
(2016) 03 ITAT CK 3876

In the Income Tax Appellate Tribunal, Bangalore B Bench

Case No : Income Tax Appeal No. 1456/Bang/ Of 2010

M/S. Hewlett-Packard India Software Operation Pvt. Ltd.

APPELLANT

Vs

Asst. Commissioner Of Income Tax

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Income Tax Act, 1961 — Section 10A, 37, 80HHC, 92CA, 92C(2), 133(6), 143(3), 144C, 144C(5), 234B, 234D

Citation : (2016) 03 ITAT CK 3876

Hon'ble Judges : Vijay Pal Rao, Member (J); Abraham P George, Member (A)

Bench : Division Bench

Advocate : Ajith Jain, Neera Malhotra

Final Decision : 1961-Section 6

Judgement

Vijay Pal Rao, Member (J)

1. This appeal by the assessee is directed against the Assessment Order passed under Section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (in short 'the Act') in pursuant to the directions of Dispute Resolution Panel ('DRP') dt.28.9.2010 under Section 144C(5) of the Act for the Assessment Year 2006-07.

2. The assessee has raised the following concise grounds :

Transfer Pricing

1. The order passed by the Honorable Dispute Resolution Panel ("DRP") and the learned Assessing Officer ("AO") / Transfer Pricing Officer ("TPO") is not in accordance with the law and is contrary to the facts and circumstances of the present case and in any case in violation of the principle of equity and natural justice.

2. The Honorable DRP and the learned AO/TPO erred in fact and in law in determining the Arm's Length Price ("ALP") by adopting the financial data for a single year [i.e. the financial year 2005-06] of the comparables as against

multiple year data considered by the Appellant.

3. The learned TPO has erred in selecting companies as comparable to the Appellant despite such companies failing the test of comparability and reliability on some or all of the factors such as functional dissimilarity and product led revenues.

4. The learned TPO has erred in adopting a faulty process of selection of comparable companies without taking into account aspects such as the influence of extraordinary events, abnormality in the financial results of the concerned year, reliability of the financial data and the failure of his own filters.

5. The Honorable DRP and the learned AO/TPO erred in fact and in law in using selective information, which was not available in public domain, obtained under section 133(6) of the Income-tax Act, 1961 ("the Act") without any independent validation of the data provided and by ignoring the inconsistencies therein with the information available in public domain, including the audited financial statements, of the comparable companies.

6. The learned TPO erred in computing the operating margins of the comparable companies at higher levels and determining the operating margin of the Appellant to be lower than the margin actually earned by the Appellant. The Honorable DRP and the learned AO have erred in upholding the same. The exercise of computation of margins ignores certain items which ought to have been considered as operating or non-operating items, as the case may be, and also ignores risk adjustments to the margins of the comparable companies

7. The Honorable DRP and the learned AO/TPO erred in law and on facts in upholding the arm's length margin arrived at by the learned TPO by not considering the lower range of 5 percent from the mean margin as allowed under the Act and the Income-tax Rules, 1962 ("Rules").

8. Without prejudice to all of the above, the Honorable DRP and the learned AO / TPO have erred in facts and in law in applying the provisions of transfer pricing to the Appellant without appreciating the fact that the Appellant was entitled to tax holiday under section 10A of the Act during the relevant year and therefore there would be not be any motive to shift profits to the other country.

Adjustments under the Section 10A of the Act

9. The Honourable DRP and the learned AO has erred in law and on facts in concluding that expenditure incurred in foreign currency are to be excluded from the export turnover for the purpose of computation of relief under the section 10A of the Act.

10. The Honourable DRP and the learned AO has erred in law and on facts in upholding that the said expenditure incurred in foreign currency should not be reduced from the total turnover for the purpose of computation of relief under section 10A of the Act even if these are reduced from the export turnover.

Others

11. The Learned AO has erred in law in concluding that expenses incurred by the Appellant towards purchase of computer software along with related hardware, which are not of enduring nature, as capital in nature and therefore not being eligible for deduction under section 37 of the Act but only entitled to depreciation at 60 percent.

Consequential Ground

12. The Honourable DRP and the learned AO/TPO has erred in law and on facts in levying interest under section 234B and section 234D of the Act.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds, at any time before or at the time of hearing of the appeal. Each of the above objections is independent and without prejudice to the other grounds preferred by the Appellant.”

3. Ground No.1 is general in nature and does not require any specific adjudication.

4. At the time of hearing, the learned Authorised Representative of the assessee stated that the assessee does not press the concise Ground Nos.2, 5, 6 & 8 and pleaded that the same may be dismissed as not pressed. The learned Departmental Representative has raised no objection if the concise Ground Nos.2, 5 6 & 8 are dismissed as not pressed by the assessee. Accordingly, the concise Ground Nos.2, 5, 6 & 8 are dismissed being not pressed.

5. Ground Nos.3 & 4 are regarding the objections of the assessee against the comparables selected by the TPO for determination of Arms Length Price ('ALP'). The assessee is part of Hewlett Packard Group (HP Group). Its ultimate Holding Company is Hewlett-Packard Company, USA. The assessee was established in Bangalore in the year 1988 and is engaged in the provisions of R & D services in the fields of e-commerce, e-solutions, internet security and management, etc. During the F.Y 2005-06 relevant to the assessment year results for the year under consideration and the details of segmental revenue are as under:

Description

Amount Rs.

Operating Revenue

5,97,79,44,770

Operating Cost

5,51,58,73,004

Operating Profit (PBIT)

46,20,71,766

Operating Profit to Cost Ratio

8.37%

The assessee has entered into international transactions in software development services to the tune of Rs.565,62,89,689. The assessee has earned an operating profit margin in respect of the software development services at 8.37%. To bench mark its international transactions, the assessee has considered 39 comparables under TNMM as MAM in its T.P. Study analysis. The operating profit margin of these 39 comparables is arrived by the assessee at 12.7% however, the average operating profit margin has been calculated by the assessee by considering the weighted average of three years data as under :

Company Name

2004

12

months

2005

12

Months

2006

12

Months

Weighted Average

A B M Knowledgeware Limited

16.63

3.03

--

9.00

Aurionpro Solutions Ltd.

--

46.24

--

46.24

Aztec Software & Technology

Services Ltd.

-4.59

20.79

23.50

18.31

Birlasoft Lintied

11.35

0.40

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5.77

Blue Star Infotech Ltd.

25.14

13.37

6.49

14.94

Bodhtree Consulting Ltd.

12.40

24.44

13.92

16.25

CMC Ltd.

16.49

10.20

17.35

14.64

California Software Co. Ltd.

-3.70

8.53

4.58

3.98

Compucom Software Ltd.

12.16

18.7

20.17

15.96

Computech International

1.07

8.78

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4.16

Four Soft Ltd.

62.07

31.33

11.57

18.54

Goldstone Technologies Ltd.

8.99

5.56

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7.42

I-Flex Solutions Ltd.

125.40

31.02

21.85

40.15

KLG Systel Ltd.

5.21

3.60

10.59

6.39

KPIT Cummins Infosystems Ltd.

15.16

13.57

13.89

14.00

Lanco Global Systems Ltd.

10.57

10.65

--

10.62

L & T Infotech Ltd.

4.45

10.58

--

8.09

Lifetree Convergence Limited

-3.28

8.53

--

4.06

Maars Software Ltd.

--

-6.65

--

-6.65

Mascon Global Ltd.

2.37

12.35

10.10

8.88

Mindteck (India) Ltd.

-2.81

4.91

5.45

3.65

Mphasis BPL Ltd.

26.56

18.33

24.50

22.97

Nucleus Software Exports Ltd.

12.96

24.75

34.45

25.65

Ontrack Systems Ltd.

5.77

7.93

9.57

7.92

Onward Technologies Ltd.

-0.10

-0.17

3.64

1.40

Orient Information Technology

Ltd.

7.36

10.35

-41.16

-7.09

Pentasoftware Technologies

14.93

6.75

--

11.98

Powersoftware Global Solutions Ltd.

19.58

21.94

--

20.90

Quintegra Solutions Ltd.

6.25

10.21

10.91

8.42

R S Software Ltd.

-1.96

8.00

15.44

7.91

Saksoftware Limited

9.37

24.48

23.11

20.39

Software Technology Group Intl.

Ltd.

7.36

15.30

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11.19

Sonata Softwre Ltd.

6.09

6.50

3.63

5.02

Subex Systems Ltd.

6.45

5.62

3.97

5.51

Synfosys Business Solutions Ltd.

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11.22

--

11.22

Tata Elxsi Ltd.

14.37

19.03

20.38

18.29

Transworld Infotech Ltd.

33.88

26.30

--

30.13

VMF Softech Ltd.

-0.49

37.00

--

18.07

Zensar Technologies Ltd.

5.50

7.76

18.64

11.21

Arithmetic Mean (%)

13.58

13.88

11.94

12.70

The TPO has rejected the T.P. Study analysis of the assessee and also rejected 33 comparables of the assessee. The reasons for rejecting the 33 comparables selected by the assessee are summarized by the TPO as under :

Sl.No.

Reason

No. of

companies

1.

Companies which had ceased to exist in the FY 2005-06 because of merger/ amalgamation/ winding up etc and companies whose annual report for the FY 2005-06 do

not show any revenue by way of software services.

2

2.

Companies whose operating revenues or segmental revenues from software development services are less

than Rs.1 Crore.

0

3.

Companies which failed related party transactions filter.

21

4.

Companies with different accounting year.

2

5.

Companies which failed export revenue filter.

3

6.

Companies which failed salary filter.

0

7.

Companies which failed onsite revenue filter.

1

8.

Companies with persistent losses.

0

9.

Companies functionally dissimilar / different economic
circumstances.

1

10.

Companies in respect of which information (onsite revenue, employee cost and
segmental details) not
available.

3

Total Companies Rejected

33

Companies accepted as comparables.

6

Total No.of comparables.

39

Thus the TPO has accepted these comparables selected by the assessee. The TPO has also carried out a fresh search and included 14 more comparable companies in the list of comparables for the purpose of determining the ALP.

The list of comparables selected by the TPO including six companies which were accepted from the list of the assessee are as under :

Sl.No.

Company Name

Sales (Rs. Crs.)

OP to Total Cost

%

Provisions written

back

Adjusted OP/TC

%

1.

Aztec Software Ltd.

128.61

18.09

0

18.09

2.

Geometric

Software Ltd(Seg)

98.59

6.70

0

6.70

3.

Infosys Limited

9028.00

40.38

0

40.38

4.

KALS Info Systems

Ltd.

1.97

39.75

0

39.75

5.

Mindtree

Consulting Ltd.

448.79

14.67

0

14.67

6.

Persistent Sys. Ltd.

209.18

24.67

0.05

24.71

7.

R Systems

International Ltd.

79.42

22.20

0

22.20

8.

Sasken Communication

Ltd. (Seg)

240.03

13.90

0

13.90

9.

Tata Elxsi Ltd. (Seg)

188.81

27.65

0

27.65

10.

Lucid Software Ltd.

1.02

8.92

0

8.92

11.

Mediasoft Solutions

P Ltd.

1.76

6.29

0

6.29

12.

R S Software (I) Ltd.

91.57

15.69

0

15.69

13.

SIP Technologies &

Exports Ltd.

6.53

3.06

0

3.06

14.

BOdhtree

Consulting Ltd.

5.32

15.99

0

15.99

15.

Accel Transmatics

Ltd. (Seg.)

8.02

44.07

0

44.07

16.

Synfosys Business

Solutions Ltd.

4.49

10.61

0

10.61
17.
Flextronics Software Systems
Ltd.
595.12
27.24
2.17
27.83
18.
IGATE Global
Solutions Ltd.
527.91
15.61
0
15.61
19.
Lanco Global
Systems Ltd.
35.63
5.27
0
5.27
20.
Megasoftware Ltd.
56.15
52.74
0
52.74
Average
20.68 %

20.71 %

In the above list of comparables, the companies at S.Nos.1, 3 12, 14, 16 & 19 are common as were accepted by the TPO from the list of assessee's comparables. Thus the TPO has arrived at Arithmetic Mean (AM) margin of comparables at 20.71%. The TPO has also allowed working capital adjustment of 2.19% and the adjusted AM was computed at 18.49%. Accordingly, the TPO proposed an upward adjustment of Rs.54,25,32,620 under Section 92CA of the Act. The assessee challenged the action of the TPO/A.O in selecting the list of comparables but could not succeed as DRP has upheld the action of the TPO/A.O.

6. Before us the assessee has raised the objections in respect of six comparables selected by the TPO and another comparable being Tata Elxsi Ltd. (Seg.) which was selected by the assessee but the assessee is seeking exclusion of the same by filing the additional ground which we will deal with separately.

7. We will deal with the functional comparability of the companies selected by the TPO one by one as under :

(i) Accel Transmatics Ltd. (Seg.)

(ii) KALS Technology Ltd.

These companies were selected by the TPO however the assessee objected to the inclusion of these companies in the list of comparables on the ground that these companies are functionally different and engaged entirely in different activities including main services.

8. The learned Authorised Representative of the assessee has submitted that the functional comparability of these two companies has been examined by the co-ordinate bench of this Tribunal in the case of Goldman Sachs Services Pvt. Ltd. Vs. DCIT dt.7.9.2015 in IT(T.P)A No.1423/Bang/2010. He has further submitted that the functional comparability of these companies were earlier examined by this Tribunal in the case of Ariba Technologies India Pvt. Ltd. Vs. ITO in IT(TP)A No.1179/Bang/2010 dt.19.12.2014 and therefore the Tribunal has been taking a consistent view on the functional comparability of these companies. Thus the learned Authorised Representative has submitted that these two companies are not functionally comparable with that of the assessee as the issue was examined by the Tribunal for the same assessment year i.e. 2006-07.

9. On the other hand, the learned Departmental Representative has submitted that the Tribunal has considered all verticals of the comparable companies whereas the assessee has not considered its income verticals and therefore the findings of the Tribunal in the other cases cannot be applied in the case of the assessee whose business profile includes a vast number of activities and not confined only to software development services. In rebuttal the learned Authorised Representative has pointed out that during the year under consideration, the assessee has undertaken the services for its software development services segment only as it is clear from the para 2.2 of the TPOs

order.

10. Having considered the rival submissions and the relevant material on record, we note that during the year under consideration the assessee has undertaken the software development services for its group companies (AEs), therefore, the international transactions in question are related to the software development services segment. At the outset we find that the comparability of these two companies examined by the Tribunal in the case of Goldman Sachs Services Pvt. Ltd. (supra), which in our view it is applicable in the case of the assessee where the international transactions are only in the software development services. We note that the Tribunal in the case of Goldman Sachs Services Pvt. Ltd. (supra), has examined the functional comparability of this company in paras 8.1 to 8.5.2 as under :

" 8.1 Accel Transmatics Ltd.

The assessee contends that this company is not a pure software development service company but rather it is a product development company and has a different functional profile from the assessee who is providing only software development to its AEs. It is submitted that this company is engaged in business application products in the healthcare and education segments which operate the products 'Healthspace' and 'Prodigy' respectively for which it received and would continue to receive royalty. It is also submitted that in the period under consideration, this company has ventured into the area of developing animation and gaming software and offers 2D, 3D animation, visual effects and gaming solutions.

8.2 KALS Infosystems Ltd.

The assessee contends that this company is into product development and is a product oriented company. It was submitted that this company deals with a variety of products such as Insure, La Vision and eDMS. Further, the application software segment would include both software development and software product sales for which appropriate segmental information is not available.

8.3 In support of its contention for exclusion of these two companies from the list of comparables, on the grounds that they are functionally different from the assessee in the case on hand who is a provider of software development services to its AEs, the learned Authorised Representative placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. (supra) for Assessment Year 2006-07 dt.19.12.2014.

8.4 Per contra, the learned Departmental Representative supported the orders of the authorities below in including these two companies in the list of comparables to the assessee.

8.5.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited and placed reliance upon. We find that a co-ordinate bench of this Tribunal in the case of

Ariba Technologies India Pvt. Ltd. (supra) for Assessment Year 2006-07 has excluded both these companies from the list of comparables from companies in the business of software development services since both these companies are functionally different and at paras 11 to 13 of its order, the co-ordinate Bench has held as under :-

" 11. Improper selection of comparables: It was submitted by the learned counsel for the Assessee that the following 2 companies are not functionally comparable with that of the Assessee.

a) KALS Information Systems Limited

b) Accel Transmission Limited.

In this regard our attention was drawn to the decision of the Hon'ble ITAT Bangalore Bench in the case of Triology E-Business Software India Pvt.Ltd. (supra) wherein these companies were held to be not functionally comparable with that of a pure software developer like the Assessee.

12. The following were the relevant observations of the Tribunal on the aforesaid comparable companies in the case of Triology E-Business Software India Pvt.Ltd. (supra):

"(d) KALS Information Systems Ltd.

As far as this company is concerned, the contention of the assessee is that the aforesaid company has revenues from both software development and software products. Besides the above, it was also pointed out that this company is engaged in providing training. It was also submitted that as per the annual report, the salary cost debited under the software development expenditure was Q 45,93,351. The same was less than 25% of the software services revenue and therefore the salary cost filter test fails in this case. Reference was made to the Pune Bench Tribunal's decision of the ITAT in the case of Bindview India Private Limited Vs. DCI, ITA No. ITA No 1386/PN/10 wherein KALS as comparable was rejected for AY 2006-07 on account of it being functionally different from software companies. The relevant extract are as follows:

"16. Another issue relating to selection of comparables by the TPO is regarding inclusion of Kals Information System Ltd. The assessee has objected to its inclusion on the basis that functionally the company is not comparable. With reference to pages 185-186 of the Paper Book, it is explained that the said company is engaged in development of software products and services and is not comparable to software development services provided by the assessee. The appellant has submitted an extract on pages 185-186 of the Paper Book from the website of the company to establish that it is engaged in providing of I T enabled services and that the said company is into development of software products, etc. All these aspects have not been factually rebutted and, in our view, the said concern is liable to be excluded from the final set of comparables, and thus on this aspect, assessee succeeds."

Based on all the above, it was submitted on behalf of the assessee that KALS Information Systems Limited should be rejected as a comparable.

We have given a careful consideration to the submission made on behalf of the Assessee. We find that the TPO has drawn conclusions on the basis of information obtained by issue of notice u/s.133(6) of the Act. This information which was not available in public domain could not have been used by the TPO, when the same is contrary to the annual report of this company as highlighted by the Assessee in its letter dated 21.6.2010 to the TPO. We also find that in the decision referred to by the learned counsel for the Assessee, the Mumbai Bench of ITAT has held that this company was developing software products and not purely or mainly software development service provider. We therefore accept the plea of the Assessee that this company is not comparable."

"(e) Accel Transmatic Ltd.

48. With regard to this company, the complaint of the assessee is that this company is not a pure software development service company. It is further submitted that in a Mumbai Tribunal Decision of Capgemini India (F) Ltd v Ad. CIT 12 Taxman.com 51, the DRP accepted the contention of the assessee that Accel Transmatic should be rejected as comparable. The relevant observations of DRP as extracted by the ITAT in its order are as follows:

"In regard to Accel Transmatics Ltd. the assessee submitted the company profile and its annual report for financial year 2005-06 from which the DRP noted that the business activities of the company were as under.

(i) Transmatic system - design, development and manufacture of multi function kiosks Queue management system, ticket vending system

(ii) Ushus Technologies - offshore development centre for embedded software, net work system, imaging technologies, outsourced product development

(iii) Accel IT Academy (the net stop for engineers)- training services in hardware and networking, enterprise system management, embedded system, VLSI designs, CAD/CAM/BPO

(iv) Accel Animation Studies software services for 2D/3D animation, special effect, erection, game asset development.

4.3 On careful perusal of the business activities of Accel Transmatic Ltd. DRP agreed with the assessee that the company was functionally different from the assessee company as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation and therefore assessee's claim that this company was functionally different was accepted. DRP therefore directed the Assessing Officer to exclude ACCEL Transmatic Ltd. from the final list of comparables for the purpose of determining TNMM margin."

Besides the above, it was pointed out that this company has related party transactions which is more than the permitted level and therefore should not be

taken for comparability purposes. The submission of the Id. counsel for the assessee was that if the above company should not be considered as comparable. The Id. DR, on the other hand, relied on the order of the TPO.

50. We have considered the submissions and are of the view that the plea of the assessee that the aforesaid company should not be treated as comparables was considered by the Tribunal in Capgemini India Ltd (supra) where the assessee was software developer. The Tribunal, in the said decision referred to by the Id. counsel for the assessee, has accepted that this company was not comparable in the case of the assessee engaged in software development services business. Accepting the argument of the Id. counsel for the assessee, we hold that the aforesaid company should be excluded as comparables."

13. The facts and circumstances under which the aforesaid companies were considered as comparable is identical in the case of the Assessee as well as in the case of Triology E-Business Software India Pvt.Ltd. (supra). Respectfully following the decision of the Tribunal referred to above in the case of Triology E-Business Software India Pvt. Ltd.(supra), we direct that KALS Info Systems Ltd. And Accel Transmatic Ltd. be excluded from the list of 20 comparable arrived at by the TPO."

8.5.2 Following the decision of the co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. for Asst. Year 2006-07 (supra), we direct the Assessing Officer / TPO to exclude M/s. Accel Transmatics Ltd. (Seg) and M/s. KALS Infosystems Ltd. from the set of comparables from companies in the software development services segment of the assessee."

As it is clear that an identical issue has also considered by the Tribunal in the case of Ariba Technologies India Pvt. Ltd. for the same assessment year i.e. 2006-07. The Tribunal has followed and concurred with the view taken in the case of Ariba Technologies India Pvt. Ltd. (supra). Hence, to maintain rule of consistency, we follow the decision of the co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. (supra) as well as in the case of Goldman Sachs Services Pvt. Ltd. (supra) and hold that M/s. Accel Transmatics Ltd. and M/s. KALS Information Systems cannot be considered as functionally comparable with the assessee. Accordingly, we direct the A.O./TPO to exclude these two companies from the set of comparables for determination of ALP.

11.1 Flextronics Software Ltd. (Seg.) : This company was selected by the TPO. The assessee objected the inclusion of this company in the list of comparables on the ground that there was extra-ordinary events of amalgamation during the year under consideration and further this company provides and engaged in wide range of services and does not report separate segmental results. This company is also a product oriented company. The learned Authorised Representative has further submitted that the functional comparability of this company has been examined and decided by the Hyderabad bench of the Tribunal dt.29.11.2013 in ITA No.1445/Hyd/2010 in the case of CES Pvt. Ltd. Vs. DCIT and the finding of

the Tribunal has been confirmed by the Hon'ble High Court of Andhra Pradesh & Telangana in ITA No.442 of 2014.

11.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that merely because there is an amalgamation ipso facto will not make a particular company functionally dis-similar if the functional and business profile of the company is similar to that of the assessee.

11.3 Having considered the rival submissions as well as the relevant material on record, at the outset, we note that the functional comparability of this company has been examined by the Hyderabad Benches of this Tribunal in the case of CES Pvt. Ltd. (supra) at page 14 of the order as under :

“ 2 . Flextronics Software Systems L t d .

The learned counsel f or the assessee s ubmission is to e xclude the said company from the list of comparables on the gro und that in this company substantial acquisition of Flextroncis International took place on 05-05 -2005 and hence cannot be taken as comparable. He relied on Hyderabad IT AT order in the case of Capital IQ Information Systems (India) Ltd. 32 T axmann.com 21”

We further note that the finding of the Tribunal in the case of CES Pvt. Ltd. (supra) has been confirmed by the Hon'ble High Court of Andhra Pradesh & Telangana in ITA No.442 of 2014 Dt.16.7.2014. Accordingly, following the order of the co-ordinate bench of this Tribunal in the case of CES Pvt. Ltd. as well as Hon'ble High Court, we direct the A.O./TPO to exclude this company from the list of comparables.

12. Megasoft : This company was selected by the A.O./TPO. The assessee objected against the inclusion of this company in the set of comparables on the ground that this company is a product company and therefore functionally different from that of the assessee. Further this company is having a different financial year and therefore the results of this company are not contemporaneous to that of the assessee.

13.1 The learned Authorised Representative of the assessee has submitted that the functional comparability of this company has been examined by the Tribunal in the case of Goldman Sachs Services Pvt. Ltd. (supra) as well as in the case of CES Pvt. Ltd. (supra) and it was found that this company cannot be considered as a functionally comparable to that of a software development services provider like the assessee.

13.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that the functional comparability has been examined by the TPO and it was found that this company is in the same business activity.

13.3 Having considered the rival submissions as well as the relevant material on

record, we note that the co-ordinate bench of this Tribunal in the case of Goldman Sachs Services India Pvt. Ltd. (supra) has examined the functional comparability of this company in para 10 to 10.2.3 as under :-

" 10. Megasoft Ltd.

10.1 The learned Authorised Representative of the assessee submitted that this company is a product development company and is therefore functionally different from the assessee in the case on hand who is purely a provider of software development services to its AEs. It is submitted that this company has three divisions; one of which, is, XIUS Division is completely into product development and has various products such as XIUS WISE, XIUS Voise, XIUS Roaming, XIUS Infinet, etc. customises its own products and only passes on right in the form of licenses. The learned Authorised Representative also submitted that this company fails the Related Party Transaction ('RPT') filter of 15% and is a super profit company. In support of the assessee's contentions, that this company, being into products and product development should be excluded from the list of comparables, as it is functionally different from companies into provision of software development services, the learned Authorised Representative placed reliance on the decision of the Hyderabad bench of the ITAT in the case of CES Pvt. Ltd. in ITA No.1445/Hyd/2010 for Assessment Year 2006-07.

10.2 Per contra, the learned Departmental Representative supported the order of the TPO in including this company in the list of comparable companies to the assessee in the case on hand.

10. 3.1 We have heard both parties and perused and carefully considered the material on record; including the judicial pronouncement cited. We find that the Hyderabad bench of the ITAT in the case of CES Pvt. Ltd. (supra) for Assessment Year 2006-07, has held that this company is not to be considered as comparable to a company merely providing software development services as is the assessee in the case on hand. At paras 16(6) and 17 of its order, the co-ordinate bench of the ITAT, Hyderabad has held as under :-

"16.....

(6) Megasoft Ltd .

The learned counsel for the assessee s ubmission is to e xclude the said company f rom the list of comparables on the ground that this company is a su per prof it making company and difference in functionality and b usiness model. Further, T PO pla ced a f ilter of simila r year financial endin g i.e., March year endin g. Ho we ver, Megasof t Ltd has a diff erent f inancial year endin g compared to Assessee company i.e., December Year ending and ought n ot to have considered it as a c omparable. He relied on the follo win g c ase law:

1. Hyderabad IT AT order in the case of Capital IQ Inf ormation Systems (India) Ltd. vide para 15 - 32 T axmann.com 21.

2. Mumbai IT AT order in T eva India P vt. Ltd. Vs. DCIT Mum bai.

3. Dy. CIT Vs. America I E xpres s (India)(P) Ltd. [2012] 135 IT D 211 (Delhi)(T rib)”

“ 17. we have considered various objection in the light of material placed before us. Various co-ordin ate benches have already considered the above object ions on similarly pla ced sof tware development companies. Accord ingly, these objections o f Assessee are accepted and the T PO directed to exclude the above companies and re work out arithmetic mean of PLI.”

10.3.2 Following the decision of the ITAT, Hyderabad Bench in the case of CES Pvt. Ltd. for Assessment Year 2006-07 (supra), we hold and direct that this company, namely, Megasoft Ltd. is to be excluded from the list of comparable companies for software development services segment of the assessee.”

There is no dispute that this company is following a different financial year in comparison to the assessee as this company is following the calendar year as accounting year whereas the assessee is following the financial year as its accounting year. Therefore, the data of this company are not contemporaneous to the assessee. Following the earlier order of this Tribunal in the case of Goldman Sachs Services Pvt. Ltd.(supra), we direct the A.O./TP to exclude this company from the list of comparables.

14.1 Persistent System Ltd. : This company is selected by the TPO. The assessee objected the inclusion of this company on the ground of functionally different and engaged in the product development and design services. The learned Authorised Representative of the assessee has submitted that the functional comparability of this company has been examined by the Hyderabad Tribunal in the case of CES Pvt. Ltd. (supra) and the finding of this Tribunal has been upheld by the Hon'ble High Court of Andhra Pradesh & Telangana in ITA No.442 of 2014.

14.2 On the other hand, the learned Departmental Representative has relied upon the orders of authorities below.

14.3 Having considered the rival submissions as well as the relevant material on record, we note that the functional comparability of this company has been examined by the Tribunal in the case of CES Pvt. Ltd. (surpa) and held as under :

“ 3 . Persistent Systems Ltd .

The learned counsel f or the assessee s ubmission is to e xclude the said company from the list of comparables on the gro und that in this company subs t antial ac quis ition of Norwe st Capita l Partners took placed on 22 -11-2005 and hence cannot be taken as comparable. He relied on Hyderaba d IT AT order in the case of Capital IQ I nf ormation Systems (India) Ltd. 32 T axmann.com 21.”

We note that the finding of the Tribunal has been upheld by the Hon'ble High Court vide judgment dt.15.7.2014 in ITA N.442 of 2014. Following the order of the co-ordinate bench, we direct the Assessing Officer/TPO to exclude this

company from the list of comparables.

15. Infosys Technologies Ltd. : This company was selected by the TPO/A.O and the assessee objected the inclusion of this company in the list of comparables.

15.1 Before us, the learned Authorised Representative of the assessee has submitted that the functional comparability of this company has been examined in the series of decisions of this Tribunal. He has relied upon the decision of the co-ordinate bench of this Tribunal in the case of Goldman Sachs Services Pvt. Ltd. (supra) as well as CES Pvt. Ltd. (supra). Further the learned Authorised Representative of the assessee has submitted that the functional comparability of this company was also considered by the Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. which has been confirmed by the Hon'ble Delhi High Court vide judgment dt.10.7.2013 in ITA No.1204 of 2011.

15.2 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below.

15.3 Having considered the rival submissions as well as the relevant material on record, we note that the functional comparability of this company has been examined by the Tribunal in a number of decisions. In the case of Agnity India Technologies Pvt. Ltd. (supra), the matter was carried to Hon'ble Delhi High Court and the Hon'ble High Court has confirmed the finding of the Tribunal by observing in paras 5 & 6 as under :

" The Tribunal has observed that the assessee was not comparable with Infosys Technologies Ltd., as Infosys Technologies Ltd. was a large and bigger company in the area of development of software and, therefore, the profits earned cannot be a bench marked or equated with the respondent, to determine the results declared by the respondent-assessee. In paragraph 3.3 the Tribunal has referred to the difference between the respondent-assessee and Infosys Technologies Ltd. For the sake of convenience, we are reproducing the same :-

Basic Particular

Infosys Technologies Ltd.

Agnity India

Risk Profile

Operate as full-fledged risk taking
entrepreneurs.

Operate at minimal risks as the 100% services are
provided to AEs.

Nature of Services

Diversified-consulting,

Contract Software
application design,
Development Services.
development, re-
engineering and
maintenance system
integration, package
evaluation and
implementation and
business process
management, etc. (refer
page 117 of the paper
book)

Revenue

Rs.9,028 Crores

Rs.16.09 Crores

Ownership of branded /

Develops / owns

proprietary products

proprietary products like

Finacle, Infosys Actice

Desk, Infosys iProwe,

Infosys mConnect. Also,

the company derives

substantial portion of its

proprietary products (including its flagship banking product suite

'Finacle')

Onsite Vs. Offshore

As much as half of the software devt. Services rendered by Infosys are onsite (i.e. services performed at the customer's location overseas). And offshore

(50.20%) (Refer page 117 of the paper book) than half of its services, income from onsite

services.)

The appellant provides only offshore services (i.e. remotely from India)

Expenditure on Advertising / Sales promotion and brand

building

Rs.61 Crores

Rs. Nil (as per the 100% services are provided to AEs)

Expenditure on R& D

Rs.102 Crores

Rs.Nil

Other

100% Offshore (from

India)

6. Learned counsel for the Revenue has submitted that the Tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the Tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent-assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted."

Following the decision of the co-ordinate bench as well as Hon'ble Delhi High Court, we hold that this company cannot be held as good comparable of the assessee which is provider of capital service to AE. Accordingly, we direct the A.O./TPO to exclude this company from the list of comparables.

16.1 The assessee has also filed an additional ground which reads as under :

"1. The Id. TPO has, in his fresh study, erred in selecting Tata Elxsi Limited as comparable to the appellant. This company cannot be retained as comparable, merely because this was initially selected by the appellant in its transfer pricing documentation. The Hon'ble DRP has also erred in confirming the order of the TPO in this regard.

The said ground is independent and without prejudice to the other grounds of appeal preferred by the appellant.

The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Hon'ble ITAT to decide this appeal according to law."

16.2 We have heard the rival submissions on the admissibility of this ground. The learned Authorised Representative of the assessee has submitted that though Tata Elxsi Ltd. (Seg.) was selected by the assessee in its T.P. Study however, this company is not functionally comparables with that of the international transactions of the assessee and therefore the same cannot be considered as good comparable for the purpose of determination of ALP. The learned Authorised Representative has relied upon the decision of the Special Bench of Chandigarh Bench of the Tribunal in the case of Quark Systems P. Ltd. (2010) (Chd.) (SB) 38 SOT 307 and submitted that the Special Bench has held that the tax payee can seek the rejection of a company selected by it in the T.P. Study as not being comparable even such a plea is raised for the first time before the Tribunal. Thus the learned Authorised Representative has submitted that when the functional comparability of this company has been considered and decided by various decisions of this Tribunal, then this company cannot be considered in the list of comparables for the purpose of determining the ALP only because the assessee has selected the same. He has also relied upon the decision of the Tribunal in the case of Goldman Sachs Services Pvt. Ltd.(supra) as well as Ariba Technologies India Pvt. Ltd. (supra) and submitted that this company shall be excluded from the list of comparables on the ground of functional dis-similarity.

16.3 On the other hand, the learned Departmental Representative has objected to the admission of the additional ground and submitted that when the assessee itself has selected this company as comparable then, the assessee cannot be permitted to raise this ground at this stage.

16.4 Having considered the rival submissions and relevant material on record, we note that this company is not in the activity of pure software development services but engaged in the diversified product development which includes multi media and Imaging process. Further this company is also engaged in the activities such as hardware design, engineering design and virtual computing. By considering the functional profile of this company, we find that this company cannot be considered as functionally comparable with the software development services provider and therefore in view of the decision of the Special Bench of this Tribunal in the case of Quark System Pvt. Ltd. (supra), we admit the additional ground raised by the assessee. We find that the functional comparability has been examined by the co-ordinate bench in the case of Goldman Sachs Services Pvt. Ltd. (supra) in paras 11 to 11.3.2 as under :

" 11. Tata Elxsi Ltd.

11.1 The learned Authorised Representative of the assessee submitted that this

company is a product company and it has several core practices which encompass product design services, industrial design and engineering services for automotive and consumer goods; animation and visual effects including content development and system integration services. It is also submitted that appropriate segmental information is not available in respect of the software development segment which have different segments. In support of the assessee's contention that this company ought not to have been included in the set of comparable companies to the assessee who is a non-provider of software development services to its AEs, the learned Authorised Representative placed reliance on the decision of a co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. in IT(TP)A No.1179/Bang/2010 dt.19.12.2014 for Assessment Year 2006-07.

11.2 Per contra, the learned Departmental Representative supported the order of the TPO in including this company in the list of comparable companies to the assessee in the case on hand.

11. 3.1 We have heard both parties and perused and carefully considered the material on record; including the judicial pronouncement cited by the assessee. We find that a co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. (supra) for Assessment Year 2006-07 has excluded this company i.e. M/s. Tata Elxsi Ltd. from the set of comparable companies which are mere providers of software development services, as is the assessee in the case on hand. At paras 17 and 18 of its order, the co-ordinate bench has held as under :-

" 17. As far as comparable company chosen by the TPO viz., Tata Elxsi Ltd., is concerned, the comparability of the aforesaid company with that of the software service provider such as the Assessee was considered by the Mumbai Bench of this Tribunal in the case of Logica Pvt.Ltd. IT (TP) 1129/Bang/2011 AY 07-08) wherein on the comparability of the aforesaid company, the Tribunal held as follows:-

"14. As far as comparable at Sl.No.6 & 24 are concerned, the comparability of the aforesaid two companies with that of the software service provider was considered by the Mumbai Bench of the Tribunal in the case of Telcordia Technologies India Private Ltd. (supra) wherein on the aforesaid two companies, the Tribunal held as follows:-

"7.7.Tata Elxsi Limited.:

From the facts and material on record and submissions made by the learned AR, it is seen that the Tata Elxsi is engaged in development of niche product and development services, which is entirely different from the assessee company. We agree with the contention of the learned AR that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we

are unable to treat this company fit for comparability analysis for determining the arms length price for the assessee, hence, should be excluded from the list of comparable parties.”

15. In view of the above, the Id. counsel for the assessee fairly admitted that comparable company at Sl.No.6 viz., Flextronics Software Systems Pvt. Ltd. should be taken as a comparable, while comparable at Sl.No.24 viz., Tata Elxsi Ltd. should be rejected as a comparable.”

18. In view of the aforesaid decision, we hold that Tata Elxsi has to be excluded from the list of comparable chosen by the TPO.”

11.3.2 Following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of Ariba Technologies India Pvt. Ltd. for Assessment Year 2006-07 (supra), we hold and direct that this company, namely, Tata Elxsi Ltd. shall be excluded from the set of comparable companies for the software development segment of the assessee.”

In view of the facts as discussed above as well as the decision of the co-ordinate bench, we direct the A.O./TPO to exclude this company from the list of comparables.

17. Ground No.7 is regarding the benefit of tolerance range of +/- 5% as per the proviso to Section 92C(2) of the Act. If the difference of the price of the international transactions and average price of the comparables is within the tolerance range then the benefit of proviso to Section 92C(2) of the Act is available to the assessee. Accordingly, we direct the A.O./TPO that while computing the ALP after excluding certain comparables as directed by us, the benefit of the proviso to Section 92C(2) of the Act has to be considered.

18. 1 Ground Nos.9 & 10 are regarding the exclusion of expenditure incurred by the assessee in foreign currency from export turnover.

18.2 We have heard the rival submissions as well as considered the relevant material on record. This issue is now covered by the judgement of Hon'ble jurisdictional High Court in the case of CIT v M/s Tata Elxsi Ltd. & Others 349 ITR 98 had held that while computing the exemption u/s 10A, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded from the total turnover in the denominator. The relevant finding of the Hon'ble jurisdictional High Court reads as follows:-

“.....Section 10A is enacted as an incentive to exporters to enable their products to be competitive in the global market and consequently earn precious foreign exchange for the country. This aspect has to be borne in mind. While computing the consideration received from such export turnover, the expenses incurred towards freight, telecommunication charges, or insurance attributable to the delivery of the articles or things or computer software outside India, or expenses if any incurred in foreign exchange, in providing the technical services outside India should not be included. However, the word total turnover is not

defined for the purpose of this section. It is because of this omission to define 'total turnover', the word 'total turnover' falls for interpretation by this Court;

.....In section 10A, not only the word 'total turnover' is not defined, there is no clue regarding what is to be excluded while arriving at the total turnover. However, while interpreting the provisions of section 80HHC, the courts have laid down various principles, which are independent of the statutory provisions. There should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10A is a beneficial section which intends to provide incentives to promote exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of section 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in section 10-A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. To the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. If the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in section 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. When the statute prescribed a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. Thus, there is no error committed by the Tribunal in following the judgments rendered in the context of section 80HHC in interpreting section 10A when the principle underlying both these provisions is one and the same".

Following the judgment of the Hon'ble High Court, we direct the Assessing Officer to exclude the expenditure in the foreign currency from total turnover as well.

19.1 Ground No.11 is regarding the disallowance of computer software expenses by treating the same as capital in nature.

19.2 We have heard the rival submissions as well as considered the relevant material on record. The learned Authorised Representative of the assessee has submitted that the co-ordinate bench of this Tribunal in the case of Broadcom Communications Technologies Pvt. Ltd. Vs. DCIT in Income Tax Act, 1961-Section No.1276/Bang/2011 has decided an identical issue vide order dt.11.6.2015 in favour of the assessee. He has pointed out that the expenditure incurred by the assessee is in respect of purchase of application of software and therefore the said expenditure is revenue in nature. Thus the learned Authorised Representative has relied upon the decision of the co-ordinate bench of this Tribunal.

19.3 On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that the Assessing Officer has found that the expenditure has been incurred for purchase of software and the same is capital in nature.

19.4 Having considered the rival submissions as well as the relevant material on record, we note that an identical issue has been considered by the co-ordinate bench of this Tribunal in the case of Broadman Communications Technologies Pvt. Ltd. (supra) in paras 30 to 34 held as under :

" 30. We have heard the Id. counsel for the assessee and the Id. DR on the issues raised in concise ground Nos.12 & 13. Taking into consideration the decision rendered by the Hon'ble High Court of Karnataka in the case of CIT v. Tata Elxsi Ltd [2012] 349 ITR 98 (Karn), we are of the view that it would be just and appropriate to direct the Assessing Officer to exclude telecommunication charges, internet charges etc., both from export turnover and total turnover, as has been prayed for by the assessee in concise ground No.13. In view of the acceptance of the alternative prayer in concise ground No.13, we are of the view that no adjudication is required on concise ground No.12. 31. Gr.No.8 to 11 raised by the Assessee in the concise grounds of appeal reads as follows: "8. The Hon'ble DRP has erred in law and on facts in upholding the AO's reasoning in disallowing an amount of Rs.1,09,16,141 being expenditure for acquiring the rights to use application software. 9. The Hon'ble DRP has erred in law and on facts in upholding the AO's reasoning that expenditure on software is capital in nature even though the Appellant has submitted that it has acquired only the right to use the software and not the right to own the software. 10. Without prejudice to our above ground that expenses incurred on the right to use the application software should be treated as revenue expenditure, the Hon'ble DRP has erred in law and on facts in upholding the learned AO's action of not providing appropriate depreciation at the rate of 60 per cent on the amount considered as capital in nature. In the said order, the AO has not considered depreciation and has disallowed the entire amount of Rs.10,916,141. 11. Without prejudice to our contention that expenses incurred on right to use the application software should be treated as a revenue expenditure, the Hon'ble DRP has erred in law and on facts in upholding the learned AO's action of not providing

appropriate deduction under section 10A of the Act in respect of the above additions made to the net profits of the Company.”

32. The DRP after considering the issue held that the expenditure on acquisition of software has resulted in enduring benefits of capital nature to the assessee. That expenditure which increases the efficiency and capacity of the apparatus established to earn profit is capital in nature. The DRP also held that the expenditure results in increasing the data storage, processing and retrieval capacity of the assessee and this benefit is considered as enduring and of capital nature and therefore, AO has rightly excluded it and not allowed the assessee to use it as revenue expenditure. 33. At the time of hearing, it was brought to our notice that identical issue came up for consideration in the case of ING Vysya Bank before this Tribunal in A.Y. 2004-05 in ITA No.1143/Bang/2010. The Tribunal by its order dated 30.12.2014 dealt with issue in paras 13 to 21 of its order. Paras 19 to 21 of the said order relevant to the present case read thus:- “19. The learned counsel for the assessee brought to our notice the decision of the Hon'ble Karnataka High Court in the case of IBM India Ltd., in ITA No.130/2007, dt 10.04.2013. The Hon'ble Karnataka High Court in the aforesaid decision considered the following question of law : “Whether the Tribunal was correct in holding that the purchase of software amounting to Rs.33,14,298/- should be allowed as a revenue expenditure without recording a finding as to the nature of the purchase, its durability and its application before deciding the issue ? The Hon'ble High Court on the aforesaid question of law held as follows :

“9. The second substantial question of law relates to application of the amount utilized for projects of Software in a sum of Rs.33,14,298/-. The Tribunal on consideration of the material on record and the rival contentions held, when the expenditure is made not only once and for all but also with a view to bringing into existence an asset or an advantage for the enduring benefit, the same can be properly classified as capital expenditure. At the same time, even though the expenses are once and for all and may give an advantage for enduring benefit but is not with a view to bringing into existence any asset, the same cannot be always classified as capital expenditure. The test to be applied is, is it a part of company's working expenses or is it expenditure laid out as a part of process of profit earning. Is it on the capital layout or is it an expenditure necessary for acquisition of property or of rights of a permanent character, possession of which is condition on carrying on trade at all. The assessee in the course of its business acquired certain application software. The amount is paid for application of software and not system software. The application software enables the assessee to carry out his business operation efficiently and smoothly. However, such software itself does not work on stand alone basis. The same has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Thus, for payment of such application software, though there is an enduring benefit, it does not result into acquisition of any capital asset. The same merely enhances the productivity or efficiency and hence to be treated as revenue expenditure. In

fact, this Court had an occasion to consider whether the software expenses is allowable as revenue expenses or not and held, when the life of a computer or software is less than two years and as such, the right to use it for a limited period, the fee paid for acquisition of the said right is allowable as revenue expenditure and these softwares if they are licensed for a particular period, for utilizing the same for the subsequent years fresh licence fee is to be paid. Therefore, when the software is fitted to a computer system to work, it enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Though certain application is an enduring benefit, it does not result into acquisition of any capital asset. It merely enhances the productivity or efficiency and therefore, it has to be treated as revenue expenditure that view of the matter, the finding recorded by the Tribunal is in accordance with law and do not call for any interference. Accordingly, the second substantial question of law is answered in favour of the assessee and against the Revenue.” 20. According to the learned counsel for the Assessee, the aforesaid ruling of the Hon'ble Karnataka High Court that the expenditure incurred for acquiring application software has to be treated as revenue expenditure. The learned counsel further pointed out that in the remand report filed by the AO before CIT(A) on the aforesaid issue, the AO did not dispute the fact that the computer software which was claimed as revenue expenditure were not application software as was contended by the assessee in his submission before the CIT (A). In other words, the fact that the nature of the expenses as one being licence fees for using MS office and MS windows was not disputed by the Assessing Officer. He also pointed out that the AO did not dispute the contention before CIT(A) that the Assessee had not made double deduction once in the profit and loss account and again in the computation of total income nor has the Assessee claimed depreciation on the capitalized value of the software expenditure incurred on purchase of application software. According to him therefore the claim of the Assessee had to be allowed. The learned DR relied on the order of the CIT(A) and further submitted that the issue may be set aside to the AO for a consideration afresh in the light of the submissions made by the Assessee before the Tribunal. 21. We have considered the rival submissions and are of the view that in the light of the submissions before CIT(A) and the remand report of the AO before CIT(A), it is clear that the revenue does not dispute the fact that there was no double claim of expenditure either in the form of a debit in the profit and loss account and thereafter a deduction claimed in the computation of total income. The revenue has also not disputed the fact that the expenditure in question though capitalized in the books of accounts, no claim for depreciation on the application software had been claimed by the Assessee. The fact that the software in question is application software has also not been disputed. In these circumstances we are of the view that the plea of the learned DR for a remand of the issue to the AO for a fresh consideration will be an exercise in futility and would result in harassment to the Assessee. In the light of the above legal position laid down by the Hon'ble Karnataka High Court in the case of IBM (India) Ltd. (supra) and the factual position, in the assessee's case, we are of the view that the disallowance

of expenditure on purchase of software was not proper. Accordingly the addition made by the Assessing Officer and confirmed by the CIT (A) is directed to be deleted.”

34. It is not disputed by the revenue that the expenditure was in respect of application software. Respectfully following the said decision of the Tribunal, we hold that expenditure incurred on purchase of software should be allowed as revenue expenditure.”

Therefore when the expenditure in the case of the assessee is towards application software then by following the decision of the co-ordinate bench of this Tribunal, we decide this issue in favour of the assessee.

20. Ground No.12 is regarding levy of interest under Sections 234B & 234D which is consequential and mandatory.

21. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on the 9th day of March, 2016.