IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI

Before Sh. N. K. Saini, AM and Smt. Beena Pillai, JM

ITA No. 479/Del/2016 : Asstt. Year : 2011-12

Birlasoft (India) Ltd., (formerly Birlasoft Ltd.), 8th Floor, Birla Tower, 25, Barhkhamba Road, New Delhi-110001	Vs	Asstt. Commissioner of Income Tax, Circle-5(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACB2769E		

SA No. 44/Del/2016
(in ITA No. 479/Del/2016 : Asstt. Year : 2011-12)

Birlasoft (India) Ltd., (formerly Birlasoft Ltd.), 8th Floor, Birla Tower, 25, Barhkhamba Road, New Delhi-110001	Vs	Asstt. Commissioner of Income Tax, Circle-5(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACB2769E		

Assessee by : Sh. Ajay Vohra, Sr. Adv., Sh. Neeraj Jain, Adv. & Abhishek Agarwal, CA
Revenue by : Sh. N. C. Swain, CIT DR

Date of Hearing : 04.08.2016		**Date of Pronouncement : 29.09.2016**

ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 31.12.2015 of the AO passed u/s 144C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act). The assessee has also moved an Application for the stay of the

recovery of outstanding demand amounting to Rs.37,50,83,420/-.

2. Following grounds have been raised in this appeal:

"1. That the assessing officer erred on facts and in law in completing the assessment under section 144C read with section143(3) of the Income-tax Act (the Act) at an income of Rs. 73,60,36,382 as against the loss of Rs. 34,78,61,077 returned by the appellant.

2. That the assessing officer erred on facts and in law in making adjustment of Rs. 103,59,59,621 to the income of the appellant on account of the alleged difference in the arm's length price of the international transaction of provision of software development services undertaken during the previous year on the basis of order passed by Transfer Pricing Officer ('TPO') under section 92CA(3) of the Act.

2.1 That the Dispute Resolution Panel ('DRP')/TPO erred on facts and in law in disregarding the internal benchmarking undertaken by the appellant for determining the arm's length price of the international transactions, applying TNMM, holding that:

(i) the appellant did not maintain segmental accounts for the related and non-related transactions and there was no segregation of these activities in the audited financials.

(ii) in the segmental accounts prepared by the appellant, expenses which cannot be directly allocated are apportioned on the basis of respective turnover and is not reliable at all.

(iii) that the Chartered Accountants while auditing the segment analysis has relied on the segments drawn by the management.

(iv) That the appellant has failed to provide the details of employees functioning under the AE and non-AE segments.

2.2 That the DRP/ TPO erred on facts and in law in holding that the internal comparability does not provide meaningful benchmarking, even after accepting that, FAR of the segments are identical and concurrent transactions of both the segments are homogeneous.

2.3 That the DRP/ TPO erred on facts and in law in disregarding the internal benchmarking analysis applying TNMM undertaken by the appellant, without pointing out any error or mistake in the segmental profitability in relation to revenue earned from AE and non AEs transactions worked out by the appellant and also certified by independent Chartered Accountants.

2.4 Without prejudice, while benchmarking the international transaction of provision of software development services with external comparables, the DRP/ TPO erred on facts and in law in considering the following companies which does not pass

comparability criteria provided under Rule 10B(2) of the Income Tax Rules:

i. Acropetal Technologies Limited
ii. Infosys Ltd.
iii. Wipro Technology Services
iv. Igate Global Solutions Ltd,
v. E- Infochips Ltd.
vi. Sankhya Infotech Ltd.
vii. Sasken Communication Technologies Ltd.
viii. E-zest Solutions Ltd.
ix. Persistent Systems & Solutions Ltd.
x. Infor Global Solutions
xi. Zylog Systems Ltd

2.5 That the DRP erred on the facts and in law in sustaining the inclusion of Infor Global Limited as comparable without adjudicating the objection of the appellant that in the absence of availability of reliable audited financial information in the public domain, the company cannot be considered as comparable.

2.6 That on the facts and in the circumstances of the case and in law, the DRP/ TPO erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that in absence of robust and reliable data, both for the assessee and for the comparables, risk adjustment cannot be considered for enhancing comparability.

2.7 Without prejudice, that the assessing officer/TPO erred on facts and in law in not appreciating that the adjustment in the arm's length price at best should only be restricted to the

international transaction undertaken with the associated enterprise and not to the entire turnover of the appellant.

