आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.549/Mum/2016

(**निर्धारण वर्ष /** Assessment Year : 2010-11)

M/s. eBaotech India Pvt. Ltd., Housefin Bhavan, Sunteck Certainity Suit No. 801, 8th floor, C-21, Bandra Kurla Complex, Bandra(E), Mumbai-400051	**बनाम**/ v.	DCIT 5(1) R.No. 525, Aayakar Bhavan, M.K Road Mumbai 400020
स्थायी लेखा सं./ PAN: AABCE7013R		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri. Satish R. Mody
Revenue by :	Shri. Manoj Kumar, DR

सुनवाई की तारीख **/Date of Hearing : 27.09.2018**
घोषणा की तारीख **/Date of Pronouncement : 22.10.2018**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 549/Mum/2016, is directed against appellate order dated 20.08.2015 passed by learned Commissioner of Income Tax (Appeals)-10, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2010-11, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 22.03.2013 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2010-11.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> *"1) The Learned Commissioner of Income-tax (Appeals) - 10. Mumbai, has erred in disallowing Rs.11,97,000/- our Travelling expenses, where the same are incurred purely for purposes of business of the company.*
>
> *2) The Learned Commissioner of Income-tax (Appeals) -10,Mumbai, has erred in disallowing Rs. 24,70,578/- out of total salary expenses of Rs. 1,23,52,891/-incurred for the financial year 2009-10 where the same are incurred purely for purposes of business of the company.*
>
> *3) The Learned Commissioner of Income-tax (Appeals) -10, Mumbai, has erred in adding Rs. 32 Lakhs as mark up on sales of software u/s. 92 of the Income-tax Act, 1961.*
>
> *4) The Appellant reserves right to add, amend or alter any of the grounds of appeal as and when found necessary."*

3. The assessee is engaged in the business of developing, modifying and designing of computer software and devising, customizing and provision of technical support in developing of software programs.

The assessee has debited Rs. 29,95,103/- on account of travelling expenses. During the course of assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act , the assessee was asked by the AO to furnish the complete details of the travelling expenses claimed. The assessee vide reply dated 17.01.2013, submitted before the AO as under:-

> "*The Assessee's business is of Installation of software and its applications, During the financial year 2009-10 the assesses has entered into business relationship with HCL Technologies which requires software to be installed and training to be given to its staff. The assessee requires to incur travel expenditure for Engineers to HCL Technologies*

to provide onsite training and installing services. The local travelling is provided for this contract.

The assessee's holding company is in China which requires assessee's Managing Director Mr. Ashish Shah is travel overseas for meetings and for obtaining training which is a prerequisite for business in India."

The AO was not satisfied with the replies submitted by the assessee. The AO observed that part of travelling expenses included foreign travelling and further some of the expenses were also incurred for training of its staff. The AO observed that part of the expenses incurred by the assessee were personal in nature while some of the expenses were in the nature of the capital expenses , which led to disallowance of expenses to the tune of 50% of the expenses claimed by the assessee .

4. The assessee filed first appeal before learned CIT(A), which was dismissed by Ld. CIT(A) by holding as under:-

" 4.2. I have carefully considered the facts and circumstances of the case. As seen from the list of total travelling expenses produced before me, it runs into 24 pages and total entries are about 950. In the list submitted before me the last column head note stated "purpose of travel". However, the details mentioned therein do not throw any light on the purpose of travel. On the other hand, the details speak of nature of travel like travel allowance, the guest house payment, taxi fee, hotel stay, flight tickets, meals, snacks etc. Travel was accounted in almost every month. Several persons, apparently from the company, had travelled. Mr Ashok Shah being one of them had made more travels. From the details filed before me it is observed that even though the argument of the appellant that the travel has helped in getting business from HCL Technologies the purpose of visit and how the same can be attributable to the business of the company was not demonstrated properly before the AO to his satisfaction. After all it is the satisfaction of the AO which counts in framing the assessment. Even before me also the learned AR has failed to exhibit sufficiently to show that the entire expenditure of Rs. 23.95 lakhs debited was meant for business alone. Therefore, in my considered view the disallowance of 50% of the said expenditure is fairly reasonable as it is attributable to non-business purposes. However, as pointed out earlier, at para -4 above the actual expenditure debited to P& L account under the head travelling expenditure is only Rs. 23.95 lakhs. Even going

by the proposal of 50% disallowance of such expenditure by the AO the disallowance should work out to Rs.11.97 lakhs but not Rs. 1,497,550. I, therefore, direct the AO to rework the disallowance of the rate of 50% by taking the correct amount debited in P & L A/c. under the head travelling expenses. The ground is allowed accordingly",

5. Aggrieved by the appellate order passed by learned CIT(A), the assessee has come in appeal before the tribunal . It was submitted by learned counsel for the assessee that complete details of the expenses were duly furnished before the authorities below. It was submitted that there are large number of small-small expenses which were incurred for travelling by employees and business guests and details were given which are placed in paper book page no. 1 to 27 . It was submitted that no reason and justification for disallowance of 50% of the expenses were given by both the authorities below. The AR of the assessee submitted that the assessee is subsidiary company of a foreign company . It was submitted that the assessee is professionally managed company and is engaged in providing technical support to the companies to whom the foreign parent company sold equipment / software. It was submitted that the foreign company sold software to HCL Technologies Ltd. through assessee company and assessee is to provide technical support to the said HCL Technologies Ltd.. It was submitted by learned counsel for the assessee that the expenses have been incurred for travelling of employees/guests while coming on visit to India for business purposes. It was submitted that none of the travelling expenses incurred by the assessee were personal in nature nor were these expenses capital in nature. It was submitted that the authorities below allowed 50% of the expenses while the rest of 50% of the expenses were disallowed by Revenue. The learned DR submitted that the assessee never submitted purposes for incurring these travel expenses. It was submitted by learned DR that the assessee could not substantiate that these travel expenses were for business purposes.

6. We have considered rival contentions and perused material on record including orders of the authorities below and details of

travelling expenses incurred by the assessee in paper book filed with the tribunal.

The assessee is engaged in the business of developing, modifying and designing of computer software and devising, customizing and provision of technical support in developing of software programs. The assessee is subsidiary company of a foreign company . The assessee is professionally managed company and even the Managing Director of the assessee is a professional divorced from being a promoter/shareholder of the assessee company. We have observed that the assessee has supplied software as well as rendered services for which revenue is booked in its books of accounts and details are under:-

Income	31.03.10 Rs.	31.03.09 Rs.
Service charges	24,00,000	0
Sales of Software License	3,20,00,000	0
	34,40,00,000	0
Expenditure		
Purchase of Software License	3,20,00,000	0
Operating & Administrative expenses Sch-F	58,79,615	57,90,036
Payment for benefit of employees Sch-E*	1,44,20,103	68,95,081
Interest & financial charges Sch-G	(3255254)	(963208)
Depreciation	2,69,943	2,79,372
	4,93,14,404	1,20,01,281

SCHEDULE-E

Payment for benefit of Employees	31.03.10 Rs.	31.03.09 Rs.
Staff salary & Allowance	1,23,52,891	54,16,001
Bonus salary expenses	13,10,854	11,55,475
Other benefit to employees	48,584	972
PF Employer contribution	7,07,774	3,22,633
	1,44,20,103	68,95,081

The assessee had stated to have incurred travelling expenses to the tune of Rs. 29,95,103/- with respect to its employees as well business guests travels, of which 50% of the expenses were disallowed by the AO. however Ld. CIT(A) was of view that the travelling expenses claimed by the assessee in its books of accounts and in return of income filed with the Revenue, were to tune of Rs. 23.95 lac instead of Rs. 29.95 lacs as made out by the AO and hence the learned CIT(A) directed for disallowance of 50% of the said travelling expenses aggregating to the tune of Rs. 23.95 lacs incurred by the assessee. The Revenue is not in appeal as to part relief granted by learned CIT(A) which was more of an correcting of an error in taking the correct figure of actual travel expenses incurred by the assessee. We have observed that assessee has submitted complete details as to the travelling expenses which are placed in paper book page no. 1 to 27. The assessee has rendered services as well sale of software licence for which an aggregate income of Rs. 3.44 crore was booked and offered for taxation. It is not the case of revenue that no expenses were incurred and/or the assessee has claimed bogus/fraudulent expenses. It is also not the case of Revenue that the business of the assessee was not set up during the year under consideration and

these expenses pertained to period prior to setting up of business by the assessee. The assessee has infact booked revenue to the tune of Rs. 3.44 crores towards sale of software and services during the year under consideration. The authorities below could not point out any specific defect in the expenditure claimed by the assessee. It is a professionally managed company dehors promoter run company . Even Managing Director is a professional and is not holding any shareholding /ownership stake in the assesse company. The authorities below have stated that Mr. Ashok Shah has made more travels . It is also claimed by Revenue that some of the travel expenses were for training of staff.No specific instances for disallowing travelling expenses is pin pointed by Revenue while adhoc disallowance of 50% of total travelling expenses were made. These are no reasons and justification for making such disallowance keeping in view factual matrix of the case in its entirety . The assessee discharged its burden/onus by placing all the material on record with respect to travelling expenses and revenue could not specifically point out which of these travel expenses were incurred for non-business/personal purposes of the employees. No nexus of these expenses being incurred in connection with capital outlay or being capital in nature is provided by the AO and these are merely conjectures and surmises which cannot take the place of the proof. The expenses incurred on training of staff cannot be considered as personal or capital in nature unless incriminating material /reasons/justification for their holding to be personal/capital in nature is brought on record. Nothing incriminating is there on record to validate disallowance of 50% of travel expenses. The authorities did in-fact allowed 50% of the travel expenses and it is not a case that entire disallowance of travel expenses were made holding to be non-genuine, personal or capital in nature. No further enquiry was made by lower authorities to bring on record cogent material of discredit version of the assessee to justify disallowance of 50% of travel expenses being personal or capital in nature warranting/justifying disallowance under the provisions of the 1961

Act. Under these circumstances based on appreciation of entire material on record, the assessee did discharge its burden by placing entire material on record and no addition is warranted towards disallowance of 50% of the travelling expenses and we hereby order deletion of additions as were made by the AO and confirmed by Ld. CIT(A). We decide this issue in ground no. 1 in favour of the assessee. The assessee succeeds on this ground. We order accordingly.

7. The second disallowance made by Revenue concerns itself with disallowance of salary expenses to the tune of Rs. 24,70,578/- being 25% (sic. 20%) of the salary expenses debited by the assessee to P&L account which was added by the AO in an assessment framed u/s 143(3) of the 1961 Act. The AO observed that the assessee has debited salary expenses to the tune of Rs. 1,23,52,891/- during the year under consideration as against an amount of Rs. 54,16,001/- debited to Salary Expenses in immediately preceding year . The AO also observed that in addition to the salary expenses as above, the assessee also debited bonus salary expenses to the tune of Rs. 13,10,854/- . The AO observed that the assessee is engaged by its parent holding company in Shanghai which is the only revenue generating activity of the assessee. As per the AO , the salary expenses were excessive and the AO was of the view that the salary expenditure should be allowed to the tune of 2/3 of the claimed amount. The assessee was asked to explain the same. The assessee explained before the AO as under:-

> *"The assessee company has obtained huge contract from HCL and which was in pipeline for quite sum. Before the contract is signed, the assessee company has to keep the infrastructure (Engineers) in place. The Engineers receive on job the training from the principal company through online instructions.*
>
> *The entire team of engineers were employed for HCL contract and as the income from HCL is the revenue income, the expenses incurred on the salary is also revenue expenditure,"*

The above submissions filed by the assessee however did not found favour with the AO as in the opinion of the AO , the assessee has debited salary expenses of Rs. 1.23 crores to P & L Account and further the assessee has only one contract from holding company based in Shanghai, As per AO, disproportionately huge expenses towards salary were claimed by the assessee which led to disallowance of 25% (sic. 20%) of salary claimed in P & L Account which was added to the income of the assessee by the AO , vide assessment order dated 22-03-2013 passed u/s 143(3) of the 1961 Act.

8. Aggrieved by the assessment order passed by the AO, the assessee filed first appeal with learned CIT(A) and submitted as under:-

> *"i) Full details of salary paid with the designation and work profile of employees were filed before the Ld.AO*
>
> *ii) The claim of expenses is allowable u/s.36 & 37(1) of the Income Tax Act 1961 based on the fact that the expenses incurred for the purpose of business of the company and same cannot be disallowed on the ground that the income earned against the expenses incurred is disproportionate.*
>
> *iii) During the financial year 2009-10 the assessee received a contract from HCL Technologies and the contract is for a period of 3 years.*
>
> Being the initial years of the company it is very likely the company -would have high overheads and salary cost as compared to income being at low levels as customer responses and successful contracts take time. Therefore we respectfully submit that the Ld.AO has disallowed the expenses of Rs. 24,70,578/- arbitrarily by just stating that expenses incurred are disproportionate to the income without finding any discrepancy in the details of expenses filed".

The learned CIT(A) rejected the contentions of the assessee vide appellate order dated 20-08-2015, by holding as under:-

> *"5.2. I have carefully considered the facts and circumstances of the case. The P&L Account for the A.Y. 2009-10 relevant to present assessment year is as under:-*

Income	31.03.10 Rs.	31.03.09 Rs.
1 Service charges	24,00,000	0
Sales of Software License	3,20,00,000	0
	34,40,00,000	0
Expenditure		
Purchase of Software License	3,20,00,000	0
Operating & Administrative expenses Sch-F	58,79,615	57,90,036
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SCHEDULE-E

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PF Employer contribution	7,07,774	3,22,633
	1,44,20,103	68,95,081

As seen from the profit and loss account there was no business income in the preceding year. Only in the relevant assessment year the appellant has received the income. The income received was under two heads-1. service charges of Rs. 24

lakhs and 2. sales of software license of Rs. 320 lakhs. Since the purchase of software license also casted Rs.320 lakhs, there was no net income out of the software license sale. All the expenses were targeted against Rs. 24 lakhs income out of service charges and at the end there resulted a loss of Rs. 149 lakhs. The Schedule E of above profit and loss account which is relevant for the present discussion is also shown above. It is seen that the expenses of staff salary and allowances have more than doubled when compared to earlier year despite a marginal increase in bonus payments. The AO has asked the appellant to furnish full details of the expenditure claimed of Rs. 12,352,891. After careful examination, the AO during the course of assessment proceedings, has made a proposal for a disallowance of 2/3 of such expenditure, vide his order sheet entry dated 4.2.2013. However while concluding the assessment, in the light of the explanation submitted, the AO has restricted the disallowance to only 20% (20% of Rs. 12,352,891 is Rs.24,70,578) even though he has mentioned the disallowance at 25% in the assessment order. Since the appellant has failed to demonstrate properly to the satisfaction of the AO that the entire expenditure was meant for business, the disallowance made by the AO found to be reasonable. Even before me also the learned AR has not given any further evidence to show that the entire expenditure debited under the head staff salary and allowance was incurred only for business purpose. In view of the above discussion I conform the addition made by the AO. The ground is dismissed.

9. Aggrieved by the appellate order passed by learned CIT(A), the assessee has come in an appeal before the tribunal. It was submitted by Ld. Counsel for the assessee that it is for the assessee and not for Revenue to decide how his business should be conducted . It was submitted that there is no justification for making disallowance of salary on ad-hoc basis based on certain percentage of salary without pointed out any defects in books of accounts. The assessee relied upon the decision of Hon'ble Supreme Court in the case of S.A Builders Ltd. v. CIT , (2007) 288 ITR 1(SC) and further reliance is placed on page no. 28 to 29 of the paper book wherein complete details of employees and the salary expenses of these employees were furnished before the authorities below , are placed. It was submitted that the AO has disallowed 20% (although stated to be 25% in AO order which learned CIT(A) has clarified) of salary expenses. The Ld.

DR on the other hand submitted that salary expenses of the assessee were high while the income offered to income-tax was low . It was submitted that income offered in the P&L account was only Rs. 24 lac from services while the in case of sale of software licence to the tune of Rs. 3.20 crores was equal to the purchased amount without any mark-up. The purchase of software was done from foreign parent company for Rs. 3.20 crores and sale of the said software was also done for Rs. 3.20 crores to HCL Technologies Limited for an amount of Rs. 3.20 crores. Our attention was drawn to details placed in paper book and orders of the authorities. The attention was drawn also to page 35 to 76/paper book wherein agreement with HCL Technologies Limited is placed.

10. We have considered rival contentions and perused the material on records including order of authorities below, paper book filed by the assessee and cited case laws. We have observed that the assessee is engaged in the business of developing, modifying and designing of computer software and the devising, customizing and provision of technical support in developing of software programs. The assessee is subsidiary company of a foreign company . The assessee has signed an sub-contractor agreement dated 21.11.2008 with HCL Technologies Ltd. which is placed in paper book page no. 36 to 76. Under this agreement the assessee is required to supply core insurance product jointly with HCL Technologies Limited to National Insurance Company Limited in accordance with the Tripartite contract and this sub-contractor agreement . The tripartite agreement is entered between assessee, HCL Technologies Limited and National Insurance Company Limited wherein the assessee is OEM-CI consortium partner of HCL Technologies Limited , the prime tenderer , for the RFP No. #NIC/IT/RFP/1/2008 dated 7th May 2008 for implementing and commissioning the 'Enterprise Architecture Solutions for Insurance' issued by National Insurance Company Limited for which tripartite agreement was entered into by and

between assessee, National Insurance Company Limited and HCL Technologies Limited . The assessee acquired software license from its foreign parent company for Rs. 3.20 crores for meeting its obligation which was then supplied to HCL Technologies Limited for an amount of Rs. 3.20 crores for ultimate supply to National Insurance Company Limited. The said sale and purchase was routed through assessee's books of accounts and payments were made and received through assessee's bank account, albeit for both the sale and purchase the value of the software was Rs. 3.20 crores and the assessee did not earned any income/mark-up on it. The assessee earned Rs. 24 lacs from its foreign parent company for services during the year under consideration . This clearly evidences that the business was set-up/ carried on by the assessee and no defect is pointed by the AO so far as these salary payments to these professional executives-employeeswere concerned except that the allegation of the Revenue is that payments were on the higher side keeping in view income/turnover of the assessee offered for taxation. The assessee has claimed that it is subsidiary of foreign parent company, The employees are all professional having no shareholding in the assessee. The shares of the assessee are held by the foreign parent company. It is not the case of the Revenue that bogus claim of salary is set up by the assessee. The assessee has given complete details of its employees and salary/bonuses paid to them which is placed in paper book/page 28-29. In the assessment year 2011-12 and 2012-13, salaries were paid which were infact higher than salaries paid by the assessee, while no additions were made by Revenue in assessment framed u/s 143(3) of the 1961 Act for those years i.e. AY 2011-12 and 2012-13 and these assessment orders framed by the AO u/s 143(3) are placed in paper book /page 30-34. It is also claimed in the written submissions filed (page 28/paper book) that income-tax was deducted at source on these salary payments . It is claimed by the assessee that the assessee has to arrange its affair keeping in view commercially expediency which is upheld by Hon'ble Supreme Court in the case of

S.A Builders (Supra) and Revenue has no right to stipulate the manner in which the assessee should conduct its business. The assessee has also explained that these are initial years of its business and assessee has to develop the entire infrastructure for achieving full business potential. The revenue on the other hand has allowed part of the salary expenses and only 20% of the salary expenses stood disallowed on the grounds of being excessive vis-a-vis turnover/income declared in return of income filed with Revenue. These employees are independent professionals employed by the assessee and there is nothing on record that these independent professionals are part of promoter group or their relatives. The genuineness of the salary is not doubted by the Revenue except that it is only considered excessive. The Revenue has not brought on record comparative analysis of other independent entities to bring on record cogent material to prove that the salaries paid to these employees were excessive. The only grievance of the revenue is that the said salary expenses were on the higher side vis-a-vis business generated by the assessee during the year, which in our opinion is no reason for making disallowance keeping in view factual matrix of the case and the explanation submitted by the assessee. We are of the considered view that no disallowance of 20% of the salary expenses is warranted keeping in view factual matrix of the case, which we order deletion . This issue raised in ground number 2 is decided in favour of the assessee. We order accordingly.

11. The third addition concern itself with additions made u/s. 92 of the Act, wherein the AO observed that the assessee has purchased software for Rs. 3.2 crore from its foreign parent company based in Shanghai, China which was sold by the assessee for Rs. 3.2 crore to HCL Technologies Limited , without any mark-up for the assessee . The assessee submitted before the AO as under:-

> *"The* assesses *along with group company received contract from HCL for supplying and installing of software and services for HCL*

Technologies. The software is the domain of assessee's holding company and the same is provided to HCL Technologies at same cost by the assesses. *The assessee's margin of profit is by providing installing and after sale servicing (training) to HCL Technologies."*

This explanation submitted by the assessee did not found favour with the AO and the assessee was show-caused as to why no mark up for sale of product has been charged on sale of software . The assessee submitted before the AO in response to show-cause, as under:

"The company has obtained contract from HCL for supply of software and its maintenance, installation and service. The contract has be split by the assessee company between its parent company as follows:

Parent company to provide for software.

Assessee company to provide services amounting to Rs. Approx. 3 crores. The assessee company to render the services for with the support will be given by principal company at no cost. Thus the purchase and sale of software by assessee company is at no cost as there is no value addition by the assessee company in this transaction.

The method adopted by the assessee company for determining the arm length price the purchase and sale of software is "cost plus" and the element of profit is NIL as there is no function performed, assets employed, and risk assumed by the assessee company."

The assessee in nut-shell submitted that it will be benefited from the same contract by rendering services to the tune of Rs. 3 crore over a period of time spanning into succeeding years , while it was submitted by the assessee that since no value addition was done so far as software is concerned hence consequently no mark-up was added. It was submitted that since the sale of software was routed through assessee's books of account which was purchased from its foreign holding company and sold to HCL Technolgoies Ltd. under sub-contractor agreement and tripartite agreement, the AO made addition to the tune of 10% as mark-up of the sale amounting to Rs. 32 Lac.

12. The assessee carried the matter in appeal before the Ld. CIT(A) and submitted as under:-

> " *6.1.....*
>
> *i) The assesee executed 2 contracts with HCL Technologies a)For sale of software for Rs.3.2 crores and b) Service contract for implementation, training and maintenance of software. The sale of software is a licence held by assesee's principal company and the order was obtained from HCL Technologies because of the license held by the principal company. The sale of licence to HCL Technologies does not give rise to profit of asessee company as the licence is held by principal company and there were no efforts made by the asessee company in the sale of this licence.*
>
> *ii) Carrying out FAR analysis (functions performed, assets employed and risk assumed), no profit accrues to assessee company on sale of license to HCL Technologies.*
>
> *iii) The assessee company's role is in the second part of contract relating to implement of software, training of staff at HCL Technologies and maintenance of software. In the second part of the contract, assessee company received full support from the principal company for execution of the contract and technical assistance was given at Nil cost."*

The replies of the assessee did not found favour with Ld. CIT(A) , who dismissed the appeal of the assessee by holding as under:-

> *"6.2. I have carefully considered the facts of the case and the submissions of the Id.AR. It was submitted before me that the role of the appellant is to sell the software to HCL Technologies on cost-to-cost basis on behalf of the principal company at Singapore(sic. Shanghai). The role of the appellant is implementation, training and maintenance of the software in India for which it charged the service charges of Rs. 24 lakhs during the year. So far so good. However the AO has observed that there is no mentioning in the agreement with HCL Technology that the product will be delivered by the appellant on behalf of the principal company on cost-to-cost basis. Even if we presume that the appellant has to act on behalf of the principal company, it failed to furnish the details to the satisfaction of the AO that there is a direction/correspondence from the principal company that the appellant has to simply deliver the software to HCL Technology on cost-to-cost basis. Before me also the learned AR has not furnished any evidence*

to that extent. It is not that the AO should ask for the evidence every time. The Hon'ble jurisdictional High Court in the case of M/s Shivanand Electronics 209 ITR 63, has held that 'when the legislature casts a duty on the appellant, he should fulfil. It cannot be said that the ITO should ask for it[1]. As the appellant has failed to substantiate with evidence that there was a clause in the agreement entered by the appellant with the HCL Technology or there was a direction from the principal company, Singapore(sic. Shanghai) to the extent, that the software technology received from Singapore company has to be supplied on cost-to- cost basis to HAL (sic. HCL)Technology, in my considered opinion, the decision of the AO in working out 10% mark up value, is in order and I uphold the addition. The ground is dismissed.

13. Aggrieved by the dismissal of its appeal by learned CIT(A), the assessee has come in appeal before the tribunal . Our attention was drawn to the order of the authorities below and it was submitted that the software was purchased from the foreign holding company based in Shanghai(China) and sold to HCL Technologies Ltd.. It was submitted that HCL Technologies Ltd is not connected with the assessee company and the AO had invoked provisions of Section 92 of the 1961 Act with respect of sale of software to HCL Technologies Ltd. and mark up of 10% was added to the income of the assessee u/s. 92 of the Act. It was submitted that Revenue has not doubted purchases and also no reference was made by the AO to TPO and no TP study was conducted by the Revenue. It was submitted that the assessee purchased the said software from its holding company and sold the same to HCL Technologies Ltd. at the same value i.e. Rs. 3.20 crores . It was submitted that only billing was done by the assessee company while the HCL Technologies Ltd. downloaded the software directly from the websites of the foreign parent company of the assessee. It was submitted that since the assessee did not incur any expenses nor any value additions were done by the assessee to software sold, hence no mark-up was added. It was submitted that additions were made to the tune of 10% as mark up on the sale of software by the learned AO which was later confirmed by learned CIT(A) . It was submitted that services contract/AMC were awarded to the assessee vide sub-

contractor agreement dated 21.11.2008 and the assessee benefited from the said sub-contractor agreement awarded in its favour for rendering of services/maintenance/AMC. It is claimed that Revenue towards services/maintenance/AMC was received by the assessee in subsequent years which was offered for taxation which can be verified by the Revenue. Our attention was drawn to page 70/pb which carried details of financials associated with the sub-contractor agreement dated 21.11.2008 as to values associated with sale of software and services associated with maintenance/AMC/services. On the other hand, the Ld. DR relied upon the order of the authorities below and it was submitted that since billing towards sale of software was done by the assessee , there should be some profit/mark up earned by the assessee which should have been offered for taxation while in the instant case no income was offered for taxation with respect to sale of software.

14. We have considered rival contentions and perused the material on record. . We have observed that the assessee is engaged in the business of developing, modifying and designing of computer software and the devising, customizing and provision of technical support in developing of software programs. The assessee is subsidiary company of a foreign company based in Shanghai, China. The assessee has signed an sub-contractor agreement dated 21.11.2008 with HCL Technologies Ltd. which is placed in paper book page no. 36 to 76. Under this agreement the assessee is required to supply core insurance product jointly with HCL Technologies Limited to National Insurance Company Limited in accordance with the Tripartite contract and this sub-contractor agreement dated 21.11.2008. The tripartite agreement is entered between assessee, HCL Technologies Limited and National Insurance Company Limited wherein the assessee is OEM-CI consortium partner of HCL Technologies Limited , the prime tenderer , for the RFP No. #NIC/IT/RFP/1/2008 dated 7th May 2008 for implementing and commissioning the 'Enterprise Architecture

Solutions for Insurance' issued by National Insurance Company Limited for which tripartite agreement was entered into by and between assessee, National Insurance Company Limited and HCL Technologies Limited . These details as to tripartite agreement is found mentioned in clause C & D of sub-contractor agreement dated 21.11.2008(pb/page 37). The assessee acquired software from its foreign parent company for Rs. 3.20 crores for meeting its obligation under the agreement which was then supplied to HCL Technologies Limited for an amount of Rs. 3.20 crores for ultimate supply to National Insurance Company Limited. The said sale and purchase was routed through assessee's books of accounts and payments were made and received through assessee's bank account, albeit for both the sale and purchase the value of the software was Rs. 3.20 crores and the assessee did not earned any income/mark-up on it. The assessee earned Rs. 24 lacs from its foreign parent company for services during the year under consideration . The assessee is contending that the assessee has not done any value addition to the software supplied by parent company to HCL Technologies Limited for making ultimate delivery to National Insurance Company Limited and the said software was directly downloaded by HCL Technologies Limited from the website of foreign parent company of the assessee based at Shanghai, China without intervention of the assessee to be ultimately supplied to National Insurance Company Limited under an contractual obligation as stipulated in the agreements . Thus, a claim is made out that no expenses were incurred by the assessee for supply of software as well no value addition being done by the assessee to said software, there arises no need of mark-up on said software value for the assessee. It is also claimed that the assessee will be benefitted by a simultaneous contract it got for services/maintenance/AMC with respect to software supplied by the foreign parent company to HCL Technologies Limited for ultimate delivery to end customer namely National Insurance Company Limited, which it is claimed will generate revenue for the assessee in years to come which is the reason for non

charging of mark-up on sale of software. The doctrine of commercial expediency is invoked by referring to decision of Hon'ble Supreme Court in the case of S A Builders(supra) and Revenue was asked to stay away from the manner in which the assessee is entitled to conduct its business including transactions entered into by the assessee with its foreign parent company and with HCL Technologies Limited for purchase and sale of software without any mark-up/profits relying on doctrine of commercial expediency. On the first blush, the arguements of the assessee looks quite attractive but there lies a basic fallacy in the arguments of the assessee. The background of these agreements are that Request for Proposal was invited by National Insurance Company Limited for implementing and commissioning the 'Enterprise Architecture Solutions for Insurance' issued by National Insurance Company Limited. The assessee company is OEM-CI consortium partner of HCL Technologies Limited , the prime tenderer , for the RFP No. #NIC/IT/RFP/1/2008 dated 7th May 2008 for implementing and commissioning the 'Enterprise Architecture Solutions for Insurance' issued by National Insurance Company Limited for which tripartite agreement was entered into by and between assessee, National Insurance Company Limited and HCL Technologies Limited.The prime tenderer for RFP floated by National Insurance Company Limited is HCL Technologies Limited while the assessee has entered into tripartite agreement with HCL Technologies Limited and National Insurance Company Limited. (clause C and D of subcontractor agreement/page 37 of paper book) . However, The said tripartite agreement is not placed on record . As it could be seen from Clause C and D of sub-contractor agreement dated 21.11.2008 that the foreign parent company of the assessee based in Shanghai , China is not a consortium partner in the tripartite agreement for supply and services/maintenance/ AMC of software and it is the assessee who has entered into all agreements in India. The assessee is a separate tax entity in contradistinction with its foreign parent company based in Shanghai, China. As could be seen from the sub-contractor

agreement dated 21.11.2008, a large number obligations are placed on the assessee with respect to sale of software to be made to HCL Technologies Limited for ultimate user by National Insurance Company Limited, even post sale of software. The assessee being consortium partner has to execute and undertaken vast activities by way of participating in RFP, tendering, negotiations etc which include huge efforts and expertise . This entail huge costs both in terms of time , manpower, expertise and cost and involves use of infrastructure including manpower and travelling to participate in the tender and finally after going through all the stipulated processes and procedures to win the tender in its favour outcasting rivals. Thus, the costs associated and incurred in connection with participation in and finally winning tender both direct and indirect costs enter Profit and Loss account which needs to be neutralised with Revenues from these contracts based on the concept of matching principles. The doctrine of commercial expediency and non interference of Revenue cannot be stretched and allowed to invoked in the cases when the tax-payer incur costs to participate and win the tenders for supply of products/services and when it comes to booking of Revenue, the same is being billed on costs to costs basis without any profit/mark-up element . Even post sale of this software, the assessee is burdened with onerous responsibilities which found mentioned in the sub-contractors agreement. Reference is drawn to clause 1(b) (page 37/pb) wherein the assessee has to execute deed of adherence and a performance undertaking as required by HCL Technologies Limited. The assessee in contradistinction to its foreign parent company which is a separate entity will continue to be liable to HCL Technologies Limited which the said HCL Technologies Limited shall be made liable to fulfil similar obligation undertaken by HCL Technologies Limited under tripartite contract with the ultimate buyer , as a partner of the assessee as a OEM-CI consortium partner(refer clause 4.1 of sub-contractor agreement dated 21.11.2008) . The assessee is also burdened with undertaking customisation of software and its

implementation as per RFP which is again an onerous liability cast on the assessee which entail costs both direct and indirect both in monetary terms as well time to be spent by software professionals in undertaking customisation and implementation tasks(clause 4.1(b)(page 38/pb). The scope of assessee responsibility may also expand as the project progresses is an another contractual obligation undertaken by the assessee(page 38/pb). Based on material on record, we have observed that the assessee's foreign parent company has not signed any such onerous agreement in connection with sale of the said software . Several warranties and representations have also been made by the assessee which also cast onerous burden on the assessee(refer clause 5 /page 38) . In case of the termination of agreement, again several onerous burden are placed on the assessee which found mentioned in sub-contractor agreement dated 21.11.2008. The assessee's parent company which is a foreign company is an altogether distinct entity and the assessee has undertaken these above stated responsibilities upon itself in contradistinction to its parent company. Entire revenue model followed by the assessee in its wisdom wherein purchase and sale of software is made without any mark-up as detailed above after winning RFP from National Insurance Company Limited is to be evaluated on the touchstone of commercial prudence and expediency to see that it does not transgress those limits and boundaries as set out by doctrine of commercial expediency to shift profits to foreign tax jurisdiction while Indian tax jurisdiction is burdened with costs. In this situation protection granted by doctrine of commercial jurisprudence shall fail and revenue will be definitely entitle to lift the veil and see behind the smoke screen , the true colours of transaction entered into by the assessee with a view to shift profits to foreign tax jurisdiction. After all commercial expediency involves working in a manner which is commercial expedient for the tax-payer and not to work in the manner so as to shift profits to its foreign parent company and erode tax base in India. There is no such vested right in the assessee to

work under the garb of commercial expediency in a manner prejudicial to the legitimate revenue expectation of the Government of India supported by the provisions of the 1961 Act and the mandate of Article 265 of the Constitution of India. The manner in which software costs are billed by the assessee in the instant case puts heavy onus on the assessee to prove that there is no booking of costs with respect to entire spectrum and process of bidding for RFP issued by National Insurance Company, in consortium with its partner HCL Technologies India Private Limited while profits stood shifted in favour of its foreign parent company. To contend that the assessee will be benefitted in future years with AMC/maintenance costs/services of these softwares is too far fetched while the germane of the expenses is to bid and win RFP for sale of software . The entire spectrum and process which the assessee went through while bidding for RFP issued by National Insurance Company Limited as well other contracts being bid by the assessee and/or its parent company in India needs to be seen vis-a-vis costs incurred in connection therewith by the assessee and the manner in which revenues are booked by the assessee from these contracts/tenders to ensure that there is no base erosion and shifting of profits to foreign tax jurisdiction without payment of legitimate taxes which were legitimately due within Indian tax-jurisdiction. The assessee is to demonstrate and prove that its activities are in-fact govern by doctrine of commercial expediency and there is no shifting of profits/income legitimately chargeable to tax to outside Indian tax-jurisdiction while on the other hand costs are only loaded in Indian tax-jurisdiction . The direct nexus of the service/AMC/maintenance contract to be generated by the assessee under sub-contractor agreement with the doctrine of commercial prudence invoked by the assessee so much so it involves billing of software product purchased from foreign parent company on cost to cost basis without any mark-up is to be demonstrated and proved by the assessee with cogent evidences. The contention of the assessee that it has not incurred any expenses nor it did any value addition to software supplied by the

foreign parent company cannot be prima-facie accepted on its face value based on material on record and it is for the assessee to support the same with cogent evidences. The complete details to that effect are not placed by the assessee before the authorities below as well before us . Under these circumstances, we are inclined to restore the matter back to file of the AO for denovo determination of the issue on merits in accordance with law. The assessee is directed to appear before the AO and produce all necessary evidences/explanations to support its contentions. The AO shall admit all evidences/explanation submitted by the assessee in its defence and shall provide the assessee proper and adequate opportunity of being heard in accordance with principles of natural justice in accordance with law. We have restored this matter as detailed above in exercise of wide powers as are vested with Appellate Tribunal under Section 254(1) of the 1961 Act. This ground number 3 per memo of appeal filed by the assessee is allowed for statistical purposes. We order accordingly.

15. In the result , appeal filed by the assessee is partly allowed as indicated above.

Order pronounced in the open court on 22.10.2018.

आदेश की घोषणा खुले न्यायालय में दिनांकः 22.10.2018 को की गई

Sd/-	Sd/-
(C.N PRASAD) JUDICIAL MEMBER	(RAMIT KOCHAR) ACCOUNTANT MEMBER

Mumbai, dated: 22.10.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent

3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI