

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

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

ITA No.370/Bang/2015
Assessment year : 2010-11

First Advantage Global Operating Centre Private Ltd., (formerly known as First Advantage Offshore Services Pvt. Ltd.), Level-1, Explorer Building, International Tech Park, Whitefield Road, Bangalore – 560 066. PAN: AAACZ 1029M	Vs.	The Deputy Commissioner of Income Tax, Circle 3(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Vikram Vijayaraghavan, Advocate
Respondent by	:	Shri Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	05.10.2021
Date of Pronouncement	:	02.11.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is against the order passed by the AO u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 [the Act] dated 30.12.2014.

2. The assessee has raised the following consolidated grounds dated 27.9.2021:-

“Based on the facts and circumstances of the case and in law, First Advantage Global Operating Center Private Limited (hereinafter referred to as "Appellant"), respectfully craves leave to prefer an appeal under section 253 of the Income-tax Act, 1961 ("Act") against the order passed by Deputy Commissioner of Income-Tax 3(1)(2) ("AO") in pursuance of the directions issued by Dispute Resolution Panel ("DRP"), Bengaluru dated 30 December 2014 (received by the Appellant on 16 January 2015) on the following grounds:

That on the facts and circumstances of the case and in law,

1. The learned AO/Transfer pricing officer ("TPO") has erred in law and facts in making an addition of Rs. 2,44,72,098 and Rs 2,48,13,962 to the total income of the Appellant on account of adjustment in the arm's length price of the provision of software development services transaction and provision of IT enabled services transaction respectively, entered by the Appellant with its Associated Enterprises ("AEs");
2. The learned AO/ TPO has erred in law and facts by not accepting the Appellant's plea in entirety and not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("Rules") and conducting a fresh economic analysis for the determination of the arm's length price in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length;
3. The learned AO/ TPO has erred, in law and in facts, by ignoring the fact that since the Appellant is availing tax holiday u/s 10A of the Act, there is no motive or reason to shift profits out of India, curbing which is the basic intention of introducing the transfer pricing provisions.
4. The learned AO/ TPO has erred in law and facts by determining the arm's length margin/ price using only FY 2009-10 data which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements.

5. The learned DRP/AO/TPO erred, in applying only the lower turnover filter of INR 1 crore as a comparability criterion and not applying a higher threshold limit for turnover filter, like INR 200 crores.
6. The learned DRP/AO/TPO has erred in law and in facts by accepting/ rejecting companies based on unreasonable comparability criteria.

In respect of software development services transaction

The following companies were erroneously accepted by DRP/AO/TPO based on unreasonable comparability criteria:

- a) Persistent Systems Limited- DRP/AO/TPO accepted stating that it is functionally comparable, the company is engaged in providing varied range of services including sale of software products and segmental breakup for the same is not available, hence functionally non comparable.
- b) Larsen & Toubro Infotech Limited- DRP/AO/TPO accepted stating that it is functionally comparable, the company is engaged in providing software development services & sale of software products and segmental breakup for the same is not available, hence functionally non comparable.

Although the above companies were chosen as comparables in the transfer pricing study, upon consideration of more details being available in public domain or subsequent decisions, these companies are found to be not comparable.

The following companies were erroneously rejected by DRP/AO/TPO based on unreasonable comparability criteria:

- c) Silverline Technologies Limited - DRP/AO/TPO rejected stating that the company has a different accounting year, extrapolated data provided however not considered by the DRP/AO/TPO

- d) R Systems International Limited — DRP/AO/TPO rejected stating that current year data not available in public domain and different accounting year, extrapolated data provided however not considered by the DRP/AO/TPO
- e) Goldstone Technologies Limited- DRP/AO/TPO rejected by stating that it fails 75% export earnings which is factually incorrect, the export revenue as a percentage of operating revenue is 89.47%, hence passes the export turnover filter.
- f) LGS Global Limited - DRP/AO/TPO rejected by stating that it fails 75% export earnings which is factually incorrect, the export revenue as a percentage of operating revenue is 98.71%, hence passes the export turnover filter.
- g) Zylog Systems Limited- DRP/AO/TPO rejected stating that it fails 75% export earnings filter and is engaged in onsite software development, hence functionally not comparable.
- h) CG Vak Software & Exports Limited - DRP/AO/TPO rejected by stating that it fails employee cost < 25% filter, without inferring the employee cost to sales ratio.
- i) R S Software (India) Limited — Accepted by the TPO, however, suo-moto rejected by the DRP citing that it is predominantly an onsite software development company
- j) Akshay Software Technologies Limited- DRP/AO/TPO rejected stating that it is engaged in off shore software development, hence functionally non comparable.

In respect of Information Technology Enabled Services

The following companies were erroneously accepted by DRP/AO/TPO based on unreasonable comparability criteria:

- k) Accentia Technologies Limited — DRP/AO/TPO accepted stating that it is functionally comparable, the company is engaged in providing medical transcription services, hence functionally non comparable.

The following companies were erroneously rejected by DRP/AO/TPO based on unreasonable comparability criteria:

- l) R Systems International Limited — DRP/AO/TPO rejected stating that current year data not available in public domain and different accounting year, extrapolated data provided however not considered by the DRP/AO/TPO
 - m) Microgenetics Systems Limited — DRP/AO/TPO rejected stating that the company has a different accounting year, annual report for April to March as available in public domain provided, however not considered by the DRP/AO/TPO
 - n) Jindal Intellicom Private Limited - DRP/AO/TPO rejected stating that the company has a different accounting year, extrapolated data provided however not considered by the DRP/AO/TPO
 - o) Caliber Point Business Solutions Limited - DRP/AO/TPO rejected stating that the company has a different accounting year, extrapolated data provided however not considered by the DRP/AO/TPO
7. The learned AO/TPO has erred, in computing the margin of Jeevan Scientific Technology Ltd (formerly known as Jeevan Softech Ltd) after taking into account working capital adjustment, for the IT enabled services segment.
 8. The Learned AO/TPO has erred, in not considering the provisions/liabilities no longer required written back as part of the operating income while computing the operating margin in respect of software development and IT enabled services segment.
 9. The learned AO/TPO has erred in law and facts by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-à-vis the comparables.
 10. The learned AO has erred, in law and in facts, in levying interest of Rs. 66,14,337 under Section 234B of the Act.
 11. The learned AO erred, in law and in facts, in initiating penalty proceedings u/s 271(1)(c) of the Act.

The Appellant submits that each of the above grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, substitute and/or otherwise modify in any manner whatsoever all or any of the foregoing grounds of appeal before or at the time of the hearing of the appeal, so as to enable the Hon'ble Income-tax Tribunal to decide on the appeal in accordance with the law.”

3. The assessee company is a subsidiary of First Advantage Pte Ltd. Singapore and is engaged in provision of software development services ("SWD") and Information technology enabled services ("ITeS") to its AEs.

4. The summary of the TP proceedings are as under:-

Particulars	As per TP Study		As per TP Order		As per DRP	
	SWD	ITeS	SWD	ITeS	SWD	ITeS
PLI	10.84%	16.01%	7.98%	13.50%	7.98%	13.50%
Method	TNMM	TNMM	TNMM	TNMM	TNMM	TNMM
Adjustment	—		INR 5,46,53,367		INR 4,92,86,060	

5. Out of the consolidated grounds raised by the assessee, ground Nos.6(a) & 6(b) are additional grounds for which assessee has filed petition for admission of the same stating that failure to raise these grounds at earlier stage is not wilful and that no prejudice would be caused to the revenue by reason of these additional grounds if admitted and adjudicated and balance of convenience is in favour of the assessee. Accordingly it was prayed that additional grounds may be admitted.

6. We have gone through the additional grounds filed by the assessee before us as enumerated in grounds 6(a) & (b). In our opinion, all the material facts relating to these grounds are already available on record and there is no question of investigation into fresh facts so as to adjudicate the same. Accordingly, following the Hon'ble Supreme Court judgment in the case of *M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional grounds are admitted for adjudication.

7. From the consolidated grounds, ground Nos.1 to 4 are general in nature and do not require any adjudication. Ground No.5 is not pressed. Accordingly grounds 1 to 5 are dismissed.

Software development services

8. Ground No.6(a) & 6(b) relate to exclusion of the comparables viz., Persistent Systems Ltd. and Larsen & Toubro Ltd. in respect of software development services. These companies were considered as a comparable by the TPO in the software development services segment and assessee had no objection before the TPO.

Persistent Systems Ltd.

9. Now before us, the Id. AR submitted that it cannot be compared to assessee's case as held by the Tribunal in assessee's own case in IT(TP)A No.190/Bang/2014 by order dated 7.8.2019 wherein it was held as follows:-

“25. We have perused submissions advanced by both sides in light of records placed before us. It is observed that annual report of this company is placed at one 1260 -1410 of paper book and at page 1347 breakup of income forming part of profit and loss account has been given in schedule 11. It is observed that this company earns its income from sale of software services and products however there is no separate segmental information in respect of these 2 segments. Thus it is clear that this company is earning revenue from activities which includes licensing of products, royalty on sale of products as well as income from maintenance contracts etc which could not be considered functionally similar with that of assessee holders only carrying out software development service at the behest of its AE's on a captive basis.

Similar view has been taken by this Tribunal in case of DCIT vs Electronics for Imaging India Pvt.Ltd (supra).

Respectfully following the same we direct Ld.AO/TPO to exclude this company from the final list.”

10. It was also submitted that this company was not considered as a comparable in the following case laws:-

- CSG Systems International (India) P Ltd. v. DCIT, ITA No.2026/Bang/2017, order dated 31.7.2019.
- Cerner Healthcare Solutions P. Ltd. v. ITO, IT(TP)A No44/Bang/2015 & 69/Bang/2015 order dated 16.1.2017 which was upheld by the Karnataka High Court in ITA No.489/2017 dated 5.7.2018.

11. The Id. DR submitted that the issue may be remitted to the AO since it being an additional ground.

12. We have heard both the parties and perused the material on record. Admittedly, this comparable was excluded for AY 2009-10 in assessee's own case in IT(TP)A No.190/Bang/2014 by order dated 7.8.2019 as discussed above. Accordingly, we direct the AO/TPO to exclude this company from the list of comparables.

Larsen & Toubro Infotech Ltd.

13. The Id. AR submitted that this company was excluded in the assessee's own case for the AY 2009-10 by the order of the Tribunal (*supra*) and also in the case of CSG Systems International (India) P Ltd. v. DCIT, ITA No.2026/Bang/2017, order dated 31.7.2019.

14. The Id. DR submitted that the issue may be remitted to the AO since it being an additional ground.

15. We have heard both the parties and perused the material on record. Admittedly, this comparable was excluded for AY 2009-10 in assessee's own case (*supra*) wherein it was held as follows:-

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

Assessee placed the annual accounts of this company at page 1543-1576 of paper book volume IV, reveals that this company entered into sale of services as well as sale of products. It is also observed that there is no segmental information available in respect of services and products demonstrated separately by this company.

29.1 Further this company has been considered to be comparable by Delhi Tribunal in Agnity India Technologies Pvt.Ltd vs ITO (*supra*) for following reasons:

“14. Larsen and Toubro Infotech Ltd had an operational margin of 20% for assessment year under consideration, and it was considered as a comparable in assessee's own case for assessment year 2006-07 which was upheld by the tribunal and the said order of Tribunal had already been upheld by orderable High Court (*supra*) and so we direct the inclusion of Larsen and Toubro Infotech in the list of comparables.”

It is clear from the above observation by Delhi Tribunal that since this comparable was considered to be a good comparable in preceding year in that case, which was upheld by Hon'ble Delhi High Court, the same was considered to be good comparable for subsequent assessment year that was considered. In the facts of present case, this Tribunal for assessment year 2005-06 have held this comparable to be not functionally similar to that of assessee due to high turnover filter. This Tribunal while deciding so, observed that this Tribunal in case of Autodesk India Pvt.Ltd vs ACIT reported in IT(TP)A No.220/Bang/2016, after considering various views held it to be not comparable with assessee, who is performing limited functions in process of software development carried out by AE's.

30. For year under consideration, we have already observed hereinabove that this company has no segmental details available for software services rendered and software products and financial results are combined. Further holding that this company owns high intangibles as much as 33.33% which makes it one of a giant company in category of Software Development Company, which cannot be anyways compared with small company like assessee which is providing Ltd services in software development process carried out by AE.

Respectfully following the view is adopted by this tribunal reproduced hereinabove in case of assessee for preceding assessment year as well as in case of Autodesk India private Ltd (supra), we direct Ld. AO/TPO to exclude this company from the list.”

16. Similar is the position in assessee's own case for the AY 2005-06. Being so, this comparable is to be excluded from the list of comparables. Ordered accordingly.

17. By ground 6(c) & 6(d), it is contended that certain companies were erroneously rejected by the revenue authorities.

Silverline Technologies Ltd. & R Systems International Ltd.

18. These companies are rejected by the AO/TPO on the reason that financial year of these are different from the assessee's financial year. The contention of the Id. AR is that these are functionally comparable and available data can be extrapolated.

19. Further, it was submitted that in the case of *RR Donnelley India Outsource Pvt. Ltd. v. DCIT in ITA No.678/Mds/2015*, the Tribunal vide order dated 8.8.2016 held as under:-

“6. We have heard the rival submissions and perused the material on record. In this case, there is no dispute that RSIL is functional comparability to the assessee's case. However, the accounting

year adopted by the RSIL is different from the assessee's accounting year. RSIL is adopted 1st January to 31st December as accounting year as against the accounting year adopted by the assessee as 1st April and 31st March. However, data for the financial year could be compiled from the audited accounts of RSIL. Hence, the assessee is directed to furnish data for the financial year 2009-10 (1st April and 31st March) to the TPO, who after due verification shall consider the same as comparable to the assessee's case so as to determine the ALP. This view of ours is fortified by the decision of the Tribunal in the following cases :

- (i) Xchanging Technology Services Pvt. Ltd. in ITA No.1222/Del/2015 dated 8.9.2015
- (ii) Mercer Consulting (India) Pvt. Ltd. in IA No.966/Del/2014 dated 6.6.2014
- (iii) Ameriprise India Pvt. Ltd. v. ACIT in ITA No.2010/Del/2014 dated 14.8.2015
- (iv) M/s. Maersk Global Service Centres (India) Pvt. Ltd. v. DCIT in ITA No.2594/Mum/2014 dated 16.1.2015
- (v) Aegis Ltd. v. ACT in ITA No.1213/Mum/2014 dated 27.7.2015

Accordingly, this ground is allowed.”

20. The Id. DR relied on the orders of lower authorities.

21. We have heard both the parties and perused the material on record. These companies are excluded from the list of comparables on the reason that financial year is different from the assessee's financial year. The Id. AR submitted that other than this, functionally these two are comparable to the assessee's case. There is no dispute on this issue. Being so, as held by the Tribunal in the case of of *RR Donnelley India Outsource Pvt. Ltd. (supra)*, we direct the AO/TPO to include these companies in the list of comparables to determine the ALP. This view of ours is also supported

by the order of the Delhi High Court in the case of *CIT v. Mckinsey Knowledge Center India Pvt. Ltd. in ITA No.217/2014 dated 27.3.2015* and this Tribunal's order dated 28.4.2017 in the case of *GE India Exports Pvt. Ltd. v. DCIT in IT(TP)A Nos.840 & 1042/Bang/2013 dated 28.4.2017*. Accordingly we direct that these two comparables are to be included in the list of comparables to determine the ALP.

Goldstone Technologies Ltd., LGS Global Ltd., Zylog Systems Ltd. & CG Vak Software & Exports Ltd.

22. Vide **grounds 6 (e), (f), (g) & (h)**, the four comparables viz., Goldstone Technologies Ltd., LGS Global Ltd., Zylog Systems Ltd. & CG Vak Software & Exports Ltd. are sought to be included in the comparables by the assessee. These comparables were rejected on the ground that these companies fail export income filter, though they are functionally comparable.

23. The Id. DR submitted that the export turnover of these companies is less than 75% of total turnover, hence excluded.

24. We have heard both the parties and perused the material on record on this issue. The TPO has selected all the companies whose income from software development services constitute at least 75% of the total operating revenue. Companies which have less than 25% foreign exchange earnings have been excluded. However, the DRP observed as follows:-

“(b) CG-VAK SOFTWARE AND EXPORTS LTD:

It is stated that the TPO has excluded this company on the ground that it fails the 25% employee cost filter. Having heard the objection, we are of the view that when there is no specific mention of employees cost, it is not possible to ascertain as employees cost. Accordingly, rejection of the above company

from the comparables by application of employees cost filter is upheld.

(c) GOLD STONE TECHNOLOGIES LTD:

This company has been excluded by the TPO on the ground that it fails the 75% export sales filter. To examine the contention in regard to Goldstone Technologies Limited, we perused the annual report produced by the assessee, from which it is noticed that against the total turnover of '23.18 crores, the foreign exchange earning is '15.57 crores which works out to 67% of the total turnover, which makes it clear that the company has rightly been excluded from the comparables as the export turnover is less than 75%.

(e) LGS GLOBAL LTD:

This comparable has been rejected by the TPO on the ground that it fails the 75% export sales filter. On perusal of Annual Report, it is noticed by us that export receipts are only '117 crores against the turnover of ' 237 crores. Hence, fails the export earning filter. Further, the company is engaged in two activities i.e., software development and professional services, no segmental breakup is available. Hence the Objection is not found acceptable.

(f) ZYLOG SYSTEMS LTD:

In this regard the assessee has stated that the TPO has erred in rejecting the company on the ground that it fails the 75% export sales filter in this regard. Having heard the objection, we examined the Annual Report from which it is evident, out of the total revenue of 778 .12 crore, the on-site revenue is ' 622.58 crore which makes it clear that the above company is predominantly engaged in on-site development of software and therefore cannot be retained as comparable.

In this regard the assessee has stated that the following comparables should be excluded:"

25. The findings of the DRP are contrary to the filter adopted by the TPO with regard to foreign exchange earnings. Hence we remit this issue with

regard to comparability of these comparables to the file of AO/TPO for fresh consideration and decision in accordance with law.

26. The assessee seeks exclusion of R S Software Ltd. in **ground No.6(i)**. This company was accepted by the TPO on the ground that it is functionally comparable. However, it was rejected by the DRP on the reason that expenses on foreign activities are incurred to the extent of Rs. 12.42 crores i.e., 82% of foreign expenses of Rs.15 crores debited to P&L account which made it clear that this company is predominantly onsite software development company and therefore cannot be retained as a comparable. However, we find that in assessee's own case in IT(TP)A No.190/Bang/2014 by order dated 7.8.2019 for AY 2009-10 this company was considered as a comparable. However, from the record submitted by the assessee, we are not in a position to ascertain the details of expenses incurred in foreign branches out of the total expenses debited to P&L account. Hence, in the interest of justice, we remit this issue to AO/TPO to examine this issue and decide the same accordingly.

27. By ground No.6(j), Akshay Software Technologies Ltd. is sought to be included in the comparables by the assessee. This was rejected on the reason that RPT details are not available on record. Before the us, the Id. AR submitted that this company passes RPT, & employees cost filter and functionally comparable, hence onsite development should be criterion for rejection.

28. We have heard both the parties and perused the material on record. The TPO has rejected this company on the ground that it is engaged in onsite software development and reasons given by TPO and DRP are different. Hence this issue is remitted to AO/TPO for fresh consideration.

Information Technology enabled Services [ITeS]

29. The assessee seeks exclusion of the following comparables:

Accentia Technologies Ltd.

30. In **ground No.6(k)**, the contention of the Id. AR is that there is functional dissimilarity and different revenue recognition methodology charged by Accentia Technologies Ltd. as compared to the assessee's case and segmental information is not available. Therefore, the company cannot be considered as a comparable. However, the DRP observed that on examination of annual report it was found that it is functionally comparable to assessee's case. It was noticed that the company offers medical coding and billing and into healthcare receivables management which are all integral part of healthcare BPO services termed HRCM services. With regard to revenue recognition, the DRP found that the assessee's objections are not acceptable in view of financial reporting in page 35 of annual report in which it was clearly mentioned that the company was preparing and maintaining accounts fairly and accurately in accordance with account and financial reporting. The question of segmental information does not arise as per page 80 of the annual report, the company has only one segment.

31. We have heard both the parties and perused the material on record on the issue. It is admitted fact that for AY 2009-10 in assessee's own case in IT(TP)A No.176/B/2014, 190/B/2014 & CO No.39/B/2016, this company was considered as not comparable to assessee's case by observing as follows:-

“43. Accentia Technologies Ltd

Ld.TPO considered this comparable and assessee objected to the same for the reason that during the year under consideration this

company acquired M/s.Oak Technologies Inc, USA and therefore, there is extraordinary event of acquisition of another company. Ld.Counsel submitted that, in view of extraordinary event of acquisition, this company cannot be considered as a good comparable with assessee. Apart from this objection,

44. Ld.Counsel submitted that even otherwise this company is not functionally comparable with assessee in so far as services provided to AE. He referred to various business transactions and services provided by this company and submitted that this company provides services under various segments of like medical transcription, medical coding, medical billing, etc directly to its clients. He thus where mentally argued that business model of this company is much different from that of assessee, who is a captive service provider providing services to its AE is only.

45. Ld.CIT DR opposed the exclusion and placed reliance upon orders passed by authorities below.

46. We have perused submissions advanced by both sides in the light of the records placed before us is. It appears that this company purchased up to 96% of share holding of M/s. Oak Technologies. If it is only a transaction of purchase of shares of said company, it may be a case of purchase as an ongoing business, and may not be a case of merging the same with business of Accentia Technologies Ltd and M/s.Oak Technologies still remains an independent entity. Therefore, in the absence of complete relevant facts, it cannot be held that the so-called acquisition of M/s.Oak Technologies can be considered as extraordinary event having impact on the revenue as well as business activity of Accentia Technologies Ltd.

46.1 Further, it is observed that annual report of this company is placed at page 2337-2045 of paper book volume 5. At page 2390, income from operations earned by this company amounts to Rs.80,14,40,931/-the details of which are at page 2397 in Schedule 8. Various segments under which revenue has been earned by this company is medical transcription, billing and collections, income from coding, interest on FD. Thus it is clear that this company is engaged in healthcare activity and providing BPO service in healthcare sector, that too by providing specific

services of medical transcription, medical coding, medical billing etc. We note that these activities are quite different from service of contact provided by assessee to its AE's which are purely in nature of call centre. Accordingly we direct Ld. TPO to exclude this company on this count.”

32. Accordingly, we direct to exclude Accentia Technologies Ltd. from the list of comparables.

33. Further, the assessee seeks inclusion of the comparables viz., R Systems International Ltd., Microgenetics Systems Ltd., Jindal Intellicom Pvt. Ltd. & Caliber Point Business Solutions Ltd. by **grounds no. 6 (l) to (o)**. All these comparables are excluded by the TPO/DRP on the reason that they are following different financial year. The Id. Relied on the decision of the Tribunal in the case of *RR Donnelley India Outsource Pvt. Ltd. (supra)* wherein the relevant observations have already been reproduced at para 19 hereinabove with regard to comparability of R Systems International Ltd.

34. We have heard both the parties and perused the material on record on this issue. As rightly pointed out by the Id. AR in the case of *RR Donnelley India Outsource Pvt. Ltd. (supra)* it was observed that though these comparables are following different financial year, the data for the relevant financial year could be compared from the audited accounts of these companies. Hence assessee is directed to furnish the data for the FY 2009-10 relevant to AY 2010-11 i.e., 1 April 2009 to 31 March 2010 of these companies. The TPO after due verification shall consider the same as comparable to assessee's case so as to determine the ALP. Accordingly this issue is remitted to the AO/TPO to consider the case afresh in view of the order of the Tribunal cited *supra*.

35. Ground No.7 is regarding computing the margin of Jeevan Scientific Technology Ltd. after taking into account the working capital adjustment

for ITeS. The Id. AR submitted that the AO committed error while computing the adjusted margin of the said company. The TPO while computing the unadjusted margin has considered the correct figure, however, while computing the adjusted margin, he has erroneously considered the incorrect figures. The Id. AR submitted that the TPO may be directed to consider the correct figures of adjusted and unadjusted margins after going through the annual report of this company.

36. We have heard both the parties and perused the material on record on this issue. We agree with the plea of the Id. AR and direct the AO/TPO to consider the correct figures while computing the adjusted and unadjusted margins of the company. Accordingly this issue is remitted to the AO/TPO for fresh consideration.

37. Ground No.8 is that the AO/TPO has erred in not considering the provisions/liabilities no longer required written back as part of the operating income while computing the operating margin in respect of software development and ITeS segment. The Id. AR submitted that such expenditure was considered as operating expenditure in the previous assessment years and treated as part of operating cost, therefore the same should be treated as operating income in the year of reversal. He relied on the following judgments:-

- AMD India (P) Ltd. v. ITO, IT(TP)A No.113/Bang/2018 AY 2012-13, Bang. Trib. order dated 05.12.2019.
- CGI Information Systems & Mgmt. Consultants P. Ltd. v. DCIT, ITA No.1227(Bang)2012, AY 2008-09, Bang. Trib.
- Sony India (P) Ltd. v. DCIT, ITA Nos. 1189/Del/2005, 819/Del/2007, Del Trib. Order dated 23.9.2008.

38. We have heard both the parties on this issue. In the case of *AMD India (P) Ltd. v. ITO, IT(TP)A No.113/Bang/2018 AY 2012-13*, Bangalore Tribunal by order dated 05.12.2019 has held as under:-

“We have considered the submission of the learned AR on this issue and find that in the decision rendered in the case of *Sony India (P) Ltd. Vs. DCIT 114 ITD 448 (Delhi)*, this aspect has been considered and it was held that provisions written back in the P&L a/c should be regarded as forming part of the operating profit of the taxpayer. The relevant observations of the Tribunal are as follows:-

“**106.2** After considering facts and circumstances of the case, we do not see any good ground for not permitting the taxpayer to raise the ground before the Tribunal which is clearly arising out of the impugned order. As noted earlier, the Revenue has not challenged relevant part of the order of the CIT(A). Therefore, the objection now being taken by the learned Departmental Representative is not justified. On merit, we see no good reason to exclude provisions written back as not forming part of computing operating profit of the taxpayer. In our considered opinion, exclusion of above provision is based upon misconception of real nature of the entry generating income. It is not practically possible for a businessman to actually disburse all expenses incurred by it in the financial year and, therefore, a large number of business liabilities (manufacturing included) are provided in the accounts of a given year. It is elementary that there is no difference between actual disbursement of an expenditure or provision thereof. However, recovery of liability provided may become barred by limitation or for some other reasons, liability gets unenforceable or is reduced or ceases to exist with the passage of time. Therefore, it may be necessary to write back such a liability. But, it cannot follow that the liability was not expenditure of business or operating expense. Cessation of a liability is a taxable income under s. 41 of the IT Act. The underlying principle behind above provision is that Revenue takes back a benefit which it granted earlier, but which, due to subsequent events or changed circumstances should be charged to tax as "income". Statutory provision overrides general understanding that mere creation of a benefit to a

taxpayer by admission or cessation of a debt or a liability should not result in an income. Thus, creation of unpaid liability and its write back is a normal incident of a business operation which is carried everywhere in accounts to have true picture of profits of the relevant period. If a liability has ceased to exist and is required to be accounted for and shown as income by the taxpayer and, in case it is not so shown the taxpayer can be subjected to a penal action under Indian regulations. In this connection, we can refer to decision of the Supreme Court in the case of CIT vs. S. Teja Singh (1959) 35 ITR 408 (SC). Having regard to statutory provisions, it cannot be said that provision or writing back of liability is not part of operating profit or would not be taken into consideration for computing the same. The aspect of liabilities written off was ignored without considering nature and character of such liabilities. It would have been different if a finding was recorded that provision written back did not relate to business operations of the taxpayer. There is no suggestion on the above lines. Further, it is not the case of the Revenue that liabilities written back were wrongly provided for. It is a settled and well accepted proposition that adjustment can be made only on account of differences. It is not possible to believe that other comparable entities taken into consideration are not making and writing back provision of liabilities no more required. There is no material nor there is any finding to support action of the Revenue authorities. We can therefore make a general observation that all business enterprises are making and writing back liabilities as a normal incident of operating business. The expenses for which provisions were originally made were considered operating in nature and allowed in assessment. These provisions no longer required by the taxpayer during the year under review were reversed in the books of account as per mercantile system of accounting and shown as income. Therefore, on facts we do not see any justification for excluding provisions written back in the P&L a/c as not forming part of the operating profit of the taxpayer. Accordingly, claim of the taxpayer is accepted.”

16. Respectfully following the aforesaid decision, we hold that provision written back should be regarded as part of the revenue of the Assessee while determining PLI.”

39. We have gone through the case laws relied upon by the assessee and we are of the opinion that in earlier assessment years these items are treated as part of operating expenditure and on reversal of this expenditure in the assessment year under consideration, it has to be considered as operating income. With these observations, we remit this issue to the AO/TPO for fresh consideration in view of the above orders of the Tribunal.

40. Ground No.9 is not pressed and dismissed as such.

41. Ground No.10 regarding interest u/s. 234B of the Act is mandatory and consequential in nature.

42. In the result, the appeal is partly allowed for statistical purposes.

Pronounced in the open court on this 2nd day of November, 2021.

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 2nd November, 2021.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.