INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No. 1482/Del/2016
(Assessment Year: 2011-12)

DCIT(LTU), Circle-1, NBCC Plaza Pusph Vihar, New Delhi	Vs.	EXL Service.com (India) Pvt. Ltd, 414, 4th Floor, DLF Tower-B, Plot No. 10 & 11, DDA District Centre, Jasola, New Delhi PAN: AAACE5174C
(Appellant)		(Respondent)

ITA No. 1708/Del/2016
(Assessment Year: 2011-12)

EXL Service.com (India) Pvt. Ltd, 414, 4th Floor, DLF Tower-B, Plot No. 10 & 11, DDA District Centre, Jasola, New Delhi PAN: AAACE5174C	Vs.	DCIT(LTU), Circle-1, NBCC Plaza Pusph Vihar, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri Neeraj Jain, Adv Shri Abhishek Aggarwal, CA Shri Anshul Sachar, CA Shri Karan Jain, CA
Revenue by:	Shri Surendra Pal, CIT DR
Date of Hearing	28/07/2020
Date of pronouncement	26/08/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the assessee as well as the revenue for AY 2011-12 against the order passed by the ld DCIT, Circle-1, LTU, New Delhi against the order passed on 20.01.2016 u/s 143(3) read with section 144C of the Income Tax Act, 1961 passed in pursuance of direction of the ld DRP.

2. ITA No. 1708/Del/2016 is filed by the assessee challenged the addition of Rs. 355309/- on imputing interest on outstanding receivable from associated enterprises as its separate international transaction and its determination of ALP raising following grounds:-

"Appeal against the order under section 143(3) read with section 144C of the Income-tax Act, 1961 ("the Act") dated 20 January 2016 for the Assessment Year 2011-12 passed by the learned Deputy Commissioner of Income Tax, Large Tax Payer Unit, New Delhi (hereinafter referred to as "the Ld. AO")

1. *That on the facts and in the circumstances of the case and in law, the assessment order passed by the Ld. Assessing Officer ("Ld. AO") is bad in law.*
2. *The Ld. Dispute Resolution Panel ("DRP") has inadvertently omitted to adjudicate on the specific ground raised by the Appellant during DRP proceedings in respect of advances available with the Appellant from the Associated Enterprise ("AE") and that pursuant to the said advances, no adjustment on account of outstanding receivables is warranted. The Appellant has filed a rectification application with the Hon'ble DRP requesting adjudication on the same, which is pending.*
3. *The Ld. DRP erred in confirming the Ld. AO/ Ld. Transfer Pricing Officer's ("Ld. TPO") approach of enhancing the income of the Appellant by Rs. 355,309 holding that the alleged international transactions pertaining to interest on outstanding receivables do not satisfy the arm's length principle envisaged under the Act. In doing so, the Ld. AO/ Ld. TPO has grossly erred in:*
    - 3.1 *re-characterizing the outstanding period as short term loans advances related party receivable from overseas AEs beyond 90 days period to the AEs;*
    - 3.2 *disregarding the business/ commercial arrangement by not appreciating the fact that unlike a loan or borrowing, outstanding receivable is not an independent transaction which can be viewed on standalone basis and needs to be examined with the commercial transaction as a result of which the debit balance has come into existence;*
    - 3.3 *rejecting the Appellant's contention that the impact of working capital investment made by the Appellant should be evaluated using Transactional Net Margin method ("TNMM") as the most appropriate method rather than independently benchmarking the outstanding receivables of the Appellant by considering an interest rate (i.e. LIBOR) for comparability which does not amount to the application of Comparable Uncontrolled Price ("CUP") Method or any of the "method" defined in the Act;*
4. *The Hon'ble DRP has erred in considering reimbursement of expenses received as part of the core transaction (i.e. provision of Information*

Technology ("IT") enabled services) of the Appellant and re-computing the Profit Level Indicator ("PLI") of the Appellant after considering it as part of the operating revenue and operating cost, thus, in effect proposing that a mark-up is required to be earned on such non-core, non-value adding pass through transactions.

5. *The Ld. DRP erred in confirming the Ld. AO/ Ld. TPO's approach of determining the Arm's Length Price ("ALP") of the international transactions pertaining to provision of IT enabled services. In doing so, the Ld. AO/ Ld. TPO has grossly erred in:*

   5.1. *disregarding the ALP as determined by the Appellant in the Transfer Pricing (TP') documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ("Rules") as well as fresh search and in particular modifying/ rejecting the filters applied by the Appellant;*

   5.2 *disregarding multiple year/prior years' data used by the Appellant in the TP documentation and holding that current year [(i.e. Financial Year ("FY") 2010-11] data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its TP documentation;*

   5.3 *not appropriately considering the functions, assets and risk profile of the companies used for comparison with the Appellant, thereby including in the final comparable set certain companies with completely different functional profile;*

   5.4 *excluding certain companies considered by the Appellant in its TP documentation/ fresh search on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

   5.5 *including companies having abnormal margins/ volatile operating margins in the final comparables' set, that signify high element of entrepreneurial risk, thereby not appreciating the risk profile of the services rendered by the Appellant and not allowing risk adjustment to the Appellant;*

      5.5.1. without prejudice, that if risk adjustment is not allowed to compensate for risk free activities of the Appellant and hence considered it to be risk bearing, in that case appropriate tested party for the arm's length analysis should be the Appellant's overseas AE;

      5.5.2. without prejudice, did not give cognizance to the overall Group profits and Appellant's contribution in the total value chain;

   5.6 *not appreciating the fact that in the relevant assessment year the Appellant was; entitled to a tax holiday on its profits from provision of IT enabled services and therefore did not have advantage by manipulating the transfer prices of its any motive of deriving any tax international related party transactions;*

6. *The reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO has not recorded any reasons in the draft assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Ld. TPO for computation of the ALP, as is required under section 92CA(1) of the Act.*

7. *The Ld. TPO/ AO erred in enhancing the income of the Assessee by Rs 3,55,309 holding that the international transactions do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred in not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;*

8. *The Ld. AO/ Ld. TPO has grossly erred on facts and in law by disregarding judicial pronouncements in India in undertaking the TP adjustment;*

9. *That the Ld. AO / learned Dispute Resolution Panel (hereinafter referred to as "the Ld. DRP") has erred in law and on the facts and circumstances of the case by disallowing differential depreciation of Rs. 1,15,860 on Voice Recording Software License stating that depreciation on such software license was to be claimed @ 25% as against 60% claimed by the Appellant. In doing so:*

   9.1 The Ld. AO/Ld. DRP has erred in law and on the facts and circumstances of the case by not taking cognizance of the amendment brought vide IT (Twenty-Fourth Amendment) Rules 2002 effective from 1 April 2003 stating that depreciation on computer software is to be claimed at 60% as against 25% claimed.

   9.2 The Ld. AO/Ld. DRP erred in law and on the facts of circumstance of the case in ignoring various judicial precedents submitted and relied upon by the Appellant during the course of assessment proceedings.

10. *That the Ld. AO / Ld. DRP erred in law and on the facts and circumstances of the case by making a disallowance of notional expenditure of Rs. 12,52,630 per provisions of section 14A of the Act read with rule 8D of the Rules. In doing so:*

    10.1. The Ld. AO also erred in law and on the facts and circumstances of the case in making addition of notional expenditure of Rs. 12,52,630 per provisions of section 14A of the Act while calculating book profit under section 115 JB of the Act.

11. *That the Ld. AO has erred in law and on the facts and circumstances of the case by disallowing expenses incurred by the Appellant on facility maintenance, advertisement and tour and travel of Rs. 19,60,055 on account of short deduction of tax at 1% instead of 2% under section 40(a)(ia) of the Act. In doing so:*

    11.1. The Ld. AO erred in law and on facts and circumstances of the case by ignoring the submission of the

Appellant wherein it was highlighted, relying on the various judicial precedents, that no disallowance is warranted in case of short deduction of tax under the provisions of section 40(a)(ia) of the Act.

12. *That the Ld. AO has erred in law and on the facts and circumstances of the case in not allowing deduction under section 10A of the Act in respect of profit and gains of business and profession as computed by the Ld. AO and not following the directions issued by the Ld. DRP wherein the Ld. DRP has directed to compute deduction under section 10A of the Act with reference to the income computed by the Ld. AO under the head 'profits and gains of business and profession' and not the profit as computed by the Appellant.*

13. *That the Ld. AO erred in law and on the facts and circumstance of the case by directing to levy interest under section 234B, 234C and 234 of the Act."*

14. *That the Ld. AO erred in law and on the facts and circumstances of the case by initiating penalty proceedings under section 271(l)(c) of the Act for furnishing inaccurate particulars of income and concealment of income."*

3. ITA No. 1482/Del/2016 is filed by the ld AO raising following grounds of appeal:-

"*1. On the facts and circumstances of the case and in law, the Hon'ble DRP has erred in directing to allow deduction u/s 10A/10B in respect of income of Rs. 353989/- from sale of scrap of Gurgaon of Pune Unit.*

2. On the facts and circumstances of the case and in law, the Hon'ble DRP has erred in directing to delete the disallowance on account of depreciation of Goodwill of Rs. 168391424/- which is not allowable as per the provisions of income tax Rules, 1962.

3. On the facts and circumstances of the case and in law, the Hon'ble DRP has erred in directing to delete the disallowance of Rs. 7287750/- on account of referral pay, ignoring the fact that the assessee has filed to furnish any evidence either before the ld AO or the DRP in respect of the said claim, showing that it was incurred wholly and exclusively for the purpose of assessee's business.

4. On the facts and circumstances of the case and in law, the Hon'ble DRP has erred in directing to delete the disallowance of Rs. 7287750/- on account of referral pay ignoring the fact that the assessee has failed to furnish any evidence regarding services rendered in respect of expenditure claimed on account of referral pay."

4. The brief facts of the case shows that the assessee is engaged in the business of rendering of transaction processing services and internet and

voice based customer care service for its worldwide clients. It filed its return of income on 29.11.2011 declaring total income of Rs. 654608370/- as per normal provision of the computation of the total income and determining book profit u/s 115JB of Rs. 1095270405/-.

5. The assessee has entered into an international transaction, therefore, the ld AO referred the matter for determination of ALP to the ld TPO. The LD TPO noted that the assessee has entered into six different international transactions. The main international transaction was with respect to provision of IT enabled services amounting to Rs. 6975172486/- and other five transaction were related to reimbursement of expenses to its associated enterprises. The assessee adopted the transaction net margin method (TNMM) as the most appropriate method, adopted the profit level indicator of operating profit/ operating cost. The assessee arrived at set of 12 comparable companies' shows average margin at 14.29% using the multiple year data. The assessee computed its own margin at 14.89% and thus held that according to TP study report its international transactions are at arm's length.

6. Ld TPO was dissatisfied with the TP study report of the assessee, proposed certain different filters and after discussing the various judicial precedents as well as considering the objection of the assessee, carried out additional search and found with the comparable companies. He rejected the working capital adjustment also. The TPO computed the margin of these comparable at 35.78%. He applied this margin to the operating cost of the assessee at Rs. 5660241831/- compared them with the price received of Rs. 7122893475/- and made an adjustment of Rs. 562582883/-. He further found that there is a delay in recovery of outstanding dues from the associated enterprises and therefore, he held it to be a separate international transaction and computed the interest receivable from associated enterprises at overdue outstanding amounting to Rs. 5695209/-.

7. The ld AO based on the above adjustment passed an order proposing draft of the income on 30.03.2015 making an adjustment of Rs. 568278092/- on account of the ALP of international transaction. He further held that

a. Sale of scrap cannot be considered as a part of eligible business profit while calculating deduction u/s 10A of the Act and made an addition of Rs. 1107141/-.
b. Disallowed the depreciation of goodwill in the hands of the assessee amounting to Rs. 168391424/-.
c. Restricted the depreciation of software @ 25% instead of 60% as claimed by the assessee and disallowed Rs. 115860/-.
d. Assessee has derived an exempt income of Rs. 18674678/- which is claimed u/s 10(35) of the Act and therefore, he made a disallowance under Rule 8D u/s 14A of Rs. 1252630/-.
e. He also found that assessee has made short deduction of tax and therefore, disallowed Rs. 1810400/- being 1% short deduction of tax.
f. He disallowed a sum of Rs. 15829973/- on account of AIR information.
g. A disallowance of Rs. 7287750/- was also made on account of employee referral after expenditure. Disallowance u/s 37(1) of the Act of Rs. 17556975/- was made.

Certain other corporate disallowances were made and consequential total income was determination of Rs. 1669571600/- as per normal computation of income. While working out the book profit he increase the sum by disallowance u/s 14A of Rs. 1252630/-.

8. Against this draft order assessee filed objection before the LD DRP-1, New Delhi who passed a direction on 07.12.2015. The LD TPO passed an order on 14.01.2016 giving effect to the direction of the LD DRP. Accordingly, the transfer pricing adjustment on account international transaction of 7923967663/- was held to be at Arm's length and therefore, the adjustment proposed by the TPO of Rs. 562582883/- made in the order of the ld TPO was deleted. With respect to the outstanding receivable the ld DRP directed the ld TPO to compute interest rate by taking six months Libor plus + 400 resulting into interest of 4.519%. therefore, the addition proposed by the TPO on account of overdue amount receivable from associated enterprises of Rs. 5695209/- was reduced to Rs. 355309/-.

9. On the corporate issues, the ld DRP retained disallowance on account of depreciation of software, disallowance u/s 14A, deduction u/s 10A of other

income and short credit of TDS resulting into disallowance as per AIR information. In short the ld DRP upheld the addition/ disallowance only at Rs. 3784743/-. The normal income computation resulted into determination of income of assessee at Rs. 658393110/- against the return income of Rs. 654608370/-.

10. While computing the book profit the ld DRP directed to retain the disallowance u/s 14A of the Act of Rs. 1252630/- which resulted into adjusted book profit u/s 115JB of Rs. 1096523035/- against the book profit shown by the assessee at Rs. 1095270405/-.

11. Thus, final assessment order was passed by the ld AO on 20.01.2016. The assessee is aggrieved with the sum of the addition retained in the final assessment order and the ld AO is aggrieved with the addition directed to be deleted by the ld TPO. Therefore, both the parties are in appeal before us.

12. We first come to the appeal of the assessee. Ground number 1 is general in nature and therefore it is dismissed. Ground no 13 and 14 are also not argued and hence same are also dismissed.

13. Ground number 2 & 3 are related to the transfer pricing adjustment of ₹ 355,509 in relation to delay in receipt of receivable from associated enterprise. The learned assessing officer from the perusal of the invoice of details of services rendered to the associated enterprise noted that in certain cases the remittances were received by the appellant after sometime beyond the period agreed between the parties i.e. 90 days. The learned transfer-pricing officer concluded that the outstanding receivable are like a short-term loans/advances only and they fund the working capital requirement of the associated enterprise for the period. He therefore stated that delay in receipt of receivable is an unsecured loan advance to the associated enterprise, so a separate International Transaction, and imputed notional interest at the rate of 10.84 percentages being the base rate of interest of state bank of India on the period of delay exceeding 90 days. On the objection before the learned dispute resolution panel the adjustment proposed by the learned transfer pricing officer was upheld however the learned DRP directed the learned TPO to recompute the interest by imputing the rate of 4.519 percentage being LIBOR +400 basis points. Accordingly, the learned transfer-pricing officer while giving effect to the direction of the

learned dispute resolution panel computed the transfer pricing adjustment of ₹ 355,509/– on account of interest for the period of delay in receipt of trade receivable from the associated enterprise.

14. Challenging the above addition the learned authorised representative submitted that the learned transfer pricing officer is not authorised to recharacterise the actual transaction of the accounts receivable into transaction of loan so as to impute notional interest income. He relied upon the decision of the honourable Delhi High Court in Principle Commissioner Of Income Tax Versus Kusum Healthcare Private Limited in ITA number 765/2016. He stated that the similar view was followed by the honourable Delhi High Court in case of Avenue Asia Advisors Private Limited Versus Deputy Commissioner Of Income Tax [398 ITR 120]. In view of this, it was submitted that even if the appellant has received receivable from its associated enterprise beyond the agreed credit period, no interest can be charged for delay in receipt of receivable by treating the same as an international transaction separate from the international transaction of rendering of the services. Without prejudice to the above submission, he submitted that the interest cost has already been suitably factored in the sale price as the learned transfer pricing officer has benchmarked its operating profit margin earned from international transaction with the associated enterprises at 14.89% with average working capital adjustment of operating profit margin of comparable companies at 14.29%. He therefore submitted that since the operating margin of the appellant is higher than the operating margin to the comparable companies after taking into consideration the difference in working capital, the impact of account of delayed realization of the receivable has already been built into the sale price or profit margin of the appellant. Therefore, it was submitted that no separate adjustment on account of the alleged delay in realization of the receivable is warranted. For this proposition he relied on the decision of the honourable Delhi High Court in case of Principal Commissioner Of Income Tax Versus Kusum Healthcare Private Limited once again. He also referred to several judicial precedents of the coordinate benches wherein the adjustment on account of receivable was deleted on the basis of the comparison of working capital adjusted margin of the assessee with

comparable companies applying transactional net margin method. In the end, it was submitted that at the beginning of the year ₹ 227,363,291 was payable by the appellant to its associated enterprise and no interest was paid by the appellant . It is debt free company. Therefore it is submitted that since the appellant has not paid any interest on payable due to its associated enterprise no interest to be imputed on the receivable outstanding from the associated enterprise.

15. The learned departmental representative relied upon the orders of the learned transfer pricing officer and direction of the learned dispute resolution panel. It was submitted that as the assessee has not recovered the outstanding due from its associated enterprise in accordance with the agreement, the outstanding beyond that period is a separate international transaction, which is required to be benchmarked separately. He therefore submitted that no infirmity could be pointed out in the direction of the learned dispute resolution panel, which has also scale down the interest, which was computed by the learned transfer-pricing officer.

16. We have carefully considered the rival contention and perused the orders of the lower authorities. As in the present case the assessee has been granted the working capital adjustment while computing the arm's-length price of the international transaction of the sale of services, according to us no separate benchmarking should be done of the outstanding receivable as outstanding receivable are part of the working capital of the assessee. Further the issue is squarely covered in favour of assessee by the decision of the honourable Delhi High Court in case of Principal Commissioner Of Income Tax Versus Kusum Healthcare Private Limited (supra). Therefore ground number two of the appeal of the assessee is allowed and learned transfer pricing officer/learned assessing officer are directed to delete the addition of Rs 3 55509/– in relation to the delay in receipt of receivable from associated enterprise.

17. Ground number 4 to 8 of the appeal are not pressed and therefore those grounds are dismissed.

18. Ground number 9 of the appeal is with respect to the disallowance of depreciation claimed by the appellant at the rate of 60% on voice recording software licenses amounting to ₹ 3,31,030/–. On this voice recording

software license purchased by the assessee, the assessee claimed depreciation of ₹ 1 98618/– at the rate of 60% however the learned assessing officer held that it is actually a license as opposed to software and assessee is eligible for depreciation at the rate of 25% only, disallowed differential depreciation of an amount of Rs 115860. The learned dispute resolution panel on objection by the assessee confirms the finding of the learned assessing officer following its directions for assessment year 2010 – 11 and held that the rate of 60% was applicable only to the computer software purchased or acquired along with the computer and not to software license.

19. The learned authorised representative submitted that this issue is squarely covered in favour of the appellant by the order of coordinate bench in appellants own case for assessment year 2010 – 11 in ITA number 302/del/2015. He extensively referred to para number 24 of that order.

20. The learned departmental representative relied upon the orders of the lower authorities. It was submitted that there is a difference between the computer software and the software on which the assessee is claiming depreciation at the rate of 60%, which is merely a license.

21. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case, the issue is squarely covered in favour of the assessee by the decision in assessee's own case for assessment year 2010 – 11 in ITA number 302/del/2015 dated 3 January 2017 wherein para number 24 of that decision the identical software was considered. In para number 28, the coordinate bench relying on the decision of the honourable Delhi High Court in case of CIT versus BSE Yamuna powers Ltd (2013) 355 ITR 47 directed the AO to allow the claim of the assessee for depreciation at the rate of 60%. The learned departmental representative could not distinguish the above decision or brought before us any other judicial precedent. Therefore, respectfully following the decision of the coordinate bench in assessee's own case we direct the learned assessing officer to grant assessee depreciation on the above software at the rate of 60%. Accordingly, ground number 9 of the appeal of the assessee is allowed.

22. Ground number 10 of the appeal of the assessee is against the disallowance of ₹ 1,252,630 u/s 14A read with rule 8D of the income tax rules. The fact

shows that during the year the appellant has earned a dividend income of RS. 1 86,74,678 from investment held in mutual funds which was exempt u/s 10 (34) or (35) of the income tax act. The details of the above dividend income show that assessee has earned such dividend income on mutual funds of liquid plan, cash plus plan and other mutual funds. The learned assessing officer noted that it is unbelievable that no expenditure was incurred by the appellant in earning such income and made disallowance of ₹ 1,252,630 being 0.5% of the average value of investment related to the tax free income in terms of Section 14 A of the act by invoking the provisions of rule 8D (iii) Of the income tax rules. The learned dispute resolution panel on objection before it followed its own order for assessment year 2010 – 11 and upheld the findings of the learned assessing officer.

23. The learned authorised representative challenged the above addition on the fact that no satisfaction was recorded by the assessing officer having regard to the accounts of the assessee, which is mandatory. He relied upon the several judicial precedents for the proposition. He further submitted that appellant has earned dividend from investment in mutual fund only and mutual funds are required to pay dividend distribution tax on dividends distributed and only the net income has been received as dividends by the appellant. He further stated that mutual funds are covered by SEBI rules and charge fund management charges. Out of the income earned by the fund the fund management charges are deducted and net income is available for distribution to unit holders. He therefore submitted that during the year under consideration the assessee has received only the net income of Rs 186,74,678 after deduction of such fund management charges. He further stated that no effort/ time was utilized in receiving the dividend income and the investment activity only requires filing of mutual fund standard printed requisition forms and issue of cheques. The dividend on maturity proceeds are straightway credited to the appellant's bank account. In the end, it was submitted that the coordinate bench in assessment year 2010 – 11 has set aside the matter to the file of the learned assessing officer.

24. The learned departmental representative vehemently supported the orders of the lower authority and submitted that the learned assessing officer has

recorded proper satisfaction therefore the argument of the learned authorised representative that no satisfaction has been recorded is devoid of any merit. It was further stated that the learned AO has merely computed disallowance being 0.5% of the average value of the investment. He otherwise submitted that even the minimum activities that as stated by the learned authorised representative also deserves to be considered for making the disallowance and the only option left with the learned assessing officer is to invoke the provisions of rule 8D of the income tax rule for disallowance u/s 14 A of the act. He therefore submitted that no fault could be found with the orders of the lower authorities.

25. We have carefully considered the rival contention and perused the orders of the lower authorities. On careful perusal of the assessment order, it is found that in para number seven of the assessment order the learned assessing officer noted that assessee has earned dividend income of Rs. 186,74,678, which did not form part of the total income. On the basis of this the learned assessing officer straightway asked the assessee to explain as to why the disallowance u/s 14 A read with rule 8D should not be made. The assessee submitted its reply on 6th January 2015 stating that the assessee has not incurred any expenditure in relation to the earning of such exempt income. The learned assessing officer in para number 7.2 held that it is unbelievable that for earning an income of ₹ 1.86 crores no expenditure was made by the assessee. He noted that it is pertinent that the assessee has not provided the details of such expenses as are directly attributable to and which are necessarily required for making / maintaining investment in shares and mutual funds and earning there from. Therefore, he held that he is not satisfied with the correctness of the claim of the assessee that no expenditure has been incurred in respect of such expenditure in relation to income, which does not form part of the total income under this act. Thereafter he proceeded to compute the disallowance applying the provisions of rule 8D and computed such disallowance at ₹ 1,252,630. On careful consideration of the reasons given by the learned assessing officer we do not find any satisfaction with respect to the books of accounts maintained by the assessee that assessee has incurred any expenditure with respect to the earning of exempt income. In view of this, according to

us, the learned assessing officer has failed to record any satisfaction with regard to the correctness of the claim of the assessee that it has not incurred any expenditure. The learned assessing officer did not cite any of the expenditure in the profit and loss account of the assessee, which is incurred by the assessee for earning of the exempt income. The satisfaction of the learned assessing officer as provided Under subsection 2 of Section 14 A of the income tax act is a preliminary requirement for invoking the provisions of rule 8D of the income tax rules for making a disallowance u/s 14 A of the act. Therefore, in absence of any satisfaction recorded by the learned AO with respect to the examination of the books of account of the assessee to verify the correctness of the claim of the assessee, the disallowance u/s 14A cannot be sustained. Accordingly we direct the learned assessing officer to delete the disallowance of ₹ 1,252,630 made u/s 14 A of the act.

26. As we have already deleted the disallowance u/s 14 A of the income tax act in normal computation of the total income, for the similar reasons, as well as special bench decision in case of the Asst Commissioner of income tax versus Virret investments private limited [2017] 82 taxmann.com 415 (Delhi - Trib.) (SB)/[2017] 58 ITR(T) 313 (Delhi - Trib.) (SB)/[2017] 165 ITD 27 (Delhi - Trib.) (SB)/[2017] 188 TTJ 1 (Delhi - Trib.) (SB), we direct the AO to delete the above addition while calculating the book profit u/s 115JB of the income tax act.

27. Accordingly, ground number 10 of the appeal of the assessee is allowed.

28. Ground no 11 of the appeal is against the disallowance confirmed by the learned CIT – A u/s 40 (a) (ia) of the act of ₹ 1,960,055 on facility maintenance advertisement and tour and travel for the reason that assessee has deducted tax at the source at the rate of 1 % instead of at the rate of 2%.. Facts show that AO disallowed expenses under section 40(a)(ia) of the Act amounting to Rs. 19,60,055 incurred on facility management, advertisement and tour and travel on account of short deduction of tax @ 1% instead of 2%. Based on AIR information, the assessing officer pointed out that there was a default of Rs. 18,104 on account of short deduction of tax at source during 1st quarter of the financial year 2010-11, in respect of payments of Rs. 19,60,055 made to 11 parties for facility maintenance,

advertisement, tour and travel, etc., in view of the fact that tax was deducted under section 194C of the Act @1% instead of 2%. The assessing officer, accordingly made disallowance under section 40(a)(ia) of the Act.

29. The Ld DRP directed the assessing officer to examine whether the shortfall was due to lower TDS rate or TDS was not deducted on certain expenses. Though the assessing officer accepted that tax was deducted at source under section 194C of the Act out of the said payments, the disallowance proposed in the draft assessment order was sustained on the ground that tax was short deducted. Therefore, the learned assessing officer disallowed the above sum.

30. The ld Authorised Representative submitted that Disallowance under section 40(a)(ia) of the Act cannot be sustained for short deduction of tax at source, as held in

i. CIT vs. S.K Tekriwal: 361 ITR 432 (Cal. HC)
ii. ACIT vs. Pankaj Bhargava: ITA No. 86/Del./2012 (Del.)
iii. Micromax Informatics Ltd. vs. DCIT: 154 ITD 156 (Del.)
iv. UE Trade Corpn. (India) Ltd. vs. DCIT: 28 taxmann.com 77 (Del.)
v. Hero Motocorp Ltd. vs. ACIT: 60 SOT 25 (Del.)

Without prejudice, learned authorised representative further submitted that disallowance under section 40(a)(ia) of the Act should, if at all, be restricted to 30% of the expenditure, in view of the amendment made by the Finance Act 2014 to the following effect:

> "40. Notwithstanding anything to the contrary in sections 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",— ..... (ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 ....." (emphasis supplied)

The Memorandum explaining provisions of the Finance Bill, 2014 provides the rationale of the aforesaid amendment to section 40(a)(ia) of the Act in the following words:

"……As mentioned above, in case of non-deduction or non-payment of tax deducted at source (TDS) from certain payments made to residents, the entire amount of expenditure on which tax was deductible is disallowed under section 40(a)(ia) for the purposes of computing income under the head "Profits and gains of business or profession". The disallowance of whole of the amount of expenditure results into undue hardship. In order to reduce the hardship, it is proposed that in case of non-deduction or non-payment of TDS on payments made to residents as specified in section 40(a)(ia) of the Act, the disallowance shall be restricted to 30% of the amount of expenditure claimed. Further, existing provisions of section 40(a)(ia) of the Act provides that certain payments such as interest, commission, brokerage, rent, royalty fee for technical services and contract payment made to a resident shall not be allowed as deduction for computing business income if tax on such payments was not deducted, or after deduction, was not paid within the time specified under the said section. Chapter XVII-B of the Act mandates deduction of tax from certain other payments such as salary, directors fee, which are currently not specified under section 40(a)(ia) of the Act. The payments on which tax is deductible under Chapter XVII-B but not specified under section 40(a)(ia) of the Act may also be claimed as expenditure for the purposes of computation of income under the head "Profits and gains from business or profession – Clause 14 "

…… These amendments will take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years."(emphasis supplied)

The aforesaid amendment, it he submitted that, is curative in nature, being introduced to reduce the undue hardship caused to assessee on disallowance of entire amount of expenditure. Accordingly, the same would, have retrospective operation, relying upon the following cases:

i. Allied Motors (P) Ltd vs CIT: 224 ITR 677 (SC)
ii. CIT vs Alom Extrusions Ltd: 319 ITR 306 (SC)•
iii. CIT, Kolkata vs Calcutta Export Company: 404 ITR 654 (SC)

Specific reliance in this regard is placed on the following decisions, where it has been held that amendment to section 40(a)(ia) of the Act restricting the disallowance to 30% of expenditure, being clarificatory/ curative in nature, is applicable retrospectively:

i. Smt. Kanta Yadav vs. ITO: ITA No. 6312/Del/2016 (Del)
ii. Prabhatam Advertising Pvt. Ltd. vs. DCIT: ITA No.5798 of 2014 (Del)
iii. RH International Ltd. vs. ITO: ITA No. 6724 of 2018 (Del)
iv. Sh. Rajendra Yadav vs. ITO: ITA No. 895/JP/2012 (Jaipur)
v. Smt.Sonu Khandelwal vs. ITO: ITA No. 597/JP/2013 (Jaipur) –
vi. Siddi Vinayak Sarees vs. ITO: 2056 of 2018 (Kol)

31. The learned department representative vehemently supported the order of the learned assessing officer and stated that when the assessee has failed to deduct tax at the appropriate rate in accordance with the Chapter XVIB of the income tax act the disallowance has rightly been made.

32. We have carefully considered the rival contentions and perused the orders of the lower authorities. Here the facts stated before us undisputedly shows that the assessee has deducted tax on the above sum the rate of one percent instead of 2% as held by the assessing officer. Therefore there is no failure of non-deduction of tax. If there is any offence or violation it is deduction of tax at lower rates compared to what is prescribed. The issue is squarely covered in favour of the assessee by the decision of the honourable Calcutta High Court in CIT versus SK Tekriwal 361 ITR 431. In view of this ground number 11 of the appeal is allowed.

33. In the result, appeal filed by the assessee is partly allowed.

34. Now we come to the appeal of the learned assessing officer. The ground number 1 is with respect to the disallowance of deduction u/s 10 A/10 B on account of income of ₹ 353,989 arising from sale of scrap. Assessee has claimed deduction u/s 10 A of the income tax act on sale of scrap pertaining to its Gurgaon and Pune units amounting to Rs. 301,723 and Rs. 52,266 respectively. The learned assessing officer denied in the draft assessment order holding that the income had no nexus with/attributable to export or with export activity of the assessee. The learned dispute resolution panel following its own order for assessment year 2000 – 11 allowed the deduction

u/s 10 A/10 B of the act holding that the income from sale of scrap was inextricably linked to the business of the eligible unit. Therefore, the learned assessing officer aggrieved with the above finding of the learned dispute resolution panel has preferred this ground of appeal.

35. The learned departmental representative heavily relied on the order of the learned assessing officer and submitted that assessee is not engaged in the business of manufacturing or processing of any goods therefore the scrap generated during the course of business is not linked to the business of the assessee. He further submitted that the profits are also not derived by an undertaking from the export of articles or things computer software. He therefore submitted that the order of the learned assessing officer in not allowing deduction u/s 10 A / 10 B of the act on sale of scrap is correct.

36. The learned authorised representative submitted that the issue squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own case for assessment year 2008 – 09 in ITA number 4459/del/2013 and assessment year 2000 – 11 in ITA number 302/del/2015. Therefore this ground of the appeal of the learned assessing officer deserves to be dismissed.

37. We have carefully considered the rival contention and find that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case as per para number 64 of ITA number 302/del/2015 for assessment year 2010 – 11 wherein the coordinate bench held that the receipt from sale of scrap being part and parcel of the activity and having the proximate relationship would also be within the ambit of gain derived from the industrial undertaking and therefore the deduction u/s 10 B was granted. We have also noted from the assessment order that the learned assessing officer has treated this income from sale scrap as business income and not income from other sources. Therefore, it is profits of the business of the undertaking that are considered by the learned assessing officer himself. According to this, subsection 4 of Section 10 B the profit derived from export of article or things or computer software shall be the amount which bears to the profits of the business of the undertaking in the same proportion as the export turnover in respect of such article or things or computer software bears to the total turnover of the business

carried on by the undertaking. Therefore, according to that provision profits of the business of the undertaking is required to be computed and thereafter the deduction is required to be granted in proportion to the export turnover to total turnover. For this reason, also we do not find any infirmity in the order of the learned dispute resolution panel giving direction to the learned assessing officer to delete the above disallowance. Accordingly, ground number 1 of the appeal of the learned assessing officer is dismissed.

38. Ground number 2 of the appeal of the AO is against the disallowance of depreciation on goodwill amounting to ₹ 168,391,424 which resulted into on account of an asset purchase agreement dated 4/11/2009 and its subsequent amendment with American Express India private limited to acquire the global travel service centre as a going concern for a lump sum consideration. The fact shows that during the assessment year 2000 – 11 the assessee entered into an asset purchase agreement with American Express India private limited to acquire the global travel service centre as a going concern for a lump sum consideration of ₹ 1 350 million. The aforesaid consideration was allocated to an identifiable asset and liability based on the book value, and the difference between the purchase price and the net asset value of acquired asset was recognized as a goodwill amounting to ₹ 769,789,365 in the books of the assessee. It is required to be noted that this is not the first year of the claim of depreciation on goodwill. In fact, this is the second year of depreciation claimed by the assessee on the goodwill. The learned assessing officer disallowed the depreciation, which was deleted by the learned dispute resolution panel. It is apparent that in assessee's own case for assessment year 2010 – 11 in ITA number 302/del/2015 the coordinate bench relying on the decision of the honourable Supreme Court in CIT versus Smif securities Ltd (2012) 348 ITR 302 and the decision of the honourable Delhi High Court in case of Areva T & D India Ltd versus Deputy Commissioner Of Income Tax (2012) 345 ITR 421 held that depreciation was admissible on goodwill amounting to ₹ 769,789,365 and dismissed the appeal of the revenue. The learned dispute resolution panel deleted the disallowance following its own direction

issued in assessment year 2010 – 11. Therefore, the learned assessing officer is in appeal before us.

39. The learned departmental representative payment please submitted that for the purpose of the claim of the depreciation merely an accounting entry could not suffice. He submitted that there has to be an asset available with the assessee, which should be owned by the assessee. He submitted that it is merely an accounting entry which does not result into an asset automaticaly. He relied upon the order of the learned assessing officer.

40. The learned authorised representative submitted that the issue squarely covered in favour of the assessee by the decision of the coordinate bench for assessment year 2000 – 11 in ITA number 302/del/2015 at para number 74 of the order.

41. We have carefully considered the rival contention and perused the orders of the lower authorities. As stated by us earlier that this issue is not a new as the claim of the depreciation on the goodwill has already been allowed to the assessee in assessment year 2010 – 11 by the coordinate bench vide para number 71 of its order. Therefore respectfully following the decision of the coordinate bench in assessee's own case, we dismiss this ground of appeal.

42. 3rd ground of appeal of the AO is against the disallowance of referral pay amounting to ₹ 7,287,750 on the ground that the assessee has failed to furnish evidence in respect of the services rendered. The fact shows that the assessee incurred employee referral cost of the above sum towards payment to its employees, which is paid whenever a new employee is hired or employed through a reference given by the existing employee. The details of the employees to whom such referral pay was paid during the year was submitted by the assessee along with the pay slips mentioning the amount of referral pay so paid to the employees on sample basis. The learned assessing officer disallowed the above expenditure stating that no actual expenses were incurred. The learned dispute resolution panel took note of the industry practice of payment of referral paid to existing employees for referring prospective candidates for employment. It also took on record the payment of referral pay to the existing employees and then deleted the disallowance. As the learned dispute resolution panel directed the AO to

delete the above disallowance, AO aggrieved with that direction has preferred this ground of appeal.

43. The learned departmental representative supported the order of the learned assessing officer. The learned authorised representative supported the order of the learned dispute resolution panel.

44. We have carefully considered the rival contention and perused the orders of the lower authorities. The learned dispute resolution panel in paragraph number 14 of its directions held that the above sum is paid to the employees when the assessee hires a person referred by those existing employees. It was also noted that assessing officer has also been submitted respective details and the AO has failed to bring any material on record to justify the disallowance. According to the learned dispute resolution panel the above expenditure is allowable u/s 37 (1) of the act. We do not find any infirmity in the order of the learned dispute resolution panel because such expenditure was incurred by the assessee for the purpose of recruitment of its own employees. The payment for such referral was made to the employees of the company who were existing and who referred new employees. Therefore, the above expenditure is incurred wholly and exclusively for the purposes of the business. In view of this ground number, three of the appeal of the learned assessing officer is dismissed.

45. In the result, appeal filed by the learned assessing officer is dismissed.

46. Thus, by this order of appeal filed by the assessee is partly allowed and appeal of the learned assessing officer is dismissed.

Order pronounced in the open court on 26/08/2020.

Sd/-	Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 26/08/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)

5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	24.08.2020
Date on which the typed draft is placed before the dictating member	24.08.2020
Date on which the typed draft is placed before the other member	26.08.2020
Date on which the approved draft comes to the Sr. PS/ PS	26.08.2020
Date on which the fair order is placed before the dictating member for pronouncement	26.08.2020
Date on which the fair order comes back to the Sr. PS/ PS	26.08.2020
Date on which the final order is uploaded on the website of ITAT	26.08.2020
date on which the file goes to the Bench Clerk	26.08.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	