INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I–2": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 741/Del/2017
ITA No. 3992/Del/2017
ITA No. 5745/Del/2018
&
SA number 250 – 252/Del/2020

[Assessment Years: 2012-13, 2013-14 & 2014-15]

M/s. Steria (India) Limited, Building No. 4, Sea View SEZ, Plot No. 21–21, Sector : 135, Gautam Budh Nagar, Noida – 201304 PAN : AAACX0385L	Vs.	Addl. CIT, Special Range : 8, New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv. Shri Neeraj Jain, Adv. Sh. Akshay Uppal, C.A. Ms. Shailey Gupta, C.A.
Department by:	Sh. Anupam Kant Garg, CIT DR
Date of Hearing	30/06/2020 stay petitions were heard on 17 July 2020
Date of pronouncement	28/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.:

1. ITA No. 741 (Del) of 2017 is filed for assessment year 2012-13, ITA. No. 3992 (Del) of 2017 is filed for assessment year 2013-14 and ITA. No. 5745 (Del) of 2018 is filed for Assessment year 2014-15 by M/s. Steria (India) Limited, (The Assessee/ Appellant). As some common issues are involved, for the sake of convenience, these were heard together, and are being disposed of by this consolidated order. Stay petitions were also

heard on 17 July 2020, which are also disposed of by this order for all these years.

2. ITA No. 741/Del/2017 for AY 2012-13 is filed by the assessee against the assessment order passed u/s 143 (3) read with Section 144C of The Income Tax Act, 1961[The Act] dated 5/12/2016 passed by The Additional Commissioner Of Income Tax, Special Range – 8, New Delhi (The Learned Assessing Officer/ AO) wherein the returned income of ₹ 1,132,764,007 370 filed by the assessee on 29/11/2012 is assessed at ₹ 1,515,053,700/–. The assessee has raised following grounds of appeal.-

"1. That the assessing officer erred on facts and in law in completing assessment under section 144C read with section 143(3) of the Income-tax Act ("the Act") at an income of Rs. 151,50,53,700 as against the returned income of Rs. 113,27,64,370 under normal provisions of the Act.

Transfer Pricing issue:

2. That the assessing officer/DRP erred on facts and in law in making an adjustment of Rs. 11,70,02,000 to the arm's length price of the 'international transaction' of provision of IT enabled services on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('TPO').

2.1 That the DRP/TPO erred on facts and in law in not appreciating that the appellant being a routine back office support service provider cannot be compared with companies engaged in provision of Knowledge Process Outsourcing ('KPO') Services for the purpose of benchmarking analysis.

2.2 That the DRP/TPO erred on facts and in law in considering Acropetal Technologies Ltd. (Seg.) as comparable for the purpose of bench marking without appreciating that the company is not functionally comparable to the appellant.

2.3 That the DRP/TPO erred on facts and in law in considering following companies in the final set of comparable for the purpose of bench marking analysis not appreciating that these companies are not functionally comparable to the appellant in terms of Rule 10B(2):

a. Eclerx Services Ltd.
b. Infosys BPO Ltd.
c. TCS E-Serve Ltd.
d. Informed Technologies Limited
e. BNR Udyog Ltd. (Seg.)

2.4 That the DRP/TPO erred on facts and in law in considering following companies in the final set of comparable companies without appreciating that companies with such high turnover does not satisfy the test of comparability laid down under Rule 10B(2) Of the Income T&X Rules, 1962, for being operating in different market conditions and level of competition:

a. Infosys BPO Ltd
b. TCS E-Serve Ltd.

2.5 That the DRP/TPO erred on facts and in law in considering following companies which are earning exceptionally high margin when it should be appreciated that a company engaged in provision of routine BPO services cannot be expected to earn such high operating margins:

a. B N R Udyog Ltd. (Seg.)
b. Eclerx Services Ltd.
c. Infosys BPO Ltd.
d. TCS E-Serve Ltd.

2.6 That on the facts and circumstances of the case and in law, the DRP erred in accepting Infosys BPO Ltd., TCS E Serve Ltd and eCLerx Services Ltd as comparable companies not appreciating that such companies were rejected as comparable by the DRP in the earlier assessment years holding them to be functionally dissimilar to the assessee

2.7 That the DRP/TPO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low-risk-bearing captive service provider as opposed to the comparable companies who were independent software service provider.

2.8 That on the facts and in the circumstances of the case and in law, the DRP/TPO erred in rejecting the contention of the assessee regarding risk adjustment, allegedly holding that the computation of risk adjustment provided by the assessee is vague and without any basis.

<u>Corporate Tax Issues:</u>

Disallowance of Management Services Fees

3. That on the facts and in the circumstances of the case and in law, the DRP/ assessing officer erred in disallowing under section 40(a)(i) of the Act, expenditure of Rs.20,03,73,067 incurred on account of management services fees, allegedly on the ground that the appellant failed to deduct tax at source therefrom under section

195 of the Act.

3.1 That the DRP/assessing officer erred on facts and in law in holding payment made to Groupe Steria SCA ('Steria France') towards management services fees to be in nature of fees for Technical services ('FTS') in terms of Article 13 of India-France Double Tax Avoidance Agreement ('the DTAA').

3.2 That the DRP/ assessing officer erred on facts and in law in erroneously relying upon the order of the Authority of the Advance Ruling ('AAR') without appreciating that the findings of AAR are perverse in light of the favorable order passed by the jurisdictional Delhi High Court in appellant's own case, thereby resulting in gross violation of the principles of natural justice.

3.3 Without prejudice, the DRP/assessing officer erred on facts and in law in not appreciating that the payment for managerial services to Groupe Steria is not covered under the term "technical" or "consultancy" services, prescribed in Article 13 of the DTAA.

3.4 That the DRP / assessing officer erred on facts and in law in not appreciating that the said services provided by Steria France does not 'make available' technical knowledge', experience, or skill to the appellant, in order to be taxed as FTS in terms of Paragraph 7 of the Protocol read with Article 13 of the India-UK DTAA.

3.5 Without prejudice, the DRP / assessing officer erred on facts and in law in not appreciating that the said transaction could not be held as FTS in terms of performance rule prescribed in Article 13(5) of India – Israel DTAA and Article 12(5) of the India - Finland DTAA.

3.6 That the DRP / assessing officer erred on facts and in law in not appreciating that there was no involvement of use of technology / technical services and the said services were provided through telephone, fax, email, etc., without any visit to India by the personnel of Steria France.

3.7 That the DRP / assessing officer erred on facts and in law in not appreciating that since the payments made to Steria France were not in the nature of FTS and accordingly, not chargeable to tax in India, therefore, the appellant was not liable to obtain certificate under section 195 of the Act for lower or no deduction of tax at source.

Disallowance of deduction under section 10AA

4. That the DRP / assessing officer erred on facts and in law in determining deduction allowable to the appellant under section

10AA of the Act at Rs.11,40,34,006 only as against deduction of Rs.12,30,93,420 claimed by the appellant.

4.1 That the DRP / assessing officer erred on facts and in law in not excluding the following expenditure from the 'total turnover', for the purpose of computing deduction under section 10AA of the Act:

- *Forex outgo (exchange loss)*	*Rs. 5,33,90,950*
- *Telecommunication charges*	*Rs. 2,82,619*
- *Subsistence for onsite employees*	*Rs. 1,09,26,932*
- *Standby and callout charges*	*Rs. 3,38,42,787*
Total	*Rs. 9,84,43,288*

4.2 That the DRP / assessing officer erred on facts and in law in not appreciating that both the 'export turnover' and total turnover have to be computed on the same basis for the purpose of computing deduction under section 10AA of the Act.

4.3 That the DRP/ assessing officer erred, while making the purported adjustment from "the export turnover", following the assessment order for preceding assessment years, without appreciating that the said issue has already been decided by the ITAT in favour of the appellant in assessment year(s) 2003-04 to 2009-10.

5. That the DRP / assessing officer erred on facts and in law in not allowing deduction under section 10AA of the Act in respect of expenses disallowed under section 40(a) of the Act to the extent of Rs.10,01,22,742, computed by apportioning the aggregate disallowance of Rs. 20,03,73,067 to Noida-4 unit on the basis of turnover.

5.1 That the DRP/ assessing officer erred on facts and in law in not appreciating that disallowance of deduction under section 10AA of the Act cannot be made with respect to increased profits on account of statutory disallowances.

Disallowance of foreign exchange loss

6. That the DRP/ assessing officer erred on facts and in law in disallowing mark to market ('MTM') losses of Rs. 5,58,54,852 on account of unrealized foreign exchange forward contracts entered into for hedging the export proceeds against currency fluctuation holding the same to be 'contingent in nature'.

7. That the DRP/ assessing officer erred on facts and in law in disallowing MTM losses suffered by the assessee by applying Instruction No. 3 dated 23.03.2010.

8. *That the DRP/ assessing officer erred on facts and in law in erroneously holding that estimation of foreign exchange liability debited to profit and loss account is gross misrepresentation of the financial position, without judiciously appreciating that it was in due adherence to the requirements of Accounting Standards.*

9. *That the DRP/ assessing officer erred on facts in not appreciating that the MTM losses would have no impact on the profits of the assessee since the same has been recovered from its group company.*

10. *That the assessing officer erred on facts and in law in granting partial relief by restricting the amount of disallowance to the differential between loss incurred on MTM basis and that debited to the profit and loss account, without appreciating that the amount debited to the profit and loss was nothing but the net amount (after set off of gains), which is also reimbursed by the group company.*

11. *That the assessing officer erred on facts and in law in rejecting the claim of the assessee which has been consistently followed and accepted by the department in the preceding years."*

3. At the time of hearing the assessee has submitted an application for admission of additional ground of appeal in terms of rule 11 of The Income Tax (Appellate Tribunal) Rules, 1963 raising following additional ground; –

> "That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore is liable to be quashed."

4. It is appropriate to mention here that these additional ground was raised when these appeals were last taken for hearing on 4 September 2019, only the additional grounds were heard, however later on 3 December 2019, the coordinate bench passed an order sheet entry that as only the additional grounds were argued initially which cannot be adjudicated in isolation of the other grounds of the appeal, hence, the additional ground may also be heard and disposed of along with the other grounds of appeal.

5. The assessee submitted that the aforesaid additional ground of appeal raises a purely a legal issue and therefore it should be admitted and

adjudicate on merits. The assessee relied upon the decision of the honourable Supreme Court in case of National thermal Power Co Ltd versus Commissioner of income tax 229 ITR 383 and also the decision of June Corporation of India versus CIT 187 ITR 688. Along with the additional ground, the assessee submitted that they chart wherein it is stated that assessee has filed the return of income on 29/11/2012 and the draft assessment order thereon was passed on 30 March 2016. The DRP issued its direction on 22 November 2016 and the due date for passing final assessment order u/s 153 (1) read with Section 153 (4) of the act was 31st of March 2016 whereas the final assessment order has been passed on 5 December 2016. Therefore it was submitted that this is a purely legal issue, which should be admitted.

6. The learned authorised representative vehemently supported the application for admission of the additional ground stating the same facts as were stated in the application for admission of the above ground.

7. The learned read departmental representative vehemently opposed the application for admission of the additional ground submitting that that ground has not been raised before the any of the lower authorities and should not be admitted.

8. We have carefully considered the rival contentions. We find that the issue raised by the assessee is purely a jurisdictional, legal in nature, does not require any fresh evidence to be investigated, as the assessee is contesting on the basis of the various dates of the order and proceedings that the order is barred by limitation, which can be raised at any point of time, till the pendency of appeal, therefore same is admitted.

9. Both the parties submitted that this ground in other appeal has already been adjudicated against the assessee on identical facts in Religare Capital Markets Limited [TS-1004-ITAT-2019(DEL)-TP]. Identical issue was also raised by the assessee in ground number one of the appeal in ITA number ITA No.6687/Del/20 (ASSESSMENT YEAR-2015-16) which has been decided by the coordinate bench on 1/05/2020 as Under:-

"3.0 At the outset, the Ld. Authorized Representative (AR) for the assessee submitted that ground no.1 was general not requiring specific adjudication and that ground No.1.1 alleging that the impugned order passed by the Assessing Officer was barred by limitation had been considered by the ITAT Delhi Bench in the case of Religare Capital Markets Ltd. Vs. ACIT in ITA Nos. 1881/Del/2014, 1583/Del/2015, 753/Del/2016 & 1763/Del/2017 vide order dated 10.10.2019 wherein the Tribunal had held that the provisions contained in Sec.144C of the Act were a self-contained code and cannot be subjected to the time limit prescribed u/s 153 of the Act.

Steria (India) Ltd. Vs. ACIT Thus, the Ld. AR fairly accepted that ground No.1.1 of the assessee's appeal was liable to be dismissed in view of binding to the judicial precedent of the Co-ordinate Bench."

10. On careful consideration of the facts before us and the decision of the coordinate bench in assessee's own case for assessment year 2015 – 16 is stated above as well as in case of Religare capital markets Limited (supra) dated 10/10/2019, the additional ground of appeal is dismissed.

11. Ground number 1 of the appeal is general in nature, no specific arguments for advanced, the specific arguments related to each of the ground, which comprised in ground number one dealt with separately, this ground is dismissed.

12. Ground number 2 of the appeal is against the adjustment of ₹ 117,002,000 to the arm's-length price of the international transaction of IT enabled services. In substance, in ground number 2.3 of the appeal the assessee objected to the comparables included by the learned that transfer pricing officer namely

(1) E Clerx services Ltd,

(2) Infosys BPO Ltd,

(3) TCS E serve Ltd,

(4) informed technologies Ltd and

(5). B N R Udyog limited (segment).

The ground number 2.1 – 2.8 are various sub grounds of the transfer pricing adjustment. However they revolve around the above five comparables only.

13. The assessee is engaged in the business of software development, maintenance and IT enabled services. It filed its return of income on 29/11/2012 declaring income of ₹ 1,132,764,370/–. The brief profile of the assessee shows that it is a subsidiary of a UK company. It provides system integration, enterprise solutions, software development services to the clients of its associated enterprise and two other independent customer is in UK, US and other countries in Europe as well as in India. It provides information technology enabled services in the nature of back-office process outsourcing and inbounds and outbound voice based services (BPO). It entered into following 11 international transactions with its associated enterprises and were benchmarked as Under:-

serial number	nature of international transactions	value of transaction	most appropriate method selected	profit level indicator adopted
1	provision of software services	371,39,46,452	TNMM	OP/OC
2	Payment for IT and communication costs	58,92,268	TNMM	OP/OC
3	Receipt of management services	15,86,13,244	TNMM	OP/OC
4	Marketing services availed	3,90,14,678	TNMM	OP/OC
5	Reimbursement of expenses paid to associated enterprise	1,19,52,735	TNMM	OP/OC
6	Provision of ITeS	178,07,37,653	TNMM	OP/OC
7	Payment for IT and communication costs	65,24,505	TNMM	OP/OC
8	Receipt of management services	8,91,44,467	TNMM	OP/OC
9	Marketing services availed	7,11,75,158	TNMM	OP/OC
10	Payment of guarantee fee to associated enterprise	18,61,045	TNMM	OP/OC
11	Reimbursement of expenses received	34,41,225	TNMM	OP/OC

	from associated enterprise			

14. Assessee benchmarked the international transaction by considering the aggregation of transactions under- Two segments by furnishing the segmental results in its TP study report wherein the Profit level indicator of operating profit as a percentage of cost in software services was determined at 14.48% and in IT enabled services at 20.61%. Assessee considered some payment for IT and communication cost, receipt of management services, receipt of marketing services, and reimbursement of expenses to associated enterprise and reimbursement of expenses from associated enterprise is closely linked to software development services and to its IT enabled services. Assessee benchmarked international transactions relating to IT enabled services using transactional net margin method as the most appropriate method adopting OP/OC as the profit level indicator, selecting eight comparable companies using multiple year data determining their margin at 16.03% and same were considered to be at arm's-length. The learned transfer pricing officer rejected the comparability analysis of the assessee, applied its own filter, applied various judicial precedents, considered the objection of the assessee, applied the working capital adjustment, selected 10 comparable companies and found working capital adjusted profit level indicator of OP/OC average at 28.53%. Thereafter, he proposed an adjustment of ₹ 117,002,000 to the IT enabled services. He did not make/proposed any adjustment to software services. Accordingly order u/s 92CA (3) of the income tax act 1961 was passed on 29 January 2016 by The Joint Commissioner Of Income Tax, Transfer Pricing Officer 3 (1), New Delhi[The ld TPO]

15. The learned assessing officer passed draft assessment order on 30 March 2016 determining total income of the assessee at Rs 114,46,78,666/– against the returned income by the assessee of Rs 113,27,64,370/–. Over and above, the above stated transfer pricing adjustment of ₹ 117,002,000 to the ITeS segment of the assessee, the learned assessing officer made

a. disallowance u/s 40 (a) (i) of ₹ 200,373,067/– for non-deduction of tax on remuneration for management services to group entity,
b. disallowance of deduction u/s 10 AA of the act of ₹ 9,059,414/– and
c. addition on account of loss on foreign exchange fluctuation of ₹ 245,904,852/–.

16. The assessee preferred its objections before The Dispute Resolution Panel – 2, New Delhi[The Ld DRP] . It passed its direction on 22/11/2016 wherein it rejected the objections of the assessee on comparability analysis with respect to certain comparables, rejected the objection with respect to the disallowance of expenses of ₹ 200,373,067, disallowance of deduction u/s 10 AA of ₹ 114,034,006 and disallowance of deduction u/s 37 (1) amounting to ₹ 245,904,852 on account of foreign exchange loss.. Thus the objections of the assessee were rejected.

17. Accordingly the learned assessing officer passed the assessment order u/s 143 (3) read with Section 144C of the income tax act 1961 on 5 December 2016 determining total income of the assessee at ₹ 1,515,053,703/– against which this assessee has preferred the appeal before us.

18. Coming to ground number 2 of the appeal of the assessee, the learned authorised representative contested the comparable (1) Infosys BPO Ltd and submitted that The Hon'ble Delhi Bench of the Tribunal in the appellant's own case for assessment year 2015-16 (ITA No. 6687/Del/2019) rejected Infosys BPO ltd as comparable on the basis that it enjoys significant brand presence and brand value plays a significant role in its ability to generate profit.(Page 566 of Case Law Paper book – Transfer Pricing). Reliance in this regard is placed on the decision of the Hon'ble Delhi High Court in the case of PCIT vs New River Software Services (P) Ltd (IT Appeal No 924 of 2016) wherein the Hon'ble Delhi High Court dismissed the appeal of Revenue against exclusion of Infosys BPO Ltd. (Page 429 of Case Law Paper book – Transfer Pricing). Reliance in this regard is also placed on the decision of Delhi Bench of Tribunal in the case of E-Valueserve SEZ (Gurgaon) P Ltd vs ACIT (ITA No. 5147/Del/2017) wherein the Hon'ble Tribunal rejected Infosys BPO Ltd.

