

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

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| IT(TP)A No.411/Bang/2016 |
| Assessment Year: 2011-12 |

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| Maxim India Integrated Circuit Design Pvt. Ltd. 4 th Floor, Tower B., Commercio @ Mantri Survey No.51/2, 51/3, Devarabisanahalli, Survey No.39/5, Kariyammana Agrahara Village Varthur Hobli Bangalore-103 PAN NO : AACCM9437E | Vs. | Deputy Commissioner of Income-tax Circle-4(1)(2) Bangalore |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri Padam Chand Khincha, A.R. |
| Respondent by | : | Shri Rajesh Kumar Jha, D.R. |

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| Date of Hearing | : | 30.12.2020 |
| Date of Pronouncement | : | 05.01.2021 |

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the assessment order dated 31.12.2015 passed by the A.O. u/s 143(3) r.w.s 144C of the Act for assessment year 2011-12 in pursuance of directions given by Ld. Dispute Resolution Panel (DRP).

2. The grounds and additional grounds urged by the assessee give rise to the following issues:-

- a) Addition relating to transfer pricing adjustment
- b) Disallowance of interest paid on ECB loans.

- c) Additional depreciation claimed on computers
- d) Deduction u/s 10A of the Income-tax Act, 1961 ['the Act' for short] in respect of disallowance of interest on ECB loans and additional depreciation.

3. The assessee has filed a letter dated 9.11.2020, wherein it is stated that the ground No.7 relating to claim of additional depreciation is being withdrawn. Accordingly, the ground relating to the above said issue are dismissed as withdrawn.

4. The facts relating to the case are stated in brief. The assessee herein is a subsidiary of M/s. Maxim International Holdings Inc., USA. The assessee is registered as 100% export-oriented unit in India. Hence it was claiming deduction u/s 10A of the Act. It has got 3 distinct operating divisions, viz., Software development services, ITES services & Marketing services. Since the assessee had entered into international transactions with its Associated Enterprises (AEs), the AO referred the matter of determination of Arms Length Price (ALP) of the international transactions to the Transfer Pricing Officer (TPO).

5. The first issue is relating to the addition made on account of transfer pricing adjustment made by the A.O. The transfer pricing adjustment relates to the Software development segment of the assessee. The turnover of the assessee from this segment for assessment year under consideration is Rs.25.66 crores. The assessee followed TNM method as most appropriate method and profit level indicator (PLI) was taken as Operating profit/Operating revenue. The assessee declared margin of 10.83%. According to the Transfer pricing study conducted by the assessee, its international transactions in respect of Software development segment were at arms length.

6. The TPO rejected transfer pricing study conducted by the assessee and selected following 13 companies:

| <i>Sl. No.</i> | <i>Name</i> | <i>Sales</i> | <i>Cost</i> | <i>PLI</i> |
|----------------|--|----------------------|------------------------|----------------------|
| 1 | <i>Acropetal Technologies Ltd. (seg)</i> | <i>81,40,16,893</i> | <i>61,67,54,876</i> | <i>31.98%</i> |
| 2 | <i>e-zest solutions (from Capitaline)</i> | <i>11,28,66,098</i> | <i>9,32,55,341</i> | <i>21.03%</i> |
| 3 | <i>E-Infochips Ltd.</i> | <i>26,03,84,251</i> | <i>167,64,47,527</i> | <i>56.44%</i> |
| 4 | <i>Evoke (from Capitaline)</i> | <i>14,48,69,912</i> | <i>13,39,96,568</i> | <i>8.11%</i> |
| 5 | <i>ICRA Techno Analytics Ltd. (in 000)</i> | <i>15,84,01,000</i> | <i>12,68,94,000</i> | <i>24.83%</i> |
| 6 | <i>Infosys Ltd</i> | <i>253850000000</i> | <i>177,030,000,000</i> | <i>43.39%</i> |
| 7 | <i>Larsen & Toubro Infotech Ltd.</i> | <i>23318122096</i> | <i>19,764, 861,289</i> | <i>19.83%</i> |
| 8 | <i>Mindtree Ltd. (seg)</i> | <i>8,783,000,000</i> | <i>7,937,143,242</i> | <i>10.66%</i> |
| 9 | <i>Persistent Systems & Solutions Ltd.</i> | <i>189,490,457</i> | <i>155,172,089</i> | <i>22.12%</i> |
| 10 | <i>Persistent Systems Ltd.</i> | <i>6,101,270,000</i> | <i>4,971,860,000</i> | <i>22.84%</i> |
| 11 | <i>R S Software (India) Ltd.</i> | <i>1,882,638,471</i> | <i>1,617,804,170</i> | <i>16.37%</i> |
| 12 | <i>Sasken Communication Technologies Ltd.</i> | <i>3,941,962,000</i> | <i>3,175,616,000</i> | <i>24.13%</i> |
| 13 | <i>Tata Elxsi Ltd. (seg)</i> | <i>3,581,985,000</i> | <i>2,962,533,352</i> | <i>20.91%</i> |
| | <i>AVERAGE MARGIN</i> | | | <i>24.82%</i> |

The average margin of the above said 13 comparable companies was 24.82%. After allowing working capital adjustment of 1.63%, the TPO arrived at adjusted margin of 23.19%. Accordingly, the A.O. proposed adjustment of Rs.2,52,81,059/-. The AO passed draft assessment order making the addition cited above towards Transfer pricing adjustment.

7. The assessee filed its objections before Ld. DRP, which rejected following 6 companies by applying turnover filter.

1. Infosys Ltd.
2. L&T Infotech Ltd.
3. MindTree Ltd.
4. Persistent Systems Ltd.
5. Sasken Communication Technologies Ltd.
6. Tata Elxsi Ltd.

Accordingly, the Ld DRP confirmed selection of remaining seven comparable companies. As a result of direction so given by DRP, the TP adjustment came to be enhanced to Rs.2,76,15,067/-. The A.O. added the above said amount to the total income of the assessee in the final assessment order passed by him.

8. The Ld. A.R. submitted that the assessee seeks exclusion of following 5 comparable companies also from the list of comparable companies confirmed by Ld DRP:-

1. Acropetal Technologies Ltd. (seg)
2. e-Zest Solutions
3. e-Info Chips Ltd.
4. ICRA Techno Analytics Ltd.
5. Persistent Systems & Solutions Ltd.

The Ld. A.R. submitted that all the above said companies have been held to be not good comparable companies for Software Development segment by various decisions of the Tribunal. The Ld A.R furnished copies of various case laws relied upon by him.

9. On the contrary, the Ld. D.R. submitted that all the above said companies should be examined independently by the Tribunal without having recourse to the past decisions rendered by the Tribunal.

10. We heard the parties on this issue. The Ld A.R submitted that M/s. Acropetal Technologies Ltd, E-zest Solutions, E-infochips Ltd and ICRA Techno Analytics Ltd have been excluded by the co-ordinate bench in the case of M/s Commscope Networks (India) Private Limited (IT(TP)A No.166/Bang/2016 dated 22-02-2017).

11. The Ld D.R, however, made detailed arguments in respect of the above said four comparable companies. The Ld A.R rebutted to

the contentions of Ld D.R. The rival contentions in respect of each of the four companies and the decision taken thereon are discussed below:-

(A) Acropetal Technologies Ltd:-

11.1 The Ld D.R invited our attention to page 9 of TPO's order and submitted that the assessee has sought exclusion of this company by submitting that it fails employees cost filter, i.e., its employee cost was only 11.51%. However, the TPO has noticed that this company has passed employee cost filter, since its employee cost was 49.36%. The Ld D.R submitted that the Tribunal, in the case of Commscope Networks (India) Private Ltd (supra) has followed the decision rendered by the Tribunal in the case of M/s Applied Materials India P Ltd (IT(TP)A No.17 & 39/Bang/2016 dated 21.9.2016). In the case of Applied Materials India P Ltd (supra), the Tribunal has excluded Acropetal Technologies Ltd by applying the filter that "revenue from Software development segment" was less than 75%. Adverting our attention to page 863 of the paper book, wherein the Profit and Loss account of M/s Acropetal Technologies Ltd is placed, the Ld D.R submitted that the segmental revenue details are not available. Accordingly, the Ld D.R submitted that the decision rendered in the case of Applied Materials India P Ltd should not be followed.

11.2 The Ld A.R, on the contrary, submitted that the TPO has issued a show cause notice dated 10.09.2014 to the assessee during the course of proceedings before him. He submitted that the copy of said letter is placed at pages 251 to 265 of the paper book. The Ld A.R invited our attention to page 260 of the paper book and submitted that the TPO has collected segmental details of Software Development activity from M/s Acropetal Technologies Ltd. According to the information so collected by the TPO, the turnover of Software development segment was Rs.81.40 crores, while its total

turnover was Rs.140.55 crores. The Ld A.R invited our attention to page 7 of the TPO's order and submitted that the TPO has applied following filter for selecting comparable companies:-

“Companies whose Software Development Service and related services is less than 75% of the total operating revenues were excluded”

Applying the above filter, this company is required to be excluded, since its revenue from software development services was less than 75% of the total revenue. The Ld A.R further submitted that the assessee had advanced arguments before the Tribunal in the case of Applied Materials India P Ltd (supra) both on employee filter and revenue filter. However, the Tribunal chose to exclude this company by applying revenue filter.

11.3 We heard rival contentions on this comparable company and perused the record. We notice that the co-ordinate bench has excluded this company in the case of M/s Applied Materials India P Ltd (supra) with the following observations:-

“15. The revenue is also seeking inclusion of some of the companies in the list of comparables which were reflected by the DRP. We will deal with the issues one by one as under :

(i) Acropetal Technologies Ltd.(Seg.)

16.1 The DRP rejected this company on the ground of employee cost filter. The ld. DR has submitted that the TPO has applied the employee cost filter and this company satisfies the same.

16.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the total employee cost of this company is 11.51% of the total operating revenue therefore it fails the employee cost

Page 7 of 20

filter of 25%. Further he has pointed out that this company also fails the software development services revenue filter of 75%. He has referred the details at page Nos.39 and 53 of the Annual Report and submitted that the income from software development is Rs.81.40 Crores out of total revenue of Rs.141 Crores. Therefore this company fails this filter.

16.3 In a rejoinder the ld. DR has submitted that the TPO has considered only Information Technology transactions segment and therefore it satisfies software development services income filter as well as employee cost filter.

16.4 We have considered the rival submissions as well as the relevant material on record. As per the segmental reporting at page 53 of the Annual Report the income from Information Technology Services is Rs.81.40 Crores out of the total income of Rs.141 Crores. Therefore the revenue from Information Technology transactions services is less than 75% and consequently this company does not satisfy the filter of information technology revenue applied by the TPO itself. Accordingly, we do not find any reason to interfere with the order of the DRP for this issue.”

11.4 We notice that the Tribunal chose to exclude this M/s Acropetal Technologies Ltd (seg.) applying revenue filter, even though the assessee has advanced arguments both on employee filter and revenue filter. We also notice that the TPO has considered segmental details only. Admittedly, this company fails on revenue filter. Accordingly, following the above said decision, we direct exclusion of M/s Acropetal Technologies Ltd.

(B) E-Zest Solutions Ltd:-

11.5 The Ld A.R submitted that this company has been excluded in the cases relied upon by him. On the contrary, the Ld D.R submitted that this company was remanded to the file of AO/TPO in

the case of Applied Materials India P Ltd. He further brought to our notice certain inconsistencies in various decisions rendered by the co-ordinate benches.

11.6 We heard the parties on this comparable company. We notice that the co-ordinate benches have rendered diverse decisions as under:-

(a) *In the case of Applied Materials India (P) Ltd (IT(TP)A 17 & 39/Bang/2016 dated 21.09.2016, it was remanded to the file of AO/TPO.*

(b) *In the case of Saxo India P Ltd (2016)(67 Taxmann.com 155), the Delhi bench of Tribunal has held that M/s E Zest Solutions Ltd is good comparable and accordingly retained the same.*

(c) *In the case of [Symantech Software & Services \(I\) Pvt. Ltd. v. DCIT, ITA No.614/Mds/2016](#), this company was held to be engaged in Knowledge Process Outsourcing (KPO) and cannot be regarded as a SWD services company. However, in the case of Applied Materials India P Ltd (supra), the co-ordinate bench has expressed the view that the question of BPO and KPO is relevant only in ITES segment and not for software development services segment.*

(d) *In the case of AMD India P Ltd vs. ACIT (IT(TP)A 1487 & 1496/Bang/2015 dated 06-04-2017), the Tribunal apparently followed the decision rendered in the case of Saxo India P Ltd (supra), but finally it excluded E Zest Solutions Ltd. We noticed earlier that the Tribunal has retained this company in the case of Saxo India P Ltd. Hence, there is an error in the order passed in the case of AMD India P Ltd (supra).*

(e) *In the case of Electronic Imaging India P Ltd (supra), the decision rendered in the case of AMD India P Ltd (supra) was followed.*

In view of diverse of opinions expressed in various cases, we are of the view that comparability of this company requires fresh examination as held in the case of Applied Materials India (P) Ltd. Accordingly, we restore this company to the file of AO/TPO for examining it afresh.

(c) **E-infochips Ltd:-**

11.7 We heard the parties on this comparable company. We notice that the co-ordinate bench, in the case of M/s Commscope Networks (India) Private Ltd (supra) has excluded this company by following the decision rendered by the Delhi bench of Tribunal in the case of Saxo India P Ltd (ITA No.6148/Del/2015 dated 05-02-2016). In the case of Saxo India P Ltd (supra), this company was excluded with the following observations:-

“(i) E-Infochips Limited:

10.1. The Transfer Pricing Officer included this company in the list of comparables. On being called upon to explain as to why it should not be considered as a comparable, the assessee contended that there was functional dissimilarity inasmuch as this company was engaged in software development and IT enabled services and also Products. The Transfer Pricing Officer observed that the revenues of this company from Products was only 15% of total revenue and hence the same qualified to be eligible for comparison. The DRP did not allow any relief.

10.2. After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025. Schedule of Income indicates its operating revenue from software development, hardware maintenance, information technology, consultancy etc. Revenue from hardware maintenance stands at Rs. 3.92 crore, which has been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of

any software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables.”

Following the decision rendered in the case of Saxo India P Ltd (supra), we direct exclusion of the above said comparable company.

(d) ICRA Techno Analytics Ltd:-

11.8 The Ld D.R submitted that the TPO has applied Related Party Transactions (RPT Filter) of more than 25%. In the case of Applied Materials India P Ltd (supra), the Tribunal has applied RPT filter of 15%.

11.9 The Ld A.R invited our attention to page 879 of the paper book and submitted that this company is having Related Party Transactions to the tune of 22.38%. He further submitted that the Tribunal in the case of Applied Materials India P Ltd (supra) has excluded this company on both RPT filter and functionality difference.

11.10 We heard the parties on this issue and perused the record. We notice that the co-ordinate bench has excluded M/s ICRA Techno Analytics Ltd in the case of Applied Materials India P Ltd (supra) with the following observations:-

“(ii) ICRA Techno Analytic Ltd.

17.1 We have heard the learned D.R. as well as learned A.R. and considered the relevant material on record. The DRP has rejected this company by recording the fact as under : We examined the annual report from which it is evident that the entire revenue has been shown under service segment which indicates that the revenue from software development, consultancy, licensing and sub-licensing, annual maintenance charges for software support. WEB development and hosting has been reported in one segment, thus in absence of segmental information, we concur with the view of the DRP in preceding year and accordingly direct the Assessing Officer to exclude this company from comparables.

17.2 We further note that the Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) has considered the comparability of this company in paras 14 to 16 as under :

“(1) ICRA Techno Analytics Ltd. (seg)

14. At the outset, we note that apart from having the related party revenue at 20.94% of the total revenue, this company was also found to be functionally not comparable with software development services segment of the assessee. The DRP has given its finding at pages 13 to 14 as under:- Having heard the contention, on perusal of the annual report, it is noticed by us that the segmental information is available for two segments i.e., services and sales. However, it is evident from the annual report that the service segment comprises of software development, software consultancy, engineering services, web development, web hosting, etc. for which no segmental information is available and therefore, the objection of the assessee

is found acceptable. Accordingly, Assessing Officer is directed to exclude the above company from the comparables.

15. We find that the facts recorded by the DRP in respect of business activity of this company are not in dispute. Therefore, when this company is engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, then the same cannot be regarded as functionally comparable with that of the assessee who is rendering software development services to its AE.

16. In view of the above facts, we do not find any error or illegality in the findings of the DRP that this company is functionally not comparable with that of a pure software development service provider.”

Nothing has been brought before us to show that the facts recorded by the DRP as well as by the co-ordinate bench of this Tribunal are not IT(T.P)A Nos.17 & 39/Bang/2016 correct. Accordingly, in view of the decision of the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra), we do not find any error or illegality in the order of the DRP on this issue.”

11.11 We find merit in the submissions made by Ld A.R. Accordingly, following the decision rendered by the co-ordinate bench in the case of Applied Materials India P Ltd (supra), we direct exclusion of this company.

12. With regard to the prayer of the Ld A.R for exclusion of M/s **Persistent Systems and Solutions Ltd**, the Ld D.R supported the

order passed Ld DRP. On the contrary, the Ld A.R relied upon the case laws in support of his contention that this company is not a good comparable company.

12.1 We heard the parties on this comparable company. We notice that this company has been excluded by the co-ordinate bench in the case of DCIT vs. Electronics for Imaging India P Ltd (IT(TP)A Nos. 227 & 285/Del/2013). For the sake of convenience, we extract below the observations made by the Tribunal in respect of this comparable company:-

“Persistent Systems & Solutions Ltd.

60. The assessee has the grievance against rejection of this company by the DRP. The ld. AR has submitted that assessee did not raise any objection against this company, however, the DRP has rejected the said company. Therefore, the said company should be retained in the list of comparables.

61. Having considered the rival submissions as well as relevant material on record, at the outset, we note that the DRP has examined the functional comparability of this company by considering the relevant details as given in the annual report of this company. The DRP has given the finding that the entire revenue has been earned by this company from the sale of software services and products and in the absence of segmental details, it cannot be considered as comparable with software services segment. We find that this company has shown the income from sale of software services and products to the tune of Rs.6.67 crores. We further note that as per Schedule 11, the entire revenue has been shown under one segment i.e., sale of software services and products. Therefore, no separate segment has been given in respect of software services. Accordingly, the composite data of revenue as well as margins of this company pertaining to the sale of software services and products cannot be considered as comparable with the software

development services segment of the assessee. In view of the above facts and circumstances, we do not find any error or illegality in the directions of the DRP in excluding this company from the list of comparables. This ground of CO is dismissed.”

We notice that the co-ordinate bench has excluded this company in the case of Applied Materials India Private Limited (supra) by following the decision rendered in the case of Electronics for Imaging India P Ltd (supra). Consistent with the view taken in the above said cases, we direct exclusion of this comparable company.

13. The Ld A.R also submitted that the TPO has not allowed working capital adjustment on actual basis. Relying upon the decision rendered by the co-ordinate bench in the case of M/s Zyme Solutions P Ltd vs. ITO (Miscellaneous Petition No.36/Bang/2016), the Ld A.R submitted that the TPO may be directed to allow working capital adjustment on actual basis.

13.1 We heard Ld D.R on this issue. We find merit in the contentions of Ld A.R. Accordingly, we direct the AO/TPO to allow working capital adjustments on actual basis as held in the case of Zyme Solutions P Ltd (supra).

13.2 In view of the foregoing discussions, the ALP of the transactions relating to Software segment requires to be re-determined. Accordingly, we restore this issue to the file of AO/TPO with the direction to re-compute the ALP of Software development Services segment in the light of discussions made supra.

14. The next issue relates to the disallowance of interest paid on ECB loans. The interest claimed by the assessee on the ECB loan has been disallowed by the AO on the ground that the loan has been

taken for purchase of an immovable property and the interest has to be capitalized till the asset is put to use as per the proviso to section 36(iii) of the Act.

14.1 The Ld A.R submitted that the AO had made identical disallowance in AY 2009-10 in the assessee's own case and the Tribunal, vide its order dated 05-07-2019 passed in IT(TP)A No. 287/Bang/2014, has deleted the disallowance.

14.2 We heard Ld D.R on this issue and perused the record. We notice that the co-ordinate bench has dealt with an identical issue in the assessee's own case in AY 2009-10 (supra). The relevant discussions made by the co-ordinate bench are extracted below:-

“12. Regarding ground no. 4(b), it was submitted by Id. AR of assessee that as per para no. 7.1 of the assessment order, it is noted by the AO that this interest of Rs. 31,08,280/- was paid on ECB loan which was taken from the holding company and utilized for the purpose of purchasing an immovable property at Koramangala, in Bangalore during the year 2005-06 and this property was purchased with an intention to build its own office premises for the assessee company. It is also noted by the AO in same para of assessment order that the construction could not be taken up as there developed a dispute followed by litigation and because of this reason, the property remained in the form of vacant site and it was kept unused right from the date of purchase till the date of assessment order. He submitted that the AO has invoked the proviso to of section 36(iii) of the IT Act which is reproduced by the AO in para 7.2 of the assessment order and he pointed out that the proviso is applicable where the loan is borrowed for acquisition of asset for extension but in the present case, the loan is not borrowed for the extension of assessee company's business but it was for expansion and

therefore, this proviso is not applicable in the present case. He placed reliance on the Tribunal order rendered in the case of ITVV Signode India Ltd. Vs. DCIT as reported in [2007] 110 TTJ 170 (Hyd.), copy available on pages 662 to 669 of paper book. He also placed reliance on the Tribunal order rendered in the case of AT & T Global Network Services (India) Pvt. Ltd. Vs. DCIT as reported in (2017) Tax Corp (A.T.) 57930 (ITAT-Delhi), copy available on pages 673 to 743 of paper book. He submitted that para no. 18 of this Tribunal order available on page no. 690 of paper book is relevant in this regard. The Id. DR of revenue supported the orders of authorities below.

13. *We have considered the rival submissions. We find that this is not in dispute that the borrowed funds were used for the purposes of acquiring a land to be used for constructing assessee's office premises and this is also not in dispute that construction could not take place because of some dispute in the title of the said land. Under these facts, the AO invoked the provisions of proviso to section 36(1)(iii) which says that if the funds are borrowed for acquiring an asset for extension of existing business, then interest is not allowable till the date on which such asset was first put to use. The objection of the assessee is this that in the present case, the land was not acquired for extension of business but it was acquired for expansion of business and therefore, this proviso is not applicable. In this regard, para no. 18 of the Tribunal order rendered in the case of AT & T Global Network Services (India) Pvt. Ltd. Vs. DCIT (supra) is relevant and hence, the same is reproduced hereinbelow from page no. 690 of the paper book.*

"18. Undisputedly assessee is engaged in telecommunication business. It has commenced its business operation on April 07, 2007. The present situation deals with the case where in the assessee has purchased capital goods for its existing telecommunication business. The question that arises for

Page 17 of 20

consideration here is that whether the proviso to Section 36(1)(iii) which disallows the interest paid on acquisition of an asset for extension of existing business is applicable to the present case or not. In the present case, whether the assets were acquired for extension of business or not. The word -extension has not been defined in the Income-tax Act, 1961 and one has to resort to the popular meaning of the term. The dictionary meaning of the word -extend is a part that is added to something to enlarge or prolong it, addition, add-on, adjunct, addendum, augmentation, supplement, appendage, appendix; annexe, supplementary etc. The assessee submitted that the assets have been acquired only in connection with its existing telecommunication business. In our view, there is a very thin line of demarcation between the term expansion and extension, which can be differentiated basis the facts and evidences brought on record. Neither the Ld AO or the Ld DRP has brought any evidence on facts to suggest that there was an extension of business during the year under consideration and the Interest paid should be disallowed u/s 36(1)(iii) of the Act. Further, the assessee also distinguished the decisions relied upon by the lower authorities on facts of the present case. While arriving at the above finding we also draw support from the decision of Hon'ble Supreme Court in the case of DCIT vs. Gujarat Alkalies & Chemicals Ltd. [2008] 299 ITR 85 (SC) cited by the Ld. AR wherein it was held that extension' implies starting of a new business activity. Keeping in view the above said meaning we are of the view that the telecom equipment purchased by the Appellant using the ECB loans was for continuation of the existing business only and not for the extension of business. Hence, the said proviso to Section 36(1)(iii) does not apply to the facts of the present case. In the result, the ground No. 3 of the appeal of the assessee is allowed"

14. *From the above para reproduced from the Tribunal order, it comes out that if the borrowed funds are not used for extension of existing business, and the same are used for continuation of existing business only, then the proviso to section 36(1)(iii) of the IT Act is not applicable. In our considered opinion, purchasing of land for construction of new office premises cannot be said to be for extension of assessee's business and hence, in our considered opinion, in the facts of present case, this Tribunal order is applicable and hence, respectfully following this Tribunal order, we hold that the interest disallowance made by the AO is not justified because the funds were borrowed for continuation / expansion of existing business and not for extension of existing business and therefore, the proviso to section 36(1)(iii) is not applicable in the present case because the amendment in this proviso was made by the Finance Act, 2015 w.e.f. 01.04.2016 as per which the words "for extension of" were omitted and therefore in our considered opinion, up to Assessment Year 2015-16, the proviso is applicable only in those cases where borrowed funds was used for acquisition of asset for extension of existing business. In the present case, the Assessment Year involved is Assessment Year 2009-10 and therefore, in the facts of present case, in the present year, this proviso is not applicable and hence, we delete this disallowance by respectfully following this Tribunal order rendered in the case of AT & T Global Network Services (India) Pvt. Ltd. Vs. DCIT (supra). Accordingly, ground no. 4(b) is allowed."*

14.3 Following the above said decision of the co-ordinate bench rendered in assessee's own case on an identical issue, we direct the AO to delete this disallowance.

15. The Last issue relates to re-computation of deduction u/s 10A of the Act. It is the submission of the Ld A.R, the amount, if any, disallowed while computing business income of the undertaking, which is eligible for deduction u/s 10A of the Act, would go to increase the "Profits and gains derived from the eligible undertaking"

Page 19 of 20

while computing deduction u/s 10A of the Act. Accordingly he prayed that the AO may be directed to re-compute the deduction u/s 10A by adopting the correct amount of Profit and gains derived from the undertaking. He submitted that the prayer of the assessee is supported by circular no.37/2016 dated 2.11.2016 issued by CBDT.

15.1 We heard Ld D.R. We notice that the addition relating to Transfer pricing adjustment is not eligible for deduction u/s 10A of the Act, in view of the bar provided in the proviso to sec. 92C(4) of the Act. Other disallowances made by the AO would go to increase the Profits derived from the undertaking. Since the prayer of the assessee is supported by Circular no.37/2016 dated 2.11.2016 issued by CBDT, we direct the AO to re-compute the deduction accordingly.

16. In the result, the appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 5th Jan, 2021

Sd/-
(George George K.)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 5th Jan, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.