3. That the assessing officer/DRP erred on facts and in law in disallowing deduction of income amounting to Rs. 4,78,62,710 claimed under section 10A of the Act in respect of GE-GDC unit holding that GE-GDC unit is not altogether different or new unit but an extension of an existing STP unit as both the units are situated in the same building and doing the same business.

3.1 That the assessing officer/DRP erred on facts and in law in not appreciating that GE-GDC was set up as an independent standalone unit with substantial fresh investment of 8.42 Crores and was separately registered with STPI and custom authority as a new undertaking for production of computer software.

3.2. That the DRP erred on facts and in law in sustaining the aforesaid disallowance on the basis that the revenue has challenged the decision of the Hon'ble Tribunal, deleting similar disallowance made in earlier years, before the Hon'ble High Court and therefore, the matter has not reached finality.

4. That the assessing officer/ DRP erred on facts and in law in making an ad-hoc disallowance of interest expenses of Rs. 75,128 allegedly holding that the interest paid on short term loans which are invested in acquisition of fixed assets shall be capitalized along with the fixed assets.

4 1 That the assessing officer/ DRP erred on facts and in law in not appreciating that the fixed assets were acquired by the assessee out of its own funds and accordingly, no interest expenses shall be aggregated with the value of fixed assets.

4.2 Without prejudice, the assessing officer/ DRP erred on facts and in law in allegedly considering the interest rate at 15% on the short term loans for the purpose of computing the interest to be capitalized.

4.3 Without prejudice the assessing officer/ DRP erred on facts and in law in not allowing depreciation on the increased cost of acquisition / written down value of such asset after including interest expenses of Rs. 75,128.

5. That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act.

The appellant craves leave to add, alter, amend or vary from the aforesaid gounds of appeal before or at the time of hearing."

3. Ground No. 1 is general in nature, so it does not require any adjudication on our part.

4. Vide Ground Nos. 2 to 2.7, the grievance of the assessee relates to the transfer pricing adjustment amounting to

Rs.103,59,59,621/- in respect of international transaction of provision of software development services.

5. Facts of the case related to this issue in brief are that the assessee company was incorporated on 20.01.1995, it was engaged in the activities of software development and related services. The said business was being carried out from the STP unit. The assessee filed its original return of income on 30.09.2011 declaring Nil income as per normal provision in the computation of income. The assessee had also carried forwarded loss of current year amounting to Rs.34,78,61,077/-. The said return was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny. During the course of assessment proceedings, the AO referred the matter to the TPO to determine the armôs length price u/s 92CA(3) of the Act in respect of international transactions. The TPO proposed an adjustment of Rs.112,18,06,048/- on account of the armôs length price of the international transaction with AEôs, relating to provision of software design and development services by passing the order u/s 92CA(3) of the Act. Therefore, the AO asked the assessee to show-cause as to why the TP adjustment of the aforesaid amount be not made in taxable income as recommended by the TPO. The submissions of the assessee did

not find merit with the AO and accordingly the said addition was proposed in the draft assessment order.

6. Being aggrieved the assessee filed the objections before the ld. DRP who directed the TPO to correct certain calculation mistakes while working out the adjustment by observing as under:

> *"In this regard the taxpayer is directed to provide all the backup details to the TPO with working so that it may be pointed out as to where TPO has faulted in the calculation and further TPO is directed to consider the same while working out the adjustment."*

7. Thereafter, the TPO worked out the adjustment at Rs.103,59,59,621/- which was added by the AO to the income of the assessee.

8. Being aggrieved the assessee is in appeal. The ld. Counsel for the assessee at the very outset stated that this issue is squarely covered in favour of the assessee in the earlier year in assesseeôs own case in ITA No. 200/Del/2015 for the assessment year 2010-11 order dated 17.04.2015 (copy of which is placed at page nos. 114 to 136 of the assesseeôs paper book). The ld. CIT DR although supported the orders of the

authorities below but could not controvert the aforesaid contention of the ld. Counsel of the assessee.

9. After considering the submissions of both the parties and carefully going through the material available on the record, it is noticed that an identical issue having similar facts has already been adjudicated by this bench of the Tribunal in assesseeôs own case for the assessment year 2010-11 in ITA No. 200/Del/2015 wherein relevant findings have been given in paras 6 & 7 of the order dated 17.04.2015 which read as under:

> *"6. We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issue having similar facts was a subject matter of adjudication in assessee's own case in ITA No. 1572/Del/2014 for the assessment year 2009-10 wherein the relevant findings have been given in paras 17 & 18 of the order dated 28.07.2014 which read as under:*
>
> > *"17.The ld counsel pointed out that a co-ordinate Bench of this Tribunal in appellant's own case for the assessment year 2006-07 reported in 136 TTJ 505, had allowed the appeal of the assessee, and held as under:-*
> >
> > *"17.In the light of the discussions made above, we therefore, hold that the assessee was justified in undertaking internal bench marking analysis on standalone basis by placing on record working of operating profit margin from international transactions with AEs and transactions with unrelated parties undertaken in similar*

functional and economic scenario, and the same should be the basis for determination of arm's length price in respect of international transactions undertaken with the associated enterprise. In the light of the facts of the present case as discussed above, we therefore, hold that the Transfer Pricing Officer had the present case as discussed above, we therefore, hold that the Transfer Pricing Officer had to mandate to have recourse to external comparables when, the present case, internal comparables were available, which could be applied for determining the arm's length price of international transactions with AEs. We therefore, direct the Assessing Officer/ Transfer Pricing Officer to determine arm's length price of international transactions with AEs by making internal comparison of the net margin earned by the assessee from the international transaction with associated enterprises and the profit earned by the assessee from the international transactions with unrelated parties. In this respect the assessee has already given his working by allocating revenue and expenses to both the segmental and determined separate profitability. However, on perusal of the TPO's order, we find that the TPO has not undertaken any exercise to examine the correctness of the workings done by the assessee. We, therefore, restore this matter back to the file of the Assessing Officer/ Transfer Pricing Officer for fresh adjudication and for the purpose of determining the arm's length price in respect of the international transactions undertaken with the associated enterprise by making internal comparison of profitability from the international transactions with associated enterprise and profitability from the international transactions with unrelated parties after allocating respective revenues and expenses to both the segmental. The Assessing Officer/TPO shall provide reasonable opportunity of being heard to the assessee. The assessee

shall furnish all the details and particulars before the authorities below to enable them to make internal comparison of the profitability from the international transactions with associated enterprise and unrelated parties undertaken by the assessee in the similar functional and economic scenario we order accordingly.

18. Since we have accepted the assessee's stand that arm's length price in respect of international transactions undertaken with associated enterprises is to be determined on the basis of internal comparison of the profit earned from the international transactions with AEs and profit earned, from international transactions with unrelated parties, we do not go to decide whether the external comparables selected by the TPO were proper or justified to make arm's length price in the present case as that issue has become academic at this stage."

18. We find from a perusal of the aforesaid order that the Co-ordinate Bench restored the matter back to the file of the Assessing Officer/ Transfer Pricing Officer for fresh adjudication; and for the purpose of determining the arm's length price in respect of the international transactions undertaken with the associated enterprise by making internal comparison of profitability from the international transactions with associated enterprise and profitability from the international transactions with unrelated parties after allocating respective revenues and expenses to both the segments. We find that in Assessment Year 2007-08 and 2008-09, too, the Tribunal has relied on its own previous order and upheld the benchmarking analysis undertaken by the appellant considering internal comparable for determining arm's length price. Similarly, we also find that vide order dated 06.05.2014, the a co-ordinate Bench of this Tribunal in appellant's own case for Assessment Year 2005-06(ITA NO. 4713/Del/2011),

upheld the internal benchmarking undertaken by the appellant, considering the ratio laid down in the decision of Tehnimont (supra) and the decision of this Tribunal in the appellant's own case for Assessment Year 2006-07. Therefore in the light of the decision of the co-ordinate bench of this Tribunal we respectfully follow it and set-aside the order of the AO/TPO on this issue and restore it back to the file of the AO/TPO with the direction as stated in order for Assessment Year 2006-07 as reproduced above in para 20."

7. Since the facts for the year under consideration are identical to the facts involved in the aforesaid referred to orders dated 28.07.2014 for the assessment year 2009-10 in assessee's own case in ITA No. 1572/Del/2014. So, respectfully following the said order, this issue is set aside to the file of the AO/TPO to be decided as directed for the assessment year 2009-10."

10. Since the facts for the year under consideration are identical to the facts involved in the preceding year, so respectfully following the aforesaid referred to order dated 17.04.2015 this issue is set aside to the file of the AO/TPO to be decided as has been directed for the preceding assessment year 2010-11 in ITA No. 200/Del/2015.

11. Next issue vide Ground Nos. 3 to 3.2 relates to the disallowance of deduction of income of Rs.4,78,62,710/- claimed as exempt u/s 10A of the Act in respect of GE-GDC unit.

12. The facts related to this issue in brief are that the assessee originally had set up a STP Unit at 2nd Floor, Block-III, Noida which was registered as STP Unit in the year 1995. Thereafter, another new STP Unit was set up at 3rd Floor, Block-III, Sector-29, Noida in the assessment year 2002-03. The nature of the work and the kind of software services provided by the assessee company in the above mentioned two units were identical. The AO asked the assessee to explain, since the nature of business and the kind of services provided by the assessee was the same, why the STP Unit established be not treated as reconstruction of the assessee companies original business and why both units should not be treated as single unit. The AO after considering the reply of the assessee was of the view that the new unit was set up to meet the increased client base and was existing company and even if the new unit is treated as a separate unit, the exemption u/s 10A of the Act cannot be allowed to the assessee company since there was no change in the business carried out by the assessee and the unit was set up as a result of extension of the existing business of the assessee. The contention of the assessee that the ITAT had pronounced decision in its favour in the assessment years 2003-04, 2004-05, 2006-07 and 2007-08 was not accepted by the AO by observing that the department had preferred further

appeal in the Honôble High Court. Accordingly exemption claimed u/s 10A of the Act amounting to Rs.4,78,62,710/- was disallowed and added to the income of the assessee.

13. Now the assessee is in appeal. The ld. Counsel for the assessee at the very outset stated that this issue is squarely covered vide order dated 28.07.2014 in ITA No. 1572/Del/2014 for the assessment year 2009-10 (copy of which is placed at page nos. 101 to 116 of the assesseeôs paper book). The ld. CIT DR although supported the impugned order but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

14. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that an identical issue having similar facts has already been adjudicated in favour of the assessee vide aforesaid referred to order dated 28.07.2014 for the assessment year 2009-10 wherein relevant findings have been given in paras 22 & 23 of the said order which read as under:

> *"22. According to the ld counsel Shri Ajay Vohra, the AO/DRP erred in not appreciating that GE-GDC was set up as an independent stand alone unit with*

substantial fresh investment of Rs. 8.42 crores and was separately registered with STPI and custom authority as a new undertaking for production of computer software. At the outset itself the ld counsel pointed out that the issue was also decided in favor of the appellant by the Delhi Bench of the Tribunal in its own case of the AY 2003-4 in ITA Nos. 3821 and 3919/Del/2006 and also in assessment year 2006-07, 2007-08 and 2008-09 in ITA No. 3839/Del/2010, ITA No. 4776/Del/2011 and ITA NO. 284/Del/2013, respectively.

"5.5 The ld counsel for the assessee further submitted that the ITAT in the case of assessee for the assessment year 2003-04, has held that both the units, being separate and independent of each other, were eligible for deduction u/s 10A of the Act.

5.6 We have heard both the parties and carefully perused the orders of the authorities below. The assessee company is engaged in the activities of software development and related services. The software related business is being carried out from the STP Unit and the exemption u/s 10A has been claimed. Originally, the assessee company had set up a STP Unit at 2nd Floor, Block-3, Sector-29, Noida and it was registered is STP Unit in the year of 1995. Thereafter, another new STP Unit was set up at 3rd Floor, Block-3, Sector-29, Noida in the assessment year 2002-03. The new STP Unit was treated by the assessee to be an independent unit for the purpose of exemption claimed u/s 10A of the Act. However, the Assessing Officer has not accepted the claim of the assessee by holding that the new unit is nothing but an extension of the existing unit and not

entitled to separate deduction of exemption u/s 10A. We find that an identical issue had arisen in the Assessment Year 2003-04 before the Tribunal where the Tribunal vide order dated 27.03.2009 in ITA Nos. 3821/Del/2006 and ITA Nos. 3919/Del/2006 has held and observed as under:-

"2.9 We have considered the rival submissions and also perused the relevant material on record. It is observed that the claim of assessee for deduction u/s 10A in respect of profits derived from the STP unit known as GE-GDC was disallowed by the Assessing Officer on the ground that the Page No. 10 said unit was set up as a result of reconstruction of the existing business of the assessee company. In his impugned order, the ld CIT(A) however held that the said new unit was not set up by the assessee company by way of reconstruction or splitting up of the unit already in existence. In its appeal by revenue against the said order of ld CIT(A), the decision so rendered by ld CIT(A) has not been challenged and the same, therefore, has become final. The ld CIT(A) however, further held that the establishment of a new unit by the assessee company was a part of expansion of its existing unit and since both these units were entitled for deduction u/s 10A, the said deduction should be computed on the combined profit of both these units treating the same as one unit. He, however, has not given any reason whatsoever or has not referred to any provisions of the Act to support his conclusion that both the units should have been treated as one unit for the purpose of computing deduction u/s 10A.

2.10 At the time, of hearing before us, the ld counsel for the assessee has relied on the various judicial pronouncements wherein it was held that where a new undertaking has been formed with fresh capital and investment with a motive to increase the production capacity and expand its business, then it cannot be said that the new undertaking was not the new industrial unit by itself. It was also held that establishment of new industrial unit as a part of already existing industrial establishment may result in an extension of the industry, but if newly established unit itself is an integrated unit in which new plant and machinery are put up and the same itself independently of the old unit capable of production of goods, then it can be classified as a newly established industrial undertaking. This makes it abundantly clear that even if the new unit was established by the assessee company as expansion of its existing unit, a substantial fresh capital having been invested in the said unit and it was capable of doing business of its own independent of the old unit, the same was eligible to be treated as a newly established undertaking. In our opinion, the ld CIT(A) thus was not correct in holding that both the units were liable to be treated as one unit for the purpose of computing deduction u/s 10A."

23. From the said decision of Tribunal pertaining to the Assessment Year 2003- 04, it is clear that the Tribunal has taken a view that new unit cannot be treated to be as one and same unit with the existing unit for the purpose of computing deduction u/s 10A of the Act. Respectfully following the Tribunal's order passed in the Assessment Year 200304 and other

Assessment Yea's in assesse's own case for the AY 2005-06, 2006-07, 2007-08 and 2008-09, we allow this ground raised by the assessee and hold that the new unit is to be treated as a separate and independent unit for the purpose of computing deduction u/s 10A of the Act. The Assessing Officer shall allow the deduction u/s 10A in respect of the new unit set up at 3rd Floor, Block-3, Sector-29, Noida, thus, this ground is decided in favour of the assessee."

15. Since, the facts for the year under consideration are identical to the facts involved in the aforesaid referred to assesseeôs own case. So, respectfully following the order dated 28.07.2014 in ITA No. 1572/Del/2014 for the assessment year 2009-10, the issue is decided in favour of the assessee and the AO is directed to allow the deduction u/s 10A of the Act in respect of the new unit set up at 3rd Floor, Sector-III, Noida.

16. Next issue vide Ground Nos. 4 to 4.3 relates to the ad-hoc disallowance of interest expenses amounting to Rs.75,128/-.

17. The facts related to these issue in brief are that the AO asked the assessee to show-cause as to why the interest on short term loan of Rs.48.49 crores be not capitalized as the funds were being diverted for long term investment/increase of production capacity. The AO pointed out that the assessee furnished the same reply which was submitted during the

course of assessment proceedings for the assessment years 2009-10 and 2010-11. The AO made the impugned addition by observing in para 6.3.4 of the impugned order which read as under:

"6.3.4 It is admitted by the assessee that actual capital expenditure incurred during the financial was Rs.4.01 crore only as per Schedule-5 of audited financials and out of which Rs.3.45 lakh relates to foreign exchange fluctuations. As a result Rs.3.97 crores (Rs.4.01 crores – Rs.3.451ac) has been diverted for capital asset. The interest pertaining to Rs.3.97 crores ought to have been capitalized in view of the observations made in preceding paragraphs. Therefore, interest of Rs.59,55,000/- (@ 15% of Rs.3.97 crores) is hereby capitalized and disallowed as revenue expenditure. In this regard, it is pertinent to mention that similar proposed by the AO in his draft order for the A.Y. 2010-11 has been duly confirmed by the Hon'ble DRP.

Aggrieved by this addition, the assessee preferred an appeal before the DRP. Hon'ble DRP vide order dated 26.10.2015 has directed to recompute the disallowance in accordance with the directions of Hon'ble ITAT in assessee's own case for A.Y. 2009-10 in ITA No. 1572 of 2014. Hon'ble ITAT vide the above said order remitted the issue back to the file of AO with following observations:

"Therefore in order to apply the proviso of section 36(l)(iii) of the act to the facts of the f-sent case, that is in other words, before disallowing the interest expenditure on the fund borrowed for procurement of

asset for extension of existing business, the AO has to record as a matter of fact the date on which the asset thus procured was put to use is absolutely necessary. However, in the instant case, we find that no such exercise has been done by the AO to find out the date on which the assessee borrowed the fund for acquisition of asset in the relevant AY and we also find that no attempt has been made by the AO to find out on which date the asset thus procured with the said borrowed fund have been put to use. Only after the dates as afore-stated has been found out then only one can compute the disallowance as prescribed by the proviso to section 36(l)(ii) of the Act. In the said circumstances we set aside the impugned order on this issue and remand this issue back to the file of AO, with a direction to AO to find out the date on which the assessee borrowed the fund for acquisition of asset and also to find out on which date the asset for extension of business thus procured has been put to use; and thereafter capitalize the incurred for the period between the date of borrowing of the fund to the date on which the asset was put to use and we also clarify the interest deduction needs to be allowed from the date after the asset has been put to use by the assessee. In view of the above directions of DRP and in line with the directions given by Hon'ble ITAT, the assessee was asked to file the following details as per order sheet entry dated 16.12.2015.

- *Details of borrowing o/s at 31.03.2010.*
- *Details of borrowing made during F.Y. 2010-11.*
- *Details of purchase of assets during the F.Y. 2010-11.*

- *Details of put to use of assets purchased during the year.*

In response to the above queries, assessee company filed the details vide letter dated 21.12.2015 vide which it was submitted that the assessee company has booked total interest of Rs.7,57,21,954/- which includes interest cost of Rs. 68,06,634/- on fresh loan taken during the F.Y. 2010-11. Details of fresh loan taken and interest paid were submitted as follows:

Nature of Loan	***Amount of Loan in INR***	***Date of Loan***	***Interest paid***
UTI-Bank Pre Shipment Credit in Foreign currency (US $ 10,00,000)	*4,46,50,000*	*31.03.2011*	*2809*
Working Capital Loan Yes Bank	*5,00,00,000*	*21.09.2010*	*29,24,315*
Short Term Loan Yes Bank	*2,00,00,000*	*28.02.2011*	*2,19,178*
Short Term Loan Yes Bank	*3,00,00,000*	*04.03.2011*	*2,87,671*
Finance Lease Obligation	*1,85,09,970*	*01.04.2010*	*33,72,661*
Unsecured Loan	*34,00,000*	*--*	*33,534*
Total	***16,65,59,970***		***68,06,634***

Further it was submitted that the addition of asset on account of Finance lease agreement amounting to Rs.1,85,09,970/- was shown as per companies act in the schedule to the Balance Sheet. However for the income tax purpose the said amount was not capitalized and when the assets under finance lease are not capitalized under income tax act, then capitalization of its interest cost does not arise. Assessee also submitted the details of additions made during the year as per Income tax Act as shown below:

Description of Asset/Block of asset	***Additions/Adjustments during the year***		***Total Additions***
	More than 180 Days	***Less than 180 Days***	
Furniture			
General	*6,79,965*	*12,61,212*	*19,41,177*
Building			
(Lease Hold improvement)	-	-	-
Plant & Machinery			
General	*15,60,697*	*7,78,557*	*23,39,254*
Computers (New Block)	*1,06,36,062*	*62,92,534*	*1,69,28,596*
Total	***1,28,76,724***	***83,33,303***	***2,12,09,027***

Further Assessee Company in its submission submitted the details in general such as the date on which assets were put to use as per its Form 3CD, However, to calculate the disallowance as per directions of the Hon'ble ITAT, three informations were specifically required i.e. the date of borrowing of loan, date of purchase of assets and the date on which assets were put to use. Accordingly the assessee was asked to submit the details of purchase date of the assets along with dates of put to use of these assets. Assessee Company could submit the said detail along with invoice in few cases only. From perusal of the said invoices, it is seen that there is a difference of 15 days to 2 months in the date of purchase and the date on which assets were put to use. Details submitted by assessee with respect to asked information as submitted in case of few assets is as below:

Description of Item	***Invoice Date***	***Date Put to use***	***Amount of Invoice***	***Amount of INR***
Cisco Switch	*24.08.2010*	*03.09.2010*	*$18988.60*	*8,65,672*
Dell Laptop	*02.12.2010*	*21.02.2011*	*$1053.24*	*3,79,922*
Dell Laptop	*26.08.2010*	*07.09.2010*	*$11137.06*	*5,27,465*

Since the invoice details or date of purchase regarding all the assets capitalized during the year have not been provided, this office has no option but to calculate the disallowance of interest on ad-hoc basis for 1 month. Accordingly, as per the details provided, following ad-hoc calculation is made for capitalization of interest expenses:

The Date on which first loan was borrowed by the assessee during the year: 21.09.2010

The amount incurred for purchase of assets after 21.09.2010 i.e. in second half of the year: Rs. 83,32,303/-

Capitalization of Amt. of interest for six months; 83,32,303 x 29,24,315/50000000 - Rs.4,87,325/-
Capitalization of interest for one month as discussed above: 4,87,325/6 = Rs. 81,220/-

Depreciation to be allowed @ 7.5% on capitalization; Rs. 81,220 x 7.5/100 = Rs, 6,092/-

Disallowance on Capitalization of interest: Rs. 81,220 - Rs. 6,092/- = Rs.75,128/-

Thus total addition of Rs. 75,128/- is made under this head."

(Addition-Rs.75,128/-)

18. Being aggrieved the assessee is in appeal. The ld. Counsel for the assessee submitted that an identical issue having similar facts has already been adjudicated by this bench of the

Tribunal in assesseeôs own case for the assessment year 2010-11 in ITA No. 200/Del/2015 in favour of the assessee vide order dated 17.04.2015.

19. In his rival submissions the ld. CIT DR supported the order of the authorities below.

20. We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issue having similar facts has already been adjudicated for the preceding year vide aforesaid referred to order dated 17.04.2015 in assesseeôs own case and the relevant findings have been given in paras 17 & 18 of the said order which read as under:

"17. After considering the submissions of both the parties and the material available on the record. It is noticed that an identical issue having similar facts has already been adjudicated by this Bench of the ITAT, New Delhi in assessee's own case in ITA No. 1572/Del/2014 for the assessment year 2009-10 vide paras 32 to 37 which read as under:

32. From a perusal of the records we take note that the appellant during the relevant previous year had total borrowing aggregating to Rs. 55.04 crores comprising of the following:

(i) Cash and export credit facility of Rs. 28,77,40,932/-
(ii) Term loan of Rs. 2,16,66,667/-
(iii) Foreign currency term loan of Rs. 11,41,18,750/-

(iv) External commercial borrowing of Rs.12,61,36,047/-

33. And during the relevant previous year incurred total expenditure amounting to Rs. 18.02 crores on addition to fixed asset, comprising of the following:-

(i)	*Software*	*Rs. 10,08,17,472/-*
(ii)	*Leasehold improvements*	*Rs. 4,01,94,194/-*
(iii)	*Computer Hardware*	*Rs. 2,83,05,870/-*
(iv)	*Office equipments*	*Rs. 92,06,519/-*
(v)	*Furniture & Fixtures*	*Rs. 17,10,491/-*
	Total	*Rs. 18,02,34,546/-*

34. Out of the aforesaid total addition of Rs. 18,02,34,546/- , Rs. 1,52,57,346/- was addition on account of foreign exchange fluctuation of Rs. 4,79,38,507 on asset taken on finance lease. The auditors, however, in their report observed that short term funds amounting to Rs. 60.36 crore had been used for long term purposes, as follows:-

Paticulars	*Rs. Crore*
Short term funds	
(i) Unsecured loan	*37,50,00,000*
(ii) Secured loans	*34,61,56,856*
Less:	
Long term use	
Fixed assets-net block	*78,02,80,997/-*
Net amount	*60,36,15,834/-*

35. The Assessing Officer on the basis of the aforesaid, observed that short term borrowed funds amounting to Rs. 11.7 crores (Rs. 18.02 crores (-) 1.53 crores (-) 4.7 crores) have been diverted for purchase of fixed asset and, therefore, interest pertaining to such funds amounting to Rs. 11.7 crores ought to have been capitalized and accordingly disallowed interest amounting to Rs. 1,75,50,000@ 15% on the said sum of Rs.

11.7 crores. The said finding of the Assessing Officer was upheld by the DRP, which has also observed that the appellant has not explained, how the acquisition of asset is sourced from the profit earned by it and as to why the appellant has raised loan of Rs. 60.365 crores for long term purpose.

36. It may be taken note that Interest on capital borrowed even for acquisition of assets is eligible for deduction as per Sect 36(i)(iii) of the Act. Subsequently a proviso has been inserted by the Finance Act 2003. April1, 2004 relating to Assessment Year 2004-05 and subsequent years. Hence the said proviso will apply to the present Assessment Year provided the assessee's case falls under it. In terms of section 36(1)(iii) of the Act, deduction is allowed in respect of interest on capital borrowed for the purpose of business or profession. In terms of the proviso to said section, no deduction, however, is allowed in respect of capital borrowed for acquisition of an asset for extension of existing business or profession for the period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use. A reading of section 36(1)(iii) mandates that only interest for the period between the date of borrowing to the date of put to use is to be capitalized as part of actual cost of asset. In other words, no interest is required to be capitalized for the period after such assets are put to use. Therefore the interest expenditure on the utilization of borrowed funds for the acquisition of new assets, from the date of its acquisition till the date when the asset is put to use, is to be disallowed. In other words, the interest paid on the capital borrowed for acquisition of an asset for extension of existing business, shall not be allowed as deduction, from the date on which the capital was borrowed for acquisition of the asset till the date on which the asset was first put to use.

37. Here admittedly an amount of Rs.11.7 crore was borrowed for acquisition of assets for expansion of existing business; therefore the interest accrued on the borrowed fund from the date on which the capital was borrowed for acquisition of the asset till the date on which the asset was put to use shall be disallowed.

Therefore in order to apply the proviso to Section 36(1)(iii) of the Act to the facts of the present case, that is in other words, before disallowing the interest expenditure on the Fund borrowed for procurement of asset for extension of existing business, the AO has to record as a matter of fact the date on which the assessee borrowed the fund for acquisition of asset for extension of business and the date on which the asset thus procured was put to use is absolutely necessary. However in the instant case, we find that no such exercise has been done by the AO to find out the date on which the assessee borrowed the fund for acquisition of asset in the relevant AY and we also find that no attempt has been made by the AO to find out on which date the asset thus procured with the said borrowed fund have been put to use. Only after the dates as afore-stated has been found out then only one can compute the disallowance as prescribed by the proviso to section 36(1)(ii) of the Act. In the said circumstances we set aside the impugned order on this issue and remand this issue back to the file of AO, with a direction to AO to find out the date on which the assessee borrowed the fund for acquisition of asset and also to find out on which date the asset for extension of business thus procured has been put to use; and thereafter capitalize the interest incurred for the period between the date of borrowing of the fund to the date on which the asset was put to use and we also clarify that interest deduction needs to be allowed from the date after the asset has been put to use by the Assessee.

18. So, by respectfully following the aforesaid referred to order, this issue is remanded back to the file of the AO to be decided in accordance with the direction given in the order dated 28.07.2014 for the assessment year 2009-10, in assessee's own case in ITA No. 1572/Del/2014."

21. So, respectfully following the aforesaid order dated 17.04.2015 in ITA No. 200/Del/2015 for the assessment year 2010-11, this issue is restored back to the file of the AO to be

decided in accordance with the directions given in the order dated 28.07.2014 for the assessment year 2009-10 in assesseeôs own case in ITA No. 1572/Del/2014.

22. As regards to the Ground No. 5 relating to the interest charged u/s 234B and 234C of the Act. It was the common contention of both the parties that it is consequential in nature, we order accordingly.

23. Since we have disposed off the appeal of the assessee. The Stay Application becomes infructuous, hence dismissed.

24. In the result, the appeal of the assessee is partly allowed for statistical purposes and the Stay Application is dismissed as infructuous.

(Order Pronounced in the Court on 29/09/2016)

Sd/-	**Sd/-**
(Beena Pillai)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 29/09/2016
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR