

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH “H”, MUMBAI**

**BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)  
AND  
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

I.T.A. No.4248/Mum/2014  
A.Y. 2007-08

ICICI Bank Ltd ICICI Bank Towers Bandra Kurla Complex Bandra (East), Mumbai-400 051 <b>PAN : AAAC11195H</b>	vs	The Deputy Commissioner of Income-tax, Circle-3(1), Aayakar Bhavan Mumbai-400 020
<b>APPELLANT</b>		<b>RESPONDENT</b>

I.T.A. No.4158/Mum/2014  
A.Y. 2007-08

The Deputy Commissioner of Income-tax, Circle-3(1), Aayakar Bhavan Mumbai-400 020	vs	ICICI Bank Ltd ICICI Bank Towers Bandra Kurla Complex Bandra (East), Mumbai-400 051 <b>PAN : AAAC11195H</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

Present for the Assessee	Ms. Aarti Vissanji, Adv
Present for the Department	Shi Himanshu Sharma, Sr.AR

Date of hearing	17/10/2023
Date of pronouncement	09/11/2023

**ORDER****Per Padmavathy S (AM):**

These cross appeals filed by the assessee and the Revenue are against the order of the Commissioner of Income-tax (Appeals)-15, Mumbai dated 24/03/2014 for Assessment Year 2007-08.

2. The issues contended by the assessee and the revenue through various grounds of appeal are as below:-

**Assessee**

<b>Ground No.</b>	<b>Item of disallowance / addition</b>	<b>Amount – Rs.</b>
1	Transfer Pricing adjustment	1,23,89,519
2 (2.1 & 2.2)	Mark to Market (MTM) clauses on forex derivatives	13,46,00,000
3 (3.1 to 3.4)	Expenses apportioned against income exempt under section 10(15), 10(34) & 10(25)	4,76,03,00,000
4 (4.1 & 4.2)	Disallowance of bad debts written off	4,37,82,57,646
5 (5.1 & 5.2)	Disallowance of business loss and other expenses	1,78,09,16,700
6 (6.1 & 6.2)	Disallowance of proportionate claim of issue discount expenses	1,49,24,355
7	Rebate under section 88E	7,08,99,317
8	Short grant of relief under section 90	4,67,30,903
9	Charging of interest under section 234B & 234D	
10 (10.1 & 10.2)	Provisions of section 115JB not applicable	
11	General	

**Revenue**

<b>Ground No.</b>	<b>Item of disallowance / addition</b>	<b>Amount – Rs.</b>
1 & 2	Depreciation on leased assets	43,43,25,891
2	Addition of non cash write back made under section 41(4)	56,19,378
3	Club Membership Fees	1,13,85,062
4 & 5	General	

3. The assessee is engaged in the business of banking and related activities. The assessee filed the return of income for AY 2007-08 on 31.10.2007 declaring the total income of Rs.30,91,68,39,720/-. The assessee later filed a revised return of income on 14.11.2007 declaring the total income of Rs.30,91,68,39,714 which was once again revised on 28.03.2009 declaring the total income of Rs.31,23,71,65,697. The assessee vide letter dated 04.03.2010 filed during the course of assessment proceedings filed the revised computation declaring the total income at Rs.33,89,66,57,390/- under normal provisions of the Act and the total income under section 115JB of the Income Tax Act (the Act) of Rs.27,34,68,28,727. The assessee vide letter dated 15.11.2010, submitted before the assessing officer that the provisions of section 115JB is not applicable to Banks. The case was selected for scrutiny and the statutory notices were duly served on the assessee. A reference was made to the Transfer Pricing Officer (TPO) in order to compute the Arm's Length Price (ALP) of the transactions the assessee had with its Associated Enterprise (AE). The TPO made an adjustment of Rs.1,06,30,175 towards ITES markup under charged and Rs.17,59,344 towards Business Support markup under charged. Besides the TP adjustments, the assessing officer made other additions towards corporate tax computing the assessed income under normal provisions at Rs.39,69,74,66,800 and book profits under section 115JB of the Act at Rs.58,10,92,52,652. On further appeal the CIT(A) gave partial relief to the assessee. Both the assessee and the revenue are in appeal against the order of CIT(A).

**I.T.A. No.4248/Mum/2014 – Assessee's Appeal****DISALLOWANCE OF MARK TO MARKET LOSSES**

4. The Assessing Officer held that the mark to market losses claimed by the assessee are in the nature of liability that is not crystallized and, therefore, cannot be claimed as a deduction as business loss. The Assessing Officer in this regard relied on the CBDT Instrn. Dated 23/03/2010. The CIT(A), on further appeal upheld the order of the Assessing Officer stating that the MTM loss is notional and that the assessee's claim that particular method of accounting continuously followed for a long period does not entail the assessee to presume that the method followed is correct.

5. Before us, the Ld.AR submitted that the MTM losses are arising out of the derivatives and the same is incurred in the regular course of business of the assessee. The Ld.AR relied on the decision of the Supreme Court in the case of Woodward Governor Pvt. Ltd v/s CIT 312 ITR 252 to submit that the Apex Court in the said decision held that the notional loss suffered on foreign exchange difference is in the nature of business loss and allowable as a deduction. The Ld.AR further placed reliance on the decision of the Special Bench of the Mumbai Benches of the Tribunal in the case of CIT Vs Bank of Bahrain & Kuwait 132 TTJ 505 (Mum)(SB). The Ld.AR brought to our attention that based on the disallowance made in the MTM loss the assessee filed a petition under section 154 to reverse the MTM gains offered to tax and the Assessing Officer reversed the gain offered to tax. The Ld AR fairly submitted that if the MTM loss is allowed as a deduction, then directions may be given to the assessing officer to bring the MTM gain reverse back to tax.

6. The Ld. DR, on the other hand, vehemently argued that the MTM loss is not the real loss incurred by the assessee, but arise out of the re-instatement of the derivatives which is notional in nature. Accordingly, the Ld. DR submitted that the lower authorities have correctly disallowed the said loss. The Ld. DR made a without prejudice submission that if the loss is to be allowed as a deduction, then the gain which was deleted by the order under section 154 should be brought back to tax.

7. We heard the parties and perused the material on record. We notice that the Special Bench of the Tribunal in the case of DCIT vs Bank of Bahrain & Kuwait (supra) has considered the issue of allowability of loss arising out of MTM re-investment of foreign exchange contracts and held that—

*"58. In view of the above discussion, we allow the assessee's appeal for the following reasons:-*

- i) A binding obligation accrued against the assessee the minute it entered into forward foreign exchange contracts.*
- ii) A consistent method of accounting followed by assessee cannot be disregarded only on the ground that a better method could be adopted.*
- iii) The assessee has consistently followed the same method of accounting in regard to recognition of profit or loss both, in respect of forward foreign exchange contract as per the rate prevailing on March 31.*
- iv) A liability is said to have crystallised when a pending obligation on the balance sheet date is determinable with reasonable certainty. The considerations for accounting the income are entirely on different footing.*
- v) As per AS-II, when the transaction is not settled in the same accounting period as that in which it occurred, the exchange difference arises over more than one accounting period.*
- vi) The forward foreign exchange contracts have all the trappings of stock-in-trade.*
- vii) In view of the decision of Hon'ble Supreme Court in the case of Woodward Governor India (I) P.Ltd., the assessee's claim is allowable.*
- viii) In the ultimate analysis, there is no revenue effect and it is only the timing of taxation of loss/profit.*

*59. We, accordingly, hold that where a forward contract is entered into by the assessee to sell the foreign currency at an agreed price at a future date*

*falling beyond the last date of accounting period, the loss is incurred to the assessee on account of evaluation of the contract on the last date of the accounting period i.e. before the date of maturity of the forward contract.”*

8. Accordingly, we hold that the loss claimed by the assessee is to be allowed as a deduction. During the course of hearing, the Ld.AR fairly conceded that the gain on MTM which has been held to be treated as income of the assessee in the order passed under section 154 can be reversed in case the MTM loss is held to be allowed as a deduction. Accordingly, we direct the Assessing Officer to reconsider the order passed under section 154 reversing the MTM gain and bring the same to tax accordingly.

#### **DISALLOWANCE UNDER SECTION 14A**

9. The assessee had earned certain exempt income and while filing the return of income, has disallowed a sum of Rs.6.63 crores at 1% of the total dividend income earned towards administrative expenses. The Assessing Officer invoked the provisions of section 14A stating that the assessee has not discharged the onus of evidencing the source of investment is from own funds. Accordingly the assessing officer made a disallowance of Rs.458.866 crores towards interest paid and Rs.17.37 crores towards administration expenses after adjusting the suo moto disallowance made by the assessee. Before the CIT(A) the assessee submitted that the assessing officer has made the disallowance under Rule 8D which is not applicable for the year under consideration. The CIT(A) held that even in the year in which Rule 8D was not available disallowance can be made on a reasonable basis and accordingly upheld the disallowance stating that the Assessing Officer has made the disallowance on reasonable basis.

10. Before us, the Ld.AR submitted that the provisions of Rule 8D are applicable only prospectively from A.Y. 2008-09 and, therefore, the Assessing Officer is not correct in applying rule 8D for the year under consideration. The Ld.AR drew our attention to page 21 of the assessment order in which the Assessing Officer himself admits the fact that the assessee is having interest free funds of Rs.46038.91 crores as on 31/03/2007 and the investment in shares stands at Rs.10,289 crores. Therefore, the Ld.AR submitted that when the investments are made out of own funds, there cannot be any disallowance towards interest cost under section 14A. The Ld.AR further submitted that the Assessing Officer also did not record any reasons to reject the suo motu disallowance made by the assessee towards administrative expenses and has proceeded to compute the disallowance afresh towards administrative expenses.

11. The Ld. DR, on the other hand, supported the order of the Assessing Officer stating that the Assessing Officer has made a reasonable estimate of the expenses incurred and therefore, he prayed that the disallowance be upheld.

12. We heard the parties and perused the material on record. The break up of the exempt income under section 10 as submitted by the assessee before the Assessing Officer is reproduced below:-

1. Tax Free interest u/10(15)	Rs. 1,20,66,400/-
2. Dividend u/s 10(34)	Rs. 614,63,64,687/-
3. Income from Venture Funds u/s 10(23F)	Rs. 314,34,28,328/-
4. Long term capital gains (LTCG computed)	Rs.265,15,641,414/-

13. It is noticed that against the above exempt income, the assessee has made a suo motu disallowance of Rs.6.63 crores. It is the submission of the assessee that Rule 8D is applicable only from 2008-09 We, in this regard, notice that the though

the Assessing Officer admits that Rule 8D is prospective he proceeded to make the disallowance, stating that the assessee in its without prejudice submission has furnished the working of disallowance under section 14A as per Rule 8D. This, in our view, is not a correct approach, since for the year under consideration, Rule 8D is not applicable. It is an undisputed fact acknowledged by the assessing officer that the assessee had its own funds which are more than the investment and, it is a settled position that when own funds are more than the investments there cannot be any disallowance towards interest. As already mentioned, the assessee has made a disallowance of 1% on the exempt income excluding long term capital gain on which STT is paid, which, in our considered view, is reasonable towards administrative expenses. Accordingly, we hold that no disallowance is warranted and the addition made by the Assessing Officer is deleted.

#### **DISALLOWANCE OF BAD DEBTS WRITTEN OFF**

14. The assessee, during the year under consideration has written off a sum of Rs.437,82,57,646/- as bad and doubtful debts. This claim was made after adjusting the credit balance of Rs.201,49,16,575/- in the provision for bad and doubtful debts. Accordingly, the assessee claimed the net amount of Rs.236,33,41,071/- as bad debts under section 36(1)(vii). The Assessing Officer held that only writing off of the debts as bad debt in the accounts is not enough and that the assessee is required to furnish complete information to the Assessing Officer to prove with conclusive evidence that the debts have become bad. The Assessing Officer further held that the assessee should furnish the documents, correspondence, action taken, etc. before the assessing authority to demonstrate that the facts which compelled them to reach the conclusion that the debt is irrecoverable. The assessee contended that as per the amended provisions of section 36(1)(vii), the



assessee is not required to show that the amount had become bad and that the write off in the books of account is sufficient. The Assessing Officer, however, did not accept this contention of the assessee and held that the assessee under the amended section 36(1)(vii) is still required to justify that the debts have become bad and will be allowed only on the basis of cogent materials to justify the claim. Accordingly, the Assessing Officer disallowed the bad debts as claimed by the assessee. The relevant observations of the Assessing Officer in this regard is reproduced below:-

*“4. The Bank has cm elaborate internal system for write off of bad debts. When the borrower defaults, rigorous follow up is made by the bank for collection of its dues. Oral as well as written communications are sent by the bank to the borrowers to regularise their accounts within a specified period. The broad parameters for classifying the loans as bad and the remedial measures taken by us have been elaborately explained by in the earlier submissions on the End debts. Recovery proceedings are also undertaken by the bank by filing suits in the DRT within the limitation period wherever possible action for enforcement of security is undertaken under the SARFAESI Act.”*

15. The CIT(A) upheld the disallowance made by the Assessing Officer.

16. The Ld.AR submitted that post amendment to section 36(1)(vii) with effect from 01/04/1989, it is not obligatory on the part of the assessee to prove that the debts have become bad if the debt is written off as irrecoverable in the books of account. The Ld.AR further submitted that in any case, the assessee has furnished all the relevant details before the lower authorities (pages 234 to 292 of the paper book). The Ld AR further submitted that in assessee’s own case for A.Y. 2004-05 and 2005-06, a similar issue has been considered by the co-ordinate bench wherein the issue has been remitted back to the Assessing Officer for proper adjudication.

17. The Ld. DR, on the other hand, relied on the order of the lower authorities.

18. We heard the parties and perused the material on record. We notice that the co-ordinate bench in assessee's own case for A.Y. 2004-05 and 2005-06 has considered the similar issue and held that –

*“34. We have heard rival contentions and perused the material available on record. We find merit in the submissions of- the learned Authorised Representative that after amendment to section 36(l)(vii) from 1<sup>st</sup> April 1989, once the assessee writes-off the bad debt as irrecoverable in its accounts it will satisfy the condition of 'the said provisions and the assessee is no more required to establish that the debt has actually become irrecoverable. The Hon'ble Supreme Court in TRF Ltd. v/s CIT, [2010] 230 ITR 14 (SC), has expressed this view. Further, in case of Vijaya Bank Ltd. v/s CIT, [2010] 323 ITR 166 (SC), the Hon'ble Apex Court held that mere debit to the Profit & Loss account is not sufficient to claim write-off as the assessee has to simultaneously reduce the amount from loans and advances or debtors on assets side of the Balance Sheet to claim right-off. The Hon'ble Supreme Court observed, closing down individual, account of each debtor in the hooks of account is not-necessary. However, the Hon'ble Supreme Court taking note of Explanation-1 to section 36(l)(vii) of the Act observed that mere provisions for bad debt will not entitle for deduction under section 36(l)(vii) of the Act. On a careful perusal of the assessment order, we have noted that in case of some of the debtors the Assessing Officer has alleged that they are in the nature of mere provisions, which requires examination. In view of the aforesaid, we direct the Assessing Officer to allow assessee's claim in respect of debts which are actually written-off by applying the principle laid down in the decisions referred to above. Further, the Assessing Officer is also required to examine whether there is any claim of write-off- of bad debt in the nature of- mere provisions, hence; not allowable in terms of section 36(l)(vi!). In this context, the Assessing Officer has to apply the law keeping in view the ratio laid down by the Hon'ble Supreme Court in Vijaya Bank Ltd. (supra), wherein it was held by the Hon'ble Supreme Court that if an assessee debits an amount of doubtful debt to the Profit & Loss account and credits the asset account like sundry debtors account, that would constitute written-off of an actual debt. We may further add, even if the assessee's claim of write-off in respect of a particular, debt having become bad is allowed, in the impugned assessment year, the Revenue is protected under section 41(4) of the Act to bring the amount to tax in case such debt is recovered by the assessee in any subsequent assessment year. With the aforesaid observation, we restore the issue to file of the Assessing Officer for adjudicating afresh in terms with our directions herein above. Ground No.6, is allowed for statistical purposes.”*

19. Respectfully following the above decision of the co-ordinate bench, we restore this issue back to the Assessing Officer with similar directions.

**DISALLOWANCE OF BUSINESS LOSS CLAIMED ON RE-POSSESSED ASSETS**

20. The assessee, in the revised return of income, claimed a loss of Rs.178,09,16,700/- towards loss of re-possessed assets and the same was claimed as the business loss. The Assessing Officer disallowed the said business loss following the similar disallowance made for A.Y. 2006-07 and that the assessee has not furnished the details.

21. The Ld.AR submitted that the assessee re-possessed its assets such as commercial vehicles, two wheelers, cars, etc. on which there is default in the repayment of loans taken. These assets are subsequently sold and the money realized, is adjusted against the unpaid loan amount and the net amount is claimed as a business loss. The Ld.AR accordingly submitted that the loss is incurred in the regular course of business of the assessee and, therefore, should be allowed as a deduction. The Ld.AR further drew our attention to the details furnished before the Assessing Officer (pages 436 to 667 of paper book).

22. The Ld. DR, on the other hand, submitted that the assessee has not discharged the onus that the loss incurred is in the regular course of business and also the computation of reported loss is arrived at. Accordingly, the Ld. DR prayed that the issue may go back to the Assessing Officer for verification, afresh.

23. We heard the parties and perused the material on record. The breakup of the loss on sale of re-possessed assets claimed by the assessee is as given below:-

Disallowance of Business Loss and other expenses	178,09,16,700
Loss on sale of repossessed assets	

Auto Loans	43,61,88474
Construction equipment	61,39,328
Construction durable	34,19,331
Commercial Vehicles	61,03,76,060
Farm Equipment	38,07,55,377
Two wheeler	25,86,53,352
Car overdraft	<b><u>7,25,19,187</u></b>
Sub total-loss on sale of repossessed assets	1,76,80,51,109
Others	<b><u>1,28,60,591</u></b>
Total	<b><u>1,78,09,11,700</u></b>

24. We notice that in the details furnished by the assessee before the Assessing Officer, the assessee has furnished the loan account number, party name, and the amount. However in our considered view it is important to examine the amount of loan given, amount realized from the borrower, un-recovered amount, the amount realized on sale, how the net loss is computed etc., and these need to be factually verified. From the details submitted, it is not clear as to how the loss finally claimed is computed i.e. the loss is arising out of the difference between the unrecovered portion of the loan after setting off the amount realized from sale of the re-possessed assets. We, therefore, remit the issue back to the Assessing Officer for fresh examination and direct the assessee to furnish the complete details of loans given, the nature of assets re-possessed, sale value of the re-possessed assets and how loss is computed. It is ordered accordingly

**DISALLOWANCE OF PROPORTIONATE CLAIM OF ISSUE AND DISCOUNT EXPENSES ON BONDS**

25. The Assessing Officer did not make any disallowance towards proportionate claim of issue and discount expenses on bonds while completing assessment under

section 143(3). But subsequently passed an order under section 154 disallowing the expenses for the reason that the same is disallowed in the year 2002-03 and, therefore, not allowable in A.Y. 2007-08. The assessee while filing the appeal against the order under section 143(3) contended the issue before the CIT(A). The CIT(A) dismissed the ground stating that the same is not arising out of the assessment order and there is no finding given by the Assessing Officer in this regard in the assessment order.

26. The Ld.AR submitted that the claim for the deduction was first made in the assessment year 2002-03. The co-ordinate bench of the Tribunal when the issue arose towards the disallowance made in this regard for A.Y. 2002-03, directed the Assessing Officer to allow proportionate expenditure on issue of discount of bonus to be spread over the period of bonds. Accordingly, the Ld.AR submitted that the assessee should be allowed the proportionate claim pertaining to the year under consideration as per the directions of the Tribunal. The Ld.AR also submitted that the Assessing Officer for .Y. 2014-15 had allowed the said expenditure based on the directions of the ITAT.

27. We heard the parties and perused he materials on record. We notice that the co-ordinate bench in assessee's own case for A.Y. 2002-03 had considered the similar issue and has issued a direction to spread the expenditure over the tenure of the bond. The relevant finding of the Tribunal in this regard is extracted below:-

*“22. We have heard the rival contentions of the parties and perused the material available on record. As far as the nature of expenditure of bonds / debenture and issue expenses are concerned, dispute that such expenditure is revenue in nature. In fact, in case of Madras Industrial Corp. (supra), the Hon'ble Supreme Court expenditure incurred on issue and discount of bond / debenture are revenue in nature as the liability incurred by the assessee is wholly and exclusively for the purpose of business, However, at the same time, the Hon'ble Supreme Court held that since by incurring such expenditure the assessee secures a benefit for a*

*number of years and there is continuing benefit to the business of the assessee over the entire period of bond / debenture, the liability should be spread over the period of bond / debenture. Though, the Assessing Officer has referred to the aforesaid decision of the Hon'ble Supreme Court and accepts the legal position, however, he has not allowed even the expenditure relating to the impugned assessment year on the ground that the assessee has not furnished the books of account for verifying the correctness of the claim. It needs to be mentioned, the learned Commissioner (Appeals) while accepting assessee's alternative claim has held that the expenditure relating to the impugned assessment year has to be allowed and the balance expenditure has to be spread, over the period of bond / debenture. We find the aforesaid reasoning of the learned Commissioner (Appeals) to be in tune with the ratio laid down by the Hon'ble Supreme Court in Madras Industrial Investment Corp. (supra). As discussed earlier, in the aforesaid decision, the Hon'ble Supreme Court, though held that the expenditure incurred on bonds / debenture is revenue in nature, the expenditure has to be spread over the period of bond /. In fact, the learned Authorised Representative has before us that in the subsequent assessment years, the Officer has allowed such expenditure on pro-rata basis, r, as it appears from the record, the assessee itself was earlier following an accounting method under which the expenditure on issuance of discount and bond / debenture was spread over the tenure of the bond / debenture. In view of the aforesaid, we direct the Assessing Officer to allow the proportionate expenditure on the issue and discount of bonds / debenture as relating to the impugned assessment year and the balance expenditure should be spread over to the tenure of bond / debenture. This ground is partly allowed."*

28. Therefore, we see merit in the contention claim of the assessee that proportionate expenditure pertaining to the year under consideration should be allowed as a deduction. Accordingly, we direct the Assessing Officer to consider the claim of the assessee and allow the deduction in accordance with the directions given by the Tribunal.

### **REBATE UNDER SECTION 88E**

29. The assessee made the claim through a letter towards deduction under section 88E. The CIT(A) rejected the ground raised by the assessee in this regard stating that the Assessing Officer has not made any discussion in the assessment order and, therefore, the impugned issue does not arise out of the findings of the

Assessing Officer. Accordingly, the CIT(A) did not consider the claim of the assessee.

30. The Ld.AR submitted that the claim is submitted before the Assessing Officer vide letter dated 26/11/2010 in form 10BB and 10DC which have not been considered by the Assessing Officer. The Ld.AR also submitted that in the subsequent years, when the claim was made in the return of income, the Assessing Officer has allowed the said claim.

31. The Ld. DR, on the other hand, submitted that the claim which is not made by the assessee in the return of income cannot be entertained.

32. We heard the parties and perused the material on record. From the submissions of the Ld.AR it is noticed that the assessee has been allowed the rebate under section 88E in the subsequent assessment years, i.e. A.Ys 2006-07 and 2008-09 when the same is claimed in the return of income by the assessee. We, therefore, direct the Assessing Officer to consider the submissions made by the assessee in this regard vide letter dated 26/11/2010 and allow the claim in accordance with law. Needless to say that the assessee be given a reasonable opportunity of being heard. It is ordered accordingly.

**SHORT GRANT OF RELIEF UNDER SECTION 90.**

33. Through ground No.8, the assessee is contending the issue of short grant of relief under section 90. The Ld.AR in this regard submitted that the claim is made before the Assessing Officer through letter dated 26/11/2010, which has not been

considered. We accordingly, issue a direction to the Assessing Officer to consider this submission of the assessee and allow the claim in accordance with law.

34. Ground 9 pertains to charging of interest under section 234B and 234D is consequential and does not warrant separate adjudication.

### **APPLICABILITY OF PROVISIONS OF SECTION 115JB**

35. Through ground No.10, the assessee is contending the applicability of provisions of section 115JB. The CIT(A) dismissed the submissions of the assessee for the reason that the Assessing Officer in the assessment order has not discussed the issued and, therefore, does not emanating from the order of the Assessing Officer.

36. The AR submitted that the issue is covered in assessee's own case for A.Ys. 2004-05 and 2005-06. The Ld.AR further submitted that the Assessing Officer has accepted the submissions of the assessee in subsequent assessment years i.e. A.Y. 2010-11 & 2011-12.

37. The Ld. DR, relied on the order of the lower authorities.

38. We heard parties and perused the material on record. We notice that the impugned issue has been considered by the co-ordinate bench in assessee's own case for A.Y. 2004-05 in which the co-ordinate bench has given a finding as extracted below:-

*"62. We have heard rival contentions and perused the material available on record. As could be seen in the return of income the assessee has computed book profit; 'under'..section 115JB at ₹720,47,89,971. The Assessing. Officer, while .completing, .the. assessment enhanced the book profit tp.? 2353,34,75,0157 by adding provision for*



*advance amount transferred to special reserve, etc, The' assessee challenged the computation of book profit before the learned Commissioner (Appeals). Before the first appellate authority the assessee justified the book profit computed by it. The learned Commissioner (Appeals) after considering the submissions of the assessee directed the Assessing Officer to compute the book profit as worked out by the assessee subject to the modification to be made on account of relief granted to the assessee towards expenditure disallowable under section 14A of the Act. Admittedly, the assessee has not challenged the aforesaid decision of the learned Commissioner (Appeals). Learned Departmental Representative has also not . advanced any substantive argument to defer from the view expressed by the learned Commissioner (Appeals). In any case of the matter, as per the decision of the Co-ordinate Bench in Krung Thai Bank v/s JDIT, 45 DTR 218, and subsequent decisions of different Benches of the Tribunal, , provisions of section 115JB AND 115J Act are not applicable to banking companies, In view of the .aforesaid, we do not find any reason to interfere With, the order .of the learned Commissioner (Appeals) on this issue. Accordingly we uphold the order of the learned Commissioner (Appeals) by dismissing-the ground no.11 raised by the Revenue.”*

39. Respectfully following the above decision of the coordinate bench we hold that provisions of section 115JB is not applicable to assessee and allow the ground.

## **TRANSFER PRICING ISSUE**

### **Adjustment towards margin under charged on Back officer support services**

40. The Assessing Officer made a reference under section 92CA(1) to the Transfer Pricing Officer (TPO) or computing the arm's length price in relation to the international transactions. In the transfer pricing study with regard to the back office support services, the assessee has shown to have received an amount of Rs.6,03,38,090/- i.e. Cost of Rs.5,48,52,810 plus a 10% mark up at Rs.54,85,280. The assessee explained that this amount includes 10% mark up received from the AE in UK and Canada. The assessee had benchmarked the said transaction

comparing the mark up in the case of similar back office support services wherein the margin was worked out at 9.18%. Accordingly, the assessee claimed that the transaction is within the arm's length. However, the TPO rejected the TP study and the comparables to make a fresh search to arrive at the following list of comparables:-

S.No.	Company Name	OP to Total Cost%
1	Accentia Technologies Ltd	33.40
2	Aditya Birla Minacs Worldwide Ltd (Earlier Transworks Information Services Ltd)	11.98
3	Allsec Technologies Ltd	27.31
4	Apex Knowledge Solutiuons Pvt Ltd	12.70
5	Asit C Mehta Financial Services Ltd	24.21
6	Bodhtree Consulting Ltd (Seg.)	29.58
7	Caliber Point Business Solutions Ltd (dated as corrected)	21.26
8	Cosmic Global Ltd	11.31
9	Datamatics Financial Services Ltd (Seg)	-18.09
10	Eclerx Services Ltd	90.23
11	Flextronics Software Systems Ltd (seg) (Data as corrected)	-0.72
12	Genesys International Corporation Ltd	13.35
13	H C L Comnet Systems & Services Ltd (Seg)	33.72
14	ICRA Techno Analytics Ltd(Seg.)	12.24
15	Informed Technologies India Ltd	35.56
16	Infosys B P O Ltd	28.78
17	IServices India Pvt Ltd	49.46
18	Maple Esolutions Ltd	33.94
19	Mold-Tek Technologies Ltd	101.70
20	R Systems International Ltd(Seg.)	12.17
21	Spanco Ltd (Seg.)	25.20
22	Triton Corp Ltd	34.93
23	Vishal Information Technologies Ltd	51.18
24	Wipro Ltd (Seg.)	29.70
	<b>Average</b>	<b>29.38</b>

41. Accordingly, the TPO worked the adjustment as below:-

		Amount - Rs
A	Operating cost	5,48,52,810
B	Mark up @29.38%	1,61,15,755
C	ALP (A+B)	7,09,68,565

D	Price actually charged	6,03,38,090
E	<b>Adjustment (C-D)</b>	<b>1,06,30,175</b>

42. The CIT(A), on further appeal rejected the various contentions of the assessee with regard to the comparables and upheld the adjustment made towards back office support services. With regard to the adjustment towards recovery of expenses, the CIT(A) held that the expenses needed for monitoring activities of AE is required to be benchmarked and, therefore, upheld the adjustment made by the TPO.

43. The Ld. AR during the course of hearing submitted that out of the 24 comparables included by the TPO, the assessee is not contended the inclusion of companies in Sl. No. 2,3,4,5,7,9, 11,15 & 17. The Ld. AR submitted that most of the other comparables included by the TPO are functionally different from that of the assessee and that certain comparables are failing the TPO's filter. In this regard, the ld. AR drew our attention to the details of the filters applied by the TPO as tabulated below to submit that some of the comparables included by the TPO fails filters applied by the TPO himself –

1	Companies whose data is not available for the FY 2006-07 are excluded	Para 8 page 2 of the TPO order
2	Companies whose ITES income < Rs. 1 crore are excluded	Para 8 page 2 of the TPO order
3	Companies whose revenue from ITES is less than 75% of the total operating revenues are excluded	Para 8 page 3 of the TPO order
4	Companies having more than 25% related party transactions (sales as well as expenditure combined) of 4 the sales are excluded	Para 8 page 3 of the TPO order
5	Companies who have export sales less than 25% of	Para 8 page 3 of the TPO order

	the 5 sales for ITES are excluded	
6	Companies who have diminishing revenues/persistent losses for the last three years up to and including FY2006-07 are excluded	Para 8 page 3 of the TPO order
7	Companies having different financial year ending (i.e. not March 31, 2007) or data of the company does not fall within the relevant 12 month period i.e. 01-04-2006 to 31-03-2007 are excluded	Para 8 page 3 of the TPO order
8	Companies that are functionally different from the taxpayer are excluded	Para 8 page 3 of the TPO order
9	Companies that are having peculiar economic circumstances are excluded	Para 8 page 3 of the TPO order

44. Further, the ld. AR presented specific arguments regarding the inclusion of comparables which are tabulated below –

Sr. No.	Company name	Reason for exclusion
1	Accentia Technologies Ltd.	Fails TPO filter no. 8 as company is functionally different as company is providing medical transcription, coding and software development  Fails TPO filter no. 3 as ITES revenue is less than 75% of total revenue i.e. ITES income of Rs. 16.57 crore is 57.7% of total operating revenue of Rs. 28.72 crore
2	Bodhtree Consulting Ltd.	Fails TPO filter no. 8 as company is functionally different as company providing software development  Fails TPO filter no. 3 as ITES revenue is less than 75% of total revenue i.e. ITES income of Rs. 2.94 crore is 28.48% of total operating revenue of Rs. 10.35 crore
3	Cosmic Global Ltd.	Fails TPO filter no. 8 as company is functionally different as company mainly provides medical transcription and translation (company's employee cost to sale is 13.6% and has paid translation charges of 56% of

		sales. Hence, it is shows it is outsourcing its activity and it is not a pure ITES company)
4	Eclerx Services Ltd.	<p>Fails TPO filter no. 8 as company is providing data analytics and data process solutions. They are third party data analytics KPO company.</p> <p>"For instance, for retailers, using our own people, processes and technologies, we capture and analyze millions of prices each week, enabling our clients to optimize the revenue on their catalogue of products, most profitably. We study over 10 million customer web transactions every quarter to identify embedded buying patterns so our clients can bundle their products most effectively."</p> <p>Net cost plus margin amounting to 90.23%, is unusually high in comparison to other companies selected by the TPO.</p>
5	Genesys International Corporation Ltd.	Fails TPO filter no. 8 as company is functionally different 10 as company providing geographical information services P comprising photogrammetry, remote sensing, cartography, data conversion, related computer based services and other related services.
6	HCL Comnet Systems & Services Ltd.	Fails TPO filter no. 7 as company has prepared financial S statements ended June 30, 2007.
7	ICRA Techno Analyties Ld.	Fails TPO filter no. 8 as company is functionally different as company providing software development services, we development and hosting services and sub license
8	Infosys BPO Ltd.	In Bombay HC-Pentair Water India P. Ltd. company was excluded on the basis of high turnover (Rs. 649 crore against Rs 11 crore)
9	Maple Solutions Ltd.	<p>Fails TPO filter no. 8 as company is functionally different as company is in the business call centre services and sale of software.</p> <p>As held in various case laws, since the directors are involved in fraud, financials are unreliable</p>
10	Mold-Tek Technologies Ltd.	<p>Fails TPO filter no. 8 as company is functionally different as company is business of plastic and IT. IT division of the company is providing structural engineering and healthcare billing services.</p> <p>Fails TPO filter no. 3 as ITES revenue is less than 75% of total</p>

		revenue i.e. ITES revenue of Rs. 11.40 crore is 13% of total revenue of Rs. 88.11 crore
11	R Systems International Ltd.	<p>Fails TPO filter no. 8 as company is functionally different as business is of sale of software products and rendering software development services.</p> <p>Fails TPO filter no. 3 as ITES revenue is less than 75% of total revenue i.e. ITES income of Rs. 17.34 crore is 14.75% of total operating revenue of Rs. 117.54 crore</p> <p>Fails TPO filter no. 7 as company has prepared financial statements ended December 31, 2006</p>
12	Spanco Ltd.	<p>Fails TPO filter no. 8 as company is functionally different as company is providing services in form of network integration, sale of developed softwares, BPO operations, network engineering services.</p> <p>Fails TPO filter no. 3 as ITES revenue is less than 75% of total revenue i.e. ITES income of Rs. 35 crore is 8.2% of total operating revenue of Rs. 426.59 crore</p>
13	Triton Corp Ltd.	<p>Fails TPO filter no. 8 as company is functionally different as company provides call center services, support services and trading in peripherals.</p> <p>As held in various case laws, since the directors are involved in fraud, financials are unreliable</p>
14	Vishal Information Technology Ltd	Fails TPO filter no. 8 as company is functionally different as company the company has incurred data entry charges and vendor payments, such payments amount to 42.87% of sales which shows company has <u>outsourced its activities</u>
15	Wipro Ltd	<p>Fails TPO filter no. 8 as company is functionally different as company is providing software services, sale of systems, ITES and other activity</p> <p>Fails TPO filter no. 3 as ITES revenue is less than 75% of total revenue i.e. ITES income of Rs. 939.1 crore is 14.75% of total operating revenue of Rs. 13,683.9 crore</p> <p>In Bombay HC-Pentair Water India P. Ltd. company was excluded on the basis of high turnover (Rs. 939.78 crore against Rs 11 crore)</p>

45. The Ld. DR on the other hand relied on the order of the TPO.

46. We have heard the parties and perused the material on record. The major reason as submitted by the ld. AR for seeking exclusion of the comparables is that the

functions of the comparables are different from that of the assessee-company, Therefore, before proceeding further, we will look at the functions performed by the assessee as per the Transfer Pricing Report.

**Treasury Support:**

- Processing of treasury-related transactions
- Ensuring accounting of deals after deal validation and manual entries are posted where system support is not available
- Validation of deals, confirmation and settlement of deals
- Verification of transactions entered with the documents, sending deal confirmations to counter parties, settlement of deals
- Settlement-related activities
- Preparation of reports and MIS, follow up with counter party in case of non payment, SWIFT inward and outward management
- Reconciliation of treasury accounts, bonds, inventory, etc
- Review of nostro accounts reconciliations, reconciliation of inventory of bonds/securities of subsidiary treasury between clearing house, internal ledger balances etc.
- Development of operational policies
- Ensuring that operational policies of the subsidiary are aligned to the Bank's policy
- Preparation of reports
- Preparation and sending MIS reports
- Cash and Fund management
- Transfer of funds as per directions of AE to corresponding central bank for liquidity management

**Note:** Revenue from this service constitutes 24% of total activity

**Back office account processing and related activities**

- Processing of applications for various products and services
- Opening of customer ID's and accounts of customers
- Account opening in the books
- Customer's account opening in the system
- Communicating with clients to solve discrepancies in forms
- Verification of account opening forms and applications and communicating discrepancies
- Reconciliation of accounts
- Reconciliation of the customer's account and office account reconciliation
- Processing of money transfer transactions

- Processing of customer money transfer transactions
  - Preparation of I-Kits and I-packs for new accounts
  - Preparation of initial kits for new accounts opened
  - Account maintenance services
  - Processing of customer's account modification transactions
  - Handling queries
  - Handling account related queries
- Note:** Revenue from this service constitutes 63% of total activity

**Technology support services**

- Management of website
  - Supervision of website as per the Bank's policy
  - Customer information process in relation to logins, passwords, account numbers etc
  - Maintenance of customer information
  - Secured framework of risk management
  - Ensuring risks management adheres to the Bank's policy
- Note:** Revenue from this service constitutes 13% of total activity

47. From the above it is clear that the functions of the assessee is rendering back officer support services to AE in the field of Treasury, account opening, maintenance and related activities and technology support in terms of website maintenance, customer information and risk management. It is also relevant to mention here that the revenue of the assessee generated from rendering these services is Rs.6,03,38,090 which includes the mark up of 10%. Given this we will now considered each of the comparables for the purpose of exclusion/inclusion in the ensuing paragraphs.

**Accentia Technologies Ltd.**

The Ld. AR submitted that the company is functionally different and is providing medical transcription, coding and software development. In this regard, we noticed that in the statement of accounts of the company, the income from operations (schedule-O page 716 of the PB) mainly consists of medical transcription, coding



and software development. We also noticed that income from medical transcription is more than 50% of the revenue, therefore, we see merit in the submission of Id. AR that the company is not functionally comparable with the assessee which is engaged in providing back office support services to its AE, therefore, we hold that Accentia Technologies Ltd. be excluded from the list of comparables.

**Bodhtree Consulting Ltd.**

From the perusal of the Director's report (page 769 of PB) of the company where it is stated that Bodhtree has only one segment namely software development and is engaged in providing open and end to end web solutions, software consultancy, design and development of solutions using latest technology. We also noticed that the income of the company (page 772 of PB) mainly consists of export sales from software development services, therefore, in our considered view the functions of the company is different from that of the assessee which is rendering captive back office support services to its AE. Accordingly, we direct the TPO to exclude Bodhtree Consulting Ltd. from the list of comparables.

**Cosmic Global Ltd.**

From the perusal of the financial statement of the company (page 830 of PB), the company is deriving income from medical transcription and consultancy services from translation charges and their accounts BPO. From the perusal of the expenditure of the company, we noticed that the translation charge paid by the company is 56% of the income derived from the translation charges. Therefore, in our view there is merit in the contention of the Id. AR that the company is outsourcing its major activities and is not a pure ITES company. Further the nature of services rendered is different from the services rendered by the assessee.

Accordingly, we hold that Cosmic Global Ltd. be excluded from the list of comparables.

**Eclerx Services Ltd.**

The contention of the Id. AR with regard to exclusion of the company is that it is functionally different and is providing data analysis, data process solutions. The Id. AR is also seeking exclusion on the basis that the company is having unusual margin during the year under consideration as compared to earlier years. In this regard, we noticed that as per the financial statements of the company (page 847 of PB), we noticed that for the year ended 31.03.2007 the income of the company has almost doubled. Further, we noticed that as per the annual report wherein the functional profile of the company is stated to be that of KPO. Accordingly, we are of the view that the company cannot be compared with assessee which is rendering captive back office services to its AE. It is also relevant to notice here that in various decisions of the Co-ordinate Bench of the Tribunal, the inclusion of the said company has been rejected on the ground that the company is providing KPO services and therefore there is merit in the argument that the company which is rendering KPO services cannot be compared with the assessee. Accordingly, we direct the TPO to exclude Eclerx Services Ltd. from the list of comparables.

**Genesys International Corporation Ltd.**

The exclusion of this company is contended for the reason that the company is functionally different wherein the company is providing geographical information services comprising photogrammetry remote sensing data conversion and related computer based services. In this regard our attention was drawn to the annual report of the company where the business profile of the company is stated (page

1088 of PB schedule-M). Therefore, in our considered view there is merit in the contention of the assessee that the company is not functionally comparable to the assessee which is a back office service provider to its AE in various banking related activities. Accordingly, we hold that Genesys International Corporation Ltd. is not functionally comparable with the assessee and therefore to be excluded from the list of comparables.

**HCL Comnet Systems and Services Ltd.**

The exclusion of this company is contended on the ground that the company has prepared the financial statements for the year ended 30.06 whereas the assessee is financial year ended is 31.03. It is also contended that the company is having large scale operations as compared to the assessee and therefore, the same is to be excluded. In this regard, we noticed that from the perusal of the P&L A/c of the company. The company is having revenue of Rs. 314 crores which is significantly higher than the turnover of the assessee from back office support services. Further, it is noted that the Jurisdictional High Court in the case of CIT Vs. Pentair Water India Pvt. Ltd. (ITA No.18/2015) had rejected the inclusion of the company for the reason that the company is having large turnover. On perusal of the annual accounts of the company (page 887 of PB) we noticed that in ITES Segment, the company is rendering services to data centre management, individual computer managed securities services and tool and process consultant services which in our considered view is functionally not similar to the services rendered by the company which is extracted in the earlier part of this order. For these reasons, we hold that HCL Comnet Systems Services Ltd. is not comparable with the assessee and accordingly should be excluded from the list of comparables.

**ICRA Techno Analytic Ld.**

From the perusal of the annual report of the company (page 886 of PB) we noticed that the company is deriving revenue from professional services which consists of revenue earned from service performed for software development, sub-licensing fees, web development and hosting, etc. Also it is noticed from the financial statements that the revenue generated mainly from software development and other allied services. It is also noticed that the decision of the Co-ordinate Bench in the case of DCIT Vs. Morgan Stanley Advantage Services Pvt. Ltd. (ITA No. 4406 and 4479/Mum/2012), the company is excluded for the reason that it is functionally different. In assessee's case, the assessee is engaged in the business of rendering back office services to its AE which is different from the nature of services rendered by the company. Accordingly on the basis of functional comparability we hold that ICRA Techno Analytic Ltd. be excluded.

**Infosys BPO Ltd.**

The exclusion of the company is contended for the reason that the company is deriving very high turnover from its operations and therefore, the same cannot be compared with the assessee company. In this regard, we noticed that the turnover of the company is Rs. 649.56 crores which is significantly higher when compared to the turnover of the assessee derived from rendering back officer support services. In our considered view when the operations of the company is much larger than that of the assessee, the assets employed and the risk undertaken would also be different and therefore, there cannot be any comparison between the company having a significantly higher turnover and the company with the lower turnover. We notice from the filters applied by the TPO that the filter for lower

turnover of Rs.1 crore has been applied whereas there is no filter on upper turnover. It is settled position that while the turnover filter upper limit of the turnover filter should also be applied in order to excluded companies having very high turnover. We noticed in this regard that Hon'ble Bombay High Court in the case of Pentair Water India P. Ltd. (supra) has excluded the company on the basis of high turnover and also that on same basis the company is excluded in various decisions of the Jurisdictional High Court and also in the decisions of the Coordinate Bench. In view of this discussion, we are of the view that the company is not comparable with the assessee and therefore, we direct the TPO to exclude Infosys PBP Ltd. from the list of comparables.

**Maple Solutions Ltd.**

From the perusal of the P&L A/c (page 959 of PB), we noticed that the operating revenue of the company is mainly deriving from call centre services and nominal income is derived from sale of software. It is also submitted by the Id. AR during the course of hearing that in various decisions including the decision of the Coordinate Bench in the case of Morgan Stanley Advantage Services Pvt. Ltd. (supra) it has been held that since the directors of the company are involved in fraud, the financials of the company are unreliable and therefore, cannot be taken as comparable. We also notice that a similar view is held by the Hon'ble Bombay High Court in the case of CIT vs Cummins Turbo Technologies Ltd (ITA No.1099 of 2015). Considering these facts and that the revenue being generated exclusively from call centre services, in our considered view, the company is not a comparable with assessee. Accordingly, we hold that Maple Solutions Ltd. (supra) be excluded from the list of comparables.

**Mold-Tek Technologies Ltd.**

Contention of the assessee seeking exclusion of this company is that the company is not functionally comparable. In this regard, we noticed that in the annual report, it is mentioned that the company's business segments are plastic and IT (KPO) divisions. In the KPO division, the company is rendering services providing structural engineering and healthcare billing services. Further, from the P&L A/c of the company (page 970 of PB), the revenue from KPO services is Rs. 11.40 crores which is 13% of total revenue of Rs. 88.11 crores whereby the company fails the TPO filter No.3 on exclusion of companies having ITES revenue of less than 75%. It is also noticed that the company is rejected from inclusion in the case of DCIT Vs. Morgan Stanley Advantage Services Pvt. Ltd. (supra) based on functionality, therefore, in our considered view the company which is into plastic and IT (KPO) Services is not functionally comparable with that of the assessee and accordingly we hold that Mold-Tek Technologies Ltd. should be excluded from the list of comparables.

**R Systems International Ltd.**

The ld. AR argued that the company is engaged mainly in sale of software products and rendering software development services. The ld. AR further argued that the income from ITES in the case of the company is only 14.75% and accordingly fails to filter applied by the TPO stating ITES revenue is less than 75% of total revenue. In this regard, we perused the financials of the company wherein we noticed that out of the total revenue of Rs. 117.54 crores is derived from sale of software products and rendering software development services. Therefore, we see merit in the submission of ld. AR that functions of the company

cannot be compared with that of the assessee which is engaged in providing back office support services to its AE. Therefore, in our considered view based on functionality the company is not comparable with the assessee and accordingly we hold that R Systems International Ltd. be excluded from the list of comparables.

**Spanco Ltd.**

The exclusion of the company is sought on the ground of functionality dissimilar and that the ITES revenue is only 8.2% of the total revenue of the company. On perusal of the annual accounts of the company, we noticed that the main revenue of the company is derived from sale of Network Integration and other traded goods and also from sale of developed software and service income from network integration and others (page 1027 of PB). On further perusal, we noticed that the income derived from BPO operations is Rs. 35 crores out of the total turnover of Rs. 426 crores which is around 8.2%. From the perusal of the filters applied by the TPO which is extracted in the earlier part of this order one of the filters applied is to exclude companies whose ITES revenue is less than 75% of the total revenue. Accordingly, the company whose income from ITES is 8.2% fails the filter applied by the TPO and should be excluded accordingly. It is also noted that even on functionality the company is not comparable to that of the assessee since the major business of the company seems to be network integration of traded goods. In view of the above, we hold that the company be excluded from the comparables.

**Trition Corp Ltd.**

The main contention of the Id. AR for exclusion of the company is that the company is acquired by Maple E-solutions Ltd. w.e.f. 01.01.2007 and that in various case laws Maple Solutions Ltd is excluded for the reason that .the Director

of Maple Solutions Ltd. involved in fraud and therefore financials are unreliable. We notice from the perusal of the Annual Report that the company is into call centre services. Accordingly we hold that Triton Corp Ltd shall be excluded for the same reasons as has been stated for the exclusion Maple Solutions Ltd.

### **Vishal Information Technologies Ltd**

The exclusion of this company is sought for the reason that the company has outsourced its activities and the business model is different. We in this regard notice that the exclusion of the company has been considered by the Delhi Bench of the Tribunal, in the case of American Express (India) (P.) Ltd., vs DCIT [2017] 83 taxmann.com 345 (Delhi - Trib.), where it is held that –

*The annual accounts of this company have been perused where the data entry charges and vendor payments have been specified at approximately 64.68 per cent of the total cost. This itself shows that this company is getting things done through outside vendor and is not carrying on work by employing its own human resources where as in case of the assessee, it carries on its business through its own employees for whom during the year it has incurred cost of almost 59 per cent of the total cost. The order of the co-ordinate bench in assessee's own case for the assessment year 2006 - 07 has also been perused wherein the co-ordinate bench has directed for exclusion of this comparable holding that the outsourcing model has its impact on the overall profitability of the company and therefore the business model of the comparable company is different than the assessee and hence it is required to be excluded. In view of this there is no reason to deviate from the order of the co-ordinate bench in assessee's own case for earlier years. Further, the Delhi High Court had also an occasion to consider the exclusion of Vishal information technologies Ltd. in Rampgreen Solutions (P.) Ltd. v. CIT [2015] 377 ITR 533/234 Taxman 573/60 taxmann.com 355 (Delhi) wherein, the High Court has held that this comparable could not be considered, as a comparable because of its business model was completely different. In view of the decision of the Delhi High Court as well as the decision of the co-ordinate bench in assessee's own case, the Assessing Officer/TPO was to be directed to exclude Vishal information technologies Ltd. from comparability analysis.*



The ratio laid down by the Tribunal in the above case is that the outsourcing model has its impact on the overall profitability of the company and therefore the business model of the comparable company is different than the assessee and hence it is required to be excluded. In assessee's case, the back office support services are rendered by the assessee through its own staff and therefore the business model of the assessee is different from that of the company. According we hold that Vishal information technologies Ltd. be excluded from the list of comparables.

### **Wipro Ltd**

From the perusal of the financial statement of the company we notice that the revenue generated by the company from ITES services is 939.78 cores (page 1079 of paper book) which is much higher than the revenue derived by the assessee from rendering back officer support services rendered to AE. It is a well settled position that that size and scale of the operations are critical for comparability and that the company having higher turnover much more than that of the assessee would makes it inapposite comparable. Accordingly we are of the considered view that Wipro Ltd be excluded from the comparables.

48. The TPO is directed to re-compute the ALP of the international transactions pertaining to adjustment towards back officer support services in accordance with the directions as given above with respect to exclusions / inclusions.

### **Adjustment towards margin under charged on business support services**

49. With regard to the benchmarking of business support services, the assessee furnished the below break up of a sum of R.1,51,79,844/- which is included in the

amount received towards business support services. The assessee submitted that the nature of amount received is a 'pass through cost' and hence no mark up was charged on the same.

Sl.No.	Nature of expense	Amount - Rs.
A	SAP maintenance expenses	17,85,423
B	Legal expenses	55,14,827
C	Internal audit expenses	73,44,177
D	IT expenses	5,35,417
	<b>Total</b>	<b>1,51,79,844</b>

50. The assessee further submitted before the TPO that these cost / costs are necessary for the purpose of exercising control over AE and, therefore, the same is recovered on a cost to cost basis from the AE. The TPO, however, did not accept the submissions of the assessee and held that these are in the nature of business support services for which the assessee is required to charge a margin since benefit is derived by the AE. The TPO did a benchmarking by selecting the following comparables to arrive at the arithmetic mean margin:-

Name of the company	Operating profits on operating costs (%) Financial Year 2006-07)
Capital Trust	-6.71
Crisil Limited	21.41
Cyber Media events Limited	10.64
Educational Consultants (India) Limited	10.64
ICRA Management Consulting Services Ltd	15.23
IDC (India) Limited	15.33
NTPC Electric Supply Co.Ltd.	16.78
<b>Arithmetic mean</b>	<b>11.59</b>

51. Accordingly, the TPO made a TP adjustment as per below working:-

		Amount – Rs.
A	Operating cost	1,51,79,844
B	Mark up @11.59%	17,59,344
C	ALP (A+B)	1,69,39,188

D	Price actually charged	1,51,79,844
E	<b>Adjustment (C-D)</b>	<b>17,59,344</b>

52. The ld. AR reiterated the submissions made before the TPO. The ld AR submitted that these cost are incurred towards common services rendered by the third parties which are used by the AEs and the cost paid to third parties is allocated using allocation keys to all AEs using such services. Since the assessee does not do any value addition to the services and merely makes the payment and recover the same from AEs. For assessee these are pass-through costs and therefore no mark up is added to these costs

53. The ld DR relied on the order of TPO / CIT(A).

54. With regard to the pass through cost for which the TPO has added a margin of 11.59, we notice that from the nature of expenses that these costs are incurred on behalf of the AE and the same is allocated to the AE, using allocation key. Therefore, we are of the considered view that since the costs are pass-through costs and no value addition is made by the company by paying the cost on behalf of the AE and claiming the reimbursement there is no requirement of a mark up. Accordingly, we delete the adjustment made in this regard.

**ITA No. 4158 Mum 2014 – Revenue's appeal.**

**DEPRECIATION ON LEASED ASSETS**

55. During the year under consideration, the assessee has claimed depreciation amounting to Rs. 387,34,77,774/- which included depreciation on leased assets to the tune of Rs. 43,43,25,891/-. The AO held that ownership of the assets in all

leased transactions is not established by the assessee and therefore, these transactions are finance transactions. Accordingly, the AO disallowed the depreciation claimed on leased assets by following the decisions of the earlier years in assessee's own case from AY 1994-95 to 2003-04. The Ld. CIT(A) followed its own order in assessee's case for AY 2006-07 directing the AO to allow the depreciation on leased assets.

56. The Ld. DR relied on the order of the AO. The Ld. AR submitted that the assessee has not entered into any new lease transaction during the year. The issue of depreciation on leased assets is a recurring issue in assessee's case and the Tribunal has been consistently allowing the depreciation.

57. We have heard the parties and perused the material on record. We noticed that the Co-ordinate Bench in assessee's own case for AY 2004-05 and 2005-06 (ITA No. 5276/Mum/2013 and ITA No. 6217/Mum/2008 dated 03.11.2017) has considered the similar issue and has held that .....

*“17. We have heard rival contentions and perused the material available on record. Learned Counsels appearing for both the parties have agreed before us that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for preceding assessment year as submitted in the paper book. As could be seen from the material on record, in the impugned assessment year, there is no new lease transaction. The assessee has claimed depreciation on its own fixed assets and depreciation claimed on leased assets were continuing from past lease transactions. Notably, in assessment year 1997-98, the Tribunal while deciding the issue in ITA no.5424/Mum./2001, dated 13th July 2016, had allowed assessee's claim of depreciation. The same view was reiterated by the Tribunal while deciding the cross appeals for assessment year 2000-01 in ITA no.4657/Mum./2004 and ITA no.4826/Mum./2004 dated 31st January 2017. In view of the aforesaid, we uphold the order of the learned Commissioner (Appeals) on this issue. Ground no.3 is dismissed.”*

58. Considering the fact that no new lease transactions are entered into by the assessee during the year and that the Co-ordinate Bench has been consistently hold the issue in favour of the assessee, where for the year under consideration see no reason to interfere with the decision of the Ld. CIT(A). This ground of the Revenue is dismissed.

**ADDITION OF NON-CASH WRITE BACK MADE UNDER SECTION 41(4)**

59. During the year under consideration, the assessee in the financial statements has shown Rs. 17,28,03,297/- as write back of bad-debts in respect of interest and principle of loan credit card right off in earlier year now considered as good. The said write back included non-cash write back to the tune of Rs. 56,19,378/-. The assessee in the return of income did not offer the non-cash write back to tax for the reason that there was no cash recovery made in respect of the said amount and therefore, it is not offered to tax as per provisions of section 41(1) of the Act. However, the AO did not accept the submissions of the assessee holding that the word “recovery” used in section 41(4) also includes “recoverable” depending on the method of accounting followed by the assessee. The AO further held that since the assessee is following mercantile system of accounting even though no cash recovery is made, the non-cash write backs also should be brought to tax. Accordingly, the AO made addition of Rs. 56,19,368/- towards non-cash write backs under section 41(4) of the Act.

60. The Ld. CIT(A) allowed the claim of the assessee by deleting the addition made by the AO. In this regard relied on its own order in assessee’s case for AY 2006-07. The Ld. DR relied on the order of the AO.

61. The Ld. AR on the other hand submitted that the amounts have not been actually received by the assessee and therefore, not taxable under section 41(4) of the Act. The Ld. AR further submitted that the issue is covered by the decision of Co-ordinate Bench in assessee's own case for AY 2004-05 and 2005-06 (supra).

62. We have heard the parties and perused the material on record. The Co-ordinate Bench in assessee's own case has referred above is considered the similar issue and held that –

*“21. We have heard rival contentions and perused the material available on record. Learned Counsels appearing for both the parties have agreed before us that the issue is covered by the decision of the Tribunal in the preceding assessment years. Notably, in assessment year 2000–01, the Tribunal while deciding identical issue in ITA no.4657/Mum./2004 and ITA no.4826/Mum./2004, dated 31st January 2017, has restored the matter back to the file of the Assessing Officer for considering afresh. In fact, in assessment year 2002–03 also in assessee's own case, the Tribunal while deciding identical issue in ITA no.836/Mum./2008 and ITA no.392/Mum./2008 dated 7th July 2017, has restored the issue to the Assessing Officer for considering afresh keeping in view the directions of the Tribunal in the preceding assessment year. Therefore, consistent with the view expressed by the Tribunal in the preceding assessment year as referred to above, we restore the issue to the file of the Assessing Officer for considering afresh with similar direction and only after reasonable opportunity of being heard to the assessee. Ground no.4, raised by the Revenue is allowed for statistical purposes.”*

63. Respectfully following the above decision of the Tribunal, the issue is restored to the file of the AO with similar directions. This ground of the Revenue is allowed for statistical purposes.

### **CLUB MEMBERSHIP FEES**

64. The AO noticed from the Tax Audit Report that the assessee has incurred expenses towards club entrance fees and subscription to the extent of

Rs. 1,13,85,062/-. The assessee submitted that the Membership Fees paid to Club is allowable as Business Expenditure. Since the same is incurred to promote business interest. The assessee in this regard relied on the decision of the Hon'ble Bombay High Court in the case of Otis Elevators Co. (India) Ltd. (195 ITR 682). The AO, however, did not accept the submissions of the assessee and proceeded to treat the Membership Fees as capital in nature for the reason that the payment made is towards initial payments for entrance that pertains to several years and therefore, held it as capital expenditure.

65. The Ld. CIT(A) deleted the disallowance made by the AO by relying of its own order for Ay 2006-07 in assessee's own case.

66. The Ld. DR relied on the order of the AO.

67. The Ld. AR submitted that the issue is covered by the decision of the Co-ordinate Bench in assessee's own case for AY 2004-05 and 2005-06 (supra), where it has been held that –

*“56. We have heard rival contentions and perused the material available on record. The Hon'ble Supreme Court in United Glass Manufacturing Co. Ltd., Civil Appeal no.6649 of 2012, has held that club membership fees for employees are to be treated as business expenditure of a company under section 37 of the Act. We must also observe that in the decisions referred to by the learned Commissioner (Appeals) similar view has been expressed. That being the case, we do not find any reason to interfere with the order of the learned Commissioner (Appeals) on this issue. Accordingly, we uphold the order of the learned Commissioner (Appeals) by dismissed ground no.9 raised by the Revenue.”*

68. We have heard the parties and perused the material on record. The facts for the year under consideration being similar, respectfully following the above decision of the Co-ordinate Bench, we uphold the decision of the Ld. CIT(A). This ground raised by the Revenue is dismissed.

69. In result both assessee's and revenues appeals are partly allowed.

**Order pronounced in the open court on 09/11/2023**

Sd/-

Sd/-

(AMIT SHUKLA)	(MISS. PADMAVATHY S)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt. 9<sup>th</sup> November, 2023

Pavanan/ SK Sr. PS

**प्रतिलिपि अग्रेषित Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी /The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि ,आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar  
ITAT, Mumbai