ITAT: Holds foreign taxes not allowable deduction u/s 37(1); Rules on comparables selection in SWD, ITeS

Oct 08, 2021

Infor (India) Private Limited [TS-499-ITAT-2021(HYD)-TP]

Conclusion

Hyderabad ITAT holds foreign taxes against which credit is not allowable u/s 91(1) is not deductible as business expenditure u/s 37(1) since special provision prevails over general provision; Also holds that Bombay HC ruling in Reliance Infrastructure is not a binding precedent in the light of Ahmedabad Bench ruling in Elitecore Technologies; Assessee-Company, for AY 2016-17, paid foreign taxes which was claimed as a deduction and before ITAT, Assessee submitted that issue of allowability of foreign taxes paid as a deduction in the nature of an expenditure incurred wholly and exclusively for business purpose was no more *res integra* in view of Bombay HC ruling in *Reliance Infrastructure* wherein it was held that it was not covered u/s 40(a)(ii); ITAT finds that aforesaid ruling was distinguished by Ahmedabad bench ruling in *Elitecore Technologies* and was held not to be a binding precedent since came from a non-jurisdictional HC; After quoting extensively from *Elitecore Technologies* ruling, ITAT further observes that Section 91 is a specific provision dealing with foreign tax credit to be granted in case of taxes paid in the specified countries and holds, "*If we go by the assessee's analogy that foreign tax credit to the specified extent u/s.91(1) "of a sum calculated on such doubly taxed income at the Indian rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal" is allowable for the purpose of granting credit and the remaining component is to be granted deduction under Chapter-IV of the Act, the same would render the former specific provision itself as otiose going contrary to "generalia specialibus non derogant" which means that a specific provision prevails over the general one*"; ITAT thus adopts a stricter interpretation and concludes that *"whatever is the assessee's unallowable foreign tax credit claim u/s.91(1) since exceeding the specified limit, would not be entitled for business expenditure u/s.37 of the Act"*; ITAT relies on Andhra Pradesh HC Full Bench's ruling in B.R. Constructions to treat Bombay HC ruling in Reliance Infrastructure as not a binding precedent; ITAT rules on comparables selection, ALP adjustment in respect of interest on outstanding receivables and management and consultancy fee for assessee engaged in software development services (SWD) and ITeS for AY 2016-17; Under SWD segment, accepting assessee's plea, ITAT excludes 7 comparables (Infosys Limited, Larsen & Toubro Infotech Limited, Tata Elxsi Limited, Persistent Systems Limited, Thirdware Solution Limited, Cybage Software Private Limited, Aspire Systems (India) Private Limited) citing huge turnover, extraordinary event of amalgamation, functional dissimilarity etc, follows earlier orders; However, remits comparability of R.S.Software (India) Limited, Infobeans Technologies Limited, Cigniti Technologies Limited for fresh adjudication; Further, accepts assessee's plea to include 3 comparables (Evoke Technologies Private Limited, Sasken Communication Technologies Limited and Infomile Technologies Limited), while rejects its plea to include Nucleus Software Exports Limited; Under ITeS segment, accepting assessee's plea, ITAT excludes 5 comparables (Infosys BPO, Eclerx Services Limited, Cross Domain Solutions Private Limited, Tech Mahindra Business Services Ltd, SPI Technologies India Private Limited) citing functional dissimilarity, huge turnover etc, however includes functionally similar MPS Ltd by relying on earlier order; ITAT accepts assessee's plea and includes functionally similar Informed Technologies Limited, however rejects plea to include Jindal Intellicom Limited, Allsec Technologies Ltd, Tata Business Support Services Limited, Cosmic Global Limited and BNR Udyog Limited; Further, remits comparability of ACC BPO Services Limited and Sundaram Business Services Pvt Limited as well as Suprawin Technologies Limited, Tata Consulting Engineers Limited and Tata Elxsi Limited; Further, ITAT directs TPO to correctly verify and compute the margins of Microland Limited, SPI Technologies India Private Limited, MPS Limited and Infosys BPO; Separately, relying on precedents, ITAT deletes ALP adjustment pertaining to interest on outstanding receivables, notes that instead of adopting LIBOR rate in international transactions, involving the very business segment, lower authorities adopted SBI short term deposit rates in the nature of a loan or cash transaction involving domestic deposits; Lastly, ITAT remits ALP adjustment w.r.t management and consultancy fee, directs TPO to re-examine the entire issue in light of assessee's submissions pin-pointing; prima-facie, a cost to cost reimbursement arrangement between itself, its AE and the ultimate payee M/s.KPMG qua the services in issue; Relying

on precedents, ITAT clarifies that the benefit test also not to be applied whilst determining Nil ALP on the ground that assessee has not in fact derived any benefit from the international transactions in issue:ITAT HYD

Decision Summary

This ruling was delivered by ITAT bench comprising Shri S.S. Godara and Shri Laxmi Prasad Sahu.

Dr. Sunil Moti Lala argued on behalf of the assessee while the Revenue was represented by Mr. D.Srinivas.

AY 2016-17

International transaction in dispute- Provision of software development services (SDS)

Name of the comparable	Proposed by	PLI considered	ITAT conclusion	ITAT observation	Judicial precedents relied upon
Comparables sought to be excluded by the assessee					
Infosys Limited Larsen & Toubro Infotech Limited	TPO	NA	Excluded	Facts being identical, relied on coordinate bench ruling in assessee's own case for AYs 2014-15 and 2016-17 wherein these companies were excluded on ground of huge turnover. Accordingly, ITAT directed exclusion of this company from the final list of comparables.	Infor (India) (P) Ltd for AYs 2014-15 and 2016-17
Tata Elxsi Limited	TPO	NA	Excluded	Facts being identical, relied on coordinate bench ruling in assessee's own case for AYs 2014-15 and 2016-17 wherein this company was excluded on ground of functional dissimilarity as it was engaged in various activities	Infor (India) (P) Ltd for AYs 2014-15 and 2016-17

				including product design services and trading wherein no segmental information was available. Considering Revenue's failure to point out any distinction regarding availability of the corresponding segmental data in the impugned AY well, ITAT thus directed exclusion of this company from the final list of comparables.	
Persistent Systems Limited	TPO	NA	Excluded	Facts beingInfor (India) (P) identical, ITATLtd for AYs relied on2014-15 coordinate bench ruling in assessee's own case for AY 2014-15 wherein this company was excluded on ground of being engaged in product development as well as on account of lack of segmental details. Accordingly, ITAT directed exclusion of this company from the final list of comparables.	
Thirdware Solution Limited	TPO	NA	Excluded	Facts beingInfor (India) (P) identical, ITATLtd for AYs relied on2014-15 coordinate bench ruling in assessee's own case for AY 2014-15 wherein these companies were excluded on ground of	

Cybage Software Private Limited				functional dissimilarity and having abnormally average high margin.	
Aspire Systems (India) Private Limited	TPO	NA	Excluded	Accordingly, ITAT directed exclusion of this company from the final list of comparables. On perusal of DRP's directions, ITAT noted that an amalgamation had taken place w.e.f.01-04-2015. Accordingly, ITAT opined that the lower authorities erred in including it as a comparable in light Hon'ble Bombay HC decision in J.P. Morgan India (P) Ltd.	J.P. Morgan India (P) Ltd
R.S.Software (India) Limited	TPO	NA	Remitted	Accordingly, ITAT directed exclusion of this company from the final list of comparables. ITAT noted that this company was included by the coordinate bench in assessee's own case for AY 2014-15 by accepting TPO's findings that these R&D activities were only to make service delivery more efficient and there was no specific debit towards R&D in the P&L A/c.	

				ITAT considered assessee's plea that this company was engaged in life cycle management as well as provides quality assurance services including testing services along with maintenance and supporting statistical data analysis and was thus functionally dissimilar to the assessee. ITAT noted that assessee failed to that coordinate bench in earlier AY had already considered this company as comparable. However, ITAT remitted comparability of this company back to the TPO with a direction to verify the same in principle and if it was found that the relevant segmental details pertaining to software development services were available, the corresponding PLI of the very filed only would be taken in necessary computation.
Infobeans Technologies Limited	TPO	NA	Remitted	ITAT noted that coordinate bench in assessee' snow case for AY 2014-15 included

				this company by noting that there was no sale of any products as claimed by the assessee and this company was involved in export of software services only. For given AY, ITAT considered assessee's plea that this company was functionally dissimilar to the assessee as it was engaged in diversified activities. Accordingly, ITAT remitted the comparability of this company back to the TPO for fresh consideration.	
Cigniti Technologies Limited	TPO	NA	Remitted	Before ITAT,Maruti Suzuki assessee soughtLtd exclusion of this company on the ground that it was engaged in the software testing segment. On the other, Revenue objected to assessee's plea on the ground that it had itself included the instant company in the list of comparables and therefore it was estopped from contesting its inclusion herein. ITAT however found no merit in submissions made by either	

				of the parties on the ground that "we are dealing with Chapter-X of the Act in the nature of a "Special Provision" so as to determine Arm's Length Price (ALP) of the specified international transaction." ITAT relied on SC ruling in Maruti Suzuki Ltd wherein it was held that income tax proceedings are not hit by the 'Principles of Estoppel'. ITAT also noted that the instant company's segmental details deserved to be verified as to whether it was providing software development services or not. Accordingly, ITAT remitted comparability of this company back to the TPO for afresh factual verification.
Comparables sought to be included by the assessee				
Evoke Technologies Private Limited	Assessee	NA	Included	ITAT relied onInfor (India) (P) coordinate benchLtd for AYs ruling in2014-15 and assessee's own2015-16 case for AYs 2014-15 and 2015-16 wherein this company was included on ground of functional similarity. Following the

				same, ITAT included this company in the final list of comparables.	
Sasken Communication Technologies Limited	Assessee	NA	Included	ITAT relied onInfor (India) (P) coordinate benchLtd for AYs ruling in2014-15 and assessee's own2015-16 case for AYs 2014-15 and 2015-16 wherein this company was included on ground of functional similarity. Following the same, ITAT included this company in the final list of comparables. **TS Note:** Though ITAT in the given case relies on earlier order to include this company, it is pertinent to note that during AY 2014-15, comparability of this company was not dealt with and during AY 2015-16, this company was remitted back.	
Infomile Technologies Limited	Assessee	NA	Included	ITAT noted thatNA this company was rejected by the lower authorities due to the alleged non-availability of the segmental data. However, ITAT affirmed assessee's submission that relevant financials of this company were indeed available	

			now. Accordingly, ITAT directed TPO to examine the relevant details subject to condition that it shall be assessee's onus only; at its own risk and responsibility, to place on record the same within three effective opportunities of hearing.	
Nucleus Software Exports Limited	Assessee	NA	Excluded	ITAT noted that lower authorities had directed exclusion of this company on ground of failing to satisfy 75% export criteria. However, assessee submitted that this company missed the foreign export filter by a whisker only since the same comes to 74.2% as against 75% adopted by the lower authorities. ITAT rejected assessee's argument by stating that "since Chapter-X is a "Special Provision" wherein there is no scope for any kind of "grace marketing" and more particularly when other segmental companies are already there." ITAT also	Dilip Kumar

				referred to SC ruling in Dilip Kumar wherein it was held that provisions of the Act have to be strictly interpreted only. Accordingly, ITAT rejected assessee's plea seeking inclusion of this company.	

International transaction in dispute- Provision of ITeS

Name of the comparable	Proposed by	PLI considered	ITAT conclusion	ITAT observation	Judicial precedents relied upon
Comparables sought to be excluded by the assessee					
Infosys BPO	TPO	NA	Excluded	ITAT relied on coordinate bench ruling in assessee's own case for AYs 2011-12 to 2015-16 wherein this company was excluded on grounds of being engaged in diversified activities, huge broad value and turnover. Following the same, ITAT thus excluded this company from the final list of comparables.	Infor (India) (P) Ltd for AYs 2011-12 to 2015-16
Eclerx Services Limited	TPO	NA	Excluded	ITAT relied on coordinate bench ruling in assessee's own case for AYs 2011-12 to 2015-16 wherein these companies were excluded on account of being KPO service providers.	Infor (India) (P) Ltd for AYs 2011-12 to 2015-16

Cross Domain Solutions Private Limited				Following the same, ITAT thus excluded this company from the final list of comparables.
Tech Mahindra Business Services Ltd	TPO	NA	Excluded	ITAT noted thatNA this company had turnover of Rs.703.2 crores which was more than the filter limit of Rs.200 crores taken by the TPO. Accordingly, ITAT directed exclusion of this company in the final list of comparables.
SPI Technologies India Private Limited	TPO	NA	Excluded	ITAT noted thatNA this company had turnover of Rs.336.21 crores which was more than the filter limit of Rs.200 crores taken by the TPO. Accordingly, ITAT directed exclusion of this company in the final list of comparables.
MPS Limited	TPO	NA	Included	ITAT noted thatInfor (India) (P) coordinate benchLtd for AY in assessee's2014-15 own case for AY 2014-15 wherein this company was included citing functional similarity. Following the same, ITAT thus included this company in the final list of comparables.
Comparables sought to be included by the assessee				
Informed Technologies	Assessee	NA	Included	ITAT noted thatInfor (India) (P) coordinate benchLtd for AY

Limited				in assessee's own case for AY 2012-13 wherein this company was included citing functional similarity. Following the same, ITAT thus included this company in the final list of comparables.	2012-13
ACC Services Limited	BPO	Assessee	NA	Remitted	ITAT noted that TPO allegedly rejected these companies as they were incurring persistent losses followed by the latter entity having derived only 1.56% profit for AY 2016-17. ITAT considered assessee's argument that these twin entities had derived losses only in one year rather than on a persistent basis. Accordingly, ITAT remitted comparability of this company back to the TPO for re-examinatio n/verification of the financials of these companies.	NA
Sundaram Business Services Limited	Pvt					
Jindal Intellicom Limited	Assessee		NA	Excluded	Before ITAT, assessee submitted that the export filter limit of 75% used to exclude these companies ought not to have been applied to reject functionally comparable	NA

				companies. Allsec Technologies Ltd Tata Business Support Services Limited Cosmic Global Limited BNR Udyog Limited In context of the above argument, ITAT however held that in light of a catena of case law, the same is found to be carrying no substance as per "stricter interpretation (supra)" Accordingly, ITAT rejected assessee's plea seeking inclusion of the aforesaid companies.
Suprawin Technologies Limited Tata Consulting Engineers Limited Tata Elxsi Limited	Assessee	NA	Remitted	Before ITAT,NA assessee alleged that these companies were cherry picked at the lower authorities' behest. Assessee submitted that the corresponding data was very much available now. Accordingly, ITAT remitted comparability of these companies back to the TPO.

Ruling Relied Upon

- ITAT:Adopts SBI rate for benchmarking trade receivables; Rules on comparables for IT/ITeS provider
- TS-774-ITAT-2019(HYD)-TP
- ITAT: Excludes persistent loss making and abnormal profit making companies for software developer

- TS-564-ITAT-2020(HYD)-TP
- ITAT: Excludes comparables in shared-services segment, directs correct-margin adoption for 2 comparables
- TS-1127-ITAT-2019(HYD)-TP

Case Law Information

Taxpayer Name

- Infor (India) Private Limited

Judicial Level & Location

- Income tax Appellate Tribunal Hyderabad

Date of Ruling

- 2021-10-06

Ruling in favour of

- Both, Partially

Section Reference Number

- 92C
- 92D

Nature of Issue

- Adjustments
- ALP computation
- Margin computation dispute
- Segmental results
- Filters
- Turnover
- Functional similarity / dissimilarity
- KPO vs BPO
- Loss Making comparables
- Software product companies vs. Software service companies
- Rulings having discussion on comparability of specific companies
- Inter-company balance receivables
- Provision of Information Technology Enabled Services (ITeS)
- Provision of software development service
- Remand for fresh consideration
- Rule of Consistency

Judges

- SHRI S.S. GODARA
- Shri L.P. Sahu

Counsel for Tax Payer

- Shri Sunil M Lala

Counsel for Department

- Mr. D.Srinivas

Industry

- IT & ITES

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

I.T.A-TP. No. 198/HYD/2021
Assessment Year: 2016-17

Infor (India) Private Limited, HYDERABAD [PAN: AAACB6197Q]	Vs	The Deputy Commissioner of Income Tax, Circle-2(1), HYDERABAD
(Appellant)		(Respondent)

For Assessee : Dr.Sunil Moti Lala, AR
For Revenue : Shri D.Srinivas, DR

Date of Hearing : 20-07-2021
Date of Pronouncement : 06-10-2021

O R D E R

PER S.S.GODARA, J.M. :

This assessee's appeal for AY.2016-17 arises against the National E-Assessment Centre, Delhi's assessment, dated 31-03-2021 framed in furtherance to the Dispute Resolution Panel ('DRP')-1, Bengaluru's directions dt.09-02-2021 in F.No.55/DRP-1/BNG/2019-20, involving proceedings u/s.143(3) r.w.s.144C(13) r.w.s.143(3A) & 143(3B) of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case file perused.

2. The assessee has raised the following substantive grounds in the instant case:

TRANSFER PRICING (TP) GROUNDS

General

1. On the facts and in the circumstances of the case and in law, the Ld. Transfer Pricing Officer i.e. the Deputy Commissioner of Income-tax - Transfer Pricing Officer - 2, Hyderabad (hereinafter referred to as 'the Ld.TPO') and the Ld.AO under the directions issued by Hon'ble DRP, erred in making an addition to the Appellant's total income of INR 26,07,96,022 (based on the provisions of Chapter X of the Income-tax Act, ('the Act') and the said additions [i.e Rs. 13,18,72,422 being the adjustment qua the software development service, Rs 3,89,08,530 being the adjustment qua the ITES Segment, Rs. 40,487,821 being additions in respect of Interest on AE receivables and Rs. 3,95,25,970 & Rs. 1,00,0 1,279 being additions in respect of Management fees/ Consultancy Fee paid/reimbursed by the Appellant] being wholly unjustified are liable to be deleted.

2. On the facts and in the circumstances of the case and in law, the Ld. TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in rejecting the transfer pricing analysis/ study prepared by the Appellant and conducting fresh benchmarking, without appreciating that none of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied.

SOFTWARE DEVELOPMENT SERVICES (SDS) SEGMENT

3. On the facts and in the circumstances of the case and in law, the Ld.TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the Ld.TPO in incorrectly selecting the following companies as com parables while benchmarking the software development segment of the Appellant, without appreciating that the said companies were not comparable/functionally dissimilar to the Appellant, which ought to have been excluded from the final set of com parables:

i) Infosys Limited
ii) Larsen & Toubro Infotech Limited
iii) Tata Elxsi Limited (Seg)
iv) Persistent Systems Limited
v) Thirdware Solution Limited
vi) Cybage Software Private Limited /
vii) Aspire Systems (India) Private Limited
viii) Nihilent Limited
ix) Inteq Software Private Limited
x) R S Software (India) Limited
xi) Infobeans Technologies Limited
xii) Cigniti Technologies Limited

4. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld.TPO in incorrectly rejecting the following companies while benchmarking the software development segment of the Appellant which ought to have been included as a com parables as they were engaged in software development services, without appreciating that the said companies were comparable to the Appellant:

i) Evoke Technologies Private Limited
ii) Infomile Technologies Limited
iii) Ace Software Exports Limited
iv) Sasken Communication Technologies Limited
v) Nucleus Software Exports Limited
vi) Melstar Information Technologies Limited
vii) Sagar Soft India Limited
viii) Goldstone Technologies Limited
ix) Akshay Software Technologies Limited
x) Sankhya Infotech Limited (Seg)
xi) DCM LTD
xii) E-Zest solution Ltd
xiii) Harbinger Systems Limited

ITES SEGMENT

5. On the facts and in the circumstances of the case and in law, the Ld. TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in incorrectly selecting the following companies as comparables while benchmarking the ITES Services (ITeS) of the Appellant, without appreciating that the said companies were not comparable/ functionally dissimilar to the Appellant, which ought to have been excluded from the final set of com parables:

i) Infosys BPO
ii) Eclerx Services Limited
iii) Cross Domain
iv) Tech Mahindra
v) SPI Technologies India Private Limited
vi) MPS Limited

6. On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in incorrectly rejecting the following companies while benchmarking the ITES Services (ITeS) of the Appellant which ought to have been included as a com parables as they were engaged in the ITES Services (ITeS), without appreciating that the said companies were comparable to the Appellant:

i) Informed Technologies Limited
ii) Ace BPO Services Limited
iii) Jindal Intellicom Limited
iv) Allsec Technologies Limited
v) Tata Business Support Services Limited
vi) Karvy Data Mangement Services
vii) Suprawin Technologies Limited
viii) Sundaram Business Services Pvt Limited
ix) Tata Consulting Engineers Limited
x) Tata Elxsi Limited
xi) Cosmic Global Limited
xii) BNR Udyog Limited

7. Without prejudice to the above grounds on incorrect selection of functionally dissimilar comparable companies while benchmarking the ITES Services (ITeS) segment of the Appellant, on the facts and in the circumstances of the case and in law, the Ld. TPO erred in incorrectly computing the margin of the following comparable companies i.e. (i) Microland Limited, (ii) SPI Technologies India Private Limited (iii) MPS Limited (iv) Infosys BPO.

SDS AND ITES Segment

8. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld TPO in not allowing risk adjustment in accordance with the provisions of Rule 10B of the Income-tax Rules, 1962 to account for differences between the international transactions undertaken by the Appellant, being a captive unit and those undertaken by the comparables.

9. On the facts and in the circumstances of the case and in law, the Ld.TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the Ld.TPO in considering bad debts and provision for bad and doubtful debts as non-operating expenditure while computing the PLI of the comparables.

10. On the facts and in the circumstances of the case and in law, while benchmarking the international transactions, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in applying inappropriate filters including the Export filter turnover filter of >75% which were erroneous and liable to be rejected.

Interest on AE receivables

11. On the facts and in the circumstances of the case and in law, the Ld.TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld.TPO in :

(i) Considering the receivables from Associated Enterprise (AE) as a separate international transaction.

(ii) Making an adjustment with respect to interest on the receivables from AE.

12. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld TPO in making an adjustment with respect to interest on the receivables from AE without appreciating that the said adjustment is unwarranted and unjustified in view of the following grounds which are independent of and without prejudice to one and another viz (i) the appellant is a debt free company (ii) the international transactions (i.e. AE sales) resulting in the said outstandings is at ALP.

13. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld TPO in (i) considering the credit period of 30 days as against the credit period mutually agreed between the Appellant and its AE's (ii) considering the State Bank of India's ('SBI') short term de 0 it rates as the Comparable Uncontrolled Price (CUP) to benchmark the impugned interest on delay in receipt of outstanding receivables instead of LIBOR rate.

Management Fees

14. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. TPO in computing the ALP of the Management Fee of Rs.3,95,25,970 paid by the Appellant to its AE at Nil resulting in addition of Rs. 3,95,25,970 without appreciating the following which are independent and without prejudice to one another:

a) That the action of the TPO and the consequent addition of Rs. 3,95,25,970 is without jurisdiction and bad in law and thus liable to quashed/deleted.

b) That the management fee payment was at arms' length and consequently the said adjustment/addition of Rs. 3,95,25,970 is wholly unjustified and liable to deleted.

c) That the said management fee was claimed as a cost qua the international transaction pertaining to the distribution segment which have been accepted to be at ALP and consequently the said management fee also ought to have been accepted at 'ALP, as consistently accepted by the Ld. TPO in the earlier years.

d) That the mark up of S% on cost charged by the AE qua the management fee' at ALP. Alternatively and without prejudice to the above, no adjustment ought to have been made qua the cost of the management fee recovered by the AE.

Consultancy Fees

15. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld.TPO in computing the ALP of the Consultancy fee of Rs. 1,00,01,279 paid/reimbursed to its at Nil without appreciating that the payment was at arms' length and consequently the said adjustment/addition of Rs. 1,00,01,279 is wholly unjustified and liable to deleted.

CORPORATE TAX (CT) GROUNDS

16. On the facts and in the circumstances of the case and in law, the Ld AO erred in not granting of deduction under section 80G of the Act amounting to Rs. 7,91,500 while computing assessed taxable income in the computation sheet forming part of the assessment order.

17. On the facts and in the circumstances of the case and in law, the Ld AO erred in not granting of credit of tax deducted at source ('TDS ') amounting to Rs. 3,01,408 attributable to Infor (Bangalore) Private Limited and Rs. 3,49,350 attributable to Approva Systems Private Limited ('transferor companies') which were amalgamated with Appellant with effect from 01 April 2015.

18. On the facts and in the circumstances of the case and in law, the Ld AO erred in not granting credit of advance tax of Rs. 27,04,000 paid by Infor(Bangalore) Private Limited and Rs. 36,42,600 paid by Approva Systems Private Limited ('transferor companies') which were amalgamated with Appellant w.e.f April 2015.

19. On the facts and in the circumstances of the case and in law, the Ld AO erred in computing higher books profits under Section 115JB of the Act by Rs. 86,95,802(net) consequent to double disallowance of deferred tax amounting to INR 89,50,830 and non-consideration of interest on delayed payment of TDS/Advance tax amounting to INR 2,55,028.

20. On the facts and in the circumstances of the case and in law, the Ld AO erred in erroneously levying interest of Rs.19,60,250 under Section 234A of the Act on the alleged delay in filing of Income tax return without appreciating that the Appellant had furnished the original ITR on 30 November 2016 and revised ITR on 03 october 2017 for the relevant AY which was within the statutory timelines provided under Section 139(1) and Section 139(5) of the Act respectively.

21. On the facts and in the circumstances of the case and in law, the Appellant prays for consequential relief in the interest levied under Section 234B of the Act basis the relief allowed in the aforesaid grounds of appeal.

22. On the facts and in the circumstances of the case and in law, the Appellant prays that the education cess paid/ payable on the income tax be allowed as a tax-deductible expenditure in view of the favorable judicial precedents and oblige. The Appellant most humbly craves leave to raise the aforesaid additional legal ground & prays to your Honours to kindly admit & allow the aforesaid ground of appeal.

23. On the facts and in the circumstances of the case and in law, the Appellant prays that the unclaimed foreign tax credit (on foreign sourced income) be allowed as a tax-deductible expenditure in view of the favorable judicial precedents and oblige. The Appellant most humbly craves leave to raise the aforesaid additional legal ground & prays to your Honours to kindly admit & allow the aforesaid ground of appeal.

GENERAL GROUNDS (applicable to both TP and CT)

24. On the facts and in the circumstances of the case and in law, the Ld TPO erred in and the Hon'ble DRP further erred in assessing total income of the Appellant at Rs.52,34,22,610/ Rs. 52,42,14,110 (in the final assessment order/computation sheet) as against Rs.26,26,26,590, which was correctly offered by Appellant in its revised return of Income. Consequently, the Ld AO erred in raising a demand of Rs. 15,08,17,460 (instead of granting refund of Rs. 74,77,860) and the said demand apart from being incorrectly computed is wholly unjustified and liable to be deleted.

25. On the facts and in the circumstances of the case and in law, the Ld AO, Ld TPO and the Hon'ble DRP erred in passing impugned orders without providing the Appellant with sufficient an adequate opportunity and in breach of the principles of natural justice and in arriving at conclusion therein based on incorrect factual averments / allegations / legal inferences without considering appreciating the facts of the case and the submissions made by the Appellant and therefore, the said impugned orders, being bad in law are liable to be quashed or alternatively set aside

The Appellant craves leave to add, alter, vary, omit, substitute and or amend the above grounds of appeal (which are without prejudice to one another) at any time before or at the time of hearing of the appeal so as to enable the Honorable Members to decide this appeal according to law".

3. Learned counsel states at the outset that the assessee's 1st, 2nd, 24th and 25th substantive grounds are general/consequential in nature. Rejected accordingly.

4. We come to the assessee's 3rd substantive ground alleging that the learned lower authorities have erred in law and on facts whilst selecting No.(i) to (xii) companies as comparables in software development services (SDS) segment. Coming to the assessee's ground Nos.3(i) to 3(vi), we note that this tribunal's co-ordinate bench's order(s) in its cases for AYs.2014-15 and 2016-17; as the case may be, have already decided the issue(s) whilst directing exclusion of M/s.Infosys Limited, M/s.Larsen & Toubro Infotech Limited on the ground that they had been having huge turnovers. The factual position is stated to be no different in the impugned assessment year as well. We therefore adopt judicial consistency in absence of any distinction on facts herein as well. These twin entities – Infosys Limited and Larsen & Toubro Infotech Limited shall stand excluded by the Transfer Pricing Officer (TPO) therefore.

4.1. Coming to M/s.Tata Elxsi Limited, we note that the tribunal's foregoing earlier order(s) have directed exclusion of the instant third entity as well whilst holding that this company is engaged in various activities including product design services and trading wherein no segmental information was available. Learned departmental representative fails to pin point any distinction regarding availability of the corresponding segmental data in the impugned assessment year as well.

We therefore direct the TPO to exclude M/s.Tata Elxsi Limited (seg) in very terms.

4.2. The next entity herein is M/s.Persistent Systems Limited, which has been excluded in the tribunal's order (supra) in AYs.2014-15 and 2015-16 on the ground that it is engaged in product development as well as on account of lack of segmental details.

4.3. Next come M/s.Thirdware Solution Limited and M/s.Cybage Software Private Limited which have already have been ordered to be excluded by the tribunal after holding the same to be functionally different than software development services and having abnormally average high margin; respectively.

4.4. Coming to M/s.Aspire Systems (India) Private Limited, we note from a perusal of the DRP's directions in Pg.56 para 2.17.4 that an amalgamation had took place w.e.f.01-04-2015 and therefore, the learned lower authorities have erred in including it as a comparable in light of PCIT Vs. J.P.Morgan India (P) Ltd., (2019) 102 taxmann.com 335 (Bombay).

4.5. Learned counsel does not press for the assessee's ground Nos.3(viii) and 3(ix) pertaining to M/s.Nihilent Limited and M/s.Inteq Software Private Limited. Rejected accordingly.

4.6. We now advert to assessee's ground No.3(x) seeking to exclude M/s.R.S.Software (India) Limited. This tribunal's co-ordinate bench's order in AY.2014-15 has admittedly included the same. The assessee's case before us is that this entity is engaged in life cycle management as well as provides quality assurance services include testing services along with maintenance and supporting statistical data analysis. Learned counsel fails to dispute that the tribunal's foregoing bench has

already held it to be a comparable entity. So far as the assessee's objection that M/s.R.S.Software (India) Limited also provides different services, we direct the TPO to verify the same in principle and if it is found that the relevant segmental details pertaining to software development services are available, the corresponding PLI of the very filed only would be taken in necessary computation. This ground No.3(x) is partly accepted for statistical purposes.

4.7. Next entity before us is, M/s.Infobeans Technologies Limited which already stands included in tribunal's order for AY.2014-15. The assessee's plea before is that this entity is engaged in diversified activities. We follow our reasoning in the preceding paragraph to remit the instant issue back to the TPO for his afresh adjudication in very terms.

4.8. The assessee's next substantive grievance seeks to exclude M/s.Cigniti Technologies Limited from the array of comparables on the ground that this entity is engaged in software testing segment. Learned departmental representative strongly opposes assessee's stand on the ground that it had itself included the instant company in the list of comparables and therefore it is estopped from contesting M/s.Cignity Technologies Limited's inclusion herein. We find no merit in either parties' submissions in entirety at this stage. This is primarily for the reason that we are dealing with Chapter-X of the Act in the nature of a "Special Provision" so as to determine Arm's Length Price (ALP) of the specified international transaction. Hon'ble apex court's recent decision in (2019) 416 ITR 613, PCIT Vs. Maruti Suzuki Ltd (SC) holds that income tax proceedings are not hit by the 'Principles of

Estoppel'. The fact also remains that the instant entity's segmental details deserve to be verified as to whether it is providing software development services or not? We therefore restore this instant ground back to the TPO for his afresh factual verification. The assessee's ground Nos.3(i) to (xii) are partly accepted in foregoing terms.

5. The assessee's 4th substantive ground (having sub-grounds (i) to (xiii) challenges correctness of learned lower authorities' action rejecting its comparables. Both the parties are *ad idem* during the course of hearing that this tribunal's co-ordinate bench's order(s) for AY.2014-15 and 2015-16 (supra) have already included M/s.Evoke Technologies Private Limited and M/s.Sasken Communication Technologies Limtied; respectively. The assessee's ground Nos.4(i) and 4(iv) are accepted therefore.

5.1. Next entity before us in ground No.4(ii) is M/s.Infomile Technologies Limited which stands excluded in learned lower authorities' respective order(s) due to the alleged non-availability of the segmental data. Learned counsel's case before us as per the corresponding details in pgs.113 to 116 is that the instant entity's relevant financials are indeed available now. We therefore accept the assessee's instant ground No.4(ii) for statistical purposes and direct the learned TPO to examine the relevant details subject to condition that it shall be assessee's onus only; at its own risk and responsibility, to place on record the same within three effective opportunities of hearing.

5.2. Learned counsel does not press for the assessee's ground No.4(iii) & (vi) to (xiii) at this stage in view of our detailed discussion *qua* other sub-grounds herein. Ordered accordingly.

5.3. Next comes the assessee's ground No.4(v) seeking to include M/s.Nucleus Software Exports Limited. Learned lower authorities have directed exclusion thereof in view of the fact that it failed to satisfy 75% export criteria. Mr.Lala vehemently submitted before us that the instant entity has missed the foreign export filter by a whisker only since the same comes to 74.2% as against 75% adopted by the lower authorities. We find no merit in the assessee's arguments since Chapter-X is a "Special Provision" wherein there is no scope for any kind of "grace marketing" and more particularly when other segmental companies are already there. We further quote hon'ble apex court's decision in Commissioner of Customs Vs. Dilip Kumar (2018) 9 SCC 1 (FB)(SC) that *provisions of the Act have to be strictly interpreted only*. The assessee fails in its instant ground No.4(v). This ground No.4 (with all sub-grounds) is partly accepted in foregoing terms.

6. We now advert to the assessee's 5th substantive ground involving sub-ground Nos.(i) to (vi) seeking to exclude the allegedly improperly selected comparables in the lower proceedings. It transpires during the course of hearing that this tribunal's earlier orders; right from AYs.2011-12 to 2015-16, have excluded M/s.Infosys BPO, Eclerx Services Limited and M/s.Cross Domain Solutions Private Limited *inter alia* on the ground that the same had been having diversified activities with huge broad value and turnover in former first and KPO

services providers, in latter twin entities cases; respectively. These sub-grounds stand accepted therefore.

6.1. The assessee's sub-grounds No.5(iv) to (v) involving M/s.Tech Mahindra Business Services Ltd., M/s.SPI Technologies India Private Limited are found to be deserves acceptance since their respective turnovers of Rs.703.2 crores and Rs.336.21 crores are found to be more than the filter limit of Rs.200 crores taken by the TPO. We therefore adopt our precious stricter interpretation reasoning direct exclusion of these twin entities.

6.2. Coming to M/s.MPS Limited in ground No.5(vi), we note that the tribunal's order in AY.2014-15 (supra) has already directed inclusion thereof. This sub-ground is accordingly rejected.

The assessee's instant 5th substantive ground (with all sub-grounds) is partly accepted in preceding terms.

7. We note at this stage that so far assessee's 7th substantive ground involving bench marking of IT enabled services; so far as the three comparable companies – M/s.Microland MPS Ltd, M/s.SPI Technologies India Private Limited and M/s.Infosys BPO is concerned, the same are consequential to its 5th substantive ground only requiring factual verification the relevant facts and figures. We therefore accept the same for statistical purposes and leave it open for the TPO to finalise consequential computation.

8. We now come to the assessee's ground No.6(i) to (xii). It emerges at the outset that this tribunal's order in AY.2012-13 has accepted M/s.Informed Technologies Limited as a valid

comparable. We thus decide the assessee's ground No.6(i) in its favour.

8.1. The assessee's sub-grounds No.6(ii) and (viii) seek to include M/s.ACC BPO Services Limited & M/s.Sundaram Business Services Pvt Limited as valid comparables. The TPO has allegedly rejected the same as since incurring persistent losses followed by the latter entity having derived only 1.56% profit for AY.2016-17. The assessee's only argument before us in light of TPO's discussion in pg.48 to this effect is that these twin entities had derived losses only in one year than on persistent basis. Faced with this situation, we deem it appropriate to restore the instant twin comparable entities' corresponding financials' re-examination/verification back to the TPO for his necessary verification. Ordered accordingly.

8.2. The assessee's sub-ground Nos.6(iii), (iv), (v), (xi) and (xii) seeking to include M/s.Jindal Intellicom Limited, M/s.Allsec Technologies Ltd, M/s.Tata Business Support Services Limited, M/s.Cosmic Global Limited and M/s.BNR Udyog Limited; respectively on the ground that the corresponding export filter limit of 75% ought not to be applied to reject functionally comparable companies in light of a catena of case law, are found to be carrying no substance as per "stricter interpretation (supra)" in preceding paragraphs. These sub-grounds are rejected therefore.

8.3. Learned counsel does not press for the assessee's sub-ground No.6(vi) during the course of hearing.

8.4. Coming to the assessee's sub-ground Nos.6(vii), (ix) and (x) alleging cherry picking at the lower authorities' behest *qua*

M/s.Suprawin Technologies Limited, M/s.Tata Consulting Engineers Limited and M/s.Tata Elxsi Limited, learned counsel first of all submitted that the corresponding data is very much available now. We therefore restore all these sub-grounds back to the TPO regarding these remaining comparables. We also make it clear that the learned counsel had made a submission before us that in case we accept the assessee's ground Nos.(i), (ii), (vii) and (viii), all the remaining eight comparables entities would be rendered academic. We therefore direct the TPO to consider the assessee's instant concession as well in consequential proceedings. This 6th substantive ground is partly accepted in foregoing terms.

9. Learned counsel next stated that the assessee's 8th to 10th substantive grounds are consequential in nature. The same are accordingly disposed in light in foregoing detailed discussion.

10. The assessee's 11th to 13th substantive grounds challenge correctness of the lower authorities' action making ALP adjustment pertaining to interest on receivables amounting to Rs.2,80,004/-. Learned counsel stated in light of the tribunal's earlier orders, and more particularly in AY.2014-15 have directed the TPO to allow credit period as per agreement between assessee and its AEs. And also that if it turned out that no such period was specified, the credit period would be 90 days only.

10.1. Learned departmental representative has strongly supported the impugned ALP adjustment pertaining to interest on outstanding receivables. He has also sought to buttress the

point that this tribunal has already adjudicated the instant issue.

10.2. We have given our thoughtful consideration to rival contentions *qua* correctness of the impugned addition. There is hardly any dispute that the learned lower authorities have gone by SBI short term deposit rates which is in the nature of a loan or cash transaction involving domestic deposits rather than LIBOR rate in international transactions, involving the very business segment.

Coming to the Revenue's argument that this tribunal has already directed the TPO to go by the agreement between an assessee and its AEs, we quote Technimont ICB Pvt. Ltd., Vs. Addl.CIT [138 ITD 23] (ITAT, Mum) (TM) and Sabic Innovative Plastic India Ltd. Vs. DCIT (2013) 59 SOT 138 (Ahd) that an AE could not be adopted as a tested party since lacking uncontrolled comparable transactions. Hon'ble jurisdictional high court's decision in CIT Vs B R Constructions [(1992) 222 ITR 202 AP Full Court] holds that *a co-ordinate bench decision not taking into consideration the relevant law and facts; as the case may be, is not a binding precedent*. We therefore accept the assessee's instant 13th substantive ground for this precise reason alone and delete the impugned ALP adjustment of Rs.2,80,004/-.

11. Next comes assessee's identical substantive grounds No.14th and 15th seeking to allow management and consultancy fee involving ALP adjustments of Rs.3,95,25,970/- and Rs.1,00,01,279/-; respectively. Learned counsel vehement contended before us that the lower authorities have erred in law and on facts in making both the impugned adjustments

thereby taking "NIL" price as their market rate(s) in issue. And also that they have wrongly applied benefit test as well which is not sustainable in light of CIT Vs. Cushman & Wakefield (India) Pvt. Ltd., [269 CTR 16] (Del) and CIT Vs. EKL Appliances Ltd. (2012) [345 ITR 241] (Del) that it is not within the TPO's domain to ascertain or apply the "benefit" test since the same has to be ascertained from the point of view of an assessee than questioning its wisdom by departmental authorities.

His next argument is that it is the assessee's AE had in fact made the impugned payments to M/s.KPMG on "cost to cost basis" only without involving any profit element therein. Learned counsel has quoted a catena of case law that such cost to cost arrangement itself forms a valid market comparable which could not be dis-regarded whilst adding the entire price as ALP adjustment.

The Revenue in turn has strongly supported both the impugned adjustment.

11.1. We have given our thoughtful consideration to rival contentions. We are of the view that the learned TPO needs to re-examine the entire issue in light of the assessee's foregoing submissions accordingly pin-pointing; *prima-facie,* a cost to cost reimbursement arrangement between itself, its AE and the ultimate payee M/s.KPMG *qua* the services in issue. We further wish to quote here the foregoing judicial procedents (supra) decision that the benefit test also not to be applied whilst determining "NIL Arm's Length Price" on the ground that the taxpayer had not in fact derived any benefit from the international transactions in issue. The assessee shall also be

at liberty to file its additional evidence; if any, in consequential proceedings as well.

The assessee's instant 14th and 15th substantive grounds are accepted for statistical purposes in above terms therefore.

12. Learned counsel next stated at the bar that the assessee is not pressing for its 16th to 21st substantive grounds forming subject matter of Section 154 rectification petition filed/pending before the Assessing Officer. Rejected accordingly.

13. The assessee's 22nd substantive ground seeks to allow education cess paid as a deduction involving an amount of Rs.52,84,078/- in issue. The Revenue on the other hand quotes Section 40(a)(ii) of the Act that a "cess" very much forms part of the clinching statutory expression "tax" employed therein. And that it is too late now for the assessee to make the impugned claim once the same had not been recorded in the corresponding books of account as well. We find no merit in the Revenue's foregoing arguments in light of Sesa Goa Ltd, Vs. JCIT (2020) [117 taxmann.com 96] (Bom), Chambal Fertilizers and Chemicals Ltd, Vs. CIT, ITA No.52/2018 (Raj) holding the impugned cess as an allowable deduction in light of CBDT's circular dt.18-05-1967 that education cess is not included in "tax" u/s.40(a)(ii) of the Act. We therefore direct the Assessing Officer to frame consequential computation as per law.

14. The assessee's 23rd substantive ground seeks to allow its foreign tax payment as a deduction. Mr.Lala vehemently contended that the instant issue allowability of foreign tax paid as a deduction in the nature of an expenditure incurred wholly

and exclusively for the purpose of the business is no more *res integra* in light of hon'ble Bombay high court's decision in Reliance Infrastructure Ltd. Vs. CIT (2017) 390 ITR 271 (Bom) wherein their lordships hold in very clear terms that *Section 40(a)(ii) does not cover the same.*

We find in this factual backdrop that this tribunal's co-ordinate bench decision in DCIT Vs. Elitecore Technologies Private Ltd. (2017) 165 ITD 153 (Ahd) has distinguished the foregoing judicial precedent to conclude that the same is not a binding precedent since coming from the hon'ble non-jurisdictional high court as under:

"27. In ground no. 3, the assessee has raised the following grievance 3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned AO in not allowing entire foreign tax credit amounting to Rs.55,61,306.

3.2 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned AO in disregarding the fact that tax credit has been claimed on the income which has been taxed in both the countries, i.e. source country and resident country.

3.3 Alternatively, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the AO in not considering actual profitability of foreign income and tax thereon while computing the tax on doubly taxed income at the time of allowing the tax credit in respect of taxes paid in Indonesia, Malaysia and Rwanda

28. In a connected ground of appeal, i.e. ground no. 3 which we must take up alongwith the above stated interrelated grievance of the assessee, the Assessing Officer has also raised the following grievance in its appeal:

3. The Ld. CIT(A) has erred in law and on facts in restricting the disallowance of foreign tax credit to Rs.3,10,799 and the balance unallowed credit of Rs.52,50,507 allowed u/s.37(1) of the Act, without properly appreciating the facts of the case and the material brought on record.

29. The relevant material facts are as follows. The assessee before us, a wholly owned subsidiary of a US based company by the name of Elitecore Technologies Inc, is a company engaged in the business of software

developments and products. During the relevant previous year, the assessee earned foreign income amounting to Rs 2,72,96,723 from Indonesia, Rs 66,53,562 from Malaysia and Rs 3,51,570 from Rwanda. It was in respect of these incomes that the taxes were withheld in the respective source countries, and the taxes so withheld aggregated to Rs 55,61,306. The assesse claimed a tax credit in respect of the taxes so withheld abroad. There is no dispute that the assessee should get foreign tax credit for the taxes so paid abroad- under section 90 read with the relevant treaty provisions in cases in which the income is sourced from tax treaty partner jurisdictions, i.e. Malaysia and Indonesia in this case, and under section 91 from the jurisdictions with which India has not entered into a tax treaty. The dispute is confined to the of tax credit. While the assessee has claimed a tax credit of Rs 55,61,306, the Assessing Officer has granted the tax credit of only Rs 3,10,799. When the matter travelled in appeal, the first appellate authority, i.e. learned CIT(A) simply followed his predecessor's order on this issue, in assessee's own case for the 2009-10, and confirmed the quantification of eligible tax credit at Rs 3,10,799. As for the balance amount of Rs 52,50,507 (i.e. tax withheld abroad at Rs 55,61,306 minus tax credit allowed of Rs 3,10,799), the CIT(A) held that it should be allowed as deduction under section 37(1)- a claim which was negatived, or rather simply brushed aside, by the Assessing Officer without any discussion at all. Aggrieved by learned CIT(A) upholding the eligible tax credit at Rs 3,10,799, the assessee is in appeal before us. In the meantime, however, the order so followed by the CIT(A) also came up for examination before us. Vide order dated 3rd January 2017 on assessee's appeal for the assessment year 2009-10, the stand of the CIT(A) on quantification of tax credit was reversed, claim of the assessee on quantification, to a very large extent, was upheld, and, in the process, some observations on principles governing the quantification of such tax credit were made. Learned counsel for the assessee suggests that matter deserves to be remitted to the file of the CIT(A) for fresh adjudication, on quantification aspect, in the light of the order so passed by the Tribunal, and learned Departmental Representative does not oppose this prayer. On the quantification aspect, therefore, we remit the matter the file of the CIT(A) for adjudication de novo in accordance with the law, in the light of the observations made by the Tribunal for the assessment year 2009-10 in assessee's own case, by way of a speaking order and after giving a reasonable opportunity of hearing to the parties. For the sake of completeness, we reproduce these observations as below:

8. So far as the first issue that we have identified for adjudication, i.e. the manner in which the quantum of income eligible which is required to be treated as taxed in both the countries ,is concerned, there is no guidance available in the treaties. All that both the treaties state is that the foreign tax credit shall not exceed the part of the income tax as computed before the deduction is given, "which is attributable as the case may be, to the income which may be taxed in that other State" but there is little guidance on how to compute such income. However, quite clearly, as the expression used is 'income', which essentially

implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself. This approach is reflected in the UN Model Convention Commentary as well, which, in turn, follows the approach in OECD Model Convention Commentary in this regard. UN Model ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 Convention Commentary (2011 update @ page 333) states that "Normally the basis of calculation of income tax is total net income, i.e. gross income less allowable deductions. Therefore, it is the gross income derived from the source state less any allowable deductions (specific or proportional) connected with such income which is to be exempted". It is, therefore, not really the right approach to take into account the gross receipts, as was contended by the assessee, for the purpose of computing admissible tax credit. The case before us is, however, somewhat unique in the sense that the main business is carried on in India and only some isolated transactions have taken place in Singapore and Indonesia. So far as the first two transactions are concerned, these are only for release of margin money and addition of a separate user-things which donot require any activity on the part of the assessee. In a way, therefore, these earnings are, so far as the present year is concerned, are passive earnings, and no part of the costs incurred in India can be allocated to earnings from Singapore and Indonesia. As regards earnings from maintenance contract, the assessee has allocated the costs on a proportionate basis and no defects are pointed out in the allocation so made by the assessee. However, there seems to be no logic in allocating a share, in proportion of turnover, of all the costs borne by the assessee to these earnings- as has been done by the Assessing Officer. When the income in respect of such foreign operations is not separately computed, it is to be done on a reasonable basis, and what would constitute reasonable basis will be the basis which is based on sound reasoning. The concept of averaging on the basis of overall revenues and profits of the assessee, or on the basis of some other ratio analysis, can only come into play when the income element cannot be worked out on some other reasonable basis on the facts of a particular case So far as the facts of the present case are concerned, we have also noted that the assessee has, during the course of the assessment proceedings, given the working on the computation of income- a copy of which is placed at page 79 of the paper-book filed before us.. .....

9. We see no infirmities in this computation showing the element of income embedded in the receipts which have been taxed abroad as well. These details were duly furnished to the Assessing Officer vide letter dated 20th March 2013, a copy of which was also placed before us at pages 69 onward of the paper-book. On a perusal of these details, we find that as far as release of retention money of Rs 53,23,085, released after validation of software by IBM Singapore, is concerned, we find that it is uncontroverted claim of the assessee that entire related expenses have been incurred in the earlier years as the software supply was completed in financial year 2006-07. There cannot obviously be any incremental cost at the point of time when retention money of 15% of total contract value is released. The same is the position in respect of receipt of Rs 31,61,369 from PT Tech Mahindra is concerned, which is only for additional

user of software already supplied to the customer. When an additional user is added by the customer, it does result in revenue to the seller but it does not at all add to his costs. There is thus merit in the plea that entire receipt, as in the case of release of retention money, is in the nature of income in this year. As regards receipt of Rs 5,74,060, this is in respect of annual maintenance fees but then there is a dedicated team for this purpose and the costs relatable to this particular receipt have been computed by apportioning these costs. We see no infirmity in this computation either. In our considered view, therefore, the computation of income element, as given by the assesse, is fair and reasonable and, in any event, the Assessing Officer has not pointed out any specific infirmities in the same. Given this analysis, we see no need to compute the profit element by taking into account the ratio of entire income to entire turnover of the assessee. Such a course, if at all, could have been relevant if the assessee had not furnished a reasonable computation of income embedded in the related receipts of the assessee. That is not the case before us. We, therefore, approve the stand of the assessee on this point. Having said that, we may add that this decision cannot be the authority for the general proposition that only marginal or incremental costs incurred in respect of foreign income should be taken into account and the overheads cannot be allocated thereto. As we have noted earlier, the allocation of proportional deductions can be justified in some situations, such as when business operations are somewhat evenly or even in a significant manner, spread over the residence and source jurisdiction, but that's not the case here. Right now, we are dealing with a situation in which a major portion of income, by release of retention money as also by addition of an additional user by the customer, is a somewhat passive income, even though in the nature of business receipt, and as such, to that extent, allocation of all the expenses incurred by the assessee, in respect of such earnings, will not be justified. As regards the income from maintenance contracts, the relates costs have already been allocated and the Assessing Officer has not pointed out any infirmity in the same. In this view of the matter, quantification of income for the purpose of computing admissible tax credit, as done by the assessee and as reproduced earlier, is accepted.

10. We have noted that the tax credit for both the jurisdictions is to be computed separately but in a similar manner, as is provided in the respective treaties. So far as the tax credit in respect of Indonesian receipts is concerned, as noted above and in view of article 23(1) of the applicable tax treaty, it cannot "exceed the part of the income tax as computed before the deduction is given, which is attributable as the case may be, to the income which may be taxed in that other State". The income tax is, therefore, required to be computed on proportionate basis. What is, therefore, to be computed next is the tax attributable to the income which is so taxed in both the tax jurisdictions. The tax has been paid, in this case, on book profits. To the best of our understanding, and particularly in the absence of any other method having been pointed out to us, only way in which be so done is by apportioning the actual tax paid under MAT provisions (i.e. Rs 54,13,417), in the same ratio as double taxed profit to the overall profits

i.e. 35,86,178:4,77,79,403. The amount of tax credit in respect of this income thus comes to Rs 4,06,315, as against the actual deduction of tax aggregating to Rs 5,71,878. The tax credit claim is thus admissible to this extent. As for the tax credit in respect of Singaporean receipts, while the formulae for limitation under article 25(2) of the Indo Singapore tax treaty remains broadly the same as it is provided that the credit shall not exceed tax "which is attributable to the income which may be taxed in Singapore" but the first variable i.e. income taxed in both the countries would change. The figure of income taxed in Singapore as also India is 53,23,085. The MAT paid, relatable to this income, will be arrived at by dividing the same in the ratio 53,23,085:4,77,79,403 The amount of tax payable in respect of Singapore income, by the same formulae, works out to Rs 6,03,107 which is clearly less than Rs 5,41,029 which was deducted at source in Singapore. The tax credit of Rs 5,41,029 in respect of Singaporean receipts is thus clearly admissible. As against tax credit claim of Rs 11,12,907, the tax credit of Rs 9,47,344 is thus indeed admissible. To this extent, the claim of the assessee is upheld. The case of the assessee, in any event, was not pressed beyond this point.

"30. There is, however, one more aspect to the controversy regarding treatment of income taxes paid abroad by the assessee, and that is with respect to deductibility of taxes so paid abroad, except to the extent of tax credit being granted in respect of the same under section 90 or 91, under section 37(1). Aggrieved by deduction being granted by the CIT(A) in respect of the balance amount of income tax paid abroad ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 (i.e. income tax withheld abroad minus the tax credit held admissible in such respect of such income tax paid abroad), the Assessing Officer is in appeal before us.

31. So far as this aspect of the matter is concerned, the stand of the assessee, at the assessment stage, has been that in case any part of the amount of income tax withheld abroad is not allowed as tax credit against the Indian tax liability, a deduction under section 37(1) be allowed in respect of the same. It was pointed that though there is a bar, under section 40(a)(ii), on deduction in respect of 'tax' on the profits and gains of the business, such a bar does not apply on the taxes paid outside India, as, in terms of definition of tax under section 2(43), "income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA". Reliance was placed on a coordinate bench decision in the case of DCIT Vs Mastek Limited [(2013) 36 taxmann.com 384 (Ahmedabad - Trib.)] as also some other judicial precedents which have been noted and relied upon in this coordinate bench decision. While the Assessing Officer did not deal with these arguments at all and simply brushed aside the claim of the assessee, learned CIT(A) upheld this claim and directed the Assessing Officer to allow deduction

under section 37(1) in respect of amount of difference between the income tax withheld abroad and the foreign tax credit granted to the assessee in respect of the same. Aggrieved, the Assessing Officer is in appeal before us.

32. Learned counsel for the assessee had stated this matter to be a covered matter by Mastek decision (supra), but when he was asked to argue the matter on merits, he painstakingly took us through section 40(a)(ii) and reiterated the arguments which were taken before the authorities below. His broad contention was that in terms of the Explanation 1 to Section 40(a)(ii), it is clear that the bar on deduction under section 40(a)(ii) is confined to only such income tax paid abroad in respect of which tax credit is granted under section 90 or 91. So far as the foreign tax in respect of which no tax credit is available, according to the learned counsel, there is no bar on deduction under section 40(a)(ii). The expression 'tax', as learned counsel contends, is a defined expression under the Income Tax Act, and its connotations are confined to only such tax as is paid under the Income Tax Act. Learned Departmental Representative, on the other hand, submitted that in terms of Section 40(a)(ii), no deduction can be allowed in respect of taxes on income, and there is no reason to assume that such a restriction is confined to taxes paid in India. As for the contention that the expression 'tax' appearing in section 40(a)(ii) is a defined expression restricting the scope of this expression to taxes paid under the Income Tax Act, learned Departmental Representative submitted that this is a hyper technical argument contrary to the scheme of the statutory provision. He, however, left the matter to us. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position. If we are to uphold the contentions of the assessee and the impugned order of the CIT(A). the scheme of benefit available to the assessee in respect of taxes paid or withheld outside India, by way of an example, is as follows:

Assuming that the assessee earned an income of Rs 100 from outside India, and the taxes withheld abroad are Rs 60 and the admissible tax credit available to the assessee under section 90 and/or 91, in respect of these taxes withheld, is Rs 40 as the effective tax rate in India in respect of the said income is 40%, the benefit available to the assessee should be as follows:
Tax credit to be adjusted against tax liability under the Income Tax Act, 1961 Rs 40 Deduction under section 37(1) in respect of taxes paid or withheld outside India Rs 20 In effect thus, the assessee gets a tax benefit of Rs 48 (i.e. Rs 40 plus 40% of Rs 20 which is allowed as deduction) as against a related tax liability of Rs 40

33. The stand of the revenue authorities, on the other hand, is that in the above example, no amount of tax paid or withheld outside India can be allowed as deduction under section 37(1). It is undisputed position that but for the restriction placed under section 40(a)(ii) income tax paid by an assessee would be deductible expense, and, therefore, the controversy requiring our adjudication is confined to the question as to whether or not this restriction

comes into play in respect of the income tax paid abroad. The case of the assessee is that taxes paid abroad are paid for the purposes of business, and as such deductible under s. 37(1) which provides that, "any expenditure (not being expenditure of the nature described in ss. 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". It is contended that the taxes paid are inherently in the nature of expenses incurred for the purposes of business but these are not allowable as deduction because of the specific bar placed under s. 40(a)(ii). However, according to the assessee, the restriction placed under s. 40(a)(ii), in computation of income from business and profession, refers to only 'tax' but the said expression, in view of definition of the expression 'tax' under s. 2(43), covers only "income-tax chargeable under the provisions of this Act (i.e. IT Act, 1961)", and, as a corollary thereto, this limitation on deduction of tax does not extend its scope to taxes paid other than under Income Tax Act, 1961. This plea, however, stands categorically rejected by Hon'ble Bombay High Court as far back as over a quarter century in 1990, in the case of Lubrizol India Limited Vs CIT [(1991) 187 ITR 25 (Bom)]. The plea was rejected in the context of Section 40(a)(ii) itself, though with reference to surtax, but principle unambiguously was the same and it dealt with the same expression in the same clause of the sub section. The argument of the assessee was that for the purpose of Section 40(a)(ii), which sets out restriction in deduction of 'tax', the definition of tax under section 2(43) must come into play, and this definition is confined to a tax levied under the Indian Income Tax Act, 1961. Hon'ble Bombay High Court had, rejecting this plea in no uncertain terms though in the context of surtax, observed as follows:

ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 With respect, this argument does not appeal to us. It is significant to note that the word "tax'; is used in conjunction with the words "any rate or tax", The word "any" goes both with the rate and tax. The expression is further qualified as a rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains. If the word "tax" is to be given the meaning assigned to it by s. 2(43) of the Act, the word "any" used before it will be otiose and the further qualification as to the nature of levy will also become meaningless. Furthermore, the word "tax" as defined in s. 2(43) of the Act is subject to "unless the context otherwise requires". In view of the discussion above, we hold that the words "any tax" herein refers to any kind of tax levied or leviable on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.
[Emphasis, by underlining, supplied by us now]

34. The views so expressed by Hon'ble Bombay High Court, in Lubrizol's case (supra), were approved by Hon'ble Supreme Court in the case of Smithkline & French India Ltd Vs CIT [(1996) 219 ITR 581 (SC)].

We are unable to see as to how these observations help the assessees herein. Firstly, it may be mentioned, s. 10(4) of the 1922 Act or s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession. The observations relied upon must be read in the said context and not literally or as the provisions in a statute. But so far as the issue herein is concerned, even this literal reading of the said observations does not help the assessee. As we have pointed out hereinabove the surtax is essentially levied on the business profits of the company computed in accordance with the provisions of the IT Act. Merely because certain further deductions [adjustments] are provided by the Surtax Act from the said profits, it cannot be said that the surtax is not levied upon the profits determined or computed in accordance with the provisions of the IT Act. Sec. 4 of the Surtax Act read with the definition of "chargeable profits" and the First Schedule make the position abundantly clear.

7. We may mention that all the High Courts in the country except the Gauhati High Court have taken the view which we have taken herein. Only the Gauhati High Court has taken a contrary view in the decisions in Makum Tea Co. (India) Ltd. & Anr. vs. CIT (1989) 178 ITR 453 (Gau) and Doom Dooma Tea Co. Ltd. vs. CIT (1989) 180 ITR 126 (Gau) . The decision of the Gauhati High Court in Makum Tea Co. (India) Ltd. is under appeal before us in Civil Appeal Nos. 3976-77 of 1995. Similarly Civil Appeal No. 3246 of 1995 is preferred against the decision of the Gauhati High Court following the decision in Doom Dooma Tea Co. Ltd.. (On enquiry, the office has informed that no Special Leave Petition/Civil Appeal has been filed against the decision in Doom Dooma Tea Co. (Ltd.). For the aforesaid reasons, we cannot agree with the view taken by the Gauhati High Court in the aforesaid decisions.

We agree with the view taken by the High Courts of Calcutta [Molins (India) Ltd. vs. CIT (1983) 144 ITR 317 (Cal) and Brooke Bond (India) Ltd. vs. CIT (1992) 193 ITR 390 (Cal) : TC 15R.590], Bombay (in) Lubrizol (India) Ltd. vs. CIT (1991) 187 ITR 25 (Bom) followed in several other decisions of that Court], Karnataka [CIT ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 vs. International Instruments Pvt. Ltd. (1983) 144 ITR 936 (Kar), Madras [Sundaram Industries Ltd. vs. CIT (1986) 159 ITR 646 (Mad), Andhra Pradesh [Vazir Sultan Tobacco Co. Ltd. vs. CIT (1988) 169 ITR 35 (AP)], Rajasthan [Associated Stone Industries Co. Ltd. vs. CIT (1988) 170 ITR 653 (Raj)], Gujarat [S.L.M. Maneklal Industries Ltd. vs. CIT (1988) 172 ITR 176 (Guj) followed in several cases thereafter], Allahabad [Himalayan Drug Co. Pvt. Ltd. vs. CIT (1996) 218 ITR 346 (All)] and Punjab & Haryana High Court

[Highway Cycle Industries Ltd. vs. CIT (1989) 178 ITR 601 (P&H) : TC 17R.807].

35. A coordinate bench of this Tribunal, while dealing with the same question of deductibility of income tax paid abroad and in the case of DCIT Vs Tata Sons Ltd [(1991) 9 ITR (Trib) 154 (Bom)] and speaking through one of us, elaborately set out the broad principles governing the issue and observed as follows:

7. Let us deal with some fundamentals first. The payment of income-tax in overseas tax jurisdictions, in addition to taxability in the home jurisdiction, is an inevitable corollary of inherent conflict between the source rule and residence rule. This conflict develops when a person resident in one of the tax jurisdictions earns income which is sourced from another tax jurisdiction. As per the residence rule, irrespective of the geographical location of a place where a person earns income, the income is taxable in the tax jurisdiction in which a person is resident. The source rule, however, lays down that an income earned in a tax jurisdiction, irrespective of the residential status of the person earning the said income, is liable to be taxed in the tax jurisdiction where the income is earned. Therefore, a tax object, i.e., the income which is to be taxed, as a rule attracts taxability in the source jurisdiction, and a tax subject, i.e. the person who is to be taxed is taxed in the residence jurisdiction. These competing claims put the taxpayer to risk of being taxed more than once in respect of the same income, and a solution to avoid such double taxation is thus to be found within the four corners of tax systems. While source rule as also the residence rule continue to be integral part of most of the tax systems, a mechanism is provided in the domestic tax legislations to relieve a taxpayer of such double taxation. In 'Tax Law Design and Drafting", an International Monetary Fund publication (ISBN 90-411-9784-2), Prof. Richard Vann, at p. 756 of Volume II, deals with this issue by observing as follows :
"It is necessary to distinguish among four basic methods in this area. The first is for a country not to assert jurisdiction to tax foreign source income of residents (either at all or for selected types of income). This territorial approach to taxation (taxing only income sourced in the country) means that the country is not following the usual international norm of worldwide taxation of residents and so is not strictly a method for relieving double taxation as residence source double taxation will simply not arise for its residents.
The second method is the exemption system, under which foreign source income is exempted in the country of residence. If the exemption is unconditional and the exempted income does not affect in any way the taxation of other income, then in substance the result is the same as a purely territorial system. Most exemption systems are not of this kind and so are to be distinguished from territorial systems. Most countries using an exemption system adopt exemption with progression, under which the total tax on all income of a resident is calculated, and then the average rate of tax is applied to the income that does not enjoy the exemption. Exemption systems are also increasingly subject to

various conditions to ensure satisfaction of the assumption underlying the system (that the income has been taxed in the ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 source country at its ordinary rates).These conditions can consist of subject- to-tax tests (including the specification of tax rates) or selective application of exemption to foreign countries under domestic law or tax treaties. In particular, the exemption is usually not given where the source tax has been reduced or eliminated by a tax treaty. The result is that there are no countries asserting jurisdiction to tax worldwide income that give an exemption for all kinds of foreign income; where a country is referred to as an exemption country, this generally means that it provides some form of exemption to business income, dividends received from direct investments in foreign companies, and often employment income, with a credit being used in other cases.

The third system is the foreign tax credit system under which a credit against total tax on worldwide income is given for foreign taxes paid on foreign income by a resident upto the amount of domestic tax on that income. This limit is designed to ensure that foreign taxes do not reduce the tax on the domestic income of residents and is calculated by applying the average rate of tax on the worldwide income before the credit to the foreign-source income. In its simplest form, this limit is applied to foreign income in its entirety, without distinguishing the type of income and the country where it is sourced.

The fourth system is to give a deduction for foreign income-taxes in the calculation of taxable income. While this system is used in some countries, often as a fall back from a foreign tax credit where the credit may not be of use to the taxpayer, it is not widely accepted as a method for use on its own and, more specifically is not used in tax treaties.

It can be argued that relief of double taxation in either credit or exemption form involves a number of complexities that are best avoided by developing or transition countries. Pure territorial taxation, however, simply invites tax avoidance through the moving of income offshore, and once qualifications on the pure territorial principle are admitted, such as limiting it to certain kinds of income, it is hard to see that any great simplicity is achieved as problems of characterization of income arise, as well as incentives to convert income from one form to another. Similar difficulties arise when a conditional exemption system is used. For this reason, a simple foreign tax credit system is probably suitable for most such countries--it asserts the worldwide jurisdiction to tax income of residents and does not require significant refinements of calculation. It leaves open the greatest scope for elaboration of the system by domestic law and tax treaties in the future without having to repeal or modify any exemption (often a difficult process politically because of entrenched interests). Given that tax treaties are premised on an item-by-item foreign tax credit limit, rather than on a worldwide limit aggregating all foreign income of the taxpayer, the item-by-item limit is probably easiest to use in domestic law.

Whichever double tax relief system is adopted, some method of apportioning deductions between domestic and foreign income will be necessary. Where

deductions allocated to foreign income exceed that income, the loss should not be available for use against domestic income."

8. There are thus four methods in which relief can be granted to a taxpayer in the residence country in respect of income-tax paid abroad. It is also important to bear in mind the fact that these four methods are mutually exclusive methods in the sense ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 that each one of these methods, on standalone basis, is meant to grant requisite relief from double taxation of an income. Application of more than one of these methods, in a particular situation can thus only result in granting relief greater than the double taxation itself. To sum up even at the cost of an element of repetition, these methods are as follows :

• In the first method, residence country follows pure territorial method of taxation and brings to tax only such incomes as are sourced in the residence jurisdiction itself. There is then no conflict between the source rule and the residence rule in as much as the residence rule is not strictly followed. Globally, however, there are not many takers for this system, and quite reasonably so, because, as Prof. Vann rightly puts it, it simply invites shifting of income offshore to evade taxes completely.
• The second method is to grant tax exemption to the income taxed abroad. The exemption method is usually conditional in the sense it provides progressive relief, on average rate basis, and is contingent upon the related income not being exempted from tax, or subjected to tax at a less than ordinary tax rate, under a tax treaty arrangement. Effectively thus it is not a simpliciter exemption of income taxed abroad, but an exemption of income subject to several riders. In that sense, it is distinct from the pure territorial method of taxation.
• In the third method, tax credit is given, in computation of tax liability of the taxpayer in respect of his worldwide income, in respect of taxes paid abroad. However, the credit so given, in respect of taxes paid abroad, does not exceed the domestic tax liability in respect of the income earned abroad. In principle, thus, even income-tax paid abroad is seen as appropriation of income towards State's share in income of a taxpayer and the credit is granted, in computation of domestic taxes, in respect thereof.
• In the fourth method, deduction is allowed in respect of the income-taxes paid abroad. It is thus seen as a charge of income, rather than appropriation of income and is seen as an expense incurred in earning the income abroad. That is in sharp contrast with all other methods where income-tax paid abroad is seen as an application of income towards Sovereign's share in income earned by a taxpayer.

9. Let us now deal with the legal provisions in the Indian IT Act, 1961, dealing with double taxation relief, and examine the manner in which the Indian IT Act provides relief from taxation of an income in more than one tax jurisdiction. These provisions are set out in Chapter IX of the Act, and are reproduced below for ready reference :

"CHAPTER IX : DOUBLE TAXATION RELIEF
90. Agreement with foreign countries or specified territories.--(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,--
(a) for the granting of relief in respect of--

(i) income on which taxes have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-s. (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-s. (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

Explanation 1 : For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

Explanation 2 : For the purposes of this section, 'specified territory' means any area outside India which may be notified as such by the Central Government.

**90A. Adoption by Central Government of agreement between specified associations for double taxation relief.--(1) Any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may, by notification in the Official Gazette, make such provisions as may be necessary for adopting and implementing such agreement--*

(a) for the granting of relief in respect of--

(i) income on which taxes have been paid both income-tax under this Act and income-tax in any specified territory outside India; or ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13

(ii) income-tax chargeable under this Act and under the corresponding law in force in that specified territory outside India to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that specified territory outside India, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that specified territory outside India, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that specified territory outside India.

(2) Where a specified association in India has entered into an agreement with a specified association of any specified territory outside India under sub-s. (1) and such agreement has been notified under that sub-section, for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-s. (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

Explanation 1 : For the removal of doubts, it is hereby declared that the charge of tax in respect of a company incorporated in the specified territory outside

India at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such company.

Explanation 2 : For the purposes of this section, the expressions--

(a) 'specified association' means any institution, association or body, whether incorporated or not, functioning under any law for the time being in force in India or the laws of the specified territory outside India and which may be notified as such by the Central Government for the purposes of this section;

(b) 'specified territory' means any area outside India which may be notified as such by the Central Government for the purposes of this section.

**This section was not in force in the relevant assessment year as it was also introduced w.e.f. 1st April, 2006 vide Finance Act, 2006, but it is reproduced nevertheless for the sake of completeness. Similarly, there are certain other variations in the statutory provisions as prevailing in the asst. yr. 2000-01 vis-a-vis the statutory provisions as on now, but these variations are not relevant in the context of issue under consideration in this appeal.*

91. Countries with which no agreement exists.--(1) If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under s. 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

(2) If any person who is resident in India in any previous year proves that in respect of his income which accrued or arose to him during that previous year in Pakistan he has paid in that country, by deduction or otherwise, tax payable to the Government under any law for the time being in force in that country relating to taxation of agricultural income, he shall be entitled to a deduction from the Indian income-tax payable by him--

(a) of the amount of the tax paid in Pakistan under any law aforesaid on such income which is liable to tax under this Act also; or

(b) of a sum calculated on that income at the Indian rate of tax;

whichever is less.

(3) If any non-resident person is assessed on his share in the income of a registered firm assessed as resident in India in any previous year and such share includes any income accruing or arising outside India during that previous year (and which is not deemed to accrue or arise in India) in a country with which there is no agreement under s. 90 for the relief or avoidance of double taxation and he proves that he has paid income-tax by deduction or otherwise under the law in force in that country in respect of the income so included he shall be entitled to a deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income so included at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

Explanation : In this section,--

(i) the expression 'Indian income-tax' means income-tax charged in accordance with the provisions of this Act;

(ii) the expression 'Indian rate of tax' means the rate determined by dividing the amount of Indian income-tax after deduction of any relief due under the provisions of this Act but before deduction of any relief due under this chapter, by the total income;

(iii) the expression 'rate of tax of the said country' means income-tax and super-tax actually paid in the said country in accordance with the corresponding laws in force in the said country after deduction of all relief due, but before deduction of any relief due in the said country in respect of double taxation, divided by the whole amount of the income as assessed in the said country;

ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13
(iv) the expression 'income-tax' in relation to any country includes any excess profits tax or business profits tax charged on the profits by the Government of any part of that country or a local authority in that country."

10. The scheme of relief from double taxation of an income, as evident from a plain reading of the above provisions, is like this. Under s. 91 of the Act, when a person resident in India earns any income outside India, which is not deemed to accrue or arise in India, and he suffers income-tax thereon in such source country, that person is entitled to deduction from his domestic income-tax liability to the extent of domestic tax liability in respect of such foreign income or taxes actually paid abroad in respect of such income--whichever is less. In other words thus, if at all a taxpayer is also taxed in India in respect of the income taxed abroad, it is only to the extent the tax rate abroad falls short of Indian tax rate. Each foreign sourced income is thus treated as a separate basket of income, and foreign tax relief in respect of that basket of income is restricted to the Indian income-tax actually levied on the same. This action also provides relief in the context of agricultural income-tax in Pakistan and also in

the context of taxation of a non-resident's share of income from a resident Indian partnership firm, which includes income earned outside India, except income deemed to accrue or arise in India, which has suffered tax in such source jurisdiction. Sec. 90 and s. 90A provide that when India has entered into a DTAA with a foreign country, or a specified association outside India, the provisions of such agreements will override the provisions of the Indian IT Act--except to the extent the provisions of the Indian IT Act are beneficial to the assessee. Under the tax credit scheme envisaged in the schemes of tax treaties, once again each income sourced in the treaty partner country is practically treated as a separate basket of income and the double taxation relief, in respect of taxes paid in that treaty partner country, is restricted to the taxes actually levied in the home country in respect of the said income. It thus follows that the least relief available in respect of income-tax paid abroad is if at all an assessee is also taxed in India in respect of the income-taxed abroad, it is only to the extent the tax rate abroad falls short of Indian tax rate. There is no dispute that the assessee has claimed double taxation relief under the scheme of the Act--as set out in s. 90 and s. 91 of the Act.

11. The assessee, however, was not satisfied with the relief so granted by the AO. He also claimed deduction, in computation of income from 'profits and gains from business and profession', in respect of taxes paid abroad. It is the case of the assessee that the taxes so paid abroad constituted expenditure laid out or expended wholly and exclusively for the purposes of the business or profession, and, therefore, deductible under s. 37(1) of the Act. It is this deduction which is now subject-matter of core dispute before us. Interestingly, while the assessee has claimed deduction of overseas income-taxes under s. 37(1), the assessee has also claimed tax credits, in respect of taxes so paid abroad, under s. 90 or under s. 91--as applicable. The same amount has been treated as a charge on income, by claiming the same as deduction as expenditure incurred to earn an income, as also an application of income, by claiming the same as appropriation of income being tax levied on profits and claiming income-tax credit in respect thereof. There is no meeting ground between these two diametrically opposed approaches, and, in our humble understanding, there cannot be any justification for making these contradictory claims. This would also result in a double unintended benefit to the assessee. To illustrate, the assessee has paid US Federal income-tax @ 35 per cent amounting to Rs. 35,01,71,283. On the one hand, the assessee has claimed deduction in respect of these taxes which gives assessee a tax advantage of Rs. 13,48,15,940, being 38.5 per cent of this amount, and the assessee has also claimed tax credit of Rs. 35,01,71,283 in respect of US Federal income-tax, in computation of Indian income- tax liability. Thus, for a payment of US Federal income-tax amounting to Rs. 35.01 crores, the assessee has claimed tax relief of Rs. 48.49 crores in India. To cap it all, the income which is so subjected to US Federal tax has not been taxed in India at all, due to deduction under s. 80HHE being available in respect of the same, and effectively thus the US Federal taxes paid by the assessee are sought to be offset, on 1.38 times

weighted basis, against taxes on assessee's domestic incomes taxable in India. While holding that the assessee is entitled to deduction under s. 80HHE, the CIT(A) has declined the claim of tax credit in respect of taxes paid in USA as there is no Indian tax liability in respect of the said income taxed in USA. That has at least restricted some intended double benefit to the assessee, but even in a situation in which tax relief is confined to a situation in which the same has been actually taxed in India, the relief will be available against tax liability in respect of other incomes to the extent of applicable tax rate on taxes actually paid abroad. The net effect is that even when there is admittedly no double taxation of an income, the assessee is able to reduce his Indian income-tax liability, in respect of other incomes, by being allowed deduction in respect of taxes paid abroad. Such a claim being accepted will lead to quite an incongruous result by any standard.

12. It is in the backdrop of the above claim for deduction that one has to take a look at s. 40(a)(ii) and s. 2(43) which are reproduced below for ready reference :

"Sec. 40(a)(ii)--Notwithstanding anything to the contrary in ss. 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",--
(ii) any sum paid on account of any rate of tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.
***Explanation 1 : For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate of tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under s. 90 or, as the case may be, deduction from the Indian income-tax payable under s. 91.*
***Explanation 2 : For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate of tax levied includes any sum eligible for relief of tax under s. 90A.*
***Inserted w.e.f. 1st April, 2006, vide Finance Act, 2006 Sec. 2(43)--In this Act, unless the context otherwise requires--*
"tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date;"

13. Let us now address ourselves to the web of legal arguments in support of this claim of deduction, in respect of taxes paid abroad, made by the assessee. The case ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 of the assessee is that taxes paid abroad are paid for the purposes of business, and as such deductible under s. 37(1) which provides that, "any expenditure (not being expenditure of the nature described in ss. 30 to 36 and not being in the nature of

capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". It is contended that the taxes paid are inherently in the nature of expenses incurred for the purposes of business but these are not allowable as deduction because of the specific bar placed under s. 40(a)(ii). However, according to the assessee, the restriction placed under s. 40(a)(ii), in computation of income from business and profession, refers to only 'tax' but the said expression, in view of definition of the expression 'tax' under s. 2(43), covers only "income-tax chargeable under the provisions of this Act (i.e. IT Act, 1961)", and, as a corollary thereto, this limitation on deduction of tax does not extend its scope to taxes paid other than under IT Act, 1961.

14. The above claim of deduction has been approved by the Co-ordinate Benches, for the first time in the asst. yr. 1976-77, and which has also been followed by another Co-ordinate Bench, vide order dt. 23rd Oct., 1984--a copy of which was also filed before us. This decision has been followed by the Co-ordinate Benches since then. It has been noted in this order that "there is no finding that local taxes (abroad) were assessed on a proportion of the profits i.e. consultancy fees received". When CIT sought a reference under s. 256(1), for esteemed views of Hon'ble Bombay High Court and against this order on the question of deductibility of local taxes paid abroad, the Tribunal declined the reference and, inter alia, observed that "the question is one of the facts", that "the tax deducted is a local tax and not a tax on profits" and that "foreign tax is not covered by the provisions of s. 40(a)(ii)". Hon'ble High Court also declined CIT's prayer for reference under s. 256(2) and the order of the Tribunal thus received finality. This decision has been consistently followed over the decades. However, in the lead decision cited before us, there is a categorical observation to the effect that "the tax deducted is a local tax and not a tax on profits", whereas in the present case it is an undisputed position that the tax levied abroad, being income-tax, is a tax on profits of the assessee--whether on presumptive basis or on the basis of actual profits earned by the assessee. Obviously, therefore, a decision in the context of 'local tax' not in the nature of tax on profits will have no application on these facts. It is also important to take note of amendment in law by inserting Expln. 1 to s. 40(a)(ii) which provides that, "for the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under s. 90 or, as the case may be, deduction from the Indian income-tax payable under s. 91". It cannot, therefore, be said that a foreign tax, in respect of which relief is eligible under s. 90 or s. 91, is not covered by the scope of expression 'tax' in s. 40(a)(ii).

15. In any event, the scope of expression 'tax' has to be considered in the context of s. 40(a)(ii), and in harmony with the scheme of things as envisaged in the IT Act. A lot of emphasis has been placed on definition of 'tax' in s. 2(43),

but, like any other definition clause in the Act, all definitions are subject to the rider that only 'unless the context otherwise requires' these definitions hold the field. It thus follows that these definitions cannot be viewed on standalone basis in isolation with the context in which the expressions so defined are set out. The underlying principle of this approach is that the statutory definitions cannot be applied everywhere, de hors the context in which these expressions are employed, on 'one size fits all' basis, exalting ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 these definitions into a prison house of obduracy, regardless of the varying circumstances in which, and myriad developments around which, these definitions are used. Hon'ble Supreme Court, in the case of K.P. Varghese vs. ITO & Anr. (1981) 24 CTR (SC) 358 : (1981) 131 ITR 597 (SC), has held that the task of interpretation is not a mechanical task and, quoted with approval, Justice Hand's observation that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning". Their Lordships further observed that, "we must not adopt a strictly literal interpretation of ... but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs" and that "we cannot ignore the context and the collection of the provisions in which ....., appears, because, as pointed out by Judge Learned Hand in the most felicitous language : interpret '. . .the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create . .."' One of the things which is clearly discernible from the above observations of their Lordships is that while interpreting the statutes, one has to essentially bear in mind the context and underlying scheme of the legislation in which the words are set out. Keeping these discussions in mind, let us see the context in which expression 'tax' is used in s. 40(a)(ii) which provides that "any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains" cannot be allowed as a deduction in computation of income from business or profession. The underlying principle in this provision is that a tax which is levied on the income of the assessee is an appropriation of income, representing State's share in the income of the assessee, and not a charge on income. In the case of Lubrizol India Ltd. vs. CIT (1991) 93 CTR (Bom) 237 : (1991) 187 ITR 25 (Bom), Hon'ble Bombay High Court has observed that, "As held in a number of decisions income-tax is a Crown's or Central Government's share in the profits of a company". In other words thus, income-tax represents State's share in income of a subject. The principle of income-tax being an appropriation of income rather than a charge on income is also in harmony with the views expressed by Hon'ble Bombay High Court, in the case of S. Inder Singh Gill vs. CIT (1963) 47 ITR 284 (Bom) wherein their Lordships took note of this Tribunal's findings to the effect that "We (the Tribunal) are not aware of any

commercial practice or principle which lays down that tax paid by one on one's income is a proper deduction in determining one's income for the purpose of taxation", and approved the same by observing that "no good reason has been shown to us to differ from the conclusion to which the Tribunal has reached". It is thus clear that in the esteemed views of Hon'ble jurisdictional High Court, taxes paid abroad do not constitute admissible deduction under s. 37(1). Incidentally, these observations were in the context of overseas income-tax paid by the assessee, i.e. in Uganda in that case. Learned counsel's reliance on definition of tax under s. 2(43), in the context of disallowance under s. 40(a)(ii), is thus of no help to the assessee. In Lubrizol's case (supra), Hon'ble Bombay High Court took note of the wording of s. 40(a)(ii) and disagreed with the assessee's contention that the expression 'tax' is restricted to 'income-tax' as defined under s. 2(43). While doing so, their Lordships, inter alia, observed as follows :

"It is significant to note that the word 'tax' is used in conjunction with the words 'any rate or tax'. The word 'any' goes both with the rate and tax. The expression is further qualified as a rate of tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains. If the word 'tax' is to be given the meaning assigned to it by s. 2(43), the word 'any' used before it will be otiose and the further qualification as to the nature of levy will also become meaningless. Furthermore, the word 'tax' as defined in s. 2(43) of the Act is subject to "unless the context otherwise requires". In view of the discussion above we hold that the word 'any' tax herein refers to any kind of tax levied or leviable on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains."

16. Hon'ble Bombay High Court's judgment in Lubrizol India Ltd. (supra) which holds that the meaning of expression 'tax' cannot be restricted to the definition of 'tax' was delivered on 11th July, 1990, and, to that extent, Tribunal's decision dt. 23rd Oct., 1984, in assessee's own case for the asst. yr. 1976-77 and which has been followed in all other assessment years, is no longer good law. None of the subsequent decisions of the Tribunal, which merely followed the said order, had an occasion to deal with the law so laid down by their Lordships. It needs hardly be stated that mere rejection of reference by the Hon'ble High Court does not amount to approval of the views of the Tribunal. As against this rejection of reference, which is sought to be construed as implied approval of Tribunal's analysis, there is a direct decision by the Hon'ble High Court holding that definition of tax under s. 2(43) is not relevant for the purpose of s. 40(a)(ii). With respect, instead of following the Co-ordinate Bench in such circumstances, we have to yield to the higher wisdom of the Hon'ble Courts above.

17. The situation before us is also quite unique in the sense that in none of the decisions cited before us, the assessee has claimed double taxation relief

under s. 90 or s. 91, and, in addition to such a relief having been claimed, the assessee has also claimed deduction in computation of business income in respect of the taxes so paid. This is clearly double 'double taxation relief' to the assessee whereas in fact there is no double taxation at all to the extent assessee's income from exports of software was held to be eligible for deduction under s. 80HHE in India. What does it lead to ? It leads to, for example, a situation that the taxes paid in US are being sought to be offset against assessee's tax liability in respect of domestic incomes, and in addition to the same, the taxes paid in USA are also being sought to be deducted from assessee's taxable income in India. The net result of this claim is that, as we have seen in para 11 above, that the assessee is claiming a weighted deduction of 1.38 times the tax paid in USA from income-tax liability in respect of other incomes. Even in a situation in which tax relief is confined to a situation in which the same has been actually taxed in India, the relief will be available against tax liability in respect of other incomes to the extent of 38.5 per cent of taxes paid abroad. The scheme of the Act does not visualize this kind of an undue relief to the assessee which provides much greater relief than the hardship caused to the assessee. The hardship is of double taxation of an income in more than one tax jurisdiction, and the relief must not go beyond mitigating this hardship; it cannot be turned into an undue advantage, or source of income, to the assessee. Sec. 91 restricts the double taxation relief only to such amount as may have been paid by the assessee in excess of his income-tax obligations in India. Similarly, in terms of the provisions of tax treaties which are entered into under s. 90, tax credits, in respect of taxes paid abroad, are restricted to assessee's domestic tax liability in respect of the subject income as was held by this Tribunal in the case of Jt. CIT vs. Digital Equipments India Ltd. (2005) 93 TTJ (Mumbai) 478 : (2005) 94 ITD 340 (Mumbai). If we are to hold that the assessee is entitled to deduction of tax paid abroad, in addition to admissibility of tax relief under s. 90 or s. 91, it will result in a situation that on one hand double taxation of an income will be eliminated by ensuring that the assessee's total income-tax liability does not exceed income-tax liability in India or income-tax liability abroad--whichever is greater, and, on the other hand, the assessee's domestic tax liability will also be reduced by tax liability in respect of income decreased due to deduction of taxes. Such a benefit to the assessee is not only contrary to the scheme of the Act and contrary to the fundamental principles of international taxation, it also ends up making double taxation relief a mechanism to reduce domestic tax liability in India--something which is most incongruous. In our considered view, an interpretation which leads to such glaring absurdities cannot be adopted.

18. Learned counsel has also submitted that in the event of our declining the deduction, we should at least direct that tax credit in terms of the provisions of s. 90 be granted in respect of the entire amount. Learned counsel submits that this approach is justified in as much as we must take into account right to tax, rather than the actual levy of tax. In our considered view, however, the right to tax is relevant only for the purpose of allocation of taxing rights, as was

held by this Tribunal in the case of Asstt. Director of IT vs. Green Emirate Shipping & Travels (2006) 99 TTJ (Mumbai) 988 : (2006) 100 ITD 203 (Mumbai), and not for the purposes of granting tax credits. Being granted tax credits in excess of the actual domestic tax liability would result in a situation that even when assessee has no tax liability in India, he is to be allowed credit in respect of entire taxes paid in US, and thus perhaps even entitling him to refund in India in respect of taxes paid in USA. That is clearly contrary to the scheme of tax credit under the applicable tax treaty. In any event, this issue is, however, covered against the assessee by Tribunal's decision in the case of Digital Equipment (supra), wherein the Co-ordinate Bench, speaking through one of us, has observed as follows :

"4. We consider it useful to reproduce the text of art. 25(2)(a) of the Indo-US DTAA which is as follows :
'Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow a deduction from the income of that resident an amount equal to income-tax paid in the Unites States, whether directly or by way of deduction. Such deduction shall however not exceed that part of income-tax (as compute before the deduction is given) which is attributable to the income which is taxed in the United States.' A plain reading of the above provision makes it clear that the deduction on account of income-tax paid in the US, from income-tax payable in India, cannot exceed Indian income-tax liability in respect of such an income. This restriction on the deduction is unambiguous and beyond any controversy, as evident particularly from the last sentence in art. 25(2)(a) which is italicized as above the supply the emphasis on the same. As a matter of fact, we are unable to appreciate any basis whatsoever for the CIT(A)'s conclusion that the taxes paid in the US, in the instant case, are to be credited to the assessee's account and are to be refunded to the appellant, in case he has no income-tax liability in respect of that income in India. As for the CIT(A)'s observation, referring to payment of income-tax in the United States on an income and returning a loss in respect of that income in India, to the effect that "this is an absurd situation and was not visualized by the treaty", it cannot but stem from his inability to take note of the fact that certain incomes (e.g., royalties, fees for technical or included services, interest, dividends etc.), are taxed on gross basis in the source country but are only be taxed on net basis, as is the inherent scheme of income-tax legislation normally, in the country of which the assessee is resident. In such situations, it is quite possible that while an assessee pays tax in the source country which is on gross basis, he actually ends up incurring loss when all the admissible deductions, in respect of that earning, are taken into account. There is nothing absurd about it. The underlying philosophy of the source rule on gross basis, which prescribes taxation of certain incomes on gross basis in the source country, is that irrespective of actual overall profits and losses in earning those incomes, the assessee must pay a certain amount of tax, at a negotiated lower rate though, in the country in which the income in question is earned. It is also noteworthy that the heading of art. 25 is

"Elimination of double taxation" but then there has to be double taxation of an income in the first place before the question of elimination of that double taxation can arise. In the case before us the assessee company has paid taxes, in respect of that earning, only in one country, i.e., the United States, and claimed losses, on taking into account the admissible deductions therefrom, in the other country i.e., India. This is surely not, by any stretch of logic, a case of double taxation of an income. Article 25 does not, therefore, come into play at all. Turning to the CIT(A)'s observation that "the treaty nowhere stipulates that the credit for the taxes paid in the USA has to be given on proportionate basis", all we need to say is that the Indo-US DTAA, as indeed other DTAAs as well, does stipulate that the foreign tax credit cannot exceed the income-tax leviable in respect of that income in the country of which the assessee is resident. It is because of this limitation that the AO declined the refund in respect of taxes paid by the assessee in the United States. In view of this limitation on the foreign tax credit, the innovative theory of crediting the entire tax paid in the US to the assessee and grant of refund to him in case there is no tax liability in India in respect of that income, as enunciated and adopted by the CIT(A), is wholly unsustainable in law. Where is the question of refund of taxes paid abroad when FTD (i.e., foreign tax credit), in view of specific provisions to that effect in the DTAAs, cannot even exceed the Indian income-tax liability ? It is not the tax payment abroad which is the material figure for the purpose of computing Indian income-tax liability, but it is the admissible foreign tax credit in respect of the same which affects such an Indian income-tax liability. The FTD in respect of income-tax paid in the US cannot exceed the Indian income-tax liability in respect of the income on which income-tax is paid in US."

19. In view of the aforesaid judicial precedent, and being in considered agreement with the same, we reject this alternate claim of the assessee.

20. Learned counsel has also contended that in any event, we must allow deduction in respect of State income-taxes paid in USA and Canada as relief is not admissible in respect of the same in respective tax treaties. We have been taken through India USA tax treaty to point out that tax credits are admissible only in respect of income- tax levied by the Federal Government and not by the State Governments. It is contended that since no relief is admissible in respect of State taxes under s. 90 or s. 91, these taxes will continue to be tax deductible, and to that extent, decisions of the Co-ordinate Benches will hold good. We are unable to see legally sustainable merits in this submission either. Apart from the fact that such a claim of deduction is clearly contrary to the law laid down by Hon'ble jurisdictional High Court in Lubrizol's case (supra), there is another independent reason to reject this claim as well. The reason is this. It is only elementary that tax treaties override the provisions of the IT Act, 1961, only to the extent the provisions of the tax treaties are beneficial to the assessee. In other words, a person cannot be worse off vis-a-vis the provisions of the IT Act, even when a tax treaty applies in his case. Sec. 90(2) States that even in relation to the assessee to whom a tax treaty applies "the provisions of this Act shall

apply to the extent they are more beneficial to that assessee". Undoubtedly, title of s. 91 as also reference to the countries with which India has entered into agreement, suggests that it is applicable only in the cases where India has not entered into a DTAA with respective jurisdiction, but the scheme of the s. 91, read along with s. 90, does not reflect any such limitation, and s. 91 is thus required to be treated as general in application. The scheme of the IT Act is to be considered in entirety in a holistic manner and each of the section cannot be considered on standalone basis. It is important to bear in mind the fact that so far as s. 91 is concerned, it does not discriminate between taxes levied by the Federal Governments and taxes levied by the State Government. The income-tax levied by different States in USA usually ranges from 3 per cent to 11 per cent, and the aggregate income-tax paid by the assessee in USA will range from 38 per cent to 46 per cent. Therefore, on the facts of the present case and bearing in mind the fact that the Federal income-tax in USA at the relevant point of time was lesser in rate at 35 per cent vis-a-vis 38.5 per cent income-tax rate applicable in India, the admissible double taxation relief under s. 91 will be higher than relief under the tax treaty. It will be so for the reason that State income-tax will also be added to income-tax abroad, and the aggregate of taxes so paid will be eligible for tax relief--of course subject to tax rate on which such income is actually taxed in India. The tax relief under s. 91 thus works out to at least 38 per cent, as against tax credit of only 35 per cent admissible under the tax treaty. In such a situation, the assessee will be entitled to relief under s. 91 in respect of Federal as well as State taxes, and that relief being more beneficial to the assessee vis-à-vis tax credit under the applicable tax treaty, the provisions of s. 91 will apply to State income-taxes as well. The State income-tax is also, therefore, covered by Expln. 1 to s. 40(a)(ii), and deduction cannot be allowed in respect of the same. Finally, in view of Hon'ble Bombay High Court's judgment in Gill's case (supra), income-tax abroad cannot be allowed as a deduction in computation of income and this judgment does not discriminate between Federal and State taxes either. Interestingly, State income- taxes paid in USA, subject to certain limitations, are deductible in computation of income for the purposes of computing Federal tax liability in USA, but that factor cannot influence deductibility of these taxes, particularly in the light of the provisions of Expln. 1 to s. 40(a)(ii) and in the light of Hon'ble Bombay High Court's judgment in Gill's case (supra), in computation of business income under Indian IT Act. For all these reasons, we are unable to uphold the plea of the assessee seeking deduction of at least State income-tax paid in USA.

21. In view of the above discussions and for the detailed reasons set out above, we uphold the grievance of the AO. The CIT(A) was indeed not justified in deleting the disallowance of Rs. 67,89,30,514 in respect of income-tax paid abroad. We vacate the relief granted by the CIT(A) and restore this disallowance.

36. Oblivious of the judicial precedents discussed above, another bench of this Tribunal, in the case of Mastek Ltd (supra), however, touched a different chord. This bench was of the view that deduction in respect of taxes paid abroad can be allowed as a deduction under section 37(1). In coming to this conclusion, bench did not take note of the Lubrizol decision (supra) by Hon'ble Bombay High Court, which stands specifically approved by Hon'ble Supreme Court in the case of Smimthkline and French India (supra), or even of the coordinate bench decision in the case of Tata Sons (supra). The coordinate bench did refer to the High Court decisions in the cases of Tata Sons Ltd and South East Asia Shipping, but these decisions were rejecting the reference applications under section 256(2) thus lending finality to the decisions of the Tribunal which, in any case, were rendered ineffective in the light of subsequent decision of Hon'ble Bombay High Court in Lubrizol's case. The coordinate bench decision in the case of Tata Sons (supra), as we have seen earlier in this order, specifically held so. Even if there were contrary views of the Tribunal at that point of time, and even if the coordinate bench had any reservations on correctness of Tata Sons decision (supra) by another coordinate bench, the matter could have been at best referred to a Special Bench. However, neither any of the parties brought these decisions to the knowledge of the bench, nor did the bench know about these decisions. It was thus, in ignorance about these significant developments, the coordinate bench, in Mastek's case (supra), has observed as follows:

39. Due consideration of the provisions of sec.37 and sec.40(a)(ii) of the Act as well, it emerges that u/s 37, all taxes and rates are allowable irrespective of the place where they are lived i.e., whether on Indian soil or offshore, whereas u/s 40(a)(ii) of the Act, income-tax which is a tax leviable on the profits and gains chargeable under the Act is deductible. On the other hand, all other taxes levied in foreign countries whether on profits or gains or otherwise are deductible under the provisions of sec. 37 of the Act and payment of such taxes does not amount to application of income.

40. Let us now have a glimpse at the judicial views on a similar issue.
(i) South East Asia Shipping Co. ITA No.123 of 1976 - Mumbai Tribunal: The issue, in brief, was that the tax authorities of the respective country had collected income-tax at source, according to them, a part of such earnings accrued and arose in their countries which were liable to income-tax under its taxing laws. Such foreign tax claimed as a deduction by the assessee was turned down by the AO. This was reversed by the AAC with a reasoning that the 'payment of foreign income-tax formed part of the expenditure like other usual business expenses incurred in the course of business and as such, the assessee was entitled to claim deduction of the same u/s 37 of the Act for being incurred wholly and exclusively for the purpose of business.' On a further appeal, the Tribunal had, after due consideration of the provisions of both the sections - 37 which allows a business expenditure and 40(a)(ii) which contained prohibition - as under:

'40(a)(ii) - any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains' The Tribunal observed that the term 'tax' is defined in relation to the AY commencing on the 1st day of April, 1965 and in subsequent assessment years as meaning tax chargeable under the provisions of the Act and that this amendment was effected by the Finance Act 1965. taking cognizance of it, the Hon'ble Tribunal had held that 'any sum paid on account of any rate or income tax and super-tax chargeable under the provisions of the Income-tax Act' is expressly disallowed by this clause (ii) of sec.
40(a).
Accordingly, the Hon'ble Tribunal observed with regard to the allowability of foreign taxes u/s 37 of the Act as under:
"So we have to see whether such expenditure is allowable under section 37 of the Act. In our view, rates and taxes which are payable irrespective of any profits being earned are admissible allowances under section 37 and section 40(a)(ii) does not apply to them. The tax levied by different countries is not a tax on profits but a necessary condition precedent to the earning of profits. So the AAC was absolutely justified in allowing the appeal of the assessee and we see no reason to differ from the finding."
Reference application of the Revenue was rejected by the Tribunal which has been ratified by the Hon'ble Bombay High Court in ITA NO.123 OF 1976.
(ii) In the case of Tata Sons Ltd. [ITA NO.89 OF 1989], the Hon'ble Mumbai Bench of Tribunal had held on a similar issue that:-
"It is an established principle that when a matter is settled by higher courts in a case of a particular assessee, at least in that case litigation cannot be allowed to perpetuate for an indefinite period. In the instant case, the issue is not only settled in favour of the assessee in its own case by the Tribunal in ITA Nos. 5708/Mum/82 and 5790/Mum/83 dated 23.10.82, but even after rejection of Revenue's Application under section 256(1) in RA Nos.305 AND 306/Bom/85 dated 14.1.86, its application under section 256(2) on the issue has been rejected by the High court by its order dated 29/3/93 in ITA No.89 of 1989. thus, the issue has reached finality in the assessee's own case and it cannot be dragged into further litigation."

41. Taking into account all these facts and circumstances of the issue and in consonance with the findings of the Hon'ble Benches of Mumbai Tribunal (supra), we are of the firm view that the learned CIT (A) was justified in his stand which requires no interference of this Bench at this juncture. It is ordered accordingly.

37. The views so taken by the coordinate bench, however, are not only diametrically opposed to an earlier decision of another coordinate bench in the case of Tata Sons (supra), as reproduced earlier, and of Hon'ble Bombay High Court's decision in the case of Lubrizol India (supra) but also clearly contrary to certain observations a later judgment of Hon'ble Bombay High Court in the

case of Reliance Infrastructure Ltd vs CIT [TS 676 HC 2016 (BOM)] wherein Their Lordships have, inter alia, observed as follows:

We have considered the rival submissions. So far as the question relating to the Tribunal not following its order in the case of the applicant itself for A.Y. 1979-80, we find that there is a justification for the same. This is so as the decision of this Court in Inder Singh Gill (supra) was noted by the Tribunal on an identical issue while passing the order for the subject assessment year. Thus, the Tribunal had not erred in not following its order for A.Y. 1979-80. In fact, the decisions of this Court in South East Asia Shipping Co.(supra) and Tata Sons Ltd. (supra), which are being relied upon in preference to Inder Singh Gill (supra) cannot be accepted as both the orders being relied upon by the applicant was rendered not at the final hearing but on applications under Section 256(2) of the Act and at the stage of admission under Section 260A of the Act. This unlike the judgment rendered in a Reference by this Court in Inder Singh Gill (supra). Moreover, the decision in South East Asia Shipping Co. (supra) is not available in its entirety. Therefore, it would not be safe to rely upon it as all facts and on what consideration of law, it was rendered is not known. Similarly, the decision of this Court in Tata Sons (supra) being Income Tax Appeal No.209 of 2001 produced before us, dismissed the appeal of the Revenue by order dated 2nd April, 2004 by merely following its order dated 23rd March, 1993 rejecting the Revenue's application for Reference under Section 256(2) of the Act. Thus, it also cannot be relied upon to decide the controversy. Moreover, the order of this Court in Tata Sons Ltd. (supra) as produced before us for Assessment Year 1985-86 had not noticed the decision of this Court in Inder Singh Gill (supra) on a Reference. Therefore, it is rendered per incuriam.
[Emphasis, by underlining, supplied by us]

38. To the best of our knowledge there is no, and having done our necessary research on judicial precedent on these issues we do not find any, decision of any of Hon'ble High Courts which is contrary to the view so taken by Hon'ble Bombay High Court in Reliance Infrastructure's case (supra). Clearly, therefore, the coordinate bench, in Mastek Ltd's case (supra), was swayed by judicial precedents which, as held by Hon'ble Bombay High Court in the aforesaid case, are not really binding judicial precedents on the issue. There are direct decisions of Hon'ble Bombay High Court itself, in the case of Inder Singh (supra) and Lubrizol (supra), which, for the detailed reasons set out above by Hon'ble Bombay High Court, must be preferred over these decisions declining to admit reference applications under section 256(2), as it then existed.

39. Having said that, we may also point out that earlier decision of Hon'ble Bombay High Court in Lubrizol's case (supra) and the fact that it stands specifically approved by Hon'ble Supreme Court in the case of Smithkline and French India (supra) was not brought to the notice of Hon'ble Bombay High

Court either. It was in this backdrop that Their Lordships further made the following observations in the case of Reliance Infrastructure (supra):

It therefore, follows that the tax which has been paid abroad would not be covered with in the meaning of Section 40(a) (ii) of the Act in view of the definition of the word 'tax' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2 (43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.
[Emphasis, by underlining, supplied by us]

40. Ironically, there is no meeting ground between the observations so made by Hon'ble Bombay High Court and its earlier observations, in Lubrizol's case (supra), to the effect that "If the word 'tax' is to be given the meaning assigned to it by s. 2(43), the word 'any' used before it will be otiose and the further qualification as to the nature of levy will also become meaningless", which stand specifically approved by Hon'ble Supreme Court in the case of Smithkline French India's case (supra) nor, for that purpose, with Hon'ble Supreme Court's observations, in Smithkline French India's case (supra), to the effect that "Firstly, it may be mentioned, s. 10(4) of the 1922 Act or s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession. The observations relied upon must be read in the said context and not literally or as the provisions in a statute". Such a conflict, as it would appear to us, requires us to bow before the higher wisdom of Hon'ble Supreme Court and to that extent, remain completely uninfluenced by any observations, from any other judicial forum below Hon'ble Supreme Court, which come in conflict with the views so expressed by the Hon'ble Supreme Court. In any event, the views so expressed by the Hon'ble non-jurisdictional High Court are without the benefit of considering the impact of Hon'ble Supreme Court's decision in Smithkline and French (supra).

41. Learned counsel for the assessee submits that the decision of Hon'ble Bombay High Court in the case of Reliance Infrastructure (supra) is directly on the issue of foreign tax credit while Lubrizol's decision (supra) and Smithkline and French India decision (supra) are in the context of surtax. These decisions, according to the learned counsel, have nothing to do with the question of deductibility of taxes paid abroad. The only direct decision on the issue is from Hon'ble Bombay High Court in the case of Reliance Infrastructure (supra) and that is in favour of the assessee. It is his argument that since there is no decision

by the jurisdictional High Court to the contrary of what has been stated by Hon'ble Bombay High Court, Reliance Infrastructure (supra) decision is a binding precedent for us and we must follow the same. Any other approach, he very politely tells us, would be violate fundamental principles of judicial discipline and cannot, therefore, meet approval of Hon'ble Courts above. He reminds us that the Tribunal decision in the case of Tata Sons (supra) is authored by one of us and suggests, in very decorous manner- which is his hallmark anyway, that we should not become so attached to our labour of love that the cause of justice is sacrificed. We are thus urged to follow the Mastek decision (supra) Reliance Infrastructure decision (supra) in letter and in spirit. Learned counsel has then pointed out that the Explanations to Section 40(a)(ii) refer only such taxes paid outside India in respect of which relief under section 90 and 91 are available, and it cannot be open to extend the scope of what is covered by Explanations to Section 40(a)(ii).

42. Learned counsel's remarks are indeed thought provoking. We have to take a conscious call on the points made by him. As we do so, we must make it clear, though at the cost of stating the obvious, that whatever we say is, and shall always remain, what Hon'ble Courts above hold on this issue. In a way, therefore, we are writing on the sand fully aware that whatever we write, no matter how painstakingly we write, on this sand, will be washed away by a wave of judicial thought from Hon'ble Courts above. We are also alive to the fact that considering how significant this issue is it is only a matter of time that Hon'ble Courts above may have to take a call on it. Its ironically in this comfort of a very limited and short lived impact of our decision on this issue, we are taking this close call. Coming to the core issue, the argument before us is that for the purpose of section 40(a)(ii), the definition of 'tax' must be the same as is assigned to 'tax' under section 2(43) of the Act. It is for this reason that tax paid outside India, not being tax levied under the Indian Income Tax Act, is said to be intact from the bar placed under section 40(a)(ii) of the Act. Section 40(a)(ii), it may be recalled, provides that "any sum paid on account of any rate of tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains" shall not be allowed as a deduction, inter alia, under section 37(1) of the Act. The entire controversy before us is confined to the connotations of expression "tax" appearing in the aforesaid statutory provision. The question thus is as to what are the connotations of the expression 'tax' and the alternative approaches canvassed are that (a) the connotations of expression 'tax' appearing in the above provisions are controlled by definition under section 2(43) of the Act; (b) the connotations of the expression 'tax' appearing in the above provision extend to any tax, whether under the Income Tax Act, 1961 or not, as long as the tax is levied on the profits and gains of business, or assessed at a proportion of, or otherwise on the basis of, any such profits and gains. This controversy is evident from the following extracts from the various decisions, including the decision cited by the learned counsel of the assessee, as also from orders impugned in appeal before us:

(i) Mastek Ltd's decision by the coordinate bench, relied upon by the learned counsel:

39. Due consideration of the provisions of sec.37 and sec.40(a)(ii) of the Act as well, it emerges that u/s 37, all taxes and rates are allowable irrespective of the place where they are lived i.e., whether on Indian soil or offshore, whereas u/s 40(a)(ii) of the Act, income-tax which is a tax leviable on the profits and gains chargeable under the Act is deductible. On the other hand, all other taxes levied in foreign countries whether on profits or gains or otherwise are deductible under the provisions of sec. 37 of the Act and payment of such taxes does not amount to application of income.

40. Let us now have a glimpse at the judicial views on a similar issue.

(i) South East Asia Shipping Co. ITA No.123 of 1976 - Mumbai Tribunal: The issue, in brief, was that the tax authorities of the respective country had collected income-tax at source, according to them, a part of such earnings accrued and arose in their countries which were liable to income-tax under its taxing laws. Such foreign tax claimed as a deduction by the assessee was turned down by the AO. This was reversed by the AAC with a reasoning that the 'payment of foreign income-tax formed part of the expenditure like other usual business expenses incurred in the course of business and as such, the assessee was entitled to claim deduction of the same u/s 37 of the Act for being incurred wholly and exclusively for the purpose of business.' On a further appeal, the Tribunal had, after due consideration of the provisions of both the sections - 37 which allows a business expenditure and 40(a)(ii) which contained prohibition - as under:

'40(a)(ii) - any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains' ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 The Tribunal observed that the term 'tax' is defined in relation to the AY commencing on the 1st day of April, 1965 and in subsequent assessment years as meaning tax chargeable under the provisions of the Act and that this amendment was effected by the Finance Act 1965. taking cognizance of it, the Hon'ble Tribunal had held that 'any sum paid on account of any rate or income tax and super-tax chargeable under the provisions of the Income-tax Act' is expressly disallowed by this clause (ii) of sec. 40(a).

Accordingly, the Hon'ble Tribunal observed with regard to the allowability of foreign taxes u/s 37 of the Act as under:

"So we have to see whether such expenditure is allowable under section 37 of the Act. In our view, rates and taxes which are payable irrespective of any profits being earned are admissible allowances under section 37 and section 40(a)(ii) does not apply to them. The tax levied by different countries is not a tax on profits but a necessary condition precedent to the earning of profits. So the AAC was absolutely justified in allowing the appeal of the assessee and we see no reason to differ from the finding."

Reference application of the Revenue was rejected by the Tribunal which has been ratified by the Hon'ble Bombay High Court in ITA NO.123 OF 1976.

.....

(ii) Reliance Infrastructure (supra) by Hon'ble Bombay High Court We would have answered the question posed for our consideration by following the decision of this Court in Inder Singh Gill (supra). However, we notice that the decision of this Court in Inder Singh Gill (supra) was rendered under the Indian Income Tax Act, 1922 and not under the Act. We further note that just as Section 40(a)(ii) of the Act does not allow deduction on tax paid on profit and/or gain of business. The Indian Income Tax Act, 1922 Act also contains a similar provision in Section 10(4) thereof. However, the Indian Income Tax Act, 1922 contains no definition of "tax" as provided in Section 2(43) of the Act. Consequently, the tax paid on income / profits and gains of business / profession anywhere in the world would not be allowed as deduction for determining the profits / gains of the business under Section 10(4) of the Indian Tax Act, 1922. Therefore, on the state of the statutory provisions as found in the Indian Income Tax Act, 1922 the decision of this Court in Inder Singh Gill (supra) would be unexceptionable.

However, the ratio of the aforesaid decision in Inder Singh Gill (supra) cannot be applied to the present facts in view of the fact that the Act defines "tax" as income tax chargeable under the provisions of this Act. Thus, by definition, the tax which is payable under the Act alone on the profits and gains of business are not allowed to be deducted notwithstanding Sections 30 to 38 of the Act. It therefore, follows that the tax which has been paid abroad would not be covered with in the meaning of Section 40(a) (ii) of the Act in view of the definition of the word 'tax' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2 (43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context ITA No.197 and 508/Ahd/2016 Assessment Year: 2012-13 of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.

(iii) Arguments of the assessee as noted in the assessment order and the CIT(A)'s order impugned in appeal before us It is submitted that the taxes paid in foreign jurisdictions constituted expenditure laid out or expended wholly and exclusively for the purposes of the business or profession, and, therefore, deductible under section 37(1) of the Act. The deduction for withholding tax was an inevitable & if we do not agree for the same then we would not be able to carry out such business deal as well.

Further, the above expenditure is not covered under Section 40(a)(ii) hence it is duly allowed as an expenditure under section 37(1) of the Act. Section 40(a)(ii) provides that "any sum paid on account of any rate or tax levied on the

profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains",;

"Tax" has been defined U/s.2(43) as "fax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA.

It is submitted that "tax" only includes taxes levied under Indian Income Tax Act, 1961 and foreign tax is out of the definition of 'tax" hence foreign tax paid will not be disallowed by virtue of Sec.40 (a)(ii).

Reliance is placed on following decided cases where it has been held that taxes paid in foreign country is an allowable expenditure U/s.37(1) ¬ CIT vs. Tata Sons Ltd (ITA No. 89 of 1989) - Bombay high court rejected reference in 1993 for this matter hence its approved stand of high court that foreign tax credit is an allowable expenditure.

¬ CIT vs. South East Asia Shipping Co (ITA No.123 of 1976) - Bombay high court rejected reference of this matter as well.

¬ DCIT Vs. Mastek Limited (Ahmedabad Tribunal) - Jurisdictional tribunal decision delivered on 16m may 2012 which relied on above decision of Bombay High Court.

The above contention of ETPL has been accepted by the learned Commissioner of Income-tax (Appeals) in ETPL's case for AY 2009-10. Copy of the said order is attached as Annexure 1A [Emphasis, by underlining, supplied by us now].

43. In the light of the above observations in judicial precedents relied upon by the learned counsel for the assessee, and in the light of extracts from the impugned orders, the core issue, in our considered view, is whether or not the meaning of expression 'tax' appearing in section 40(a)(ii) must remain confined to a tax levied under the Indian Income Tax Act, 1961. As a matter of fact, Hon'ble Bombay High Court, in the case of Reliance Infrastructure (supra), Their Lordships have gone to the extent of saying that but for definition of tax under section 2(43) "We (Their Lordships) would have answered the question posed for our consideration by following the decision of this Court in Inder Singh Gill (supra)" which was rendered in the context of the Income Tax Act, 1922, and added that "the ratio of the aforesaid decision in Inder Singh Gill (supra) cannot be applied to the present facts in view of the fact that the Act (Income Tax Act, 1961) defines "tax" as income tax chargeable under the provisions of this Act". In our humble and sincere understanding, given these

facts, it is not really possible for us to ignore the question as to what is the impact of Section 2(43) on connotations of expression 'tax' appearing in section 40(a)(ii), and when we address this question, we cannot be oblivious of the following guidance from Hon'ble Courts above:

(i) Hon'ble Bombay High Court in Lubrizol's case (supra) With respect, this argument [i.e. the definition of 'tax' under section 2(433) must hold the field] does not appeal to us. It is significant to note that the word "tax'; is used in conjunction with the words "any rate or tax", The word "any" goes both with the rate and tax. The expression is further qualified as a rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains. If the word "tax" is to be given the meaning assigned to it by s. 2(43) of the Act, the word "any" used before it will be otiose and the further qualification as to the nature of levy will also become meaningless. Furthermore, the word "tax" as defined in s. 2(43) of the Act is subject to "unless the context otherwise requires". In view of the discussion above, we hold that the words "any tax" herein refers to any kind of tax levied or leviable on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

[Emphasis, by underlining, supplied by us now]

(ii) Hon'ble Supreme Court in Smithkline and French's case (supra) specifically approving the Lubrizol judgment .....Firstly, it may be mentioned, s. 10(4) of the 1922 Act or s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession. The observations relied upon must be read in the said context and not literally or as the provisions in a statute. But so far as the issue herein is concerned, even this literal reading of the said observations does not help the assessee. As we have pointed out hereinabove the surtax is essentially levied on the business profits of the company computed in accordance with the provisions of the IT Act. Merely because certain further deductions [adjustments] are provided by the Surtax Act from the said profits, it cannot be said that the surtax is not levied upon the profits determined or computed in accordance with the provisions of the IT Act. Sec. 4 of the Surtax Act read with the definition of "chargeable profits" and the First Schedule make the position abundantly clear. .....

We agree with the view taken by the High Courts of Calcutta [Molins (India) Ltd. vs. CIT (1983) 144 ITR 317 (Cal) and Brooke Bond (India) Ltd. vs. CIT (1992) 193 ITR 390 (Cal) : TC 15R.590], Bombay (in) Lubrizol (India) Ltd. vs. CIT (1991) 187 ITR 25 (Bom) followed in several other decisions of that Court], Karnataka [CIT vs. International Instruments Pvt. Ltd. (1983) 144 ITR

936 (Kar), Madras [Sundaram Industries Ltd. vs. CIT (1986) 159 ITR 646 (Mad), Andhra Pradesh [Vazir Sultan Tobacco Co. Ltd. vs. CIT (1988) 169 ITR 35 (AP)], Rajasthan [Associated Stone Industries Co. Ltd. vs. CIT (1988) 170 ITR 653 (Raj)], Gujarat [S.L.M. Maneklal Industries Ltd. vs. CIT (1988) 172 ITR 176 (Guj) followed in several cases thereafter], Allahabad [Himalayan Drug Co. Pvt. Ltd. vs. CIT (1996) 218 ITR 346 (All)] and Punjab & Haryana High Court [Highway Cycle Industries Ltd. vs. CIT (1989) 178 ITR 601 (P&H) : TC 17R.807].

44. We are therefore of the considered view that the plea of the assessee does not merit legal acceptance. No doubt it is a close call but within our limitation of knowledge and wisdom, we sincerely believe that the plea of the assessee must be rejected. To put a question of ourselves, can it be open to us to hold that the meaning of expression 'tax' under section 40(a)(ii) will be fettered by the definition of tax under section 2(43), so far as the question of credit for taxes abroad is concerned, even though Hon'ble Supreme Court notes, in the case of Smithkline French (supra), that "s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession". We, therefore, do not think we have the liberty of taking the view that learned counsel is urging us to take.

45. In any case, Hon'ble Bombay High Court's judgment in the case of Reliance Infrastructure (supra) proceeds on peculiar facts and a sort of concession by the revenue inasmuch as it was not the case of the revenue that context in which the expression 'tax' is used in section 40(a)(ii) requires a meaning different from the meaning assigned by Section 2(43). This is evident from the observations made by Their Lordships to the effect that "We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2 (43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act". That was not the situation before us. The very thrust of stand of the revenue was that the connotations of expression 'tax' in section 40(a)(ii) must be taken in its contextual meaning which extends to any tax ascertainable with reference to the profits of the assessee as evident from the wordings of section which refer to "any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains", and that its connotations cannot be treated as restricted to tax under the Income Tax Act.

This argument, in the context of deduction in respect of tax outside Income Tax Act, 1961, has already met the approval of Hon'ble Supreme Court. The law

laid down by Hon'ble Supreme Court binds all of us under Article 141 of the Constitution of India. Once we are aware about a particular position that Hon'ble Supreme Court has taken, it is not open to us to reach a conclusion which is, or can be perceived as, in defiance to the position taken by Hon'ble Supreme Court. Maybe, if the views expressed were by our jurisdictional High Court, or by any of Hon'ble High Courts after taking into account the views expressed by Hon'ble Supreme Court on that issue, things may have been little different, but that is not the case here.

46. In view of these discussions, the correctness of our reliance on Tata Sons decision (supra) is no more than academic. As for the fact that Tata Sons decision (supra) is by one of us, merely because it is authored by one of us, we cannot ignore it either. It is as much of a binding judicial precedent as much any other decision of the Tribunal decision which is not per incuriam.

47. In our considered view, Mastek Ltd decision (supra) by the coordinate bench is a per incuriam decision for the reason that it was rendered without taking into account an earlier decision by a bench of equal strength on the same issue in the case of Tata Sons (supra), as learned representatives appearing before the said bench did not bring this judicial precedent to their notice. In the case of Punjab Land Development and Reclamation Corpn. Ltd. vs. Presiding Officer, Labour Court (1990) 3 SCC 682; (1990) 77 FJR 17 (SC) Hon'ble Supreme Court explained the expression 'per incuriam' thus (at p. 36 of 77 FJR) : 'The Latin expression 'per incuriam' means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court.' A fortiori, a decision of the Tribunal unmindful of its earlier decision(s) on the same issue is also a per incuriam decision. Of course, if the subsequent decision had considered the earlier decision and yet differed from the conclusion, the situation would have been materially different. The only reason we have preferred Tata Sons decision (supra) over Mastek decision (supra), both of which are decisions from benches of equal strength, is that the latter was delivered in ignorance of earlier decisions in the cases of Tata Sons (supra) and Lubrizol India (supra).

48. A per incuriam decision, as noted by several binding judicial precedents, including, for example, in the case of CIT Vs B R Constructions [(1979) 222 ITR 202 AP Full Court], ceases to be a binding judicial precedent. As observed by the Full Bench of Hon'ble AP High Court in this case, "It may be noticed that precedent ceases to be a binding precedent-- (i) if it is reversed or overruled by a higher Court, (ii) when it is affirmed or reversed on a different ground, (iii) when it is inconsistent with the earlier decisions of the same rank, (iv) when it is sub silentio, and (v) when it is rendered per incuriam". Nothing, therefore, turns on Mastek decision by the coordinate bench. Learned counsel has then invited our attention to the fact that the said decision in Mastek's case (supra) is now pending for consideration before Hon'ble jurisdictional High

Court, as Their Lordships have, vide order dated 14th March 2013 in TA No. 826 of 2012, have admitted the appeal, inter alia, on the question "whether the Appellate Tribunal has substantially erred in deleting the disallowance under section 40(a)(ii) in respect of Rs 42,57,297 paid as Belgium Tax claimed as deduction under section 37(1) of the Act". In our considered view, nothing turns on this argument either, since the pendency of matter before Hon'ble jurisdictional High Court acts as a bar only on the constitution of a special bench of this Tribunal, as was held in the case of General Motors India Pvt Ltd Vs ACIT [TS-640 -ITAT-2016-Ahd-TP], and not otherwise. In any event, once a judicial precedent is held to be per incuriam the pendency of appeal against such a per incuriam judicial precedent cannot convert it into a binding precedent.

49. Coming to the scope of Explanations to Section 40(a)(ii), on which learned counsel for the assessee has relied upon so much, we may only add that if the main provision, as is the claim of the learned counsel, does not cover the taxes paid abroad, there cannot be any occasion to include, under Explanations to Section 40(a)(ii), taxes in respect of which relief under section 90 and 91 is not admissible. These Explanations donot extend the scope of the Section 40(a)(ii) but rather explain the scope of the said section. If something is covered by the Explanation, it cannot be said that it is not covered by the main provision. If taxes in respect of which tax credit under section 90 or 91 are covered by the proviso, these are covered by the scope of Section 40(a)(ii) as well. And if these taxes are covered by Section 40(a)(ii), the theory that meaning of 'tax' under section 40(a)(ii) must remain confined to the taxes levied under Income Tax Act, 1961 comes to a naught since the taxes in respect of which credits are available under section 90 or 91 cannot be, under any circumstances, imposed under the Indian Income Tax Act. The argument of the learned counsel, if we have understood it correctly, is devoid of, in our considered view, legally sustainable merits.

50. In view of the above discussions, we are of the considered view that no deduction under section 37(1) can be allowed in respect of any income tax withheld abroad as the same will be, for the detailed reasons set out above, hit by the disabling provisions under section 40(a)(ii) of the Act. The relief granted by the CIT(A), by directing the grant of deduction of Rs.52,50,507 in respect of income tax withheld abroad in respect of which no foreign tax credit is admissible, under section 37(1) of the Act must, therefore, stand vacated. We direct so. We further direct that, as a result of our directions earlier in this order, in the event of assessee being allowed only partial tax credit in respect of taxes withheld abroad, the assessee cannot be allowed any deduction, in respect of the balance of the taxes so withheld abroad, under section 37(1) of the Act".

We further deem it appropriate to observe here that Section 91 of the Act is a specific provision dealing with foreign tax credit to be granted in case of taxes paid in the specified countries i.e. except Pakistan which comes under the latter sub-section 2 thereof. If we go by the assessee's analogy that foreign tax credit to the specified extent u/s.91(1) "of a sum calculated on such doubly taxed income at the Indian rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal" is allowable for the purpose of granting credit and the remaining component is to be granted deduction under Chapter-IV of the Act, the same would render the former specific provision itself as otiose going contrary to "generalia specialism non derogant" which means that a specific provision prevails over the general one. We thus adopt stricter interpretation (supra) and conclude whatever is the assessee's unallowable foreign tax credit claim u/s.91(1) since exceeding the specified limit, would not be entitled for business expenditure u/s.37 of the Act. We further quote B.R.Constructions (supra) to treat hon'ble Bombay high court's judgement as not a binding precedent in light of the foregoing detailed discussion. The assessee fails in its 23rd substantive ground accordingly.

No other ground has been pressed before us.

15. This assessee's appeal is partly allowed in above terms.

Order pronounced in the open court on 6th October, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 06-10-2021
TNMM

Copy to :

1.M/s.Infor (India) Private Limited, 7th Floor, The Skyview Tower 10, Survey No.83/1, Madhapur, Hyderabad.

2.The Deputy Commissioner of Income Tax, Circle-2(1), Hyderabad.

3.Dispute Resolution Panel (DRP)-1, Bengaluru.

4.Director of Income Tax (IT & TP), Hyderabad.

5.Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.

6.D.R. ITAT, Hyderabad.

7. Guard File.