significance, as the ownership and control remain unchanged. Further, no material has been brought on record by the Ld.TPO to show that the authorised share capital was breached or that the capital contribution was in violation of the applicable corporate law provisions.

22.3. Thirdly, the decisions relied upon by the assessee, including those of the jurisdictional *High Court*, support the proposition that capital contributions cannot be re-characterized as loans in the absence of any debt-like features. The Revenue has not brought on record any distinguishing facts for the year under consideration.

22.4. In view of the above, we find no infirmity in the order of the Ld. CIT(A) in holding that the capital infusion of USD 12 million is in the nature of equity and does not give rise to any notional interest adjustment.

Accordingly, Ground Nos. 5.1 to 5.4 raised by the Revenue stand dismissed.

23. Ground Nos. 6.1 to 6.4 relate to the adjustment proposed in respect of customization fees retained by the AEs.

<u>Brief facts relating to this issue are as under:</u>

23.1. The assessee, in relation to Product business, broadly derives license fees, customization fees and annual maintenance contracts from the AEs. It is submitted that Customization is integration of the products with customer's IT systems and enhancement to address the specific requirements of the customers. Thus thorough knowledge is therefore required not only of the assessee's products but also of the customers' IT configuration, etc.

23.2. It is submitted that the AEs in USA, Netherlands and Singapore are engaged in distribution of software products and services in respective jurisdictions. It is submitted that the assessee granted AE's right to distribute its products to end-customers in their respective jurisdiction under a license agreement. The AE's thus enter into the contract with the end customers and sell the assessee's products in their respective jurisdiction.

23.3. Since all contracts are primarily entered into by AEs with the end-customers, the AEs receive and book the entire contract value received from the customers as their revenue. Thereafter, the AEs retain certain percentage thereof for their functions and remit the balance amount to the assessee as consideration for subcontracting of the work to the assessee. The amount paid to the assessee by the AEs towards the aforesaid subcontracts is accounted as cost of sales in books of the AEs. The AEs carry on the distribution of products and services on a principal-to-principal basis.

23.3.1. During the year under consideration the AE's retained Rs.27,42,03,387/- out of the total customisation fee received from the end customers towards, marketing and customisation work.

23.3.2. It is further, submitted that the assessee also appoints third party distributors for marketing of software products. However, the third party distributors are not assigned the work of sourcing customization work for the assessee.

23.4. The Ld.TPO was of the opinion that no additional marketing function is performed by the AE's to secure the customisation assignment. He noted that once the product is sold to the end customers, and if same requires customisation, the assesse is automatically in a position to customisation services without any significant marketing efforts by the AE's. The Ld.TPO disregarded the TNMM analysis adopted by the assessee for benchmarking the said transactions and instead applied the CUP method by comparing the arrangement of the assessee with third-party distributors.

23.5. It was submitted by the assesse that marketing of customization work requires not only knowledge of the assessee's products but also familiarity with the customer's IT configuration and systems. Accordingly, continuous training is provided to the subsidiaries to equip them to effectively market and support the assessee's products. The assessee submitted that, in the present facts of the case, CUP method cannot be adopted as a similar training is not provided to third-party distributors and their entrusted with a limited responsibility for marketing of the products only. The assessee had submitted the third party distributors only sold the software products developed by assessee and these distributors were never assigned to source customisation work for assessee. It was

submitted that no commission was paid to the third party distributors as not customisation efforts were undertaken by them.

23.5.1. The Ld.TPO proposed an adjustment of ₹3,17,08,761/- in respect of fees retained by the overseas subsidiaries towards marketing, product distribution, registration and client management services relating to customization work.

The said proposed adjustment was incorporated by the Ld.AO in the draft assessment order as well as the final assessment order.

Aggrieved by the order of the Ld.AO, the assesse preferred appeal before the Ld.CIT(A).

24. The Ld.CIT(A), after considering the submissions of the assesse observed and held as under:

> *"I have gone through the order of the TPO/AO and the submissions made by the ARs for the Appellant and the orders of my predecessors in office. Further, the Appellant's ARs also drawn my attention to the order of High Court in Appellant's own case (i.e., Order in relation to Income-tax Appeal No.2352 of 2011 dated 24 March 2014 for AY 2002-03).*
>
> *The submission by the Appellant's ARs has been considered. It is evident that the nature of services rendered by the distributors in general is totally different from that of subsidiaries. The distributors were only selling the software products of the Appellant. These distributors were not assigned to source customization work for the Appellant and therefore no commission was paid to the distributor for any customization efforts undertaken by the Appellant. While the services rendered by the distributors are primarily in respect of the products, the services rendered by the subsidiaries are in respect of the overall, services carried out by the Appellant.*
>
> *Consequently, in respect of the sale of products made, commission is paid to the distributors.*
>
> *The latter are not entitled for commission payment on account of customization works done by the Appellant.*

On the other hand, the subsidiaries got paid on the overall consideration that included receipt on account of customization. Therefore, the finding of the TPO / Additional CIT that in respect of customization, the Appellant is not liable to make payment to the subsidiaries is not correct.

Appellant's ARs has vide submission dated 08 March 2018 also placed reliance on various judgments delivered such as Mumbai Tribunal in the case ofSerdia Pharmaceuticals (India) Private Limited Vs. ACIT (ITA Nos: 2469/Mum/06, 3032/Mum/07 and 2531/Mum/08), Gharda. Chemicals Ltd. vs. DCIT (9(1))(ITA No. 2242/Mum/06) and UCB India Private Limited vs. ACIT (2009) (ITA. 428& 429/Mum/2007) supports its contention that high degree of comparability is required for application of CUP method.

In the present case, a valid CUP does not exist as the functions performed by Distributors are not similar to that carried by AE who add further value by way of customization. This was even pointed out in TP documentation. It is observed that the same issue has been adjudicated in the High Court and was decided in Appellant's favour. It is also observed that in earlier years on same facts the appeal was decided in Appellant's favour on this very issue. Thus taking into account all the facts and circumstances this ground is allowed in favour of the Appellant."

Aggrieved by the order of the Ld.CIT(A), the revenue is in appeal before this *Tribunal.*

25. The Ld. DR relied on the orders of the authorities below.

25.1. AR submitted that this issue is squarely covered by the decision of the co-ordinate Bench of the *Tribunal* in the assessee's own case for earlier assessment years 2002-03 and 2005-06 in ITA No. 3699/Mum/2006; CO No. 366/Mum/2006 and ITA No.4489/M/2010; ITA No. 4079/Mum/2010, respectively. It was submitted that the Department's appeal on this issue before the *Hon'ble High Court* in *ITA No. 2352/2011* has also been dismissed, and a copy of the order is placed at pages 1 to 4 of the paper book.

We have considered the submissions of both sides in light of the material placed before us.

26. It is noted that, the Co-ordinate bench of this *Tribunal* in similar circumstances had decided the issue for AY 2002-03 which has been followed in the orders passed by this *Tribunal* for AY 2003-04 and 2004-05 *(supra)*. The relevant findings of the *Tribunal* are as under:-

> *27. Having considered rival submissions, we find, identical issue arose in assessee's own case in assessment year 2002-03. While deciding the issue, the Tribunal in ITA No. 3699/Mum/2006 dated 31.08.2010 has held as under:*
>
>> *"17. We have heard the rival submissions of the parties. The Learned D.R. vehemently argued that there is no reason to pay the additional commission to the subsidiaries then the independent local distributors. It is argued that entire customisation work is done by the assessee only and there is no contribution by the subsidiaries in the customization work entrusted by the users of the software manufactured by the assessee company. Per contra, the Learned Counsel argues that in addition to the sale of the software, the additional assignments or jobs for collection of customization work is done by the subsidiaries (A.Es.). Ld. Counsel also referred to the sample copy of the agreement, which is placed in the paper book and submits that so far as the local independent distributors are concerned, Some of them are paid between 15 to 20% only on the selling the products of the assessee. He submitted that though the entire customization work is done by the assessee but all the data collection work is done by the subsidiaries. The Learned Counsel supported the order of Learned CIT (A) deleting the addition.*
>>
>> *18. We find force in the argument of Learned Counsel. We have also gone through the reasons given by the Learned CIT (A). Though the subsidiaries are not directly involved in the customization work of the software but at the same time they are only authorized to collect the customization work in the market and other independent distributors are not doing said work. It is also seen that some of the independent distributors are paid higher commission then the subsidiaries without doing any job for collection of customization work. Moreover, the Learned D.R. could not controvert the findings of the Learned CIT (A) before us. In our opinion, no interference is called in the order of the Learned CIT (A) on this issue. Accordingly, the same is confirmed. Ground no.3 taken by the revenue is dismissed."*

26.1. It is also not in disputed that this view adopted by the *Tribunal* for AY 2002-03 has been upheld by the Hon'ble High Court in ITA

No. 2532/2011 vide order dated 24/03/2014. The Ld.CIT(A), while considering the issue has observed and held as under:-

> *"I have gone through the order of the TPO/AO and the submissions made by the ARs for the Appellant and the orders of my predecessors in office. Further, the Appellant's ARs also drawn my attention to the order of High Court in Appellant's own case (i.e., Order in relation to Income-tax Appeal No.2352 of 2011 dated 24 March 2014 for AY 2002-03).*
>
> *The submission by the Appellant's ARs has been considered. It is evident that the nature of services rendered by the distributors in general is totally different from that of subsidiaries. The distributors were only selling the software products of the Appellant. These distributors were not assigned to source customization work for the Appellant and therefore no commission was paid to the distributor for any customization efforts undertaken by the Appellant. While the services rendered by the distributors are primarily in respect of the products, the services rendered by the subsidiaries are in respect of the overall, services carried out by the Appellant.*
>
> *Consequently, in respect of the sale of products made, commission is paid to the distributors.*
>
> *The latter are not entitled for commission payment on account of customization works done by the Appellant.*
>
> *Appellant's ARs has vide submission dated 08 March 2018 also placed reliance on various judgments delivered such as Mumbai Tribunal in the case ofSerdia Pharmaceuticals (India) Private Limited Vs. ACIT (ITA Nos: 2469/Mum/06, 3032/Mum/07 and 2531/Mum/08), Gharda. Chemicals Ltd. vs. DCIT (9(1))(ITA No. 2242/Mum/06) and UCB India Private Limited vs. ACIT 2009) (ITA. 428 & 429/Mum/2007) supports its contention that high degree of comparability is required for application of CUP method.*
>
> *In the present case, a valid CUP does not exist as the functions performed by Distributors are not similar to that carried by AE who add further value by way of customization. This was even pointed out in TP documentation. It is observed that the same issue has been adjudicated in the High Court and was decided in Appellant's favour. It is also observed that in earlier years on same facts the appeal was decided in Appellant's favour on this very issue. Thus taking into account all the facts and circumstances this ground is allowed in favour of the Appellant.*
>
> *Thus, Ground No. 16 to 18 is allowed."*

26.2. It is noted that, the subsidiaries got paid on the overall consideration that included receipt on account of customization. Therefore, the finding of the Ld. TPO that in respect of customization fee, cannot be upheld. Based on the above discussion, we do not find any infirmity in the view adopted by Ld.CIT(A) and the same is upheld. We, therefore do not find any force in these grounds raised by Revenue.

Accordingly, Ground Nos. 6.1. to 6.4. raised by revenue stands dismissed.

27. It is submitted that, **Ground Nos. 7 & 8** are general in nature and, therefore, not pressed.

In the result, appeal of the revenue stands partly allowed and appeal of the assessee stands allowed.

Order pronounced in the open court on 19/02/2026

Sd/-	***Sd/-***
(GIRISH AGRAWAL) **Accountant Member**	**(BEENA PILLAI)** **Judicial Member**

Mumbai
Dated: 19/02/2026
SC Sr. P.S.

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

True Copy
By order

(Asstt. Registrar)
ITAT, Mumbai