IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM and Shri B.R.Baskaran, AM

IT(TP)A No.2616/Bang/2019 : Asst.Year 2010-2011
IT(TP)A No.2617/Bang/2019 : Asst.Year 2011-2012

M/s.Waters (India) Private Limited No.36A, 2nd Phase, Peenya Industrial Area Bengaluru – 560 058. **PAN : AAACW1411C.**	v.	The Dy.Commissioner of Income-tax, Circle 12(5) Bangalore.
(Appellant)		(Respondent)

Appellant by : Smt.G.Vaidehi, Adovcate
Respondent by : Sri.Priyardarshi Mishra, Addl.CIT-DR

Date of Hearing : 28.09.2021		**Date of Pronouncement : 01.10.2021**

O R D E R

Per George George K, JM

These appeals at the instance of the assessee are directed against two orders of the CIT(A), both dated 30.10.2019. The relevant assessment years are 2010-2011 and 2011-2012. Common issues are raised in these appeals, hence, they were heard together and are being disposed of by this consolidated order.

We shall first adjudicate ITA No.2616/Bang/2019.

ITA No.2616/Bang/2019 (Asst. Year 2010-2011)

2. Four issues are raised in this appeal –

Transfer Pricing Adjustment

(i) The CIT(A) has erred in confirming the transfer pricing adjustment of Rs,2,96,59,931 in respect of payment made by the assessee for intra group services.

Corporate tax issues.

(ii) The CIT(A) has erred in confirming disallowance of payment of intra group services of Rs.2,76,32,587 u/s 40(a)(i) of the I.T.Act, 1961.

(iii) The CIT(A) has erred in confirming the disallowance of depreciation amounting to Rs.63,991.

Additional Ground

(iv) Whether education cess is an allowable deduction.

We shall adjudicate the above issues as under:

Transfer Pricing Adjustment

3. The assessee is a company, which is a wholly owned subsidiary of Waters Technologies Corporation, USA. For the assessment year 2010-2011, the assessee had undertaken various international transactions with its Associate Enterprises (AEs). The assessee during the assessment year, had made payment of management charges amounting to Rs.2,96,59,931 to Waters S.A. France. The assessee submitted that these payments are towards service received by the assessee. The Transfer Pricing Officer (TPO) concluded that the Arm's Length Price (ALP) of payment of management charges is `Nil'. The reasoning of the TPO in concluding so are as follows:-

(i) The assessee has not been able to demonstrate the nature of services / benefits received by it nor has

the assessee been able to justify that the services are actually rendered by the AE to it.

(ii) The TPO has held that EHQ services received by the assessee do not benefit the assessee in any way.

(iii) It was held by the A.O. that when the assessee can perform these activities by itself, it is not justifiable to make the payment for such services especially when such payment is not at arm's length.

3.1 Aggrieved by the order of the AO / TPO in holding that the payment made by the assessee amounting to Rs.2,96,59,931 as `Nil' ALP, the assessee preferred an appeal to the first appellate authority.

3.2 The CIT(A) confirmed the view taken by the Assessing Officer.

3.3 Aggrieved, the assessee has raised this issue before the ITAT. The learned AR submitted that an identical issue was considered in assessee's own case by the ITAT for assessment year 2009-2010 in ITA No.2349/Bang/2019 (order dated 25.11.2020). It was submitted by the learned AR that the issue was restored to the files of the AO / TPO to determine the ALP of the services based on the documents submitted by the assessee. The learned AR submitted that a similar view may be taken in this case also.

3.4 The learned Departmental Representative did not have any specific objections for remitting the issue to the AO / TPO.

3.5 We have heard rival submissions and perused the material on record. We find an identical issue was restored to the AO / TPO by the Tribunal in assessee's own case for assessment year 2009-2010 (supra). The Tribunal for assessment year 2009-2010 directed the AO / TPO to determine the ALP of the services that the assessee received by determining what is the most appropriate method and the comparability analysis. The relevant finding of the Bangalore Bench of the Tribunal, reads as follow:-

> *"16. We have perused submissions advanced by both sides in light of records placed before us.*
> *17. It is observed that Ld.TPO determined ALP at NIL by applying CUP, vis-à-vis, ALP determined by assessee at aggregate level by using TNMM. Ld.TPO held that assessee did not obtain any benefit out of such services and that such services provided by AE were not required, as, assessee failed to provide evidence regarding receipt of services, alleged to be rendered by AE, necessitating any payment. It is observed that, Ld.TPO thus held that, as there is no benefit from services for which payments has been made, he determined ALP of international transaction at Nil, without carrying out any FAR analysis of intra-group services. This approach of Ld.TPO is not acceptable, as once a transaction has been categorised as independent international transaction, it is necessary to determined ALP of such transaction. Ld.TPO cannot consider ALP at 'NIL' and value of transaction has to be computed as per law.*
> *18. The Income Tax Act provides computation of arms length price of any international transaction as under:*
> ***Computation of income from international transaction having regard to arm's length price.***
> *92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.*
> *Explanation.—For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.*
> *(2) Where in an international transaction [or specified domestic transaction], two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service*

or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

19. According to above provisions following principles emerge:-

- *An international Transaction is entered in to between two or more associated enterprises for jointly acquiring or developing some property or for obtaining services.*
- *The parties to transaction enter in to mutual agreement or arrangement to share cost or expenses incurred or to be incurred in respect of joint property.*
- *The cost or expenses incurred should be in connection with a benefit or services of facility provided or to be provided to any one or more of such enterprise. The expectation of mutual benefit is important consideration for the acceptance of arrangement for pooling of resources by the enterprises.*
- *The enterprises would require that each participant's proportionate share of the contribution is consistent with the proportionate share of overall benefits expected to be received from the arrangement.*
- *Transfer price of cost or expenses allocated or apportioned to such enterprise or contributed by such enterprise shall be determined having regard to Arm's length price of such benefit, service or facility received by the enterprise. In order to satisfy arm's length price participant's contributions must be consistent with what an independent enterprise would have agreed to contribute under comparable circumstances considering the benefits it expects to derive from the agreement.*

20. We direct Ld.TPO to judge the requirement of services from viewpoint of assessee as a businessman. Therefore in this regard we are of view that assessee has to substantiate that these services are required by it. We note that assessee has entered into Intra Group Service agreement with AE, which is placed at page 467 of paper book Volume II. This goes to prove that services were required by assessee.

21. Hon'ble Delhi High Court in case of Cushman Wakefield Limited reported in 46 taxmann.com 317 has held that:

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/13 taxmann.com 82 (Mum.):

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under

cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since

there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."
22. Another aspect that was made clear by coordinate bench of this Tribunal in Delloite Consulting India (P.) Ltd. v. Dy. CIT/ITO reported in [2012] 137 ITD 21/22 taxmann.com 107 (Mum) is that:
'37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in Gemplus India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 352 (Bang.) of 2009, dated 20-10- 2010] held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price."
23. Placing reliance upon aforestated decisions, we are of considered opinion that for these services, assessee has to demonstrate and satisfy Evidence Test or rendition test and benefit test, as envisaged u/s 92(2) of the Act, and that, services provided by AE are neither duplicative nor shareholder's activity. Ld.AO/TPO is then directed to determine Arm's length price of these services based on documents submitted by assessee by determining "most appropriate method" and Comparability analysis."

3.6 Further, the Tribunal vide its order in MP No.41/Bang/2021 (order dated 25.06.2021) had also restored the issue to the files of the AO / TPO to determine whether segregation of management services needs to be benchmarked separately. The relevant finding of the Tribunal in MA No.41/Bang/2021 reads as follows:-

"4. The Ld.AR submitted that, at page 6 of the impugned order, this Tribunal observed that, assessee is not disputing to the segregation of management services to be bench marked separately. At the outset Ld.AR submitted that vide Ground No.1.3 assessee challenged segregation and separate benchmarking the intragroup services from the manufacturing and trading segment.

5. We have perused the submissions advanced by both sides in light of records placed before us. We note that the said Ground No.1.3 is raised by assessee challenging the segregation of service by Ld.AO/TPO. Therefore

observation of this Tribunal deserves to be deleted. 6. Accordingly we delete the observation in para 14 of the impugned order at page 6. Henceforth para 14 shall be read as under: "

"14. The Ld.AR submitted that Ld.TPO has not analysed the services rendered by AE to assessee in the light of evidences filed by assessee. He also submitted that even Ld.CIT(A) summarily rejected submissions of assessee without verifying various evidences filed.""

3.7 In view of the aforesaid orders of the Tribunal, we restore the issue raised in ground No.1.1 to 1.9 to the files of AO / TPO. The AO / TPO is directed to follow the dictum laid down by the Tribunal in assessee's own case for assessment year 2009-2010 (supra). It is ordered accordingly..

Corporate Tax Issues

The CIT(A) has erred in confirming disallowance of payment of Rs.2,76,32,587 u/s 40(a)(i) of the I.T.Act.

4. The brief facts of the above issue are as follows:

The assessee had paid a sum of Rs.2,96,59,931 as management fees to Water SA, France during the relevant assessment year. Out of the total payment of Rs.2,96,59,931, the assessee had deducted TDS of Rs.20,27,344. According to the assessee, the payment for the intra group services of balance amount of Rs.2,76,32,587 pertains to general managerial activities, which do not involve the rendering in technical knowledge, skills etc. It was further submitted by the assessee that it is not able to apply such knowledge and skill on its own. Hence, it was contended that the provisions of TDS are not applicable on payment to the extent of Rs.2,76,32,587. The Assessing Officer did not accept the arguments of the assessee. It was held by the Assessing

Officer that such payments are in the nature of fees for technical services under *Explanation 2* to section 9(1)(vii) of the I.T.Act and also under Article 13 of the India-France DTAA. The AO / TPO concluded that there is no "make available" clause under Article 13 of the India-France DTAA and did not accept the arguments of the assessee that managerial services will not be covered under `fees for technical services'' as they do not make available any skill or knowledge to the recipient of the services. Accordingly, the Assessing Officer disallowed the entire payment of management fees to the extent of Rs.2,76,32,587 u/s 40(a)(i) of the I.T.Act, since the tax has not been deducted at source on the same.

4.1 Aggrieved, the assessee preferred an appeal to the first appellate authority. The CIT(A) confirmed the view taken by the AO / TPO.

4.2 Aggrieved by the order of the CIT(A), the assessee has raised this issue before the Tribunal. The learned AR submitted that an identical issue was decided by the Tribunal in assessee's own case for assessment year 2009-2010 in ITA No.2349/Bang/2019, wherein the Tribunal had restored the issue to the files of AO / TP{O for *de novo* consideration. It was submitted by the learned AR that the similar view may be taken in this case also.

4.3 The learned Departmental Representative was duly heard.

4.4 We have heard rival submissions and perused the material on record. The issue of disallowance u/s 40(a)(i) of the I.T.Act has been considered by the Tribunal in assessee's own case for assessment year 2009-2010. The Tribunal restored the issue to the files of AO / TPO for *de novo* consideration. The relevant finding of the Tribunal, reads as follow:-

> *"24. In respect of corporate tax issues raised by assessee, we note that, Ld.AO made protective assessment u/s 40(a)(i) for non deduction of TDS on payment made towards managerial services. We note that Ld.TPO has made adjustment in respect of payments made towards managerial services , which has been remanded for denovo consideration based on evidences/documents filed by assessee.*
>
> *25. We note that assessee has deducted TDS on certain payments made to AE. It is the submission of Ld.AR that balance amount, pertains to other services. Ld.AR submits that such other payments cannot be termed as technical in nature. As we have remitted the transfer pricing adjustment on same issues to Ld.TPO for denovo consideration, this issue becomes academic at this stage.*
>
> ***Accordingly, we set aside the issues to Ld.AO/TPO.***
> ***In the result, appeal filed by assessee stands allowed for statistical purposes."***

4.5 In view of the aforesaid order of the Tribunal in assessee's own case for assessment year 2009-2010, we restore the issue of disallowance made by the A.O. by invoking the provisions of section 40(a)(i) of the I.T.Act, to the files of the AO / TPO for *de novo* consideration. It is ordered accordingly.

4.6 In the result, ground Nos.2.1 and 2.2 are allowed for statistical purposes.

Whether the CIT(A) has erred in disallowing the depreciation amounting to Rs.69,991

5. The assessee had included hardware such as UPS, Printer, etc. under computer and software and claimed depreciation at 60%. The Assessing Officer disallowed the depreciation to the extent of Rs.63,991 on printer, UPS etc. by treating it as office equipments instead of computers. In other words, the A.O. limited the allowance for depreciation on printers, UPS etc. to 15% of the cost as against the claim made by the assessee for depreciation rate of 60%.

5.1 Aggrieved, the assessee preferred an appeal to the first appellate authority. The CIT(A) partly allowed the appeal of the assessee. The CIT(A) directed the A.O. to grant depreciation at the rate of 60% on printer and at the rate of 15% on UPS.

5.2 Aggrieved by the order of the CIT(A), the assessee has raised this issue before the Tribunal. The learned reiterated the submission made before the Income Tax Authorities and also relied on the following case laws:-

(i) BSES Yamuna Powers Ltd. [2013) 40 taxmann.com 108.
(ii) Goa Tourism Development Ltd. (2019) 102 taxmann.com 437 (Bombay)
(iii) Orient Ceramics & Industries Ltd. (2011) 11 taxmann.com 417 (Delhi)
(iv) Vidal Health Insurance (P.) Ltd. (2020) 116 taxmann.com 250 (Bangalore-Trib.)

5.3 The learned Departmental Representative strongly supported the orders of the Income Tax Authorities.

5.4 We have heard rival submissions and perused the material on record. It is settled position of law that computer and its accessories and peripherals are entitled to higher rate of depreciation of 60%. The CIT(A) held that the assessee is entitled to depreciation of 60% on printer and 15% on UPS by holding that UPS is not part of component / equipment connected with computer. The Hon'ble Bombay High Court in case of Pr.CIT v. Goa Tourism Development Ltd. (supra) had held that UPS is a component / equipment connected with computer, and therefore, entitled to 60% depreciation. The judgment relied on by the CIT(A) is not applicable to the facts of the case. The Hon'ble Kerala High Court in the case of The Federal Bank Limited v. ACIT reported in ITA No.524 of 2009 (judgment dated 26th November, 2010) was considering a case of EPABX and mobile phone whether it is entitled to depreciation at the rate of 60% and the Hon'ble High Court held that it is not a part of computer peripherals. Therefore, following the judgment of the Hon'ble Bombay High Court in the case of Pr.CIT v. Goa Tourism Development Ltd. (supra), we hold that the assessee is entitled to depreciation at 60% on UPS. Hence ground No.2.3 is allowed.

Additional Ground

Whether education cess can be allowed as an expenditure:

6. We find that similar issue came up for consideration before the Tribunal in assessee's own case for assessment

year 2006-2007 in ITA No.2349/Bang/2019 (order dated 28.09.2021), wherein the Tribunal held as under:-

3. We have heard rival submissions and perused the material on record. The issue raised in the additional ground is a pure legal issue, which does not require any verification of facts. Therefore, we admit the same for adjudication. The Hon'ble Bombay High Court in the case of Sesa Goa Limited v. JCIT (supra) had held education cess is an allowable expenditure as the word "cess" is conspicuously absent under the provisions of section 40(a)(ii) of the I.T.Act. The relevant finding of the Hon'ble High Court reads as follows:-

> *"23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the I.T.Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".*

3.1 The Hon'ble High Court also placed reliance on the CBDT Circular dated 18.05.1967, which clarified that upon omission of the term "cess" from the present section 40(a)(ii) of the I.T.Act, only rates or taxes needs to be disallowed, and hence, education cess ought not to be treated as Income-tax to be disallowed u/s 40(a)(ii) of the I.T.Act.

3.2 The Hon'ble Rajasthan High Court in the case of CIT v. Chambal Fertilizers and Chemical Limited (D.B. IT Appeal No.52 of 2018 (judgment dated 31.07.2018) had held education cess is not to be disallowed u/s 40(a)(ii) of the I.T.Act. The relevant finding of the Hon'ble Rajasthan High Court, reads as follows:-

"13. On the third issue in appeal no.52/2018, in view of the circular of CBDT where word "Cess" is deleted, in our considered opinion, the tribunal has committed an error in not accepting the contention of the assessee. Apart from the Supreme Court decision referred that assessment year is independent and word Cess has been rightly interpreted by the Supreme Court that the Cess is not tax in that view of the matter, we are of the considered opinion that

the view taken by the tribunal on issue no.3 is required to be reversed and the said issue is answered in favour of the assessee".

3.3 The Mumbai Bench of the Tribunal in the case of Voltas Limited in ITA No.6612/Mum/2018 (order dated 30.06.2020) had admitted additional ground of appeal with regard to the claim of education cess and adjudicated the matter in favour of the assessee, by following the judgment of the Hon'ble Bombay High Court in the case of Sesa Goa Limited v. JCIT(supra). In the light of the aforesaid judicial pronouncements, we hold that education cess is to be allowed as deduction. It is ordered accordingly."

6.1 In view of the above order of ITAT in assessee's own case for assessment year 2006-2007, we hold that `education cess' is to be allowed as deduction.

IT(TP)A No.2617/Bang/2019 : Asst. Year 2011-2012

7. Three issues are raised in this appeal – (i) transfer pricing adjustment; (ii) corporate tax issue u/s 40(a)(i) of the I.T.Act; and (iii) whether education cess is allowable expenses (additional ground). The three issues raised in this appeal are adjudicated in our order for assessment year 2010-2011 (supra).

7.1 Therefore, for the reasons mentioned in para 3.5 to 3.7 (supra), we restore the issue of TP adjustment to the files of the AO / TPO. As regards disallowance made u/s 40(a)(i) of the I.T.Act, the issue is restored to the files of the AO / TPO for *de* novo consideration in view of our reasoning in para 4.4 to 4.6 (supra). As regards additional ground is concerned, for our reasoning mentioned in para 6 (supra), we hold that education cess is to be allowed as deduction. It is ordered accordingly.

8. In the result, the appeals filed by the assessee for assessment year 2010-2011 and 2011-2012 are partly allowed.

Order pronounced on this 01st day of October, 2021.

Sd/-	**Sd/-**
(B.R.Baskaran)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 01st October, 2021.
Devadas G*

Copy to :
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2. The Respondent.
3. The CIT(A)-7, Bengaluru.
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5. The DR, ITAT, Bengaluru.
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Asst.Registrar/ITAT, Bangalore