Further, the Hon'ble Delhi High Court in ITA No. 241/2018 dismissed the appeal of Revenue against the exclusion of Infosys BPO Ltd (Page 424 of Case Law Paper book – Transfer Pricing). Further, the Hon'ble Delhi High Court in the case of Pr CIT vs Oracle (OFSS) BPO Services Pvt Ltd 303 CTR 284(Page 503 of Case Law Paper book – Transfer Pricing) upheld the exclusion of Wipro Ltd. on the basis that the company has a significant brand presence and brand value of an entity has a significant role in the ability to garner profits and negotiate contracts. The said decision of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court in SLP (CC) No. 32469/2018.(Page 504 of Case Law Paper book – Transfer Pricing). Similarly in the case of M/S AVAYA INDIA PVT. LTD.(ITA No. 532/2019) (Page 420 of Case Law Paper book – Transfer Pricing; para 21 onwards), the Hon'ble Delhi High Court rejected companies having high brand value as comparable to captive service provider.

19. It is submitted that (2) TCS E serve Ltd. enjoys benefits associated with the brand name 'TATA' as has been held by the Hon'ble Delhi High Court in the case of PCIT vs B.C. Management Services (P.) Ltd 403 ITR 45 (Delhi) (Page 204-205 of Case Law Paper book – Transfer Pricing; para 13 onwards), wherein the Hon'ble High Court upheld the exclusion of this company on account of the brand value associated with 'TATA' brand. The Hon'ble Delhi Bench of the Tribunal in the appellant's own case for assessment year 2015-16 (ITA No. 6687/Del/2019) rejected Infosys BPO ltd as comparable on the basis that it enjoys significant brand presence and brand value plays a significant role in its ability to generate profit. Accordingly, it is submitted that since TCS E serve Ltd. too, enjoys significant benefits associated with brand 'TATA', the company is not functionally comparable to the appellant, a captive service provider. Also, the Hon'ble Delhi High Court in the case of PCIT vs Evalueserve SEZ (Gurgaon) Pvt. Ltd (ITA 241/2018) upheld the rejection of this company on account of high brand value. (Page 424 of Case Law Paper book – Transfer Pricing) Similarly in the case of M/S AVAYA INDIA PVT. LTD.(ITA No. 532/2019), the Hon'ble Delhi High Court rejected this company having high brand value as compared to captive service provider. (Page

420 of Case Law Paper book – Transfer Pricing; para 21 onwards), Further, the Hon'ble Delhi High Court in the case of Pr CIT vs Oracle (OFSS) BPO Services Pvt Ltd 303 CTR 284 (Page 503 of Case Law Paper book – Transfer Pricing) upheld the exclusion of Wipro Ltd. on the basis that the company has a significant brand presence and brand value of an entity has a significant role in the ability to garner profits and negotiate contracts. The said decision of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court in SLP (CC) No. 32469/2018. (Page 504 of Case Law Paper book – Transfer Pricing)

20. The learned departmental representative referred page number five of the order of the learned dispute resolution panel wherein the nightly LP considered the impact of the brand building expenditure and advertisement expenditure incurred by the comparable company and stated that they are insignificant. Further comparing the turnover of the assessee with the turnover of the comparable company relying on the decision of the honourable Delhi High Court learned dispute resolution panel has stated that it is of no significance. It was further stated that the comparable company Infosys BPO Ltd is functionally comparable. He further submitted that regarding the claim of the assessee that Infosys BPO and TCS E serve is enjoyed a huge brand, Steria compared to these grants of Infosys BPO and TCS E serve is a bigger brand as it is a global brand. He therefore submitted that if the comparison is required to be made with respect to the brand of the comparables with the brand of the assessee, assessee enjoys a global brand. He therefore submitted that this comparable couldn't be excluded.

21. With respect to TCS E serve Ltd, he referred to page number eight of the direction of the learned DRP and stated that it has been held that TCS E serve Ltd is also engaged in low-end ITeS services and therefore it was held to be functionally comparable. He further stated that the turnover was also not considered as criteria for excluding any comparable.

22. With respect to the other judicial precedent relied upon by the learned authorised representative it was submitted that it cannot be held that if comparable X is found to be functionally different then assessee Y, then

it should be excluded in case of assessee A. He further submitted that judicial precedent for the comparability analysis couldn't be applied in such a manner.

23. We have carefully considered the rival contention and perused the orders of the lower authorities. There is no dispute on the functional profile of the assessee. The only dispute is with respect to selection of only two comparable companies namely Infosys BPO Ltd and TCS E serve Ltd.

24. In assessee's own case for assessment year 2015 – 16 this comparable company was tested by the coordinate bench in ITA number 6687/del/2019 wherein it has held as Under:-

> "5.2 With respect to the Transfer Pricing Adjustment in respect of IT Enabled Segment, although the assessee has challenged selection of comparables as well as rejection of comparables in the grounds of appeal, the Ld. Authorized Representative has argued at length only against the inclusion of Infosys BPO Ltd. in the final set of Steria (India) Ltd. Vs. ACIT comparables on the grounds that this company is functionally different, having ownership of intangibles and enjoys benefit of synergies. The Ld. Authorized Representative has placed reliance on numerous judicial precedents for buttressing the arguments in this regard. The Authorized Representative has also submitted that the assessee has treated foreign exchange fluctuation as an operating item whereas the Revenue has treated the same as non-operating item. The Ld. AR has pleaded that if Infosys BPO Ltd. is excluded from the final set of comparables and foreign exchange fluctuation is treated as operating item, the average margin of the remaining four comparable companies viz. (i) Jindal Intellicom, (ii) Microland Ltd., (iii) Tech Mahindra Business Services Ltd. & (iv) BNR Udyog Ltd. will work out to 16.15% and since the operating margin of the assessee is 13.61%, the mean of the comparables will be within the permitted range and no Transfer Pricing Adjustment would be warranted in respect of ITES segment.
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> 5.3 Having gone through the submissions of the assessee as well as the annual report of BPO Infosys Ltd. and the judicial precedents relied upon by the Ld. Authorized Representative, we are of the considered opinion that Infosys BPO Ltd. cannot be considered Steria (India) Ltd. Vs. ACIT as a comparable to the assessee company for the simple reason that the assessee company is engaged in rendering system integration, enterprise solutions and software development services to the clients of its Associated Enterprises (AE) and also to independent customers in the United Kingdom, the United State of America and others countries in Europe as well as India while being a subsidiary of Steria (UK). On the other hand Infosys BPO Ltd. is a part of the Infosys Group, a

giant in the field of Information Technologies Services and being a part of the Infosys Group, 'Infosys', it thus enjoys significant brand presence and brand value plays a significant role in its ability to generate profit. The Hon'ble Delhi High Court in the case of Pr. CIT Vs. Oracle (OFSS) BPO Services Pvt. Ltd. in ITA No.124/2018 upheld the exclusion of entity on the basis of significant brand presence on entity on the basis of significant brand presence and brand value of an entity. This decision of the Hon'ble High Court of Delhi was later upheld by the Hon'ble Apex Court in SLP (CC) No.32469/2018. On identical lines, the Hyderabad Bench of ITAT in the case of Hyundai Motors India Engineering. Vs. ITO in ITA NO.1850/Hyd/2012 directed the exclusion of Infosys BPO Ltd. from the final set of comparables by holding that, "....'presence of a brand commands premium price and Steria (India) Ltd. Vs. ACIT the customers would be willing to pay, for the services/produced of the company. Infosys BPO is a established player who is not a only a market lead but also a company employing sheet breath in terms of economies of scale and diversity and geographical dispersion of customers. The presence of the aforesaid factories will take this company out of the list of comparables. We therefore accept the contention of the assessee that this company cannot be regarded as a comparable. Similar view was also taken in case of Symphony Marketing Solution India (Pvt.) Ltd. (supra) by the Banglore Bench. Therefore, we direct the Assessing Officer/TPO to exclude the same." 5.4 Accordingly, in view of the judicial precedents cited above we direct the AO/Ld. TPO to exclude BPO Infosys Ltd from the final set of comparables."

25. The learned authorised representative has also relied upon the several judicial precedent of the honourable Delhi High Court wherein it has been held that Infosys BPO Ltd possesses significant brand value and therefore is not comparable with a company, which does not have a brand like assessee.

26. It is important to note that a comparable cannot be excluded from the comparability analysis in case of an assessee only for the reason that it has also been excluded in case of some another assessee. This will make the comparability analysis of the functions, assets and risks of the assessee, redundant. If comparables were required to be excluded on the basis of judicial precedents in case of any other assessee, at one point of time the population of comparable for the comparability analysis of a particular industry would be zero. If the comparables are excluded on the basis of judicial precedent in somebody else case, it will make the rule 10

D of The Income Tax Rules redundant. Even in the case of same assessee for different years, the situation may arise that a comparable excluded in earlier or subsequent year may be comparable for the current year, because of the change in the functional profile of either the comparable or the assessee. Therefore, to extend the judicial precedent in some other case for exclusion of comparable is not advisable. It is imperative to examine the comparability of each comparable with the functions performed, assets employed and risks assumed by the assessee.

27. It is also to be noted that in the comparability analysis of the IT enabled services assessee has also included Infosys BPO Ltd at serial number (vi). The learned DR has objected to this stating that when assessee has also stated that it is functionally comparable in its TP study report it cannot resile from the same position now.

28. Therefore, it is imperative to analyze the functions, Assets and Risks of comparable for each year to decide for its inclusion or exclusion. In view of our above findings, we have perused the standalone financial statements of Infosys BPO Ltd for the financial year 2011 – 12. On careful appraisal of the details of the expenses in note number 2.16 at page number 17 of the balance sheet, it shows that it has incurred an expenditure of brand building and advertisement expenditure of ₹ 55,381,916/- during the year compared to ₹ 20,256,326/- in the immediately preceding year. On appraisal of the statement of profit and loss account at page number 6 of the annual report the revenue from business process management services is ₹ 1312 crores whereas the turnover of the assessee is Rs 626 crores. Therefore, we do not find multiple- X difference in the turnover of the company to exclude this company on the issue of turnover. However there is a brand expenditure incurred by Infosys BPO Ltd and therefore in pricing of the products of that comparable company brand plays an important part. The learned departmental representative though argued that appellant has also a bigger global brand however; no supporting documents were produced before us to prove it. The another important aspect of this comparable company is that its parent company Infosys Ltd has issued a performance

guarantee to certain clients for the company's executive contracts. This is evident at page number 19 of the annual report of the comparable. The performance of the company, if backed by the global leader, like the parent of the comparable company i.e. Infosys Ltd, it clearly shows that comparable company has the distinct advantage of the brand of Infosys Ltd as well as the support and backing of a global leader. Against this, the appellant only executes the work subcontracted by the associated enterprise and the appellant neither exploits any brand/trademark nor enjoys the profit associated with any brand. This shows that the comparable company has a different asset base (intangible and tangible) compared to the assessee. For this proposition only, we noted that in the original TP study report assessee included this comparable however when it was found that it uses different asset base, brand of Infosys, we are of the view that when such a mistake is found, it deserves to be excluded from the comparability analysis. Therefore, it deserves to be excluded. We direct so to the learned TPO.

29. The second comparable challenged before us is TCS E serve Ltd. This comparable is primarily engaged in the business of providing business process services for its customers in banking, financial services and insurance domain. The comparable companies operations include delivering core business processing services, analytics/insights and support services for both the data and voice processes. This company has revenue from its operation of ₹ 1 578.44 crores. According to note number 22 at page number 80 of the financial statement of other expenses, it shows it contributes to the 'Tata brand equity' of ₹ 3.67 crores. Similarly, in this comparable also the claim of the assessee is that it only executes the work subcontracted by the associated enterprise and it is neither exploits any brand/trademark nor enjoys the profit associated with any brand. Naturally, Tata brand has gone into the price of this comparable. Therefore, we direct the learned that the transfer pricing officer/AO to exclude this comparable from comparability analysis.

30. There are no other issues raised before us with respect to the transfer pricing adjustment proposed by the learned that transfer pricing officer

included by the learned assessing officer in the assessment order, therefore ground number 2 along with all its sub grounds are allowed as directed above.

31. Now coming to ground number 3 of the appeal which is against the disallowance of management services fees u/s 40 (a) (i) of the act of ₹ 200,373,067/- incurred on account of management services fee on which no tax is been deducted, the learned authorised representative submitted that this issue is squarely covered in favour of the assessee by the following judicial precedents:-

    i. HC against AAR ruling reported in 386 ITR 390 [Pg 811-823]

    ii. HC for AY 2010-11 in ITA No. 762/2017 [Pg 805-807]

    iii. HC for AY 2011-12 in ITA No. 380/2017 [Pg 808-810]

    iv. Tribunal for AY 2015-16 in ITA No. 6687/Del/2019 [Pg 133-174 of CL PB]

32. The learned authorised representative took us through all the judgments stated above submitted in the case law paper book at various pages to show that the issue is covered in favour of the assessee.

33. The learned departmental representative relied upon the orders of the lower authorities.

34. We have carefully considered the rival contention and perused the orders of the lower authorities as well as the various judicial precedents cited before us in assessee's own case.

35. Brief facts shows that during the year the assessee has incurred expenditure of ₹ 200,373,067/- as remuneration for management services to its group entity but no tax has been detected at source. On 15 March 2011, the assessee company made an application u/s 245Q (1) to the Authority For Advance Ruling [AAR] with respect to the taxability of managerial remuneration payable to group entity, a partnership firm registered in France in terms of Indo French Double Taxation Avoidance Agreement. This is as per AAR number 1055 of 2011, which was admitted as per order dated 3 August 2011. The learned AAR disposed of the above application on 2nd May 2014, wherein it has been held that the

payment made by assessee for the management services provided by the group entity would be taxable as Fees for Technical Services [FTS]. As the consideration for the services is held to be, taxable in India the applicant was held to be liable to deduct tax as per the provisions of Section 195 of The Income Tax Act from payment made to the associated enterprise in France. Thus, ld AO followed the decision of AAR. On objection before the learned dispute resolution panel, it was noted that assessee challenged the same before the honourable Delhi High Court however, no stay has been granted in this regard and therefore the action of the learned made assessing officer was upheld in the direction. When matter reached before us, now the honourable High Court has rendered its decision in the above said dispute reported in 386 ITR 390 in favour of the assessee as under :-

> "19. The next question that arises is concerning to extent to which the benefit under the India-UK Double Taxation Avoidance Agreement can be made available to the petitioner. As already noticed, the definition of "fee for technical services" occurring in article 13(4) of the Indo-UK Double Taxation Avoidance Agreement clearly excludes managerial services. What is being provided by Steria France to the petitioner in terms of the Management Services Agreement is managerial services. It is plain that once the expression "managerial services" is outside the ambit of "fee for technical services", then the question of the petitioner having to deduct tax at source from payment for the managerial services, would not arise. It is, therefore, not necessary for the court to further examine the second part of the definition, viz., whether any of the services envisaged under article 13(4) of the Indo-UK Double Taxation Avoidance Agreement are "made available" to the petitioner by the Double Taxation Avoidance Agreement with France.
>
> 20. Mr Ganesh, learned senior counsel made a reference to the decision of the Income-tax Appellate Tribunal in Deputy CIT v. ITC Ltd. [2002] 82 ITD 239 (Kolkata), where the Protocol separately executed between the India and France which formed part of the Double Taxation Avoidance Agreement between the two countries was interpreted. It was held by the Income-tax Appellate Tribunal, and in the view of this court correctly, that the benefit of the lower rate or restricted scope of fee for technical services under the Indo-French Double Taxation Avoidance Agreement was not dependent on any further action by the respective Governments. It was held that the more restricted scope of fee for technical services as

provided for in a Double Taxation Avoidance Agreement entered into by India with another OECD member country shall also apply under the Indo-French Double Taxation Avoidance Agreement with effect from the date on which the Indo-French Double Taxation Avoidance Agreement or such other Double Taxation Avoidance Agreement enters into force.

21. It has been contended by Mr. Chaudhary that the question as to the exact nature of the services provided by the petitioner under the management services agreement has not yet been examined by the Authority for Advance Rulings. It is further pointed out that the contention raised regarding Steria France having a permanent establishment in India and its income being taxable under article 7 of the Double Taxation Avoidance Agreement has not been addressed.

22. As rightly pointed out by Mr Ganesh, the question whether Steria France has a permanent establishment would arise only if it is the case of the Revenue that Steria France earns any business income in India. That is

not even the case of the Revenue. The case projected is that what has been paid by the petitioner to Steria France partakes of the character of "fee for technical services". Therefore, the question whether Steria France has a permanent establishment in India and whether its business income is taxable under article 7 of the Double Taxation Avoidance Agreement, does not arise.

23. As regards the nature of the service being provided under the management services agreement, again the court is unable to find any case made out by the Revenue before the Authority for Advance Rulings that what was provided was anything other than the managerial service which in any event stands excluded in the definition of the "fees for technical services" under the Indo-UK Double Taxation Avoidance Agreement. Consequently, this question also does not survive for consideration.

24. For all of the above reasons, this court finds that the impugned order dated May 2, 2014 of the Authority for Advance Rulings holding that the payment made by the petitioner for the managerial services provided by Steria France should be treated as fee for technical services in respect of which tax had to be withheld under section 195 of the Act, is unsustainable in law. The questions posed by the petitioner before the Authority for Advance Rulings are accordingly answered as under :

(i) The payment made by the petitioner to Steria France for the managerial services provided by the latter cannot be taxed as fee for technical services ; and

(ii) The said payments are not liable to withholding of tax under section 195 of the Act.

25. Consequently, the further orders passed on November 21, 2014 against the petitioner under sections 201(1) and 201(1A) of the Act are hereby set aside."

36. Further, the learned authorised representative has submitted that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for assessment year 2015 – 16 in ITA number 6687/Del/2019, as well as the decision of the honourable High Court for assessment year 2010 – 11 and 11 – 12. Therefore respectfully following decision of Coordinate bench where those orders were rendered following decision of Honourable High court, We hold that assessee is not liable to deduct tax at source on the above payment and therefore disallowance u/s 40 (a) (i) is not warranted . Thus, ground number 3 of the appeal of the assessee is allowed.

37. Ground number 4 of the appeal is against partial disallowance of deduction u/s 10 AA of the act. The assessee has claimed deduction of ₹ 123,093,420 against which the learned assessing officer allowed the deduction to the extent of ₹ 114,034,006. The reasons for restricting the above disallowance is that the learned assessing officer has excluded foreign exchange outgo of ₹ 53,390,915/–, telecommunication charges of ₹ 282,619, subsistence allowance for on-site employees of RS 129,26,932/– and standby and callout charges of ₹ 33,842,787/– totaling to ₹ 98,443,288/– from the total turnover for the purpose of computing deduction u/s 10 AA of the act. The claim of the assessee is that both the export turnover and total turnover for computing that deduction under this Section should be on the same basis. It is submitted by the learned authorised representative that identical issue has been decided by the coordinate bench in favour of the appellant in assessment year 2003 – 04 to 2009 – 10. The learned authorised representative further submitted that this issue is covered squarely in favour of the assessee by the following judicial precedents and circulars:-

i. Covered in favour of the appellant by decision of the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd.: 404 ITR 719 [Pg 1-7of CL PB]

ii. CBDT Circular No. 4/2018 dated 14th August 2018 has also clarified this issue [Pg 8-10 of CL PB]

iii. HC for AY(s)2004-05 to 2006-07 and 2008-09 to 2011-12vide ITA Nos. 756-759/2017, 762-763/2017 and 380/2017[Pg 800-802 and 805-810]

a. Department's SLP's for AY(s) 2004-05 and 2005-06 have been dismissed by the Apex Court vide order(s) dated 04.05.2018 [Diary Nos. 12731/2018] and 04.09.2018 [Diary No. 11142/2018 [Pg 803-804]

38. The learned departmental representative vehemently supported the orders of the lower authorities.

39. We have carefully considered the rival contentions and perused the orders of the lower authorities. In view of the decision of the coordinate benches and the honourable High Court in assessee's own case as stated above, we reverse the order of the learned assessing officer and direct to consider a sum of ₹ 98,443,288 in total turnover also for computing deduction u/s 10 AA of the income tax act. Accordingly, ground number 4 of the appeal is allowed.

40. The ground number 5 is with respect to the claim of the assessee to allow/enhance the deduction by disallowance u/s 40 (a) of the act of ₹ 200,373,067. As we have already deleted the above disallowance as per ground, number 3 of the appeal of the assessee, ground number 5 does not survive and hence it is dismissed.

41. Ground number 6 is with respect to the disallowance of foreign-exchange loss of ₹ 55,854,852 on account of unrealized foreign exchange forward contracts entered into for hedging the export proceeds against the currency fluctuation holding the same to be contingent in nature. The brief facts of the case show that in the profit and loss account of this year the assessee has debited foreign-exchange fluctuation expenses of ₹ 19,005 crores. The assessee was asked about the details of such foreign

expenses and it was found that assessee has booked the loss on account of Mark to market exchange fluctuation on forward cover contracts amounting to ₹ 24,59,04,852/– . The learned assessing officer noted that assessee has entered into several forward contracts in respect of foreign-exchange which have not been closed or match order till the end of the financial year 2011 – 12 and such forward contracts in respect of foreign-exchange has been re-evaluated as on the end of the year and corresponding loss has been booked. The learned assessing officer further referred to instruction number 3/2010 dated 23 March 2010 stating that above is contingent in nature. The assessee submitted that above instruction does not apply to the assessee for the reason that the forward exchange forward contracts are financial instruments whose values are affected by the change in rates of foreign currencies and are not speculative in nature. Assessee further submitted that it has booked the above loss in view of the accounting standard wherein the companies are required to account for Mark to market losses in their books. The assessee further relied upon the several judicial precedents. However the learned assessing officer referred the instruction number 3/2010 dated 23rd of March 2010, relied upon the several judicial precedent stating that assessee has no assets or liabilities but merely a contract with the contracting party to receive foreign-exchange at the later date at the contract rate, therefore it is contingent in nature, and disallowed the above sum. The assessee preferred an objection before the learned dispute resolution panel. Assessee filed certain additional evidences and the learned Dispute Resolution Panel as per direction dated 22/11/2016 directed the AO to restrict the foreign-exchange loss disallowance to the net foreign-exchange loss, which has been debited to the profit and loss account. Thereafter in view of the direction of the DRP the learned assessing officer disallowed the difference of ₹ 245,904,852 and 19,00,50,000 i.e. 5,58,54,852/–. This addition/disallowance is challenged by ground number 6 of the appeal.

42. The learned authorised representative submitted that in terms of the 'Software Products and IT/ ITES Services Agreement' dated 01.04.2010

entered into between the assessee company and Steria Limited, UK, its group company, revenue which is being billed by the assessee company, includes foreign exchange currency loss/ gain which is accounted for in the books of accounts and accordingly, the loss suffered by the assessee company is reimbursed by Steria Limited, UK under the said Agreement. Thus, there is no loss borne by the assessee, so there is no question of any disallowance. The relevant extracts of the agreement are reproduced as under:

> *"3.3. Invoices raised by SIL on SL UK for the fee will be raised in two parts:*
>
> *3.3.1 "MTP" invoice in arrears on a monthly basis for the services rendered for the month. The fees payable on the invoice will be based on the "Management Transfer Price" (MTP) charge out rates for each employee of SIL and*
>
> *3.3.2. "Top-up· invoice raised on a periodic basis to charge a fee necessary to ensure that SIL makes the stated fixed return noted in clause 3.2 above for the period concerned.*
>
> *3.3.2(1) For determining Top-up Invoice: "Cost" is defined as total gross cost excluding any foreign exchange currency loss/gain. The total cost is for this purpose will be cost related to related party transaction for determination of arm's length under transfer price legislation.*
>
> *3.3.2(2) For determining Top-up invoice: "Revenue" is defined as inclusive of (a) Revenue as per clause 3.3.1 (b) Foreign exchange currency gain/loss if any (c) Other income earned out of regular business operations and (d) Top-up value to arrive at agreed return.*
>
> *Non-operational and other income, if any will be excluded for determining revenue for the purpose of determining the agreed return."*

From the aforesaid agreement, it can be ascertained that the cost element specifically excludes the amount of gain/ loss incurred in foreign exchange currency and therefore, the cost of forward contract is nothing but the actual amount of cost which has been incurred by the assessee company and there is no mark-up charged on the said cost which can be

said to be received by the assessee company. Further, apart from the recovery of cost, revenue includes amount of gain/ loss incurred in foreign exchange along with other income earned by the assessee company from the regular business operations. Ld AR furnished certificate issued by an independent chartered accountant to demonstrate the revenue computation mechanism to evidence that revenue includes foreign exchange currency loss and accordingly, the loss suffered by the appellant company is reimbursed by Steria Limited, UK, thereby having no impact on Profit and Loss account of the appellant company even in the year under consideration. The contention of the appellant that gains arising on foreign exchange contracts are accounted for as revenue or reimbursed by the group company, it is respectfully submitted, has been duly accepted by the Hon'ble DRP in its order dated 22.11.2016 wherein it was held that

> "*the AO is directed to restrict the foreign exchange loss to net foreign exchange loss which has finally been debited to the profit and loss account. To make it clear, if the assessee has debited X amount under foreign exchange loss and has credited Y amount being reimbursed of foreign exchange loss from AE to the P&L a/c, then disallowance should be restricted to X-Y."*

In view of the aforesaid, at the preliminary stage itself, it was submitted, that there was no warrant to make any disallowance of foreign exchange losses since the revenue component billed by the appellant company, includes both foreign exchange currency losses/ gain which is accounted in the books of account, thereby having no impact on the profit and loss. The assessing officer, however, while giving effect to the directions of the DRP has allowed deduction of Rs.19,00,50,000, being the amount debited to Profit and loss account, which is computed after setting off gains amounting to Rs.5,58,54,486 arising on forward contracts from total loss of Rs.24,59,04,852 on mark to market of forward contracts, thereby resulting in net figure of Rs.19,00,50,000, thereby sustaining the disallowance of Rs.5,58,54,486. In doing so, it

was stated that assessing officer grossly erred in not appreciating that in case where loss is suffered in relation to foreign exchange contracts, the revenue element recognized is inclusive of the cost incurred along with mark up and the amount of foreign exchange loss suffered, which altogether, is reimbursed by the group company. However, where gain arises in foreign exchange contract, the amount of gain is reduced from the cost incurred by the assessee company and accordingly, only the net amount is reimbursed by the group company. On the contrary, had the appellant debited the amount of gross loss to profit and loss account being Rs.24,59,04,852 (without setting off gains that would have been credited separately), then the assessing officer would have, in accordance with the directions of DRP, allowed the claim of the applicant in toto. Thus, it is respectfully submitted that the partial relief granted to the appellant deserves to be allowed in whole on the basis of submissions stated herein above. In accordance with the agreement entered into, the rates charged by the assessee company are deemed all-inclusive, and no separate expenses related to infrastructure and support services are to be charged to Steria Ltd, UK. However, where the assessee company incurs any expenses on behest of Steria Ltd UK, the same will be charged by the assessee company to Steria Ltd UK without any profit (any such expenses by Steria India Ltd will be based on/ subject to its own internal policies and procedures). The aforesaid contention of the assessee company can be explained with the help of following table:

	Normal scenario	Loss scenario	Profit scenario	Profit & Loss scenario
Particulars	Amount	Amount	Amount	Amount
Revenue	100	100	100	100
Catch-up	14	34 [20+14]	8 [-6+14]	33 [24-

				5+14]
Total Revenue (A)	114	134	108	133
Cost Excluding FX Impact	100	100	100	100
Net -FX Loss as per Books		20		24
Net- FX (Gain) as per Books			-6	-5
Total (B)	100	120	94	119
Profit (A-B)	14	14	14	14
Margin on Cost (Assumed @ 14%)	14%	14%	14%	14%

He submitted that from perusal of the aforesaid table, it will be observed that the amount to be compensated is calculated on cost incurred for the contract and not on the amount after considering the amount of foreign exchange gain/ loss. It would be appreciated that where there is a loss, the entire loss is compensated to the assessee company without any mark up, which is considered as a part of revenue. In a situation where gain arises, the said amount of gain is reduced from the amount to be compensated to the assessee company and thereafter, only the net amount, which is remaining, is accounted for as revenue. In normal scenario, suppose, if cost incurred by the appellant company, during the year under consideration, is Rs. 100, then cost plus a certain percentage mark-up (say Rs. 14), is accounted for in the books of account and total amount of Rs. 114 is reimbursed by the group company to the appellant company. In case loss is incurred in relation to foreign exchange contracts, the revenue element recognized is inclusive of the cost incurred along with mark up and the amount of foreign exchange loss suffered, which altogether, is reimbursed by the group company (Rs. 134

in the present example – Rs. 100 + 14 + 20). However, where gain arises in foreign exchange contract, the amount of unrealized gain accruing or arising is reduced from the cost incurred by the appellant company and accordingly only, the net amount is reimbursed by the group company (Rs. 108 in the present example – Rs. 100 + 14 – 6). It would be appreciated from the illustrations stated above, that in either case, whether there is exchange fluctuation loss suffered by the appellant or gain earned thereon, there is no impact on the profit and loss account, since loss, if any, is recouped by the appellant and benefit of gain is passed on to the group company. Without prejudice, Ld AR submitted that although gains accruing on foreign currency transactions are also recovered from the group company having no impact on the Profit and loss account as stated supra.

43. On merits he submitted that appellant, in the previous year relevant to the assessment year 2012-13, followed the strategy of hedging foreign currency denominated export realizations by taking forward covers. Since these forward covers were taken by the appellant from various banks, the counter party in these forward cover contracts was the bank. Such forward covers are taken by the appellant to hedge the foreign exchange risk associated with the forecasted export realizations, which were expected to be realized during the corresponding period. Since the forward contracts remained outstanding as at the end of the year and were not squared off during the relevant year, the foreign exchange loss arising because of foreign exchange fluctuation between the date on which it was booked and the balance sheet date was debited to Profit & Loss Account. The aforesaid accounting treatment was also in line with the Accounting Standard-30 on "Financial Instruments: Recognition and Measurement" read with AS-11 on the "Effects of changes in Foreign Exchange rate" issued by the Institute of Chartered Accountants of India ('ICAI') providing that loss/gain on outstanding forward/derivative contracts are to be recognized on mark to market basis. Accordingly, an enterprise has to report the outstanding liability using closing rate of

exchange. Any difference, loss or gain, arising on conversion of the said liability at the closing rate, should be recognized in the balance sheet for the reporting period. In line with the aforesaid, the appellant recognized the foreign exchange difference arising on unutilized forward contracts as at the balance sheet date which was the difference between the foreign currency amount translated at the date of inception of forward exchange contract and/or last reporting date and the foreign currency amount of contract translated at the exchange rate at the balance sheet date which resulted in MTM loss. On account of reinstatement of such forward contracts as at the end of the relevant financial year, the assessee suffered MTM loss of Rs.24,59,04,852. The term "Mark to Market", it is submitted, is a concept under which the un-matured forward contracts are valued at market rate to report their actual value on the reporting date. In such an adjustment, a corresponding loss is booked through the profit and loss account, being the difference between the purchase price and the value as on the valuation date. As pointed above, as per the Accounting Standard - 11 read with Accounting Standard - 30 issued by the ICAI, companies are required to account for mark to market losses in their books despite the fact that the contract has not yet matured as at the balance sheet date. In view of the above, loss arising on outstanding forward contracts of foreign currency, on mark to market basis, is an accrued/ascertained liability as at the end of the relevant year and, was therefore, allowable as business deduction, in accordance with the mercantile system of accounting. However, the assessing officer disallowed the MTM losses of Rs. 24,59,04,852 . Attention in this regard, is invited to AS-11, on 'Effect of Changes in Foreign Exchange Rates' as issued by the ICAI, which mandates the manner of recognizing profit or loss arising from foreign currency transactions in the nature of forward exchange contracts. Para 11 of AS-11, inter alia, lists the criteria for reporting foreign exchange transactions at subsequent balance sheet dates as under:

11. At each balance sheet date:

(a) foreign currency monetary items should be reported using the closing rate. However, in certain circumstances, the closing rate may not reflect with reasonable accuracy the amount in reporting currency that is likely to be realised from, or required to disburse, a foreign currency monetary item at the balance sheet date, e.g., where there are restrictions on remittances or where the closing rate is unrealistic and it is not possible to effect an exchange of currencies at that rate at the balance sheet date. In such circumstances, the relevant monetary item should be reported in the reporting currency at the amount which is likely to be realised from, or required to disburse, such item at the balance sheet date;

(b) non-monetary items which are carried in terms of historical cost denominated in a foreign currency should be reported using the exchange rate at the date of the transaction; and

(c) non-monetary items which are carried at fair value or other similar valuation denominated in a foreign currency

"36. An enterprise may enter into a forward exchange contract or another financial instrument that is in substance a forward exchange contract, which is not intended for trading or speculation purposes, to establish the amount of the reporting currency required or available at the settlement date of a transaction. The premium or discount arising at the inception of such a forward exchange contract should be amortized as expense or income over the life of the contract. Exchange differences on such a contract should be recognised in the statement of profit and loss in the reporting period in which the exchange rates change. Any profit or loss arising on cancellation or renewal of such a forward exchange contract should be recognised as income or as expense for the period.

……

38. A gain or loss on a forward exchange contract to which paragraph 36 does not apply should be computed by multiplying the foreign currency amount of the forward exchange contract by the difference between the forward rate available at the reporting date for the remaining maturity of the contract and the contracted forward rate (or the forward rate last used to measure a gain or

loss on that contract for an earlier period). The gain or loss so computed should be recognised in the statement of profit and loss for the period. The premium or discount on the forward exchange contract is not recognised separately."

44. He submitted *that i*t is pertinent to point out that the forward contracts had been taken by the appellant in respect of (a) recognized transactions and (b) forecasted transactions with reference to expected export receipts. These contracts undertaken by the assessee company are covered under the year under consideration and the accounting treatment accorded by the assessee company has been adopted on a consistent basis in light of the aforesaid accounting principles. In terms of the aforesaid Accounting Standard, where a forward exchange contract intended for trading purposes is recorded, the premium or discount on the contract is ignored and at each balance sheet date, the value of the contract is marked to its current market value and the gain or loss on the contract is recognized in the profit and loss account for the year under consideration. In accordance with the aforesaid, the assessee provided for loss of Rs.24,59,04,852 suffered on account of fall in value of foreign currency loss as on the balance sheet date. He , in this regard, invited us to following extracts of the Notes forming part of the audited financial statements:

"2.1 Significant Accounting Policies

…….

(h) Foreign currency translation

……

(iv) Forward exchange contracts not intended for trading or speculation purposes

The premium or discount arising at the inception of forward exchange contracts (except outstanding against form commitments and highly probable forecast transaction) is amortized as expense or income over the life of the contract. Exchange differences on such contracts are recognized in the statement of profit and loss in

the period in p) Derivative Instruments As per the ICAI Announcement, accounting for derivative contracts, other than those covered under Accounting Standard 11 are marked to market on a portfolio basis, and the net loss after considering the offsetting effect on the underlying hedge item is charged to the income statement. Net gains are ignored. Accounting policy for forward exchange contracts is given in point (iv) of note (h) above."

45. It is further respectfully submitted that the aforesaid loss represents crystallized loss as on the balance sheet date for the relevant assessment years and hence allowable as business loss while computing the taxable income, as elaborated hereunder:

(i) kind attention is further invited to section 145(1) of the Act which provides that income chargeable under the head 'profits and gains of business or profession' or ' income from other sources' shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(ii) Further, section 209(3) of the Companies Act, 1956, inter alia, provides that a company shall be deemed not to have kept proper books of accounts if such books are not kept on accrual basis and according to the Double Entry System of Accounting.

(iii) Under the mercantile system of accounting, the impact of the exchange rate fluctuation in respect of the various trade balances as on the close of the year is to be accounted on accrual basis, i.e., the trading assets / liability in foreign currency outstanding at

each year end is revalued taking into account the rate of exchange prevailing on that date. Any increase/decrease in the liability, thus revalued, vis-à-vis the original liability is accounted as loss/gain, as the case may be, in that year.

(iv) The Supreme Court in the case of Sutlej Cotton Mills Limited v. CIT: 116 ITR 1 propounded the following tests to determine the character of loss/gain arising due to exchange fluctuations:

> Which the exchange rates change. Any profit or loss arising on cancellation or renewal of forward exchange contract is recognized as income or as expense for the year. *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of an asset, on conversion into another currency, such profit or loss would, ordinarily, be trading profit or loss if the asset is held by the assessee on revenue account or as part of circulating capital embarked in the business. But, if on the other hand, the asset is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."*

(v) kind attention, in this regard, is further invited to the decision the Supreme Court in the matter of CIT v. Woodward Governor India (P) Ltd.: 312 ITR 254 (SC), wherein while affirming the decision of High Court, the Hon'ble Supreme Court has held that loss suffered by the assessee in respect of a revenue liability on account of exchange difference as on the balance sheet would be an item of expenditure allowable under section 37(1) in the year of accrual.

(vi) Similar view has been taken by the Supreme Court in the decision of Oil & Natural Gas Corporation Ltd. vs. CIT: 322 ITR 180 wherein it was held that where the assessee was following the mercantile system of accounting, the loss on account of fluctuation in exchange rate is allowable revenue deduction in the year of accrual.

(vii) kind attention, in this regard, is further invited to the decision of Delhi High Court in the matter of Munjal Showa Ltd. v DCIT: 382 ITR 555 wherein the Court while quashing the reassessment proceedings, accepted the assessee's claim of MTM loss on revaluation of foreign exchange derivatives as the assessee recognized such loss by following mercantile system of accounting as per section 145 of the Act and followed AS-11 and AS-30 issued by ICAI. The Court further held that the CBDT instruction could not override the existing decisions of Supreme Court and High Courts on similar issues.

(viii) The Bombay High Court in the case of V.S. Dempo and Co. (P) Ltd.: 206 ITR 291 has succinctly culled out the principles to determine whether loss on account of exchange fluctuation is allowable as business loss. The Court inter-alia held that "(i) a *loss arising in the process of conversion of foreign currency which is part of the trading asset of the assessee is a trading loss as any other loss; (ii) The cause which occasioned the loss is immaterial; what is material is whether the loss*

has occurred in the course of carrying on the business or is incidental to it;….."

(ix) kind attention, in this regard, is further invited to the decision of Special Bench of Tribunal in case of DCIT v. Bank of Bahrain & Kuwait: 41 SOT 290, where after relying on the decision of CIT v. Woodward Governor India (P) Ltd.: 312 ITR 254 (SC), it was held that loss arising on un-matured derivative contracts, on mark to market basis, is allowable deduction, in accordance with the mercantile system of accounting, and could not be said to be contingent/notional loss.

(x) It has been held likewise by the Delhi Bench of the Tribunal in the case of Bechtel India P. Ltd. v. Addl. CIT: 146 ITD 733.

(xi) Further, the Mumbai Tribunal in the case of DCIT vs. Enercon India Ltd: 48 ITR(T) 362 (Mum) recognized that the need to hedge is a commercial expediency and necessity which is practically followed in all the business houses engaged in the business import/export these days specially when the exchange rate is highly volatile. The Tribunal heavily on the decision of apex court in the case of Woodward Governor India (P.) Ltd. (supra) and special bench decision in the case of Bank of Bahrain and Kuwait (supra) decided the issue in favour of the assessee.

(xii) Reliance in this regard is further placed on the following decisions wherein loss on account of "marked to market" arising as a result of revaluation of the un-matured forward contracts entered into the normal course of business at the end of the accounting period was held to be allowable as a business deduction:

- Indusind Bank Ltd vs. ACIT: ITA No. 931/Mum/2004 (Mum)
- ACIT vs. H. Dipak and Co : ITA No. 7629/Mum/2011 (Mum)
- ADIT vs. British Bank of Middle East : 44 SOT 109 (URO) (Mum)
- ADIT vs. Development Bank of Singapore: 46 SOT 122 (URO) (Mum)
- JCIT vs. Dena Bank : 139 TTJ 81 (Mum)
- Shinhan Bank vs. DDIT : 54 SOT 140 (Mum)
- Societe Generale vs. DDIT : 21 ITR (Trib) 606 (Mum)
- Dresdner Bank AG Commerzbank, AG vs. ADIT : 57 SOT 203 (Mum)
- DCIT v. Nitrex Chemicals India Ltd: ITA No. 756/Del/2009 dated 03.08.2015 (Del)
- Perfect Circle India Ltd v. DCIT: ITA No. 7241/Mum/2012 dated 27.03.2015 (Mum)
- DCIT vs. Kotak Mahindra Investment Ltd: 59 SOT 4 (Mum)
- Quality Engineering & Software Technologies (P.) Ltd. vs. DCIT: 152 ITD 320
- ACIT vs. Sri Ramalingeswara Rice & Oil Mill: 162 ITD 696 (Visakhapatnam)
- Inventurus Knowledge Services (P.) Ltd. vs. Income Tax Officer: 45 ITR(T) 57 (Mum)

(xiii) Having regard to the aforesaid settled legal position, loss or gain arising on trading account due to exchange rate fluctuation is, in our respectful submission, to be treated on revenue account and is allowable as deduction/ taxed as income, as the case

may be. Further, as laid down in the aforesaid decisions, the increase/decrease in liability due to exchange fluctuation has to be recognized in the year in which such increase/ decrease takes place.

46. In the case of the appellant, the forward contracts were booked to hedge against the foreign currency fluctuation risk relating to business transactions, viz., export orders undertaken by the assessee and hence taking of the aforesaid hedge cover was incidental to its business. Further, since the forward contracts were related to the export proceeds, whether backed by invoice or in relation to expected receivables, the same were in the course of business and not for acquisition of any capital asset, the loss arising on the same would be on revenue account. In this regard, it is also imperative to note that no part of liabilities/ payables have been hedged by the assessee company, which goes on to demonstrate that the assessee is not engaged in speculation activity.

47. The details tabulating the total rvenue and export revenue earned by the assessee, during the preceding financial years, is as under:

Financial Year ending on	Total Revenue	Export Revenue	Interco. Revenue (Out of export revenue)	% of Export Revenue in Total Revenue	% of Inter Co Revenue in Total Export Revenue
31/03/2012	6,266,551	5,972,733	5,494,684	95%	92%
31/03/2011	5,230,495	5,058,630	4,494,983	97%	89%
31/03/2010	5,075,976	5,040,668	4,566,097	99%	91%
31/03/200	6,149,473	6,149,473	5,757,284	100%	94%

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48. It is further submitted that the assessee had entered into a binding contract enforceable in law in the nature of foreign exchange derivative cover. As at the balance sheet date, viz., 31.3.2012, the assessee incurred losses, in view of adverse exchange fluctuations. Such losses, under the mercantile system of accounting would be allowable deduction notwithstanding that the same have not been actually paid. The contention of the assessing officer that such loss represented notional loss is, it is respectfully submitted, erroneous and contrary to the decisions of the Supreme Court discussed supra, particularly the decision in the case of Woodward Governor (supra).

49. He submitted that in the impugned order, it is respectfully submitted, reliance is placed on the CBDT Instruction No. 3/ 2010 to disallow the aforesaid MTM loss on account of unrealized exchange of forward cover reinstatement, holding it to be a contingent loss. Instruction No. 3/2010, dated 23.03.2010 is an internal directive issued by CBDT to the assessing officers providing guidelines on allowability of marked to market loss on account of foreign currency derivatives. As per the aforesaid instruction, in respect of mark to market losses, i.e., unrealized losses, debited to the profit and loss account, the assessing officers have been instructed to disallow the same while computing the taxable income. As regards the actual or crystallized losses, the assessing officers have been instructed to verify whether the losses are because of speculative transactions as specified under section 43(5) of the Act or whether contacts were used to hedge currency exposure. As regards the issue of allowability of mark to market losses dealt with by the instruction, it is respectfully submitted that the said issue is no longer res-integra in view of the decision of the Supreme Court in the case of Woodward Governor (supra). It is respectfully submitted that it is a settled law that circular/ instruction issued by the Board cannot override the position of law as explained in the binding decisions of the Supreme Court/ High Court on the similar issues. Reliance in this regard is placed on the judgment of the Hon'ble

Supreme Court in the case of Hindustan Aeronautics Ltd v. CIT : 243 ITR 808, wherein the Court concurred with the view that though circulars or instructions given by the board are binding in law on the authorities under the Act but when the Supreme Court or the High Court has declared the law on the question arising for consideration it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court. To the same effect are the following decisions:

- CCE v. Ratan Melting & Wire Industries : 220 CTR 98 (SC)
- J&K Synthetics vs. CIT: 83 ITR 335 (SC)
- CIT vs. Hero Cycles Pvt Ltd : 228 ITR 463(SC)
- CIT v. Nagesh Knitwears (P.) Ltd : [2012] 345 ITR 135 (Delhi)
- CIT v. Central Bank of India: 185 ITR 6 (Bom)
- CIT v. Indian Oil Co. Ltd : [2012] 254 CTR 113 (Bom)

50. He further submitted that the decision of the Hyderabad Bench of Tribunal in the case of VST Industries Ltd v. ACIT in ITA No. 647/Hyd/2012, conferring with the view of the Special Bench in Bank of Bahrain and Kuwait (supra), held that the instruction No. 3 of 2010 dated 23.03.2010 issued by CBDT was not applicable as the said instruction relates to only derivative transactions whereas forward contracts are clearly linked to export/import business transactions and thus, the loss incurred due to fluctuation in foreign exchange while implementing export contracts with the bank, cannot be said to be speculative and are hence, allowable as revenue expenditure. The aforesaid decision of Hyderabad Tribunal has been affirmed by Andhra Pradesh High Court in ITA No. 284/2014 vide order dated 23.04.2014. Reference in this regard is also invited to the decision of the Chennai Bench of Tribunal in the case of ACIT v. Lanco Tanjore Power Co Ltd in ITA No. 1322/Mds/2012 wherein loss arising to the assessee out of marking to market, the amounts due to it, netted with amount due from it, based on foreign exchange contract cover was held to be allowable deduction. In this context, it was held as under:

"9……Thus, for a contract to be a foreign exchange derivative contract, its value should be derived from price movement in one or more underlying assets. Here, what the assessee had obtained was only a cover for the amount of foreign currency in respect of the fluctuations that could happen. It could never be categorized as a foreign exchange derivative contract. Being not a foreign exchange derivative contract, in our opinion, CBDT Instruction No.03/2010 mentioned above, was not at all applicable. As against this, Hon'ble Apex Court in the case of Woodward Governor India P. Ltd. (supra) has clearly held that loss in foreign exchange, if any, at the end of the year, would be deductible by valuing the outstanding liability at the market rate as on the date of closing of accounts." (emphasis supplied)

51. In view of the aforesaid circumstances, reasoning adopted by the assessing officer, being contingent in nature, by primarily relying on Instruction No. 3 to disallow loss accruing or arising on account of foreign exchange transactions not yet matured, is incorrect as per law after due consideration of the aforesaid judicial precedents. The direction given in the said Instruction to disallow mark to market losses, therefore, it is respectfully submitted, cannot be the basis to disallow unrealized losses since:

(a) the said disallowance would be in violation of the law laid down by the apex Court, which is binding on all the authorities;
(b) any instruction issued by the CBDT directing a quasi-judicial authority to disallow a particular claim is violative of section 119 of the Act and hence not binding on the assessing officer and/ or the appellate authority;
(c) the instruction issued by the CBDT being contrary to the decision of the apex Court, the Instruction must be regarded as having been overruled by the said decision.

On perusal of the above, it is clear that the foreign exchange fluctuation loss claimed on mark to market basis on the closing balance sheet date

for the year ending 31st March 2012 was neither contingent nor notional loss and was hence allowable deduction.

52. It is further respectfully submitted that the claim of deduction of MTM loss on restatement of forward covers has been consistently accepted by the Department in preceding years. Though principle of res-judicata does not apply to income tax proceedings, it is well settled that if there being no change either in facts or in law, as compared to the earlier and subsequent years, the position accepted/ determined by the Department needs to be followed even on the principle of consistency. Reliance in this regard is placed on the following decisions:

- CIT vs. Excel Industries Ltd.: 358 ITR 295 (SC)
- Radhasoami Satsang v. CIT: 193 ITR 321 (SC)
- DIT (E) v. Apparel Export Promotion Council: 244 ITR 734 (Del)
- CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.)
- CIT v. Dalmia Promoters Developers (P) Ltd: 281 ITR 346 (Del.)
- DIT v. Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del.)
- CIT v. P. KhrishnaWarrier: 208 ITR 823 (Ker)
- CIT v Harishchandra Gupta 132 ITR 799 (Ori)
- CIT v. SewaBharti Haryana Pradesh: 325 ITR 599 (P&H)
- CIT v. Rajasthan Breweries Limited.: ITA 889/2009 (Del) – SLP dismissed.

53. Therefore he submitted that department having accepted that the deduction in respect of MTM losses is allowable in the preceding year(s), the same stand ought not to be changed/ modified, during the year under consideration, even on the principle of consistency, particularly, when no new fact/ information has been brought on record for the same.

54. In response to this, the learned departmental representative vehemently supported the orders of the lower authorities. He further referred to the instructions issued by central board of direct taxes on this issue. He submitted that Mark to market loss cannot be said to be definite liability. It crystallized only when it actually materializes. Therefore, he submitted

that this liability claimed by the assessee is neither ascertained nor definite but a contingent.

55. As in one of the grounds of appeal, assessee has submitted that assessee has not debited any expenditure on account of the foreign exchange loss because it has also recovered the identical amount from its associated enterprises. For this proposition, the assessee was directed to submit the proof as it would show that assessee has not claimed any expenditure on account of Mark to market losses. Further, the direction of the learned dispute resolution panel also says that the learned assessing officer should disallow only the net amount of expenditure debited to the profit and loss account on account of Mark to market foreign exchange losses. The claim of the assessee that it is not debited any expenditure but recovered everything from its associated enterprise and therefore it needs verification.

56. The learned authorised representative reiterated that that Mark to market losses incurred by the appellant has been fully recovered from its Associated Enterprises ('AEs'). In this regard, he submitted as under:

    1. The appellant suffered MTM loss of Rs.24,59,04,852, which is included in the net loss of Rs.19,00,50,366 debited to Profit & Loss Account. The relevant extracts of audited financial statements along with break-up of the foreign exchange loss are enclosed herewith as Annexures 1 and 2 respectively (also placed at Pages 667 and 799of Merit PB-II respectively).

    2. As per Clause 3 of the 'Software Products and IT/ ITES Services Agreement' dated 01.04.2010 entered into between the appellant and Steria Limited, UK, the loss suffered by the appellant company is fully recovered by the appellant from its AEs, without any mark up. A copy of the Agreement is enclosed as Annexure 3, also placed at Pages 759-762 of Merit PB-II.

3. Reference is further drawn on the certificate dated 12.10.2016 issued by statutory auditors of the appellant, wherein having regard to the revenue computation mechanism followed by the appellant, it has been certified that that the revenue recorded in the books of account includes recovery of the foreign exchange currency loss suffered by the appellant in terms of sub-clauses 3.3.2 of the agreement with AEs.

4. Reference, in this regard, is further made to the back-up working of the certificate comprising of segment wise computation of revenues derived by the appellant whereby it is clearly demonstrated that the revenue from operations of Rs.626.655 crores as per the audited financial statements includes cost-to-cost recovery of net foreign exchange loss of Rs.19 crores (which in turn includes the MTM loss of Rs. 24.59 crores incurred by the appellant). The profit computation can also be cross verified from the segment-wise profit computation forming part of the Transfer Pricing Documentation of the appellant (copy enclosed herewith as Annexure 5, also placed at Page 484 of Merit PB-I).

5. In addition to the above, the appellant further wishes to place on record party-wise break up of revenue earned by the appellant, which comprises break up of MTP (Management Transfer Price) and LTP (Legal Transfer Price)/ true-up values of invoices raised on AEs. On sample basis, the appellant is furnishing invoice wise break up and corresponding invoices raised on Steria Ltd., UK, revenue wherefrom comprises 81% of the total revenue for the year. Refer Annexure 6.

In view of the aforesaid, it is respectfully submitted that on account of the cost-to-cost recovery of MTM loss (included in

the net foreign exchange loss) incurred by the appellant, there is no impact on Profit and Loss account of the appellant company, and accordingly, the disallowance sustained by the assessing officer is liable to be deleted.

57. We have carefully considered the rival contention and perused the orders of the lower authorities. The direction of the limited dispute resolution panel to the learned assessing officer was that to restrict the foreign exchange loss to the net foreign exchange loss which is a finally been debited to the profit and loss account. The learned dispute resolution panel also made it clears that if the assessee has debited excess amount on the foreign exchange loss and is credited why amount being reimbursed by the associated enterprise of foreign exchange loss to the profit and loss account than disallowance should be restricted to only X-Y. Clause 3 of the 'Software Products and IT/ ITES Services Agreement' dated 01.04.2010 entered into between the appellant and Steria Limited, UK, the loss suffered by the appellant company is fully recoverable by the appellant from its AEs, without any mark up. Assessee also contested by submitting certificate dated 12.10.2016 issued by statutory auditors of the appellant, wherein having regard to the revenue computation mechanism followed by the appellant, it has been certified that that the revenue recorded in the books of account includes recovery of the foreign exchange currency loss suffered by the appellant in terms of sub-clauses 3.3.2 of the agreement with AEs. Assessee has also made available back-up working of the certificate comprising of segment wise computation of revenues derived by the appellant whereby it is clearly demonstrated that the revenue from operations of Rs. 626.655 crores as per the audited financial statements includes cost-to-cost recovery of net foreign exchange loss of Rs. 19 crores (which in turn includes the MTM loss of Rs. 24.59 crores incurred by the appellant). The profit computation can also be cross verified from the segment-wise profit computation forming part of the Transfer Pricing Documentation of the appellant. Further assessee has claimed to place on record party-wise break up of revenue earned by the appellant, which comprises break up of MTP (Management Transfer

Price) and LTP (Legal Transfer Price)/ true-up values of invoices raised on AEs. On sample basis, the appellant is furnishing invoice wise break up and corresponding invoices raised on Steria Ltd., UK, revenue wherefrom comprises 81% of the total revenue for the year. All these evidences need to be closely examined by the learned assessing officer to follow the direction of the learned dispute resolution panel. The direction of the learned dispute resolution panel is to only disallow the excess sum debited by the assessee in the books which is not been recovered. In view of this with respect to the submission of the assessee made during the course of hearing before us we set aside the whole issue before the learned that assessing officer with a direction to the assessee to show that the amount of loss that has been disallowed has also been recovered by the assessee from its associated enterprise. The learned assessing officer may examine the same and if it is found already been recovered by the assessee from its associated enterprise, to delete the disallowance. In view of this, ground number 6 of the appeal is allowed accordingly.

58. The ground numbers 7 – 11 are also raised against the disallowance of Mark to market loss. As we have discussed while deciding ground number 6 of the appeal of the assessee, setting aside the issue back to the file of the learned assessing officer with a direction to the assessee to substantiate that such losses has been recouped by the associated enterprise and not borne by the assessee, these grounds become merely academic and hence dismissed.

59. In the result ITA number **741/Del/2017 for assessment year 2012 – 13 is partly allowed.**

60. Now we come to **ITA number 3992/Del/2017** filed by the assessee for assessment year 2013 – 14 wherein following grounds of appeal are raised:-

"1. That the assessing officer erred on facts and in law in completing assessment under section 144C read with section 143(3) of the Income-tax Act ("the Act") at an income of Rs. 147,63,84,824 as against the returned income of Rs. 123,46,67,790.

Transfer Pricing Issues:

Software Development Service Segment

2. *That the assessing officer erred on facts and in law in making an adjustment of Rs. 23,42,50,069 to the arm's length price of the 'international transaction' of provision of software development services on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('IPO').*

2.1 *That the DRP/TPO erred on facts and in law in considering the following companies in the final set of comparables for the purpose of benchmarking analysis not appreciating that these companies are functionally not comparable to the appellant:*

a. *Larsen & Toubro Infotech Ltd. (seg)*
b. *Mindtree Ltd.*
c. *Thirdware Solutions Limited*

2.2 *That the DRP upheld the inclusion of Larsen & Toubro Ltd. (seg) allegedly holding that broad functional similarity is to be established while applying Transactional Net Margin Method ('TNMM').*

2.3 *That the DRP upheld the inclusion of Mindtree Ltd. allegedly holding that the company is not engaged in the business of software products and accordingly, functionally similar to the appellant, being a software development service provider.*

2.4 *That the DRP upheld the inclusion of Thirdware Solutions Ltd. allegedly holding that as per the website of the company, it is engaged mainly in IT segment and since, under TNMM broad functional similarity is to be established, therefore, the company is functionally comparable to the appellant.*

2.5 *That the DRP/TPO erred on facts and in law in rejecting Cat Technologies Ltd. as comparable company allegedly holding that the company is a persistent loss making company incurring losses in financial years 2011-12 and 2012-13.*

2.6 *That the DRP/TPO erred on facts and in law in incorrectly computing the operating profit margin of CG-VAK Software & Exports at 18.61% as against the correct operating margin of 12.48%, considering provision for doubtful debts as non-operating.*

2.7 *That the DRP/TPO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low- risk-bearing captive service provider as opposed to the comparable companies who were independent software service provider.*

2.8 That on the facts and in the circumstances of the case and in law, the DRP erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that the appellant failed to demonstrate risks undertaken by the appellant vis-a-vis comparable companies and provide any computation of risk adjustment claimed.

Corporate Tax Issues:

Disallowance of deduction under section 10AA

3. That the DRP/ assessing officer erred on facts and in law in restricting deduction allowable to the appellant under section 10AA of the Act at Rs.18,80,82,642 as against Rs.18,83,49,607 claimed by the appellant in aggregate for Noida SEZ 2 and SEZ 3 unit.

3.1 That the DRP/ assessing officer erred on facts and in law in excluding the following expenditure from the 'total turnover', for the purpose of computing deduction under section 10AA of the Act:

	Noida SEZ Unit 2	*Noida SEZ Unit 3*	*Total (in 1NR)*
Subsistence for onsite employees	*1,83,35,898*	*5,18,09,969*	*7,01,45,866*
Standby and callout charges	*21,50,660*	*»*	*21,50,660*
Total			*7,22,96,526*

3.2 That the DRP/ assessing officer erred on facts and in law in not appreciating that both the 'export turnover' and 'total turnover' have to be computed on the same basis for the purpose of computing deduction under section 10AA of the Act.

3.3 That the DRP/ assessing officer erred, while making the purported adjustment from "the export turnover", following the assessment order for preceding assessment years, without appreciating that the said issue has already been decided by the ITAT in favour of the appellant in assessment year(s) 2003-04 to 2011-12.

4. That the assessing officer has erred on facts and in law in allowing short credit of advance tax paid to the extent of Rs.97,70,469/-.

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

61. The brief facts of the case shows that assessee filed its return of income on 30 November 2013 declaring total income of ₹ 1,234,667,790/– the assessee has entered into eight different kind of international transactions. The only dispute is with the international transaction of the provision of software services amounting to Rs. 348,12,81,278/-. This transaction is benchmarked by the assessee by adopting weighted average profit level indicator of OP/OC, adopting Transactional Net Margin Method as the Most Appropriate Method selecting 12 comparable companies taking multiple year data and arriving at the mean margin PLI of 10.74%. Assessee compared that with its margin of 11.78% and stated that international transaction of IT services is at arm's-length.

62. The learned transfer-pricing officer as facts stated in assessment year 2012 – 13 rejected the transfer pricing study report prepared by the assessee and adopted 16 comparable companies whose average profit level indicator was 18.30% and thereafter proposed an adjustment of ₹ 279,058,181. The assessee filed an objection before the learned Dispute Resolution Panel who gave its direction on 2/3/ 2017 directing the assessing officer/transfer pricing officer to exclude from the comparability analysis two comparable companies , (1) Infosys Limited and (2) R Systems Ltd from the final set of comparables. Accordingly, the arm's-length price of the international transaction of IT services was determined by selecting 14 comparable companies whose average profit level indicator was 16.89%. Against this assessee is in appeal before us.

63. The first contention of the assessee is that there is an incorrect computation of operating profit margin of the assessee as foreign exchange income amounting to ₹ 77,507,000 is considered as a non-operating income. The learned dispute resolution panel directed the learned transfer-pricing officer to consider forex gain or losses arising from the fluctuation as operating income on expenditure both in the case of the appellant company as well as in the case of the comparable companies. However the learned that transfer pricing officer computed the margin of the comparable companies considering forex as operating income and expenditure whereas the assessee is margins were not

adjusted accordingly. The learned that authorised representative submitted that in case of the assessee for assessment year 2015 – 16 the forex loss or gain was considered as an operating income on expenditure.

64. The learned departmental representative women to read the page number three of the direction of the learned Dispute Resolution Panel stating that as per the transfer pricing document the assessee is shielded from any loss on account of foreign exchange fluctuation with respect to the transactions with its associated enterprises and therefore the foreign exchange risk remains on the assessee only to the extent of services provided to 3rd party. Therefore, the operating profit or loss gain be adjusted only to the extent of foreign exchange loss or gain earned by the assessee on its transactions with third parties and not with associated enterprises.

65. We have carefully considered the rival contention and perused the order of the coordinate bench in case of the assessee for assessment year 2015 – 16 wherein in para number 5.6 the issue of whether the forex is an operating income or loss was discussed with respect to ITeS segment. However, there was no issue before the coordinate bench with respect to IT services as the issue in the impugned appeal. For the purpose of considering the forex loss whether it is a part of operating income or loss one has to see whether the assessee was shielded from any loss on account of foreign exchange fluctuation with respect to its transaction with associated enterprises are not. The forex can be considered as an operating profit or loss only if the assessee takes the risk of foreign exchange with respect to the transaction. If assessee takes a risk with respect to the foreign exchange fluctuation with its transaction with its associated enterprise then it should be considered as an operating profit or loss and if it does not take a risk there is no requirement of including that cost or profit in the profit level margin computation of the assessee. Therefore, we set aside this issue to the file of the learned transfer Pricing Officer with a direction to the assessee to show the foreign exchange risk of the assessee with respect to the IT service segment of the assessee and whether it is borne by the assessee or it is on the associated

enterprise. The learned transfer pricing officer after proper examination of the facts and decide issue on merits with respect to the forex loss.

66. The assessee has challenged the inclusion of following comparable companies (1) Larsen and Toubro InfoTech Ltd, (2) mind tree Ltd. It also contest that the comparable companies selected by the assessee in case of CAT Technologies Ltd has been wrongly excluded from the comparability analysis.

67. With respect to the Larsen and Toubro InfoTech Ltd the contention of the learned authorised representative is that that it has a strong brand value, the segmental information used does not have the allocation case are available/disclosed in the annual report, it is not functionally comparable as it also since products.

68. The learned departmental representative vehemently stated that this comparable company has been considered by the assessee in its transfer pricing study report at serial number three wherein the margin of this company on the basis of weighted average operating profit/operating cost was considered at 24.32%. It is stated that it is the comparable of the assessee itself. He further submits that assessee has stated that it is functionally comparable. He further stated that TPO has pointed out that there are certain errors in computing the profit level indicator and he has only taken one segment, which is more comparable to the assessee's activities rather than the consolidated account. He further stated that the issue of unallocated expenses and segmental accounting being incorrect has never been raised before the authorities below. He further stated that in case of a company that is no question of giving an allocation Kiefer unallocated expenditure. In case of a corporate, there may be certain expenditure, which are not at all to be allocated to the any of the segments, and therefore only for this reason the segmental results cannot be rejected. He further stated that the several judicial precedent raised by the learned authorised representative are not relevant as the functional profile of the assessee is not comparable with those assessees. He once again reiterated the principle regarding the exclusion of or inclusion of any comparable should be made only qua the functions

performed by the assessee and not on the basis of certain judicial precedents, which have dealt with different functional profile of different assessee.

69. We have carefully considered the rival contentions. We fully agree with the contentions principally that the comparability analysis should be restricted to the functional profile of the assessee with the functional profile of the comparable companies. It cannot be that a judicial precedent in case of some other assessee who has a different and distinct functional profile and where a comparable company has been excluded, the same comparable company cannot be excluded merely based on that judicial precedent.

70. In view of this we consider the stand-alone audited financial statements of loss and Toubro InfoTech Ltd which are placed before us at page number one – 34 of the paper book. The first contention of the learned authorised representative is that that L & T InfoTech Ltd has different functional profile as it is engaged in the sale of products. We have carefully considered the annual report of that particular comparable company the profit and loss account is placed at page number 12 of the paper book (S – 633 page number of the annual report) wherein it has shown revenue from operation. The details of the same have been given in note number M showing that revenue is further bifurcated from overseas and domestic. As per significant accounting policies A – 2 (revenue recognition) it does not have any sale of software or product. Merely because in the operating expenses, it has some cost of what out items for resale of Rs 27 crores, it cannot be said that it is also thus engaged in the sale of the products. This is also the finding of the learned dispute resolution panel at page number 5 of the direction. Therefore, we do not find any functional dissimilarity between the assessee and this comparable company.

71. The second argument of the assessee is with respect to the segmental information used by the learned transfer-pricing officer. It was submitted that the TPO has considered the industrial cluster segment as comparable

for the purpose of the benchmarking analysis. However, the learned authorised representative submitted that there are certain unallocated expenditure and such information is not available in the public domain and therefore in the absence of the availability of the appropriate allocation to this company cannot be regarded as an appropriate comparable company. At page number S – 653 of the annual report of the company (page number 32 of the paper book) is the segmental information with respect to the above comparable companies. The comparable company has reorganized its business into three segments service cluster, which includes banking and financial segment and insurance segment, industrial cluster that includes high-tech in consumer electronics consumer retail and former energy et cetera and telecom sector which refers to the product engineering services. Accordingly, the segmental information of this comparable was presented. The assessee is objecting that it has certain unallocated expenses and therefore the comparison of the industrial cluster segment with the assessee though functionally comparable but for this reason this comparable should be excluded. We do not agree with this argument of the learned authorised representative. This information is provided in the annual accounts of the comparable in terms of Accounting Standard 17 "Segment Reporting". This stanadard is mandated as per law by the Ministry of Company affairs, therefore it have binding effect of a law. The expenses should be allocated in terms of that standard for preparing of segment reporting as per following provision of that standard:-

" ***5.6 Segment expense is the aggregate of***

(i) the expense resulting from the operating activities of a segment that is directly attributable to the segment.

(ii) the relevant portion of enterprise expense that can be allocated on a reasonable basis to the segment,

including expense relating to transactions with other segments of the enterprise.

Segment expense does not include:

(a) extraordinary items as defined in AS 5, Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies;

(b) interest expense, including interest incurred on advances or loans from other segments, unless the operations of the segment are primarily of a financial nature.

Explanation:

The interest expense relating to overdrafts and other operating liabilities identified to a particular segment are not included as a part of the segment expense unless the operations of the segment are primarily of a financial nature or unless the interest is included as a part of the cost of inventories. In case interest is included as a part of the cost of inventories where it is so required as per AS 16, Borrowing Costs, read with AS 2, Valuation of Inventories and those inventories are part of segment assets of a particular segment, such interest is considered as a segment expense. In this case, the amount of such interest and the fact that the segment result has been arrived at after considering such interest is disclosed by way of a note to the segment result;

(c) losses on sales of investments or losses on extinguishment of debt unless the operations of the segment are primarily of a financial nature;

(d) income-tax expense; and

(e) general administrative expenses, head-office expenses and other expenses that arise at the enterprise level and relate to the enterprise as a whole. However, costs are sometimes incurred at the enterprise level on behalf of a segment. Such costs are part of segment expense if they relate to the operating activities of the segment and if they can be directly attributed or allocated to the segment on a reasonable basis."

Therefore, all the expenses, which does not qualify as pertaining to a particular segment, are required to be shown as unallocated expenses. This is also for reconciliation of overall profit of the enterprise. Even otherwise, it does not support that case of assessee, as there is no reason to say that expenses relating to the comparable segment has not

been considered by comparable and has shown higher profit for that segment and over all lower profit as MNE. It is not the case of the assessee that segmental information presented by the Larsen and Toubro InfoTech Ltd suffers from any non-compliance with the accounting standard segmental information. In case of any company, which is dealing in different segments, there would be certain unallocated expenses, which are never allocated to any of the segment. The reason is that that expenditure does not belong to the segment and should not be considered in the profitability of that segment. Therefore, for the simple reason that there are unallocable expenses, which are, not related to any of the segment, on this ground the comparable should be excluded. We are of the view that unless there is a specific qualification by the auditor of not following the relevant accounting standard with respect to the segmental information then only there can be doubt on the audited financial statement of the comparable company. In this case the segmental information has been accepted by the directors in their directors report while discussing the performance of the company, the auditor has also stated that proper accounting standards have been followed which also includes accounting standards with respect to the segmental information and further the disclosure made by the comparable company at note number AB at page number S – 653 and 654 does not show any infirmity, on this ground, this comparable cannot be excluded. Hence, this argument is rejected.

72. The last point raised by the learned authorised representative was with respect to the strong brand value of 'Larsen and Toubro', it is submitted that the comparable company enjoys the benefit associated with that brand and therefore it cannot be regarded as a comparable to the appellant a captive service provider. He further referred the any report of the company when it is stated that the brand of the company has been increasing across the globe and the overall brand recall and brand experience amongst the stakeholders of the company is being continuously enhanced. Therefore, he submitted that the above company should be excluded. The learned departmental representative repeated

the same arguments, which he did make with reference to Infosys BPO Ltd and TCS E, serve Ltd for assessment year 2012 – 13.

73. We have carefully considered the rival contention on this point with respect to the comparable. This issue was never raised by the assessee before the lower authorities as it is evident from the direction of the learned dispute resolution panel as well as of the order of the learned TPO. However it is, true that at page number S – 623 this company has discussed about the branding of its own business. However it nowhere states that it is using 'Larsen and Toubro' brand but it is developing its own 'L and T InfoTech' brand, which normally everybody does. Therefore, it is not the case of the assessee that it is using an l & T brand and it has any added advantage. In view of this we find that Larsen and Toubro InfoTech Ltd cannot be excluded as it is functionally comparable by the assessee as well as the learned that TPO both.

74. The second comparable challenged is Mind tree Ltd stating that this company is functionally different as it is engaged in the development and sale of software products. It is further stated that this company is undertaking a wide range of activities in the domain of e-business, data warehousing and business intelligence et cetera. To support the above argument assessee submitted that company is undertaking a wide range of activities in the domain of e-business, data warehousing and business intelligence, ERP and maintenance and re-engineering of legacy mainframe applications. The company also undertaken full life cycle product engineering and owns proprietary IP building blocks in the area of Bluetooth, VOIP, Telecom, industrial automation etc. (Pg 115 of annual report paper book).In the annual report it is further stated that the company is engaged in providing solutions in the form of proprietary products / technologies such as MindTest, Mwatch, mpromo etc. (Pg 37 of Annual Report paper book). Further, the company has a proprietary delivery platform namely ONEmind (Pg. 39 of Annual Report paper book). In addition, the company has filed numerous patents in India as well as in the USA (Pg 76 of annual report paper book). Accordingly, it is submitted that since the company has developed and it owns various

proprietary products &platforms and has filed for various patents, it cannot be regarded as an appropriate comparable for the purpose of benchmarking the international transactions undertaken by the appellant, a captive software service provider.

75. The learned departmental representative submitted that assessee has taken this company is functionally comparable its transfer pricing study report and assessee is also not cite any specific and reason as to why it's study report with respect to this comparable is wrong. He further submitted that the objection of the assessee have also been considered by the learned transfer pricing officer/dispute resolution panel wherein it has been clearly held that the comparable companies not engaged in sale of any products. The annual reports also speaks about sale of services. He further stated that the intangible of that comparable company constitutes only 1.08% of the assets of that company. He therefore submitted that this comparable cannot be excluded.

76. We have carefully considered the audited standalone financial statement for assessment year 13 – 14 of mind tree Ltd to decide about the comparability with the appellant. Note number 1 offers IT services. At point number 2.8 in revenue recognition it is also mentioned that the company derives its revenue primarily from software services. In its segmental report also speaks about that the company's operations predominantly relate to providing IT services and PE services. Therefore it is apparent that this company is not engaged in any sale of products further we do not find any mention in the standalone report that assessee has acquired any patents. This is also supported by the note number 3.4.1 wherein it has fixed assets and where the intellectual property is merely ₹ 607 million out of the total assets of ₹ 5820 millions. The learned dispute resolution panel has also given its finding at page number five – six of its direction, which also justifies inclusion of this comparable company. As in the standalone financial statement submitted before us we do not find any of the arguments of the learned authorised representative sustainable and supported by the information contained in the standalone financial statements we do not find any infirmity in the

order of the learned that TPO/DRP in including the above comparable company. Thus, we confirm the finding of the lower authorities.

77. The learned authorised representative further given a written note wherein it has been mentioned that after excluding L and T InfoTech and Mind Tree limited the mean of the PLI of the comparable companies selected by the TPO reduces to 14.50% which falls within the range of 3%. However according to us both this comparable are correctly included in the comparability analysis.

78. With respect to the Thirdware solutions Ltd (overseas segment) included by the learned transfer pricing officer it was submitted by the learned authorised representative that overseas segment has been included in case of the company and further there are unallocable expenses of Rs. 401.12 lakhs. However on looking at the direction of the learned dispute resolution panel at page number 6 and 7 we find that the is no such argument advanced by the assessee on this comparable as advanced before us. Even otherwise, in view of our finding with other comparable, we do not see it correct to exclude a comparable on unallocable expenses . In segment reporting this is mandate of As 17 and Law. On looking at the revenue recognition note at page number 72 of the standalone financial statement of this comparable it is found that its revenues are from software development and implementation. Further comparison of the overseas segment also not suffer from any infirmity because assessee is also providing services to its overseas associated enterprises. In view of this, we do not find any infirmity in inclusion of this comparable company by the lower authorities.

79. The next challenge is the rejection of the comparable by the learned transfer-pricing officer of CAT technologies Ltd stating that it is incurring persistent losses. The learned authorised representative submitted that merely because companies incurring losses cannot lead to its exclusion where it is found to be functionally comparable. The learned dispute resolution panel upheld the finding of the learned TPO stating that persistent loss-making company should be excluded as it would not make a good comparable. We do not find that there is any data, which has been

shown before us in the order of the learned transfer pricing officer order and the dispute resolution panel that this company is incurring persistent losses. Merely making losses in one or two years does not make it is a persistent loss making company. The standalone financial statement submitted before us of this comparable also shows that it is incurred losses though in financial year ended on March 2013 as well as on the year ended on March 2012 however no other data with respect to the earlier years were shown by the learned transfer pricing officer to show that it is a persistent loss making company. Therefore the rejection of this comparable by the TPO and DRP is not valid. Therefore, as it is functionally comparable, we direct the learned TPO to include this company in the comparability analysis.

80. The last challenge to the comparability analysis is with respect to the operating profit margin of one of the comparable C G Vak software and exports. The assessee's claim is that TPO has incorrectly computed the operating margin at 18.61% as against the correct margin after considering the provision for bad and doubtful debts should be 12.48%. We find that provision for bad and doubtful debt cannot be considered as non-operating expenditure as it results from the sale of services and part of the operating business of the assessee. Therefore, the learned TPO is directed to compute the correct operating margin of the comparable company.

81. In view of this ground number two of the appeal is partly allowed.

82. Ground number three of the appeal is with respect to disallowance of deduction u/s 10 AA of the act. The assessee claimed deduction of ₹ 188,349,607 whereas the learned that assessing officer allowed only 18,80,82,642. The main reason is the exclusion of the expenditure of ₹ 72,296,526/– from the total turnover of the assessee for the purpose of computing deduction u/s 10 AA of the act. Learned assessing officer while calculating the deduction has excluded the expenditure of subsistence for on-site employees and standby and callout charges of ₹ 72,296,526 from the total turnover. The learned dispute resolution panel also upheld the finding of the learned assessing officer. the appellant, for the purpose of

computing allowable deduction under section 10AA of the Act, reduced those expenditure, incurred in foreign currency, from both 'export turnover' as well as the 'total turnover' of each of the units. The learned assessing officer computed the deduction allowable under section 10AA of the Act from Rs.18,83,49,607 to Rs.18,08,82,642 on the ground that subsistence for onsite employees and standby and callout charges needs to be reduced from the value of 'export turnover' but not from 'total turnover' for the purpose of computing deduction under section 10AA of the Act on the basis of detailed reasoning given in order for assessment year 2003-04 and consistently applied to later years.

83. The learned that authorised representative submitted that adjustment in deduction under section 10AA of the Act by the Hon'ble DRP/ assessing officer is incorrect having regard to the scheme of the said section; Circular No. 4/2018 dated 14th August 2018 and decisions of the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd.: 404 ITR 719 and appellant's own case for assessment year(s) 2004-05 and 2005-06 wherein Department's SLP have been dismissed vide order(s) dated 04.05.2018 [Diary Nos. 12731/2018] and 04.09.2018 [Diary No. 11142/2018].

84. The learned departmental representative vehemently supported the orders of the lower authorities.

85. We have carefully considered the rival contentions and perused the orders of the lower authorities. Ld DR did not dispute that this issue is covered in favour of assessee. As the issue is squarely covered in assessee's own case for assessment year 2004 – 05 and 2005 – 06, we direct the learned assessing officer to exclude the above sum from the total turnover of the assessee. Accordingly, ground number 3 is allowed.

86. Ground number 4 is with respect to the granting short credit of advance tax paid to the extent of ₹ 9,770,469 to the assessee. On careful consideration of the rival arguments raised before us we direct the assessing officer to consider the credit of advance tax paid to the assessee of the above sum after proper verification. Accordingly, ground number 4 of the appeal is allowed.

87. Ground number 5 is with respect to levy of interest u/s 234B and 234B of the act, which are consequential in nature, and therefore ground number five of the appeal is dismissed.

88. In the result **ITA number 3992/Del/2017 for assessment year 2013 – 14 of the assessee is partly allowed.**

89. Now we come to appeal of the assessee for **assessment year 2014 – 15 in ITA number 5745/del/2018 f**iled by the assessee against the order of the learned that assessing officer passed u/s 143 (3) read with Section 144C of The Income Tax Act on 18 July 2018 determining total income of the assessee at ₹ 1,708,344,980 against the return filed on 30/11/2014 of ₹ 1,105,566,130/–.

90. The following grounds of appeal are raised in ITA. No. 5745/Del/2018:-

"1. That the assessing officer erred on facts and in law in completing assessment under section 143(3) read with section 144C of the Income-tax Act, 1961 ('the Act') at an income of Rs. 170,83,44,980 as against the returned income of Rs.l 10,55,66,130 under normal provisions of the Act.

Transfer Pricing Issues;

2. That the assessing officer erred on facts and in law in making transfer pricing adjustment of Rs. 29,50,00,656 to the arm's length price of the 'international transactions' of provision of software development services undertaken with the associated enterprise on the basis of order passed by the Transfer Pricing Officer ('TPO')/ Dispute Resolution Panel ('DRP').

3. That the DRP/ TPO erred on facts and in law in resorting to cherry picking and considering following companies in the final set of comparable companies allegedly holding them to be functionally comparable to the Appellant.

a. Larsen & Turbo Infotech Ltd. (Seg)

b. Thirdware Solutions Limited

c. Persistent Systems Limited

d. Cybercom Datamatics Information Solutions Ltd.

e. Tata Technologies Ltd.

f. ABM Knowledgeware Ltd.

g. *Technosoft Engineering Projects Ltd*

h. *Wipro Ltd*

i. *Sasksen Technologies Ltd (Seg)*

j. *Mindtree Limited*

4. *That the DRP/TPO erred on facts and in law in not appreciating that Tata Technologies Ltd fails the TPO's related party transaction filter and therefore is liable to be rejected from the final set of comparable companies.*

5. *That the DRP/TPO erred on facts and in law in not appreciating that ABM Knowledgeware Ltd fails the TPO's export/sales filter and therefore is liable to be rejected from the final set of comparable companies.*

6. *That the DRP/ TPO erred on facts and in law in not appreciating that the aforesaid companies do not satisfy the test of comparability as provided in rule 10B(2) of the income tax rules and therefore are liable to be rejected from the set of comparable companies.*

7. *That the TPO erred on facts and in law in computing the operating margin of the comparable companies.*

8. *That the assessing officer/TPO erred on facts and in law in not allowing appropriate risk adjustment to account for the differences in the risk profile of the appellant, a low risk captive service provider and the comparable companies selected by the TPO.*

9. *That the assessing officer/TPO erred in rejecting the contention of the assessee regarding risk adjustment, allegedly holding that the computation of risk adjustment provided by the assessee is vague and without any basis.*

Corporate Tax Issues:

Disallowance of deduction under section 10AA

10. *That the DRP/ assessing officer erred on facts and in law in restricting deduction allowable to the appellant under section 10AA of the Act at Rs.22,97,37,129 as against Rs.23,12,73,820 claimed by the appellant in aggregate for Noida SEZ 2 and SEZ 3 unit.*

10.1 *That the DRP/ assessing officer erred on facts and in law in not excluding foreign currency expenditure in the nature of telecommunication charges of Rs.1,15,22,112 [Rs. 87,75,804 and*

Rs. 25,46,308 respectively] from the 'total turnover' of Noida SEZ 2 and SEZ 3 unit, for the purpose of computing deduction under section 10AA of the Act.

10.2 That the DRP/ assessing officer erred on facts and in law in not appreciating that both the 'export turnover' and 'total turnover' have to be computed on the same basis for the purpose of computing deduction under section 10AA of the Act.

10.3 That the DRP/ assessing officer erred, while making the purported adjustment from "the export turnover", following the assessment order for preceding assessment years, without appreciating that the said issue has already been decided by the Delhi High Court in favour of the appellant in assessment year(s) 2004-05 to 2011-12 and subsequently been confirmed by the Supreme Court in the case of CIT vs. HCL Technologies Ltd.: 404 ITR 719 and directed not be pressed as per subsequent Circular No. 4/2018 dated 14th August 2018 issued by the CBDT.

Disallowance of Management Services Fees

11. That on the facts and in the circumstances of the case and in law, the DRP/ assessing officer erred in disallowing under section 40(a)(i) of the Act, expenditure of Rs.20,60,44,024 incurred on account of management services fees, allegedly on the ground that the appellant failed to deduct tax at source therefrom under section 195 of the Act.

11.1 That the DRP/ assessing officer erred on facts and in law in holding payment made to Groupe Steria SCA ('Steria France') towards management services fees to be in nature of Fees for Technical services ('FTS') in terms of Article 13 of India-France Double Tax Avoidance Agreement ('DTAA') read with Protocol thereto.

11.2 That the DRP/ assessing officer erred on facts and in law in erroneously relying upon the order of the Authority of the Advance Ruling ('AAR') without appreciating that the findings of AAR are perverse in light of the favorable order passed by the jurisdictional Delhi High Court in appellant's own case.

11.3 That the DRP/assessing officer erred on facts and in law in not appreciating that the Protocol to India-France DTAA is an integral part of the treaty and does not require separate notification to be issued by Government of India for its implementation.

11.4 That the DRP/ assessing officer erred on facts and in law in not appreciating that the payment for managerial services to Steria France is not covered under the term "technical" or "consultancy"

services, in terms of Paragraph 7 of the Protocol read with Article 13 of the India-UK DTAA.

11.5 That the DRP/ assessing officer erred on facts and in law in not appreciating that the said services provided by Steria France does not 'make available' technical knowledge, experience, or skill to the appellant, in order to be taxed as FTS in terms of Paragraph 7 of the Protocol read with Article 13 of the India-UK DTAA.

11.6 Without prejudice, the DRP / assessing officer erred on facts and in law in not appreciating that the said transaction could not be held as FTS in terms of performance rule in terms of Paragraph 7 of the Protocol read with Article 13(5) of India _ Israel DTAA and Article 12(5) of the India - Finland DTAA.

11.7 That the DRP / assessing officer erred on facts and in law in not appreciating that there was no involvement of use of technology/ technical services and the said services were provided through telephone, fax, email, etc., without any visit to India by the personnel of Steria France.

11.8 That the DRP / assessing officer erred on facts and in law in not appreciating that since the payments made to Steria France were not in the nature of FTS and accordingly, not chargeable to tax in India, therefore, the appellant was not liable to obtain certificate under section 195 of the Act for lower or no deduction of tax at source.

<u>Disallowance under section 40(a)(i) of the Act</u>

12. That the DRP/ assessing officer erred on facts and in law in making disallowance of payment made to Steria France, aggregating to a sum of Rs.l 0,01,97,482, under section 40(a)(i) of the Act, for non-deduction of taxes at source under the provisions of section 195 of the Act, on purchase of computer software licenses.

12.1 That the DRP/assessing officer erred on facts and in law in failing to appreciate that payment for purchase of software made outside India was not chargeable to tax under the provisions of the Act read with the overriding provisions of the India-France DTAA and therefore, there was no default in not deducting tax at source.

12.2 Without prejudice to the above, the the DRP/ assessing officer has erred in law and on facts in not appreciating that the disallowance provisions under section 40(a)(i) of the Act are applicable only in relation to amounts 'payable' as at March 31 and not in relation to amounts 'paid' during the year.

12.3 Further without prejudice to the above, the DRP / assessing officer

further failed to appreciate that disallowance under section 40(a)(i) of the Act was, in any case, not warranted, since non-deduction of tax was on account of bona fide view taken by the appellant.

13. That the assessing officer has erredon facts and in law by not allowing credit of Tax Deducted at Source ("TDS') to the extent of Rs. 6,81,000/-.

14. That the assessing officer erred on facts and in law in levying excess interest under section 234B of the Act."

91. The assessee has raised an additional ground of appeal stating that

on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore is liable to be quashed.

92. This is identical to the ground raised in assessment year 2012 – 13 and 2013 – 14. For all those years, we admitted this ground and dismissed it following the order of the coordinate bench in assessee's own case for assessment year 2015 – 16. Therefore, for similar reasons we admit this ground and dismiss it accordingly.

93. The ground number 1 of the appeal is general in nature, which covers the additions made by the learned assessing officer in general. The specific issues raised by assessee in other grounds would cover this ground. Therefore, this ground is dismissed, as it is general in nature.

94. The only dispute in the transfer pricing adjustment is with respect to the arm's-length price of the IT software services having the international transaction value of ₹ 2,986,940,932/– which is benchmarked by the assessee adopting the Transactional Net Margin Method as the Most Appropriate Method Selecting the Profit Level Indicator of Operating Profit/Total Cost of eight comparable companies, whose Arithmetic mean on weighted average basis taking multiple year data was found to be 12.76% whereas the margin of the appellant was 18.64%, assessee submitted that its international transaction of provision of IT services is at arm's-length.

95. The learned transfer-pricing officer disturbed the comparability analysis of the assessee and selected 20 comparable companies whose profit level indicator of OP/OC was 30.66 % and proposed an adjustment of ₹ 302,750,765/- as per order passed u/s 92CA (3) of The Income Tax Act on 16 October 2017.

96. The learned assessing officer passed a draft assessment order wherein the above transfer pricing adjustment was included. Over and above the learned assessing officer made the following adjustment/ addition/disallowance to the returned income of the assessee:-

a. disallowance of deduction u/s 10 AA of ₹ 1 536691/–
b. disallowance of payment of management and service fees to group company amounting to ₹ 206,044,024/–
c. disallowance of Mark to market losses on forward contracts of ₹ 318,349,259
d. disallowance u/s 40 (a) (ia) of ₹ 110,744,356

97. Thus the draft assessment order determined the total income of the assessee at ₹ 204,49,91,225/–. Against which the assessee preferred an objection before the learned Dispute Resolution Panel and consequent to that the learned Assessing Officer passed the final assessment order on 18th of July 2018 detailing the following adjustment/ additions or disallowances :-

(i) adjustment on account of the transfer pricing provisions with respect to the arm's-length price of the software services of ₹ 295,000,656
(ii) disallowance of deduction u/s 10 AA of the act of ₹ 1,536,691
(iii) disallowance/addition on account of payment of management and services fees to group company ₹ 206,044,024/–
(iv) Disallowance u/s 40 (a) (ia) of ₹ 100,197,482.

98. Ground number 2 – 9 of the appeal is with respect to the challenge to the transfer pricing adjustment of ₹ 295,000,656/- of the international transaction of provision of Software Development Services. After the direction of the learned Dispute Resolution Panel following comparable remains.

S.No.	Name of the Company	OP/OC (%)
1.	ABM Knowledgeware Ltd	39.42%
2.	Akshay Software Technologies Ltd	0.15%
3.	CG VAK Software & Exports Ltd	8.94%
4.	Cigniti Technologies Ltd	27.39%
5.	Comviva Technologies Ltd	18.95%
6.	CybercomDatamatcis Information Solutions Ltd	87.03%
7.	Larsen & Toubro Infotech Ltd (seg)	34.09%
8.	Mindtree Ltd	20.46%
9.	Persistent Systems Ltd	37.56%
10.	Sasken Technologies Ltd	33.20%
11.	Tata Elxsi Ltd	19.77%
12.	Tata Technologies Ltd	32.86%
13.	Technosoft Engineering Projects	17.38%
14.	Thirdware Solution Ltd	50.45%
15.	Wipro Ltd	27.67%
	Average	30.35%

99. The mainly assessee challenges the inclusion of the following comparables:-

i. ABM Knowledge ware Ltd

ii. Wipro Ltd

iii. Third ware Solution Limited

iv. Mindtree Limited

v. Tata Technologies Limited

vi. Persistent System

vii. Sasken Technologies Ltd (Seg.)

viii. Cybercom Datamatics Information Solution Ltd

ix. Larsen & Toubro Infotech (seg)

100. In case of ABM Knowledge ware Ltd; he submitted that company fails the export sales filter. The TPO has applied the filter of rejecting the companies where export income is less than 75% of total sales. In this regard, it is submitted that ABM Knowledge ware has nil income from exports. (Page 12 of annual report paper book). Accordingly, it is submitted that the company does not satisfy the filters applied by the TPO and therefore ought to be excluded from the set of comparable companies.

101. The learned departmental representative submitted that no such submission was made before the lower authorities objecting that it fails the export filter. He further submitted that the assessee challenges based on only in two lines in annual report that there is only domestic turnover during the year. At the same time annual report contains how foreign exchanges are treated in its accounts therefore there appears to be a mismatch. In profit and loss account there is no further division. Since the transfer-pricing officer has applied export turnover filter and this company has passed the filter it means that data uploaded there pertaining to the export turnover is correct.

102. We have carefully considered the rival contention and perused the orders of the lower authorities. The assessee has submitted the standalone balance sheet of the above company at page number 1 – 24 of the paper book. In the present case when the CIT DR himself says that there is an inconsistency in data whether the above comparable company meets the export filter applied by the learned transfer pricing officer or not is not clear, on such inconsistent data comparability analysis cannot be made. It is further seen that there is no export turnover as per the annual report available before us of the above company for the relevant financial year. In view of this, we direct the learned transfer-pricing officer to exclude this comparable from the comparability analysis.

103. With respect to Wipro Limited ld AR submitted that Wipro Ltd is engaged in provision of IT Services, including Business Process Outsourcing (BPO) services and IT Products (Pg 113 of annual report). It is further submitted that segmental financial statements at standalone level are not available in the case of this company. At page 143 of the annual report it is clearly stated that the segmental accounts have been prepared at consolidated level. It is further submitted that even within the IT services segment (consolidated), the company has included revenue from BPO services (Pg 176 of annual report). In view of the aforesaid, it is respectfully submitted that this company cannot be regarded as comparable for the purpose of benchmarking analysis. It was stated that Wipro Ltd. owns significant intangibles in the form of brand, trademarks, patents and

technical know-how etc. and therefore, the company cannot be regarded as comparable for the purpose of benchmarking analysis. At page 44 of the annual report, the company has stated that during the year it has applied for 118 new patents and was granted 18 new patents against its existing patent applications. Further, the company has separately capitalized patents, trademarks and technical knowhow in its balance sheet (Pg 123 of the annual report).Therefore it needs to be excluded.

104. The learned departmental representative submitted that appellant is objected to being functionally dissimilar and owning substantial intangibles. He submitted that it was not challenge before the learned dispute resolution panel. He further stated that it has been challenged year for the first time and therefore it should not be considered. He otherwise submitted that it might also be set aside so that decision of the lower authorities is available and ITA T does not become the first authority to decide it.

105. We have carefully considered the rival contention and perused the orders of the lower authorities. For comparability analysis, only the standalone annual report of the comparable companies required to be verified. The annual accounts of this comparable are furnished by the assessee at page number 324 – 361. It is considered. Merely because assessee has not challenged the same before the learned dispute resolution panel, when it is not the comparable selected by the assessee, we are of the view that it can be challenged by the assessee before us. It is not the case that assessee is changing its stand from his own documents. On looking at the annual accounts of this comparable company at note number 14 it is that intangible assets on goodwill. This company also on technical know-how and patents trademarks and rights of ₹ 3535 million. The assessee does not have any such advantage of the assets employed. Therefore, there is a basic difference between the assets employed by the assessee as well as the comparable company for earning revenue. Further, the comparable company has revenue from operation of ₹ 387,651 million. On these two factors, itself this comparable company i.e. Wipro deserves to be

excluded from the comparability analysis. Hence, we direct the learned transfer-pricing officer to exclude it.

106. In case of Third ware Solutions It is submitted that as per the annual report of this company, the entire turnover of Rs 20,675.74 lakhs has been derived from sale of products.

107. The learned departmental representative vehemently supported the orders of the lower authorities he referred to page number 6-7 of the direction of the learned Dispute Resolution Panel wherein it has been specifically stated that company is engaged in the two business segments namely information technology and information technology enabled services. Functional similarity has already been shown if segment information is available then such comparable is required to be retained.

108. We have carefully considered the rival contention and perused the standalone financial statement of the above comparable company placed at page number 202 – 323 of the paper book. It is apparent that in statement of profit and loss account placed at page number two of the annual accounts in XBRL format that company has disclosed revenue from sale of products of ₹ 20,675 lakhs. However looking at the foot not placed in the sub- classification and notes on income and expenditure it shows that it is an export of service of Rs 20,194 lakhs, software services from local unit of 414 lakhs and revenue from subscription and training of 59.32 lakhs and sale of license of 7.98 lakhs. However, there is a basic discrepancy/ anomaly in the statement of profit and loss account and footnote given there under. Where there are inconsistencies in the annual accounts, itself of a comparable company from which it is not possible to determine whether the it has revenue from sale of products or revenue from sale of services, especially when this comparable is selected by the TPO, we are afraid that such a comparable can be retained for the comparability analysis. Therefore, for the reason of inconsistency in annual accounts of Third ware Solutions Limited , we direct the learned transfer-pricing officer to exclude this comparable from the comparability analysis.

109. With respect to Mind Tree Limited ld AR submitted that this company is functionally different as it is engaged in development and sale of software products and only intangibles. It is submitted that the company is undertaking a wide range of activities in the domain of analytics and information management, application development and maintenance, business process management, business technology consulting, cloud, digital business's, independent testing, infrastructure management services, mobility, product engineering and SAP services (Pg 76 of annual report). At page 30 of the annual report it is stated that the CTO of the company leads the technology thrust through platforms and products for non-linear revenue growth. Also, at page 31 of the annual report, the company has described various proprietary platforms and products such as Vmunify, VMware etc. under the heading non linear products and platforms. Accordingly, it is submitted that the company develops, owns and exploits platforms and products and accordingly cannot be regarded as an appropriate comparable for benchmarking the international transactions undertaken by the appellant, a captive service provider. Thus it needs to be excluded.

110. The learned departmental representative submitted that assessee itself is taken this company is functionally comparable in its transfer pricing study report and assessee has not excited any specific reason as to why its TP study report with respect to this comparable is wrong. It was further stated that the learned that transfer pricing officer and dispute resolution panel has considered all the arguments of the assessee and has categorically held that it is not engaged in the sale of products. None of the annual accounts also shows that this company is engaged in any sale of products. Therefore, the learned authorised representative and assessee has failed to show that this company is functionally not comparable with the assessee.

111. We have carefully considered rival contentions and orders of TPO/ Directions of DRP. This comparable has been considered by us in the appeal of the assessee for assessment year 2013 – 14 wherein we have held that mind tree Ltd is a functionally comparable to the functions

performed by the assessee. Further, it is not engaged in any sale of products on perusal of the standalone financial statements, we do not find any such a reference in its revenue. This too is the finding of the ld DRP. In the standalone balance sheet, also nothing was pointed out before us to show that it is engaged in the sale of products. Learned dispute resolution panel at its direction at page number 5-6 has also categorically held that it is functionally similar. With respect to the intangibles, it is stated that it includes only the software, which are used for the purposes of the business of the company. The learned dispute resolution panel has also categorically held that functions performed, assets employed and risks assumed does not have any the similarities. No infirmity was pointed out in the direction of ld DRP with reference to standalone annual report of the comparable. Therefore, we confirm the order of the learned DRP & TPO for including the Mind tree Ltd as comparable company.

112. In case of Tata Technologies Limited it was submitted that as per the related party schedule contained in the audited financial statements, the company has entered into the following transactions with its related parties which is 87.68% of the its revenue:

Particulars	Amount (in Rs Crore)	Pg No. of AR
Purchase of products	0.16	
Sale of products	47.68	
Services received	29.54	
Services rendered	699.65	
Total RPT	777.03	

Particulars	Amount (in Rs Crore)	Pg No. of AR
Sales	886.18	
RPT/Sales	87.68 %	

In view of the previously mentioned, since the company fails the RPT filter i.e. the related party transactions of the company are more than 25% of its revenue, the company ought to be excluded from the set of final comparable companies.

113. The learned departmental representative submitted that appellant has challenged that in that the RPT filter fails. He submitted that certain challenges been made for the first time and therefore same should not be entertained however he stated that if the RPT filter fails then the matter back to the learned transfer pricing officer to examine this.

114. We have carefully considered the rival contention and perused the standalone financial statement submitted before us by the learned that authorised representative in the paper book at page number 169 – 201. The learned authorised representative has also extracted certain financial information from the annual accounts, which shows that according to him the related party transactions in proportion to the sale is 87.68% in the above company. On perusal of the learned transfer pricing officers' order, we also do not find that what filter it is applied by him. However, in that TP order he has stated that in the show cause notice dated 15/9/2017 in para number 8 such filters has been discussed. The copy of the show cause notice was also not shown to have by the learned departmental representative or by assessee. Therefore, in the interest of justice we set aside this comparable to the file of the learned transfer pricing officer to examine that how this company cross the export turnover filter used by him. He is also directed to examine from the standalone financial

statement of this comparable company whether the claim of the assessee that it does not cross the export filter. If the claim of the assessee is found correct, Tata Technologies may be excluded.

115. In case of Persistent Systems, limited ld AR submitted that Persistent Systems Ltd. is engaged in the business of development and sale of software products and therefore, cannot be regarded as comparable to the assessee, a routine software service provider. At page 27 (Pg 192 of Annual Report paper book) it is stated that the company specializes in building software products and the business of the company is inter-alia focused on products. Also, at page 105 (Pg 270 of annual report paper book) of the annual report it is stated that the company derives significant portion of its revenue from export of software services and products (IP based software products). It is further submitted that at Page 164 & 183 of the Annual report it is stated that the company specializes in software products, services and technology innovations. It is further submitted that segmental profitability of this company from provision of software services is not available in the annual report and accordingly, Persistent Systems Ltd cannot be regarded as an appropriate comparable for the purpose of benchmarking analysis.

116. The learned departmental representative vehemently supported the order of the learned dispute resolution panel and the learned transfer-pricing officer and submitted that they have discussed the functionality of this company in detail and therefore this company is functionally comparable.

117. We have carefully considered the rival contentions and perused the standalone financial statement of the above company placed in the paper book at page number 110 – 153 (annual report page number 156 – 198). In its revenue stream as per page no 166 of Standalone Financial statements its revenue recognition shows that:-

> "Income from software services
>
> Revenue from time and material engagements is recognized on time proportion basis as and when the services are rendered in accordance with the terms of the contracts with customers. In case of fixed price

contracts, revenue is recognized based on the milestones achieved as specified in the contracts, on proportionate completion basis. Revenue from royalty is recognized in accordance with the terms of the relevant agreements. Revenue from maintenance contracts is recognized on a pro-rata basis over the period of the contract. Unbilled revenue represents revenue recognized in relation to work done on time and material projects and fixed price projects until the balance sheet date for which billing has not taken place. Unearned revenue represents the billing in respect of contracts for which the revenue is not recognized. The Company collects service tax and value added taxes (VAT) on behalf of the government and, therefore, these are not economic benefits flowing to the Company. Hence, they are excluded from revenue."

118. At note no 21 Page No 181 of Standalone Financial statements it has only one stream of Revenue i.e. Sale of Software services as under

21. Revenue from operations (net) (In ` Million) For the year ended March 31, 2014 March 31, 2013 Sale of software services 11,841.16 9,967.51

Therefore, we do not agree with the arguments of the assessee, and hold that Persistent System Limited does not sale products, but it is engaged only in sale of software services. No other reasons were given to us for its exclusion; hence, we are of the view that Persistent system has rightly been included as Comparable company by ld DRP and TPO.

119. In case of sasken Communications Limited, it is submitted that this company owns IPR, numerous patents and has branded products and accordingly, cannot be compared with a captive service provider. It is further submitted that the company is engaged in significant R&D activity leading to creation of IPRs and consequently higher profitability. It is

submitted that the TPO has considered the software services segment as comparable for the purpose of benchmarking analysis. (Segmental information at pg 50 of the annual report)However, it is submitted that the information required for allocation of common expenses is not available in the public domain. Accordingly, it is submitted that in the absence of availability of appropriate allocation keys, this company cannot be regarded as an appropriate comparable.

120. The learned departmental representative vehemently stated that this comparable has been selected by the assessee in its transfer pricing study report. Therefore, according to the assessee itself it is functionally comparable. Further, the argument of the intangible assets owned by that company has been taken up for the first time. The argument of the segment allocation keys not known is also not relevant. He submitted that it is not the case of the assessee that segmental information given by that comparable company is not in accordance with the relevant rules of disclosure by the government. He further submitted that the margin selected by the assessee earlier was based on multiple year data and when transfer-pricing officer adopted single year data which is not disputed by the assessee, this company becomes functionally dissimilar for assessee.

121. We have carefully considered the rival contentions and standalone annual financial statements (abridged) submitted by the assessee. It requires to be noted First that this comparable company was selected by the assessee accepting segmental information given in the annual accounts taking the multiple year data and considering the weighted average PLI of the comparable of OP/OC at the rate 7.45%. Subsequently, when the transfer-pricing officer held that multiple year data couldn't be allowed, the same segment of the same comparable companies profit level indicator , taken on single year data basis now reached at 33.20%. Now it is claimed by the assessee that this comparable requires to be excluded. Before us, the assessee has not submitted stand alone complete financial statement of the comparable company. Assessee has submitted the consolidated annual report of the company, which included

abridged financial statement of the comparable. In absence of these standalone financial statement of the comparable company made available before us, we are not in a position to state that on what basis assessee held it 1st to be comparable and when found that the profit level indicator of that company of single year data basis is quite high, challenging it, on the basis of its functional dissimilarity. Even on looking at its abridged financial statements, it does not show that this comparable company on standalone basis owns any intellectual property rights and has numerous patents as claimed by the assessee. Even significant research and development activity can also not be deciphered. With respect to the segmental information and the allocation expenses , we find that the comparable company has followed rules of Ministry of corporate affairs and accounting standard 17 for giving the segment information in the manner it is required. The argument of the assessee that allocation keys are not available is devoid of any merit as well as not in accordance with the provisions of the companies act and accounting standards mandated by the Ministry of corporate affairs. Further, the learned authorised representative has stated that there is no estoppel under the income tax proceedings seeking exclusion of this comparable company, even though the same has not been disputed in the earlier years order was taken as a comparable company in the TP study itself. Firstly, we hold that it is the filter applied on database that would determine the comparable is functionally comparable or not. Assessee as adopted TNMM as MAM. There is no denial on this principle but it is for the assessee to prove that under which accepts/reject metrics of the comparability analysis, this comparable company was included and how it passed at that particular filter then and how it fails now. However, as the complete annual financial statement on standalone basis of the comparable company is not available, we direct the assessee, as it is the comparable selected by assessee, to submit the standalone financial statement of the comparable company and direct the learned Transfer Pricing Officer to deal with the argument of the assessee, that it has a significant intangibles and decide inclusion or otherwise of this

comparable. Accordingly, we set aside this examination, as relevant data are not produced before us, to the learned transfer-pricing officer.

122. In case of Caybercom Datamatcis Pvt Ltd ld AR submitted that as per the annual report, the company acts as consultants and advisors on information / internet system and surveyors of information services (Pg _____ of annual report paper book). Further, the company is engaged in the business of development, testing, implementation, migration of home grown and other applications, marketing and manufacturing of various information and technology products and services. Accordingly, it is submitted that the nature of services provided by this company is different from the software services provided by the appellant and therefore, this company cannot be regarded as an appropriate comparable for benchmarking analysis. However, the TPO has considered this company as comparable on the basis that under TNMM only broad comparability is to be seen. It is submitted that the aforesaid contention of the TPO is contrary to the findings of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt Ltd vs CIT 377 ITR 533 wherein the Hon'ble Court held that selection of TNMM cannot be a consideration for dilution of comparability standards. To the same effect is the decision of the Hon'ble Delhi High Court in the case of Avenue Asia Advisors Pvt Ltd (ITA No. 350/2016) wherein the Hon'ble Court held that the principles governing the selection of comparables remains the same irrespective of the method applied. Following the decision of the Hon'ble High Court, the Hon'ble Delhi Bench of the Tribunal in the case of Li & Fung India Pvt Ltd (ITA No. 7549/Del/2017)rejected the contention of the Revenue that broad functionality would suffice in case TNMM is selected as the most appropriate method.

123. The learned departmental representative vehemently relied on the order of the learned Dispute Resolution Panel and TPO.

124. We have carefully considered rival arguments, orders of TPO, direction of DRP. This comparable was selected by the learned transfer-pricing officer, which has the profit level indicator of 87.03%. The assessee has

furnished standalone financial statement of this company at page number 25 – 45 of the paper book dated 9 June 2020. The revenue stream shown by the profit and loss account is sale of services having gross turnover of Rs 14.69 crores. The revenue recognition is also shown that it earns its revenue from technical and software services. The assessee has referred to the general note number 1A wherein the assessee is described as consultant and advisor however, it is deriving its income from sale of services and the revenue recognition policy of the company also supports that. Further, the learned Dispute Resolution Panel also noted note number 23 wherein specifically it is mentioned that the principal business of the companies providing technical and software services only. In view of this, we do not find any dissimilarity in the functions of the assessee compared to this comparable company. Hence, the same is correctly included in the comparability analysis by the lower authorities.

125. In case of Larsen & Toubro InfoTech Limited he submitted that company enjoys the benefits associated with the brand 'Larsen & Toubro' and therefore cannot be regarded as comparable to the appellant, a captive service provider. In the annual report, the company has stated that the brand of the company has been increasing across the globe (Pg _____of annual report paper book). It is submitted that the TPO has considered Industrial Cluster Segment as comparable for the purpose of benchmarking analysis. However, it is submitted that the information required for allocation of common expenses is not available in the public domain. Accordingly, it is submitted that in the absence of availability of appropriate allocation keys, this company cannot be regarded as an appropriate comparable. It is submitted that the company is engaged in provision of services as well as sale of products. At page S-1227 (Pg _____of annual report paper book) of the annual report it is stated that the company won awards for innovative products like Sapphire and Campus Next. Further, the company has recorded a sum of Rs 54.82 crores towards cost of bought out items for resale, which substantiates the contention of the appellant that the company is engaged in sale of

software products (pg _____ of annual report paper book). It is further submitted that the company owns significant intangibles in the form of software and business rights. Accordingly, it is submitted that for this reason too, this company cannot be regarded as an appropriate comparable for undertaking benchmarking analysis. (Pg _____of annual report paper book) (Pg S-1245 of the Annual report) It is submitted that the TPO has considered the Industrial Cluster segment of this company for the purpose of benchmarking analysis. However, it is submitted that the segmental information with respect to sale of services and sale of products is not available in the annual report of the company. Accordingly, it is submitted that since the company is engaged in sale of software products, it cannot be regarded as an appropriate comparable to the appellant, a captive software service provider. It is submitted that during the relevant financial year the company transferred its Product Engineering Services business to a group company namely L&T Technology Service Ltd. for a consideration of 489.57 crores. (Pg S-1259 of the annual report; Pg ___ of annual report paper book) It is submitted that the Hon'ble Delhi Bench of the Tribunal in the case of Global Logic India Ltd (ITA No. 4740/Del/2018) directed to exclude this company from the set of comparables for AY 2014-15 on the basis that it has undertaken restructuring activity during the year and also on the basis that in the absence of allocation keys, segmental accounts of this company cannot be relied upon for the purpose of benchmarking analysis.

126. The learned departmental representative submitted that assessee has included this comparable company in its TP study report is a valid and functionally similar. The computational error is have also been rectified, segmental analysis are shown, the issues raised in here are not raised by the assessee before the lower authorities. He therefore submitted that this company is a perfect comparable to the assessee.

127. We have carefully considered the rival contentions and perused the orders of the lower authorities. Same comparable has been considered by us in this order itself wherein we have held that this comparable is correctly included by the lower authorities for the comparability analysis

of the determination of arm's-length price of the international transactions. For reasons given by us therein in this order, we hold that this comparable company has been correctly included. However, we note that for this year assessee has also challenged this comparable on one more different account, which is required to be dealt with. Assessee has stated as reason in stating that it has entered into a restructuring activity during the year as according to the financial statements, the company transferred its product engineering services business to a group company and therefore it should be excluded. The standalone financial statements are submitted before us as per page number 46 – 82 of the paper book. The assessee's reliance on pages number S1225 of the annual report wherein the directors report is available. The Directors' report says that this company has initiated and completed the transfer of its product engineering services business unit to another company effective from January 1, 2014. Therefore, it is apparent that the revenue of that division was included in the revenue of the comparable company from 1 April 2013 to 31 December 2013. On careful reading of note number AB, AD it is apparent that the details of the discontinued businesses are provided. This argument was raised by the assessee before the learned dispute resolution panel at the page number four of its direction. This argument was not at all considered by DRP. Learn a dispute resolution panel retained this comparable company. This comparable is selected by the transfer-pricing officer. Therefore it is evident that there is an extraordinary event during the mid-of the year in case of comparable company which has a material impact on profitability statement of the comparable company as there is significant amount of revenue which is required to be adjusted on account of discontinuing operations. For this reason, for assessment year 2014 – 15 we direct the learned transfer pricing officer to exclude this comparable company because of extraordinary events impacting the revenue of the segment for the impugned year. Thus L & T Infotech Limited as comparable is excluded for this year for above stated reason.

128. No other issues of the transfer pricing adjustment were raised before us and therefore ground number 2 – 9 of the appeal relating to the transfer pricing adjustment are allowed with above directions with respect to the inclusion/exclusion of the comparables.

129. Now we come to ground number 10 which is with respect to the deduction u/s 10 AA of the income tax act which was claimed by the assessee of ₹ 231,273,820 which is restricted by the learned assessing officer at ₹ 229,737,129/– the only issue is with respect to the foreign currency expenditure in the nature of telecommunication charges of RS. 115,22,112 which have not been excluded by the learned that assessing officer from the total turnover of SEZs unit for computing deduction. The claim of the assessee is that both the export turnover in total turnover held to be computed on the same basis for the purpose of computing deduction.

130. The learned that authorised representative submitted that this issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in assessee's own case for assessment year 2004 – 05 to 2011 – 12.

131. The learned departmental representative vehemently supported the order of the lower authorities.

132. On careful consideration of the issue before us, it is found that this issue has been squarely covered in favour of the assessee that the export turnover in total turnover should be taken on the similar basis for computing the deduction u/s 10 AA of the income tax act. The appellant had, during the year under consideration, claimed deduction under section 10AA of the Act aggregating to Rs.23,12,73,820 in respect of profits derived from its unit(s) – Noida SEZ 2 and SEZ 3. The said claim was supported by the report of accountant duly certified by an independent auditor in Form 56F. During the relevant previous, the appellant, in its unit(s) - Noida SEZ 2 and SEZ 3 unit, had incurred foreign currency expenditure of Telecommunication Charges amounting to Rs.1,15,22,112:

Particulars	Noida SEZ Unit 2	Noida SEZ Unit 3	Total (in INR)
Telecommunication charges	89,75,804	25,46,308	1,15,22,112
Total			**1,15,22,112**

The appellant, for computing allowable deduction under section 10AA of the Act, reduced such telecommunication charges from 'export turnover' as well as 'total turnover' of each of the units. The assessing officer, however, recomputed the deduction allowable under section 10AA of the Act from Rs.23,12,73,820 to Rs.22,97,37,129 on the ground that telecommunication charges needs to be reduced from the value of 'export turnover' but not from 'total turnover' for the purpose of computing deduction under section 10AA of the Act. The DRP, though appreciating that the issue stands covered in appellant's favour by order(s) of the Hon'ble Delhi High Court in the appellant's own case for AY(s) 2004-05 to 2011-12, dismissed the appellant's objections on the ground that Department's SLP against the order of Delhi High Court is pending before Supreme Court. Accordingly, the deduction under section 10AA of the Act was disallowed to the extent of Rs.15,36,691 in the impugned assessment order . In this regard, adjustment in deduction under section 10AA of the Act by the ld DRP/ assessing officer is incorrect as correctly relied up on by the ld AR Circular No. 4/2018 dated 14th August 2018 and decisions of the Hon'ble Supreme Court in the case of CIT v. HCL Technologies Ltd.: 404 ITR 719 and appellant's own case for assessment year(s) 2004-05 and 2005-06 wherein Department's SLP have been dismissed vide order(s) dated 04.05.2018 [Diary No. 12731/2018] and 04.09.2018 [Diary No. 11142/2018]. The d DRP also agreed that issue is squarely covered in favour of the assessee, Therefore we decide this ground in favour of the assessee directing ld AO to reduce the above sum from total turnover and recompute deduction u/s 10 AA of the act. Accordingly, Ground no 10 with all its sub grounds is allowed.

133. Ground number 11 is with respect to the disallowance of management services fees for non-deduction of tax u/s 40 (a) (i) of the act amounting to ₹ 206,044,024 incurred on account of management services fees, held to be fees for technical services on which tax deduction at source u/s 195 of the act should have been done by the assessee and therefore disallowance was made. The learned dispute resolution panel also upheld the order of the learned assessing officer holding that payment made to groupe Steria SCA France is also in the nature of fees for technical services in terms of article 13 of the India France double taxation avoidance agreement read with protocol thereto. The above finding of the learned dispute resolution panel was based on the order of the authority of the advance ruling. The above issue was challenged before the honourable High Court against the order of authority for advance ruling and honourable High Court decided this issue in favour of the assessee. The identical issue arose in the case of the assessee for certain other years wherein the coordinate bench, following the order of the honourable High Court, decided the issue in favour of the assessee holding that assessee is not required to deduct any tax at source u/s 195 of the act on management fees paid to the France entity and therefore disallowance for non-deduction of tax invoking the provisions of Section 40 (a) (i) is not sustainable. This issue is also decided by in case of the assessee for assessment year 2012 – 13 and 2013 – 14 by this order wherein the disallowance is deleted. For similar reasons given therein, we also direct the learned assessing officer to delete the above disallowance for non-deduction of tax. In view of this ground number 11 is allowed.

134. Ground number 12 along with its sub grounds is challenging the disallowance of payment made to Steria France of ₹ 100,197,482/– u/s 40 (a) (i) of the act for non-deduction of tax at source u/s 195 of the act on purchase of computer software licenses. During the course of assessment proceedings, the assessee furnished details in this regard showing payment of ₹ 100,197,482 Under the head repairs and maintenance (others) to the group company on which tax deduction at source has not been made. However, during the course of hearing before

the learned dispute resolution panel the assessee filed additional evidences, which were admitted, remand report of the assessing officer was called for and rejoinder of the assessee was also obtained. The learned dispute resolution panel in its direction at para number 2.5.2.2 held as Under:-

> "2.5.2.2 we have considered the submissions of the assessee. In its submissions, the objection in form number 35A the assessee submitted that the assessee is engaged in the business of providing information technology solutions in India and abroad for which the assessee requires various hardware and software from time to time. For the purpose, the assessee entered into an intragroup supplier agreement with its group company based in France. It sheeted with external suppliers and subscribers for centralized purchases from them in the interest of all group affiliates. The objective for undertaking centralized purchases is to bar gain competitive prices for the groups purchase requirements. Under the terms of the agreement entered by the assessee, France company purchases material such as hardware or software or services and thereafter resale within the group entities for subsidiaries local needs. Such resale, as per the agreement, is done without the rendering additional services and without adding any markup. Apropos the aforesaid agreement, the assessee has purchased certain software licenses from France company in the course of the year, which as per invoices were as Under:-
>
> Xxxxxx
>
> Xxxxxx
>
> Xxxxxxx
>
> 2.5 .2 .3 now, software is an intellectual property (IP) which can be licensed to a user. The same software can be given to any number of users. On an outright sale of an article like hardware, property in its entirety is transferred to the

purchaser to the exclusion of others, whereas, in software there is no such thing as outright sale, what is transferred is only the right to use, which may be available to many such users but the IPR still remains intact with the supplier. Copyright is not an indivisible bundle, but consist of discrete rights bundled together. Any right in respect of a copyright can be conferred because a copyright is a bundle of rights which may be divided and assigned, or restrained involved or in parts. If the entire copyright itself, an undivided part of share of the entire copyright, or rights Under a copyright in a specified geographical region has been conveyed, it would be an assignment, but when the right to use has been given it would be a license, which is nothing but a right in respect of a copyright. What is taxed as royalties is the amount received as a consideration for use or the right to use and not outright purchase of the right to use an asset. Royalty is thus a consideration, including a lump sum consideration, for the transfer of all or any right (including the granting of a license) in respect of a copyright, patent, trademark, design and model, or secret formula et cetera. In order to acquire the limited right to use the software, one does not require the copyright, one merely requires to become a lawful possessor of the computer program. The license usually gives licensee the same limited right to bona fide use which Section 52 of the Copyright act otherwise allowed to and since the granting of license involves granting of right to use the copyright, consideration for use of copyright is covered in both income tax act and DTAA. Clearly what is licensed in these transactions is the copyright and other intellectual property rights in the software along with the physical software, there is no assignment of rights, rather only the right to which use has been granted which is well covered within the definition of royalty and as long as the consideration is in respect of

specified intellectual properties, the consideration is for royalty. Besides, a software program is not a product but process that is made available by the AE and payment for license to use such computer programs is a payment for use of process, which may be secret or otherwise, and any consideration made for the use of process would amount to royalty. For the payments to be characterized as royalty, such payments have to be necessarily for the use of any property mentioned in clause (iii) of explanation 2 to Section 9 (1) (vi) of the act and the process being one of the constituent items occurring in the said definition, it can further be safely a zoomed that consideration for use of the process would result in the payment being made to be referred to as royalty.

2.5.2.4 in view of the fact that the decision in the case of DIT versus infra soft Ltd (2013) (39 taxmann.com 88) Delhi HC the jurisdictional High Court relied upon by the assessee has not been accepted by the revenue and revenue has filed an SLP against the said order of the honourable High Court before the attacks court which is pending adjudication, the AO's inference that the transaction involved is in the nature of royalty within the meaning of clause (iii) of explanation 2 to Section 9 (1) (vi) of the act, and also within the meaning of royalty as define Under article 12 of DTAA, we are in agreement with the AO that the assessee was required to withhold the tax as per law.

2.5.3 the disallowance u/s 40 (a) (ia) of the act is therefore restricted to ₹ 100,197,482/–."

135. Thus, as the addition is made by the learned assessing officer in the assessment order, the assessee is in appeal before us. The learned authorised representative submitted that:-

"The appellant is engaged in the business of providing information technology solutions in India and abroad. The appellant requires various hardware(s) and software(s),

from time to time. In order to meet such requirements, in a cost effective mechanism, the appellant had entered into an Intra-Group Supplier Agreement ("the Agreement") with Steria France, a Partnership Limited by Shares, incorporated under the laws of France.

Steria France had negotiated with external suppliers and subscribes centralized purchases from them, in the interest of all its group affiliates. The objective for undertaking centralized purchases is to bargain competitive prices for the Steria Group's purchase requirements.

Under the terms of the Agreement entered by the appellant, Steria France would purchase material (hardware or software) or services and thereafter resale within the Group entities for subsidiaries' local needs. Such resale, as per the Agreement, is done without rendering additional services and without adding any markup.

Apropos the aforesaid Agreement, the appellant has purchased certain software licenses from Steria France in the course of the year. The licenses, as per the invoice, are as under:

- Paulo Alto & Wildfire -Software License charge
- Messaging 360 One
- Call Windows
- Antivirus + Tactem
- IBM License cost
- Active Directory costs
- Microsoft Maintenance
- One IT Catalogue
- Desktop Services SCCM

The aforesaid payments, not being chargeable to tax in terms of section 9(1)(vi) of the Act read with Article 13 of the India France DTAA, were made without deduction of tax at source.

During the course of assessment proceedings, the assessing officer, vide questionnaire dated 28.09.2017, directed the assessee to submit party wise detail and information of TDS compliance of 'other expenses' reflected in Note 16 of the audited Profit and Loss account. In compliance thereto, the assessee submitted the requisite details vide letters dated 30.10.2017 and 10.11.2017.

The information submitted in respect of TDS compliance was discussed in the hearing on 10.11.2017 and no further query was raised by the assessing officer. On that day, the assessment proceedings were treated as concluded. Thereafter, the assessing officer proceeded to pass the draft assessment order dated 17.11.2017, without providing due opportunity of being heard to the assessee. In the said order, various payments, including, inter alia, the aforesaid payment of IT Costs was disallowed by the assessing officer under section 40(a)(i) of the Act on account of non-deduction of tax at source.

Accordingly, the appellant company, vide application dated 15.03.2018, furnished the following documents by way of additional evidences before the DRP:

- Agreement entered into between Steria France and the appellant effective w.e.f. 01.01.2009

- Invoices raised on Steria India Ltd by Groupe Steria SCA totaling to Rs.10,01,97,482 including summary of invoices
- Tax residency certificate issued to Groupe Steria SCA for calendar years 2013 and 2014 by French tax authorities

The assessing officer, vide remand report dated 05.04.2018, held that the licenses claimed to have been purchased by the appellant falls in the ambit of definition of 'Royalty' as provided in Explanation 2 below the clause (vi) of section 9(1) of the Act and the appellant was required to withhold tax on the payments made thereon. In doing so, the assessing officer relied on the decision of Hon'ble Karnataka High Court in the case of CIT vs. Samsung Electronics Co. Ltd.: 345 ITR 494. The assessing officer, though acknowledging the fact that the issue was covered in appellant's favour by decisions of various High Courts, held that the issue is pending for consideration in various SLP's pending before the Apex Court.

After considering the appellant's rejoinder dated 17.04.2018, the DRP upheld the aforesaid disallowance on the ground that Department's SLP against favorable decision of the jurisdictional Delhi High Court in the case of DIT v. Infrasoft Ltd.: 39 taxmann.com 88 is pending before the Apex Court.

The aforesaid disallowance made the assessing officer/DRP is unsustainable and unwarranted for the reasons elaborated hereunder:

- The payments do not get covered in terms of Article 13 of India France DTAA, which deals with taxability of royalty

paid by an Indian resident to French resident. The definition of royalty under the India-France DTAA is much narrower in scope than the definition under the Act.

- In the present case, the software purchased by the appellant are standardized and not customized products and in terms of the contracts with the external suppliers/ Steria France of such software. The appellant acquires a non-exclusive, non-transferable right to distribute the software and is prohibited from copying, modifying or further development of the software. Therefore, the purchase of software by the appellant in terms of the Agreement only results in the transfer of a copyrighted *article*, rather than a copyright *right* and payment received for the same would, on that note, in our respectful submission would not be in the nature of royalty in the hands of Steria France.

- Reliance is placed on the following decisions of the jurisdictional Delhi High Court, wherein it has been held that software purchased and sold without obtaining any right to exploit the copyright in such literary work, which remains with the Licensor, payment made there against is not in the nature of royalty:
- DIT v. Infrasoft Ltd.: 220 Taxman 274 - It may be pertinent to note that the Delhi High Court in this decision has distinguished the ratio decidendi laid down by the Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd. (supra). Accordingly, the reliance placed by the assessing officer on the decision of Samsung Electronics (supra) is misplaced.
- PCIT vs. M. Tech India P. Ltd.: 381 ITR 31
- Ericsson A.B. vs. DIT: 343 ITR 470
- Alcatel Lucent Canada vs. CIT: 372 ITR 476

- CIT vs. Dynamic Vertical Software India (P) Ltd.: 332 ITR 222
- DIT v. Nokia Network, OY: 253 CTR 417

- The aforesaid distinction between copyright and copyrighted article has also been approved by the Hon'ble Tribunal in ITA No. 6687/Del/2019 vide order dated 01.05.2020, in appellant's own case for assessment year 2015-16, wherein disallowance made on identical facts was deleted. The pertinent findings recorded by the Tribunal are reproduced below:

"5.17 We have also perused the Intra- Group Supplier Agreement entered into between Steria France and the assessee we find that it is provided that the hardware and software purchases by Steria France is re-sold to the assessee without additional services and without any markup. Thus, there is no transfer of any right in respect of the copy of right and it is a case of mere transfer of a copy of righted article. The payment is in the purchase of license or a copy righted article and it represents only the purchase price and the same cannot be considered as royalty either under the Act or under the provisions of DTAA. It will be worthwhile to extract the following observations of the Hon'ble Delhi High Court from the judgment in the case of DIT vs. Infra Soft Ltd. (Del) (supra) at this juncture:

xxxxxx

5.18 Accordingly, respectfully following the ratio of the judgment of the Hon'ble Delhi High Court in DIT vs. Infra Soft Ltd (supra), we are of the considered the opinion that tax was not required to be deducted at source in respect of the payment made to Steria France for the purchase of computer software license/s and therefore, in view of the

above cited judgment we direct the AO/TPO to delete the disallowance. (emphasis supplied)

In view of the position taken by the Hon'ble Tribunal in appellant's own case for the other assessment year and the legal position laid down by the jurisdictional Delhi High Court, it is respectfully submitted that since the payments made under the agreement were to acquire software products or purchase of copyrighted article and not to exploit/use the copyright itself, the said payments did not fall within the meaning of royalty under Article 13 of the India France DTAA. Therefore, the disallowance made by the DRP/ assessing officer in terms of provisions of section 40(a)(i) of the Act is not warranted."

136. The learned authorised representative therefore submitted that issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in case of decision of DIT versus infra soft Ltd (supra).

137. The learned departmental representative vehemently supported the order of the learned AO and the learned dispute resolution panel.

138. We have carefully considered the rival contention and perused the orders of the lower authorities. The learned dispute resolution panel has categorically held that as the revenue has not accepted the decision of the honourable Delhi High Court in case of DIT versus infra soft Ltd (2013) 39 taxmann.com 88) the decision of the honourable jurisdictional High Court and therefore the addition made by the learned assessing officer with respect to the disallowance for non-deduction of tax on a sum of ₹ 100,197,482/– was confirmed. Therefore, there is no dispute that the issue is covered by the decision of the honourable jurisdictional High Court in case of infra soft Ltd (supra). Therefore, we hold that the assessee is not required to deduct tax at source on a sum of ₹ 100,197,482/– paid by the assessee to its group entity based in France

without deduction of tax at source. In view of this ground number 12 of the appeal is allowed.

139. Ground no 13 In the income tax computation form attached with the impugned final assessment order, TDS credit of Rs.10,19,36,626 is allowed to the appellant as against credit of Rs.10,26,17,626 claimed by the appellant in income tax return (also reflecting on Form 26AS), therefore resulting in short credit of Rs.6,81,000.

140. The learned authorised representative submitted that assessing officer be directed to grant appropriate credit of TDS to the appellant.

141. The learned departmental representative submitted that if the assessee is eligible for the credit supported with proper credit watchers/certificates, it can be verified by the learned assessing officer if produced by the assessee before him and found in order, the credit would be given.

142. We have carefully considered the rival contentions. The assessee is directed to produce the tax deduction at source certificates before the assessing officer. The learned assessing officer if found the same to be in order and in accordance with the law then credit for the same be allowed to the assessee. Accordingly, ground number 13 of the appeal is allowed with above direction.

143. Ground number 14 of the appeal is with respect of the levy of the excess interest u/s 234B of the act. This ground of appeal is consequential in nature, therefore same is dismissed.

144. In the result ITA number 5745/del/2018 for assessment year 2014 – 15 filed by the assessee is partly allowed.

145. Accordingly, all the three appeals filed by the assessee are disposed of by this order.

146. Meanwhile after the date of hearing of these appeals, the stay was granted to the assessee earlier was expiring and therefore assessee preferred stay petitions for extension of the above stay. As the appeal of the assessee has been disposed of by this order, the stay petition is filed by the assessee for all these three years become infructuous and therefore by this order, all the three stay petitions for all the three above assessment years are dismissed.

147. In the result appeal of the assessee as well as stay petitions filed are disposed of by this order.

Order pronounced in the open court on 28th September 2020.

-Sd/-	-Sd/-
(KULDIP SINGH) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated: 28/09/2020.

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi