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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A: NEW DELHI

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI A.D. JAIN, JUDICIAL MEMBER

ITA No. 5585/Del/2011
Assessment Year: 2007-2008

American Express Services India Ltd., First Floor, Mercantile House, 15, Kastruba Gandhi Marg, New Delhi. AABCT0555D	Vs.	DCIT, Circle 1(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Sh.Vijay Iyer, CA, Shri Anjit Chakrovorty & Sh. Manoneet Dalal, Adv.
Respondent by : Sh. Peeyush Jain, CIT(DR)

<u>O R D E R</u>

<u>PER S.V. MEHROTRA, A.M.</u>

This appeal filed by the assessee is directed against the order of AO dated 10/10/2011 for AY 2007-08 passed in terms of directions of Dispute Resolution Panel (DRP) u/s 144C(5) dated 02/08/2010.

2. The assessee company was incorporated in the year 1999 as a joint venture between American Express International Inc. and Tata Group. However, in the year 2002, American Express International Inc. became the holding company by acquiring stake from Tata Group. Presently 99.99% of share capital of the company is owned by American Express

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International Inc. and remaining .01% is owned by Tata Group. The assessee company is providing following services: -

1) Distribution of AEE charge, credit cards and other cards.
2) Distribution of AEB personal loans and other retail lending products.
3) Support for marketing and promotion of products, scheme etc. of AEB.

3. The assessee had filed its return of income declaring loss of Rs. 6,62,96,780/-. The AO noticed that assessee had undertaken International transactions with its associated enterprise to the tune of Rs. 7,03,224/-. Therefore, in accordance with the provisions of section 92CA of the Income Tax Act, the International transaction entered into by the assessee with the associate enterprise was referred to the Transfer Pricing Officer (in short "TPO") for determining the arm's length price. The TPO passed the order u/s 92CA(3) on 7th October, 2010 making an upward adjustment of Rs. 3,42,63,209/- to the income of the assessee, being the difference between arms length price and the price charged by the assessee. The AO passed the draft assessment order after considering the assessee's submissions and made the addition of Rs. 3,42,63,209/- to the income of the assessee. The assessee filed objections before Dispute Resolution Panel (in short "DRP") and the DRP issued directions u/s 144C(5) on 2nd August, 2011 confirming the TPO's action.

4. Being aggrieved, the assessee is in appeal before us and has taken following grounds of appeal on this issue: -

1. *"The order passed by the Additional Director of Income Tax, Transfer Pricisng-1(1) ("Learned TPO"), draft assessment order passed by Deputy Commissioner of Income Tax, Circle 1(1), New Delhi ("the Learned AO") and the final assessment order passed by the ld. AO on the directions of the Hon'ble Dispute Resolution Panel*

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("Hon'ble DRP"), are bad in law and void-ab-initio.

2. *That on facts and in law, the ld. AO has erred in determining the total income of the Appellant at Rs. 109,122,855 as against NIL returned income.*

Part 1

3. *That on facts and in law, the ld. AO has erred in assuming jurisdiction to refer and in making the reference to the ld. TPO despite the absence of requisite preconditions being met in law.*
4. *That on facts and in law, the ld. TPO has erred in not discharging the statutory onus to establish that the Appellant's case is covered under any of (a) to (d) clause of section 92C(3) of the Income Tax Act, 1961 ("the Act").*
5. *That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred in making/upholding an upward adjustment of Rs. 34,263,209/- in respect of the international transaction pertaining to marketing services in respect of credit cards and personal loans in the order of assessment.*

5.1 *That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred in rejecting the economic analysis undertaken by the Appellant and conducting a fresh search for identifying the comparable companies to the Appellant.*

5.2 *That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred in rejecting the Appellant's claim for use of multiple year data for computing the arm's length price and, instead used single year data of companies to conclude the arm's length price of the international transaction.*

5.3 *That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred in cherry picking comparables to accomplish pre-conceived conclusions, with the sole objective of rejecting comparables selected by the Appellant and arriving at skewed results.*

5.4 *That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred in accepting functionally dissimilar company namely Sundaram Finance*

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Distribution Limited as functionally comparable to the Appellant.

5.5That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred by selecting certain companies earning super normal power as comparable to the Appellant.

5.6That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have failed to make appropriate adjustments to account for varying risk profiles of the Appellant vis-à-vis the comparables and in the process also neglected the Indian transfer pricing regulations. OECD guidelines on transfer pricing and judicial precedence.

6.That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred by not considering that the adjustment to the arm's length price, if any, should be limited to the lower end of the 5 per cent range as the Appellant has the right to exercise this option under the pre-amended second proviso to sec. 92C(2) of the Act.

6.1That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. TPO/AO have erred in applying the amendment to section 92C(2) retrospectively and in the process have neglected the Indian transfer pricing regulations and judicial precedence."

5. Ground nos. 1 & 2 are general in nature and do not require any specific adjudication. Ground nos. 3 to 6.1 are in respect of determination of arm's length price by TPO and consequent adjustment to the assessee's income.

6. Brief facts apropos the adjustments made by TPO are that the assessee company had entered into an agreement with American Express Bank Limited of USA having its Indian office at Gurgaon for providing the following services: -

1. Distribution of AEB Charge, Credit Cards and other Cards.

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2. Distribution of AEB Personal Loans & other Retail Lending products.
3. Support for Marketing & promotion of products, schemes, etc. of AEB.

7. The TPO has noted salient terms and conditions of the agreement as under: -

> *"3.1 The assessee is entitled to the following fee and charges in accordance with the terms and conditions of this agreement is effective from 1st April 2004:*
>
> *1. Retainer fees Rs. 114 lacs per month.*
> *2. Service Fee:*
> *(i) Rs. 2280 per approved consumer card.*
> *(ii) 3.5% of personal loans disbursed.*
>
> *The above agreement was modified with effect from 1st December, 2004 and the retainer fee was increased to Rs. 140 lacs per month. The service fee on personal loan disbursed was increased 3.75%. Further amendments were carried out to the agreements on 24th May, 2005 with effect from 1st June, 2005 and the retainer ship fee was increased to Rs. 200 lacs per month and the service fee on personal loan disbursed was reduced to 3.50%. Another amendment was effected on 22nd November, 2005 with immediate effect through which the charges for the consumer card were revised as under:*
>
> *(i) Rs. 1800/- per approved card sourced through its sub contracted third parties who source card applications.*
> *(ii) Rs. 1800/- per approved card sourced through its sub contracted third parties who source loan applications.*
>
> *3.2 The assessee has entered into another Service Agreement with American Express International Inc. on 25th September, 2006 w.e.f. 1st January, 2006 to provide the following services:*
>
> *1. Analysis and trending of financial and back office data to identify out of pattern activity.*
> *2. Root cause analysis and subsequent investigation with follow-up.*
> *3. Remote control reviews with focus on protection of company assets and adherence to policies and procedures.*

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4. TID review and analysis.
5. Initiatives such as 6 Sigma, BCP coordination and adherence to GFES policies.

The fee for the above services is payable to the AESIL as under:

i. The Fees payable by AEII to AESIL for the services shall be arrived at by taking into account the total cost incurred by AESIL for providing the services plus a mark up of 15.09%.
ii. The fees shall be payable on a quarterly basis by inward remittance into India of the amount of the fees.
iii. The fees shall be payable within 30 days from the completion of the period to which the fees relate.
iv. AESIL shall provide AEII with a detailed breakup of the total cost incurred by AESIL and further furnish all such clarification as may be required by AEII in this connection."

8. The TPO noticed that assessee had applied TNMM method for determining arm's length price in regard to provision of the marketing services to Amex India in respect of credit cards and personal loans. He noted that the profitability of the company had been computed at 12.81%. He observed that for arriving at this profit margin assessee had selected six companies as comparables the operating profit/operating cost of which was used as PLI. He further observed that the data for F.Y. 2005-06, 2006-07 was used and weighted average was arrived at 17.33%. The assessee exercised its option under proviso to section 92C(2) of the Act and arm's length price was determined at -5% of arithmetic mean of the comparable prices. The TPO noticed that assessee had not made any addition in the Transfer Pricing Study. The TPO further noted that in order to bench mark

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the International transactions, the tax payer had not used the data of the current financial year i.e. F.Y. 2006-07 in respect of following six comparable companies: -

Sl.No.	Comparables
1.	Allianz Securities Ltd. (Segmental)
2.	Allianz Capital & Management Services Ltd. (Segmental)
3.	India Infoline Distribution Co. Ltd.
4.	Sundram Finance Distribution Ltd.
5.	SREI Capital Markets Ltd.
6.	SREI Money Mall Ltd.

9. He noted that multiple data had been used for determining the margin of the comparables in the TP Study furnished by the tax payer. After considering in detail Rule 10B(4) the TPO held that data of F.Y. 2004-05 and F.Y. 2005-06 is not to be considered for bench marking International Transactions and, therefore, he used the data for the F.Y.2006-07 only. The assessee furnished updated margins of the comparables. The TPO has observed that at this stage the assessee rejected SREI Money Mall Ltd., SREI Capital Market Ltd. and Allianz Capital and Management Services Ltd. as comparable which TPO considered to be in order. However, since only few comparables remained, the TPO carried out a fresh search to find out more comparables. On the basis of search carried out by TPO, he issued a show cause notice and on the basis of his examination of the companies with reference to the FAR, their annual reports and the comparables used in the earlier years by the assessee, the TPO proposed arm's length margin at 36.03%.

10. After considering the assessee's objections that the TP Documentation should not be rejected since the same was done in accordance with law, the TPO observed that the information or data used in the computation of arm's length price was not reliable or correct due to following defects: -

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1. *"As per Rule 10B(4), it is mandatory to the use the current financial year data i.e. the financial year in which the international transactions took place. (F.Y. 2006-07). But the taxpayer excluded the current year's data in most of the comparable cases.*
2. *Some companies though qualify all the filters applied by the tax payer based on the data pertaining to the F.Y. 2006-07, they have not been selected.*
3. *The assessee has himself in a way rejected its transfer pricing study and has rejected its own comparables during the present proceedings."*

11. In view of these defects the TPO rejected the assessee's first objection that its TP Study should be accepted.

12. The second objection of assessee was that the companies identified by TPO were functionally different. In this regard TPO observed that assessee had not been able to demonstrate any functional differences in the companies selected by him and the assessee company. He pointed out that the company selected by him, as noticed in para 7 of his order, were the companies which were deriving income from commission like the assessee. He further observed that under the TNMM a broad comparability is required. In this regard, he also referred to OECD guidelines which read as under: -

> *2.62 "One strength of the transactional net margin method is that net profit indicators (e.g. return on assets, operating income to sales, and possibly other measures of net profit) are **less affected** by transactional differences than is the case with price, as used in the CUP method. Net profit indicators also may be **more tolerant to some functional differences between the controlled and uncontrolled transactions** than gross profit margins. Differences in the functions performed between enterprises are often reflected in variations in operating expenses. Consequently, this may lead to a wide range of gross profit margins but still broadly*

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> *similar levels of net operating profit indicators. In addition, in some countries the lack of clarity in the public data with respect to the classification of expenses in the gross or operating profits may make it difficult to evaluate the comparability of gross margins, while the use of net profit indicators may avoid the problem."*

13. The TPO accepted the assessee's third objection in respect of Ashoka *Mercantile* Limited and dropped the same from the list of comparables.

14. The TPO further examined and considered the fourth objection of assessee with regard to use of Sundram Finance Distribution Ltd. as comparable on the ground that the Company did not employ any employee on its payroll. The TPO pointed out that the assessee's objection has following two aspects: -

a) this information had been gathered by the assessee from the report for the purpose of section 217 of the Company's Act. He pointed out that there was possibility that the company wanted to report that they had no employee for whom the details were required to be reported.
b) the company may have different business model.

He rejected the assessee's objection mainly on the ground that this comparable was selected by the assessee in the TP Report.

15. The TPO rejected the assessee's fifth objection that the companies selected were not engaged purely in agency activities observing that under TNMM a broader comparability is required.

16. The assessee's sixth main objection was that high margin comparables should have been rejected. In this regard TPO observed as under: -

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"There are no guidelines with regards to exclusion of loss making comparables and comparables-disclosing abnormal high profit under the Income Tax Act, 1961 and Income Tax Rule 1962. The OECD in Revision of Chapter I-III as published on 22.07.2010 has made reference to extreme results. For sake of ready reference, the relevant Para is extracted below.

3.63 Extreme results might consist of losses or unusually high profits. Extreme results can affect the financial indicators that are looked at in the chosen method (e.g. the gross margin when applying a resale price, or a net profit indicator when applying a transactional net margin method). They can also affect other items, e.g. exceptional items which are below the line but nonetheless may reflect exceptional circumstances. Where one or more of the potential comparables have extreme results, further examination would be needed to understand the reasons for such extreme results. ***The reason might be a defect in comparability, or exceptional conditions met by an otherwise comparable third party. An extreme result may be excluded on the basis that a previously overlooked significant comparability defect has been brought to light, not on the sole basis that the results arising from the proposed "comparable" merely appear to be very different from the results observed in other proposed "comparables".***

3.64 An independent enterprise would not continue loss-generating activities unless it had reasonable expectations of future profits. See paragraphs 1.70 to 1.72. Simple or low risk functions in particular are not expected to generate losses for a long period of time. This does not mean however that loss-making transactions can never be comparable. In general, all relevant information should be used and there should not be any overriding rule

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on the inclusion or exclusion of loss-making comparables. Indeed, it is the facts and circumstances surrounding the company in question that should determine its status as a comparable, not its financial result.

3.65 Generally speaking, a loss-making uncontrolled transaction should trigger further investigation in order to establish whether or not it can be a comparable. Circumstances in which loss-making transactions/enterprises should be excluded from the list of comparables include cases where losses do not reflect normal business conditions, and where the losses incurred by third parties reflect a level of risks that is not comparable to the one assumed by the taxpayer in its controlled transactions. Loss-making comparables that satisfy the comparability analysis should not however be rejected on the sole basis that they suffer losses.

3.66 ***A similar investigation should be undertaken for potential comparables returning abnormally large profits relative to other potential comparables.***

Careful perusal of above referred guidelines clearly reveals that on the issue of loss making companies, the OECD is of the view that such comparables should not be automatically excluded from the comparability analysis. It is the view of the OECD that abnormal profit making comparable cannot be excluded without making analysis to know whether there is exceptional circumstances. In order to exclude the extreme result cases there should be either a defect in comparability or exceptional conditions faced by the comparables.

To justify the removal of these company the assessee has relied upon the decision in the case of E Gain Communication Pvt. Ltd. and Philips Software Center Pvt. Ltd. I have considered the case laws relied upon by the assessee as well as other cases on this issue in the ensuing pargraphs:

Hon'ble ITAT in case of E-gain Communication (P) Ltd. vs. Income Tax Officer, Ward 1(4), Pune [2008] 23 SOT

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385 (PUNE), has examined the issue of selection of certain companies disclosing abnormally high profit margin for the comparability analysis. Hon'ble ITAT relying on para 1.47 of OECD TP guideline has held that it was necessary for the TPO to examine whether these entities have been taken rightly as comparable. The relevant guideline of the OECD is reproduced as under:

> *"1.47 Whether the application of one or more methods produces a range of figures, a substantial deviation among points in that range may indicate that the data used in establishing some of the points may not be as reliable as the data used to establish the other points in the range or that the deviation may results from figures of the comparable data that require adjustments. In such cases, further analysis of those points may be necessary to evaluate their suitability for inclusion in any arm's length range".*

Contrary to the above, Hon'ble ITAT in case of Philips Software Centre (P) Ltd. vs. ACIT, Circle 12(2) [2008] 26 SOT 226 (BANG), has held that a comparable disclosing high profit should be excluded from comparability analysis. For the sake of clarity the relevant part of the judgment is reproduced as under:

> *"X) The TPO has grossly erred in 'normalizing' the profits of super profit companies. Such companies should have been excluded from the list of comparables." (refer para 5.71)*

It is noteworthy here that the Hon'ble Karnataka High Court has stayed the operation of the order in the case of Philips Software Centre (P) Ltd. vs. ACIT.

Taking into account the OECD guidelines and the above referred judgments of Hon'ble ITAT on the issue, I am of considered view that loss or abnormal profit making comparables should not be automatically excluded from the comparability analysis. In the present case the assessee has not shown any functional dissimilarity or exceptional circumstances. The only objection that the assessee has raised is abnormal results, which is not supported by any significant comparability defect.

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It is also pertinent to mention here that I am taking low margin companies also as a comparables viz. Indian Infoline.com Distribution Company Limited. If the high margin companies are to be removed from the list of comparables on the ground of abnormal margins than low margin companies are also required to be removed from the list of comparables. It is also important to mention here that the companies are being selected on the basis of comparability and not on the basis of margins. I am therefore inclined to reject the argument of the assessee on this ground."

17. The TPO rejected the assessee's ***following*** two comparables on the ground that assessee had not stated any criteria on the basis of which these companies had been selected:

i) Technicom-Chemmie (India) Limited and

ii) National Engineering Industry Limited.

18. Before TPO the assessee had claimed a risk adjustment on the ground that it is a capital service provider and had assailed return. The assessee's claim was that it provided marking support services to its AE and, therefore, its operations were devoid of any risk. The TPO rejected the assessee's objection for various reasons given in para 10 of his order and pointed out that since the assessee had made claim of risk adjustment, initial onus to file requisite information pertaining the claim was on assessee. However, the assessee did not discharge its initial onus. He relied on the decision of ITAT, Delhi Bench in the case of Vedaris Technology 2010-TII-10-ITAT-DEL-TP, wherein it was held that no risk adjustment can be allowed in the absence of computation.

19. The TPO examined the margins of the comparables computed from the annual reports by assessee and found the computation to be correct. He has tabulated the comparables along with their operating margins on operating cost (%) as under: -

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S.No	Name of the Company	Operating margin on operating costs (%) for FY 2006-07
1.	Access Global Solutions Ltd.	4.64%
2.	Eastern Financiers Limited	9.76%
3.	Empire Industries Limited	20.53%
4.	Geojit Commodities Ltd.	3.09%
5.	ICC International Ltd.	82.92%
6.	NYK Line (India) Ltd.	5.03%
7.	Priya International Ltd.	13.97%
8.	Publicity Society of India Ltd.	12.80%
9.	Relic Technologies Ltd.	12.90%
10.	Reliance Communications Infrastructure Ltd.	20.85%
11.	India Infoline.com Distribution Company Ltd.	0.39%
12.	Allianz Securities Ltd.	12.37%
13.	Sundaram Finance Distribution Ltd.	84.79%
	Arithmetic mean	**21.85%**

He, accordingly, computed arm's length price by taking arithmetic mean PLI 21.85% and made an adjustment of Rs. 3,42,63,209/- as under: -

Arithmetic mean PLI	*21.85%*
Operating Cost	*361,589,674*
Arms Length Price (ALP) @ 21.85% of operating cost	*440,597,017*
Price received	*406,333,808*
Shortfall being adjustment u/s 92CA	*34,263,209*

20. In the draft assessment order the AO also made this adjustment against which the assessee filed objections before DRP and DRP rejected the assessee's objections. The main objection of assessee before us is in regard to taking Sundaram Finance Distribution Ltd. and ICC International Ltd. as comparables the operating margin on operating cost of which was 84.79% and 82.92% respectively.

21. Ld. Counsel submitted that as far as ICC International Ltd. was concerned, this company was engaged in the trading of embroidery, accessories and embroidery machines. He filed before us technology upgradation scheme issued by Ministry of Textiles and pointed out that this

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scheme was announced for modernization and technology upgradation in the textile sector. He pointed out that the scheme aimed at making available funds to the Domestic Textile Industry for technology upgradation of existing units as well as to set up new units. This claim was launched on 01/04/1999 for five years but subsequently, extended upto 31/03/07. Ld. Counsel referred to the year-wise progress of TUFS and pointed out that in 2006-07 number of applications sanctioned were 12,589, whereas in other financial years it ranged from 309 to 6072. He pointed out that the TPO had considered "commission and servicing activity" segment of ICC International in the final set of comparables. The income from this segment comprised of commission income from sale of products and income from providing after sales services to its customers. He submitted that because of spurt in applications for availing TUFS, this was a unique year which aspect has not been considered by TPO. In this regard, he also referred to the extracts from annual report of ICC International contained at page 52 of paper book, wherein the director's report it is, inter-alia, stated as under: -

> *"Your Company's Income from indenting commission increased by 27.11% from Rs. 292.20 lac last year to Rs. 371.43 lac this year. This is mainly because of higher capital investment made by the textile industry, especially investment in multi head embroidery machines."*

22. Ld. Counsel submitted that ICC International was functionally different because of heavy investment in textiles. This should not have been considered as comparable to the assessee.

23. As regards, Sundaram Finance Distribution Ltd., ld. Counsel submitted that merely because assessee had supplied the said comparable, the same could not automatically been considered without properly examining whether the comparable company was functionally same or not. In this regard ld. Counsel relied on the decision of ITAT, Chandigarh Spl. Bench in the case of Deputy Commissioner of Income Tax

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vs. Quark System Pvt. Ltd., wherein it was held that even if assessee has taken "D" as a comparable in its transfer pricing data, still it was entitled to point out that said enterprise had wrongly been taken as a comparable. He, therefore, submitted that TPO was wrong in not excluding Sundaram Finance Distribution Ltd. (in short "SFDL) mainly on the ground that assessee had provided the said comparable without considering functional dissimilarity. He pointed out that Sundaram Finance Distribution Ltd. earned commission as an insurance agency for life insurance products and general insurance products, whereas assessee provided marketing support services. In this regard ld. Counsel referred to page 48 of the paper book, wherein the director's report is contained, wherein the business review, it is stated as under: -

"BUSINESS REVIEW

During the year under review, the total commission earned through distribution of insurance products of M/s National Insurance Company Limited and M/s SBI Life Insurance Company Limited is Rs. 110.18 lakhs as against Rs. 136.10 lakhs in the previous year. Your company earned an income of Rs. 95.57 lakhs through distribution of various mutual fund/financial products as against Rs. 80.19 lakhs in the previous year. The profit after tax for the year amounted to Rs. 79.70 lakhs as against Rs. 100.30 lakhs in the previous year.

PERSONNEL

Your Company has no employees on its payroll. The provisions of sec. 217(2A) of the Companies Act, 1956 are not applicable.

Income from Operations:

Insurance Agency Commission	*1,10,18,411*	*1,36,09,672*
Brokerage, Service Charge Incentives etc.	*95,56,540*	*80,18,870*
Others	*-*	*4,22,734*
	2,05,74,951	***2,20,51,276***

Other Income

Interest	*52,068*	*3,99,212*
Profit on Redemption of Investments	*4,51,229*	*57,98,036*
Dividend	*13,28,219*	*1,93,618*
Miscellaneous Income	*2,98,553*	*4,945*

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	21,30,069	***63,95,811***
Administrative & Othr. expenses		
Outsourced Servicing Fees	*1,08,03,087*	*1,45,37,206*

24. Ld. Counsel referred to the director's report and pointed out that the company had no employees on its payroll. This aspect has also not been properly appreciated by TPO. Ld. Counsel further referred to page 49 & 50 of paper book to demonstrate that SFDL carried out its activity through out-sourced personnel and had paid out sourcing services fees amounting to Rs. 1,08,03,087/- out of total administrative and other expenses of Rs. 1,13,16,155/-. He, therefore, submitted that at-least 94.90% of total cost was in relation to out sourced servicing fee.

25. In this regard he relied on the following decisions: -

1) Maersk Global Services Centre (India) Ltd., ITA No. 3774/Mum./2011.
2) Zydus Altana Healthcare Pvt. Ltd. 2010-T11-29-ITAT-MUM-TP.

26. Ld. Counsel submitted that companies earning super normal profits had to be excluded from comparables and in support of his contention he relied on Abode Systems India Pvt. Ltd. vs. ACIT.

27. Ld. DR Shri Piyush Jain submitted that Sundaram Finance Distribution Ltd. is in same line of business. He referred to the decision in the case of M/s Symantec Software Solutions Pvt. Ltd. vs. ACIT & DCIT vs. M/s Deloitte Consulting India P. Ltd. and referred to para 15.1 of the said order for the proposition that a comparable selected by assessee is not to be excluded merely on the ground that the same was earning high margin of profit. The said para reads as under: -

> *15.1 "Similarly, low turnover does not necessarily mean high margin in competitive market condition. Therefore,*

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unless and until it is brought on record that the turnover of such comparables has undue influence on the margins, it is not the general rule to exclude the same that too when the comparables are selected by the assessee itself."

28. Ld. DR further referred to page 186 of paper book, wherein the assessee's transfer pricing report is contained, wherein the assessee has stated as under: -

> *"The comparables selected for analysis could also include companies that may perform additional functions (while being engaged in providing comparable services). Further, the risk profiles of independent companies usually differ from that of AESIL, as they may undertake business risks, legal and contractual risks, etc. The effect of these functional and risk differences on profit margins, needs to be factored while determining the arm's length price. However, no adjustments have been made to account for such functional and risk differences between the tested party (AESIL) and the comparable companies and AESIL reserves the right to undertake an adjustment for such differences (including differences in the risks assumed and working capital employed), if warranted."*

29. With reference to aforementioned assessee's study, ld. DR submitted that assessee did not point out any functional differences which were there and since this comparable was selected by assessee itself, therefore, it was rightly not excluded by TPO. He further submitted that comparables had been chosen by TPO after following due process. Ld. DR further referred to para 4.3 of DRP's order and pointed out that the assessee's contention regarding lack of employees in the case of Sundaram Finance had been duly considered and it was held that the same did not change functionality in any manner.

30. Ld. DR also relied on the decision of ITAT Hyderabad Bench in the case of DCIT, Circle 1(2), Hyderabad vs. M/s Deloitte Consulting India Pvt.

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Ltd. vide ITA No. 1082/Hyd/2010, wherein Tribunal in para 36 has observed as under: -

> *36. "**Now, we deal with the issue relating to inclusion of Vishal Information. Technology Limited (VITL in short)** in the final list of comparable companies by the TPO. It is contention of the assessee company that VITL has empkloyee-cost at 1.38% of its revenue when compared to that of the assessee company which is at 52.12%. Thus, the VITL cannot be considered as comparable company and to be excluded from the list of comparable companies. It is also an alternate contention of the assessee that VITL owns valuable intangible when compared to the assessee company. Hence, the said company has to be excluded. The assessee company itself agreed before the TPO that VITL is a comparable company offering IT enabled services and this company is an extension of one Indian company Amex IT Ltd., having agreed so it is not correct on the part of the assessee company to raise a new plea appears that the VITL has outsourced the manpower and the cost of outsourcing appears to have been included in the other heads of the expenditure instead of wages-employee cost. Moreover, the intangibles will not materially affect the price or profit earning. By outsourcing the manpower, the VITL would have incurred more cost compared to the assessee company, thus resulting in lesser operating profit. **But, having considering the findings of the TPO, we find that the intangibles or outsourcing the manpower will not materially affect the price or profit margin. In our considered opinion, no two comparable companies can be replicas of each other. The application of Rule 10B should be carried out and judged not with technical rigor, but on a broader prospective**. In this view of the matter, we find no infirmity in the order of the CIT(A) in confirming the action of the TPO by selecting the VITL as comparable company. The case-law relied on by the ld. Counsel for the assessee is distinguishable on facts. Hence, the ground raised by the assessee on this issue is rejected."*

He, therefore, submitted that mere outsourcing of activities was of no consequence.

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31. We have considered the submissions of both the parties and have perused the record of the case.

32. The main issue for consideration is in regard to selection of following two comparables for computing arithmetic mean of margins: -
(a) Sundaram Finance Distribution Ltd. selected by assessee and (b) ICC International Ltd. selected by TPO.

33. The assessee's contention is that since both these comparables had earned super profits, therefore, they should have been excluded for determining the arithmetic mean of operating margin to operating cost. The assessee's contention is that as far as ICC International Ltd. is concerned DRP has not considered the assessee's objections in including this company as a comparable and, therefore, the matter should be restored back to the DRP/AO for reconsideration. As far as the issue regarding inclusion of Sundaram Finance Distribution Ltd. is concerned the main contention of assessee is that since this company had no employees on its payroll and it had outsourced all its operations, therefore, this should not have been included as comparable.

34. Before we consider the assessee's arguments, it would be useful to refer to the main provisions in this regard. As per section 92C(1), the ALP is determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the board may prescribe, namely (a) comparable uncontrolled price method, (b) resale price method, (c) cost + method, (d) profit split method, (e) transactional net margin method, (f) any such other method as may be prescribed by the board. Where more than one price is determined by the most appropriate method, the arm's length

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price shall be taken to be arithmetical mean of such prices. Rule 10B of the Income Tax Rules, 1962 prescribes the determination of arm's length price u/s 92C. The first and foremost step in all the methods is to evaluate the differences between the international transaction undertaken with the unrelated enterprise performing the comparable functions in similar circumstances. Rule 10B(1)(a) deals with comparable uncontrolled price method. In this method first we have to identify the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction or a number of transaction and then to adjust the price to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market. This methodogy is followed in all the methods in the manner prescribed in Rule 10B in respect of various methods.

35. In the present case, we are concerned with transactional net margin method (TNMM) on the adoption of which there is no dispute. In this method the net profit margin realized by the enterprise from an international transaction entered into with associate enterprise is computed in relation to cost incurred or sales affected or assets employed or to be employed by the enterprise or having regard to any other relevant base. In the present case, the operating cost has been adopted as the relevant base in relation to which net profit margin has been determined. The net margin realized by the enterprise, having regard to the operating cost, is required to be adjusted as per Rule 10B(e)(iii) to take into account the differences, if any, between the international transaction and the comparable uncontrolled transaction, or between the enterprises entering into such transaction, which could materially effect the amount of net profit margin in the open market. It goes without saying that comparision can be made amongst equals and not amongst dissimilar objects. The object is to bring the assessee's transaction in relation to all possible aspects on the same

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footing on which the comparable uncontrolled transaction is based. All the aspects of the two comparables cannot be same but the object is to bring the comparables on a platform at which the profit margin may become comparable. ITAT Mumbai Bench in the case of DCIT vs. B.P. India Service Pvt. Ltd., 133 ITD 255 has, inter-alia, observed in para 11 as under: -

> *"From the Transfer Pricing Study of the assessee it is essentially noticed that the services provided by it to its AEs were in the nature of Accounting and Control Support Services, Legal and Tax Support Services, Management, HSE and Human Resource Services, Lubricant Support Services, Marketing Support Services, Technical Support Services and services relating to development, maintenance and operation of International delivery data capture systems, invoicing and cash/debt collection. The case of 'F' considered by the TPO as not comparable and liable for elimination from the list of comparable cases supplied by the assessee divulges income from software services at Rs. 82,31,765 and income from IT enabled services at Rs. 72,39,330 for impugned year. The assessee admitted that the nature of services provided by the assessee to its AEs match only with the IT enabled services rendered by 'F' and not the software services made available by 'F'. This indicates that the software services which constitute more than 53 per cent of the revenues of such other company are different from that of the assessee-company. The Commissioner (Appeals) has held that this company as functionally comparable to the assessee-company by noting that the TPO had inadvertently considered the revenue from IT enabled services as revenue from software services and vice versa for the years ending 31.03.2002 and 31.03.2003. It is relevant to note that impugned assessment year is 2004-05 and in this respect the figures of software services and income from IT enabled services of 'F' recorded by the TPO for the year ending 31.03.2004 are perfectly in order. These figures can be verified from the copy of profit and loss account of this company."*

36. In the rules, no where it has been provided that comparables having high or low margins of profits are required to be excluded for determining

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arithmetic mean of net margins for applying to the operating cost of international transaction entered into by the assessee with the associate enterprise. Therefore, the assessee's contention that since Sundaram Finance Distribution Ltd. and ICC International Ltd. were earning super net profit margins should be excluded is devoid of any merit. It has only to be adjusted for the material differences between business modules as adopted by the assessee vis-a-vis business module adopted by the comparable uncontrolled transactions. If the comparables are performing the same functions then merely on the ground of they being earning super profits, cannot be excluded. Material differences between their business modules, however, are required to be taken care off and duly adjusted. In the case of Sundaram Finance Distribution Ltd., we find that the main objection of assessee is that the said comparable was included because assessee had supplied the same and the second objection is that in the said comparable there was no staff. As far as first objection is concerned, we are in agreement with the assessee's counsel that merely because the said comparable was provided by assessee, the same could not be included without proper examination to account for the differences. The assessee is well within his right to demonstrate that a comparable supplied by it in the transfer pricing analysis was not correct and had to be excluded. This right of the assessee is not curtailed in any manner, whatsoever, in the rules.

37. Now the second issue is regarding adjustment of net profit margins of comparable uncontrolled transaction for material differences. The assessee's contention is that in case of Sundaram Finance Distribution Ltd. the operations of the company were conducted by the outsourced personnel. Ld. DR has very rightly referred to the decision of M/s Deloitte Consulting India Pvt. Ltd. vs. DCIT (supra) in this regard, wherein it was, inter-alia, observed that outsourcing the manpower does not materially

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affect the price or profit margins. The assessee has not demonstrated the effect on net profit margin of cost involved in outsourcing the manpower vis-a-vis the cost involved in making the payment to personnel, if employed. In the case of Deloitte Consulting India P. Ltd. tribunal has, inter-alia, observed that by outsourcing the manpower, the comparable would have incurred more cost compared to the assessee company, thus, resulting in lesser operating profit. However, in the present case, the situation is reverse and the comparable uncontrolled transaction has earned much more profit than the assessee. Further Tribunal has also observed that the cost of outsourcing had been included in other heads of the expenditure in respect of wages employee cost. In the present case, these aspects have not at all been considered by TPO. If the business module adopted by Sundaram Finance Distribution Ltd. materially affected the profit then the same had to be adjusted. We, therefore, consider it in the interest of justice that the matter may be restored back to the file of AO for examining the assessee's plea afresh.

38. Now coming to the issue regarding ICC International, we find that assessee has demonstrated, as noted earlier, that it had earned super profits during the year because of increase in supply on account of government scheme. We find that TPO has considered the assessee's objection regarding exclusion of high margin comparables in para 8.7 of his order and the DRP in para 7.1. They have merely, inter-alia, observed that comparables cannot be rejected simply because they are loss or high profit making comparables. However, they have not considered that if certain extra ordinary factors materially affected the profit in a particular year then that aspects had to be taken into consideration and due adjustment was required to be made to the net profit margin for brining the comparable on the same platform at which the assessee was performing its functions.

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39. Admittedly the assessee's objections in regard to ICC International, as noted earlier, have not been considered by DRP and, therefore, we consider it in the interest of justice that this issue should also be restored to the file of TPO for fresh consideration.

40. In view of above discussion, we proceed to decide the various ground of appeal raised in Part 1 of its ground of appeal. Ground nos. 3 & 4 deals with reference to the TPO. We find that the TPO has clearly stated in his report that the assessee itself rejected certain comparables given by it and in ultimate analysis only three comparables were left. Therefore, TPO had resorted to such analysis in order to find out other comparables. The reference to TPO is made u/s 92CA(1), wherever AO consider it necessary or expedient to do so. We, therefore, reject the ground no. 3 & 4 raised by the assessee. Ground no. 5 is allowed for statistical purposes; ground no. 5.1 is rejected; ground no. 5.2 is decided against the assessee in view of specific provisions contained under rule 10B(4) as discussed earlier; Ground no. 5.3 is allowed for statistical purposes; Ground no. 5.4 is allowed for statistical purposes; ground no. 5.5 is allowed for statistical purposes; ground no. 5.6 is dismissed as not seriously pressed before us. Ground no. 6 was also not seriously pressed before us and, therefore, dismissed. Ground no. 6.1 was not seriously pressed before us. Moreover, we find that DRP has observed in para 9.1 to 9.3 of its order as under: -

> *9.1 "We have examined the issue. The Memorandum explaining the Finance Bill, 2009 has clearly stated that the aforesaid amendment shall apply on all the cases pending with the TPO on or after 01/10/2009 as para 37.5 of circular number 5/2010, inadvertently stated that the aforesaid amendment shall apply from AY 2009-10 onwards the CBDT issued a corrigendum vide F.No. 142/13/2010-SO(TPL) dated 30/09/2010 reiterating the position as explained in Memorandum to the Finance Bill, 2009 i.e. the amended proviso shall apply to all the*

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cases pending on or after 01/10/2009 with the TPO. Since in this case the TPO has passed the order after 01/10/2009, the amended proviso shall apply.

9.2 It may be mentioned that in the following decision the ITATs have held that even under preamended proviso benefit of 5% is not available if the price is beyond that range as such benefit is not a standard deduction:

a) Global Vantedge Pvt. Ltd. (2010-TIOL-24-ITAT-DEL)
b) M/s Marubeni India Pvt. Ltd. (2011-TII-36-ITAT-DEL-TP)
c) M/s ST Micro Electronics (2011-TII-63-ITAT-DEL-TP)

9.3 It may also be mentioned that the amended proviso is only clarificatory in nature as the Memorandum explaining the Finance Bill has clarified that the same was brought as there were disputes about its interpretation/applicability. It is a settled position of law that an amendment which clarifies a provision has retrospective operation.

Thus, this ground of objection is also overruled. We decline to interfere with the order of the TPO on this ground."

41. We concur with the findings of DRP and, therefore, we reject the ground no. 6.1 raised by the assessee.

42. Part II : Grounds of appeal read as under:

"7. That on the facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. AO has erred in disregarding the acquisition cost of database amounting to Rs. 120,000,000 and valuing the same at Rs. 30,000,000 based on the asstt. order passed for the AY 2002-03.

8.1 That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. AO has erred in disallowing the claim of the appellant for depreciation on the acquired business database u/s 32 of the Act.

8.2 That on facts and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. AO has erred in following the assessment orders passed by the predecessor for asstt. years 2002-03 to 2006-07 that the acquired business database could not be regarded as plant and machinery.

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8.3 Without prejudice to the above, the ld. AO has erred in not appreciating that the database falls under the head of "intangible asset" and accordingly, depreciation should be allowed on the same.

9. Without prejudice to the above, the ld. AO has erred in disallowing the amount of Rs. 7,519,793 as depreciation on database without appreciating the fact that depreciation on database actually claimed in the return of income is Rs. 1,210,254. The ld. AO has erred in disregarding the fact that Rs. 7,519,793 is the tax depreciation on all the blocks of assets of the business of the Appellant including that on database of Rs. 1,210,254.

10. That on the facts of the case and in law, the Hon'ble DRP has erred in confirming and accordingly, the ld. AO has erred in considering computer peripherals (other than printers, scanners and NT servsers etc.) to be in the nature of plant & machinery and allowing depreciation at 15% thereon as against 60%, thereby making an addition of Rs. 339,849 alleging it to be excessive depreciation claimed by the Appellant on such items.

11. That in law, the ld. AO has erred in disregarding the directions of the Hon'ble DRP and not allowing the relief in regard to the deletion of the proposed disallowance of sundry advances written off of Rs. 703,224 on account of irrecoverable employee receivable."

43. The assessee has raised following additional grounds which have been admitted by the Tribunal vide its order dated 15th May, 2010: -

Additional Ground 1: Without prejudice to the other grounds, the Hon'ble DRP has erred in confirming and accordingly, the ld. AO has erred in restricting the cost of acquired database to Rs. 30,000,000 instead of Rs. 120,000,000 as confirmed by the ld. TPO.

Additional Ground 2: Without prejudice to the other grounds, the Hon'ble DRP and ld. AO has erred in not appreciating that the said database falls under the head of "Intangible asset" and accordingly, depreciation of Rs. 7,119,141 as computed in the Tax Audit Report for the subject year should have been allowed on the same."

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44. For properly appreciating the facts apropos ground no. 7 and additional ground no. 1 raised by the assessee, we reproduce hereunder the observations of Tribunal while admitting the additional grounds of appeal: -

> *"<u>ITA No. 5585/Del/2011</u>:*
>
> *The assessee has filed an application for permission to raise following additional grounds of appeal:*
>
> *<u>Additional Ground 1</u>: Without prejudice to the other grounds, the Hon'ble DRP has erred in confirming and accordingly, the ld. AO has erred in restricting the cost of acquired database to Rs. 30,000,000 instead of Rs. 120,000,000 as confirmed by the ld. TPO.*
>
> *<u>Additional Ground 2</u>: Without prejudice to the other grounds, the Hon'ble DRP and ld. AO has erred in not appreciating that the said database falls under the head of "Intangible asset" and accordingly, depreciation of Rs. 7,119,141 as computed in the Tax Audit Report for the subject year should have been allowed on the same."*
>
> *2. The ld. counsel for the assessee submitted that assessee is joint venture between TATA Finance Ltd. and American Express International. It is engaged in the business of money changing, foreign exchange and other related services as permitted by the RBI. The assessee had purchased four foreign exchange service locations of American Express-TRS(Legal Entity: AEB India) for a consideration of Rs. 26.77 crores. A sum of Rs. 12 crores was paid towards the business of database. While framing asstt. order in AY 2002-03, AO has taken the value of database at Rs. 3 crores. He did not grant the depreciation to the assessee. Ld. CIT(A) accepted the value of database at Rs. 3 crores as determined by the AO but directed the AO to grant depreciation as admissible on plant and machinery. The dispute traveled to the ITAT in ITA No. 4106/Mum./07 and Cross-objection No. 202/Mum./09. The ITAT has held that value of database is to be accepted at Rs. 12 crores as disclosed by the assessee, because the transaction between the assessee and the Associate Enterprises for purchase of business database were subject to transfer pricing scrutiny. The ITAT further held that the*

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depreciation would be admissible by treating the database as intangible assets. The ld. Counsel for the assessee pointed out that the ITAT's decision has come on 3/02/2012. Thus, for computing cost of acquisition and consequent depreciation, ITAT's order has to be given effect in the subsequent years and, therefore, the issues raised by the assessee in the additional grounds of appeal go to the roots of the dispute and ultimately effect the taxability of the assessee. The ld. Counsel for the assessee put reliance upon the decision of the Hon'ble Supreme Court in the case of NTPC vs. CIT reported in 229 ITR 383. On the other hand, ld. DR submitted that the assessee ought to have taken this plea in the beginning. On due consideration of the facts and circumstances, we are of the view that in view of the ITAT's order for AY 2002-03, the issues raised in the additional grounds of appeal will effect the determination of tax liability of the assessee, therefore, they are essential issues which require to be adjudicated upon by the ITAT. We allow the application of the assessee and admit these additional grounds of appeal for adjudication on merit. The hearing is adjourned to 02.07.2012, copies of this order be supplied to both the parties.

Sd/- Sd/-
JUDICIAL MEMBER VICE-PRESIDENT
Dated: 15/05/2012"

45. In view of above observations, the additional ground no. 1 and ground no. 7 raised by the assessee stands allowed. The additional ground no. 2 raised by the assessee also stands allowed as it has been held that the depreciation would be admissible by treating the data base as intangible asset vide ITAT order in ITA No. 4106/Mum./2007 and CO No. 202/Mum./2009.

46. Brief facts apropos ground no. 8.1 to 9 are that the AO had disallowed the claim of Rs. 75,19,793/- following the order for assessment years 2002-03, 2003-04, 2004-05 and 2005-06. In view of the findings of

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Tribunal in regard to additional ground no. 2, the depreciation is to be allowed.

47. Ld. Counsel submitted that depreciation is to be allowed @ 25% instead of @ 15% allowed by the AO by treating the data base as plant and machineries. We find that ITAT in assessee's own case dated 03.02.2012 has held as under:

> *"8. We find that it is not in dispute that the transaction between the assessee and American Express Bank, inter-alia, including for purchase of Acquired Business Database were subjected to transfer pricing scrutiny and, the Transfer Pricing Officer vide order dated 15.02.2005 has accepted the transaction without making any adjustment to the arms length price. In this view of the matter and as held by Hon'ble Delhi High Court in the case of CIT vs. Oracle India Pvt. Ltd. (243 CTR 103), when the price fixed is acceptable as arms length price by TPO u/s 92 of the Act, it cannot be open to the AO to disturb that price so paid as unreasonable. We have also noted that the AO has doubted the appropriateness of the consideration of Rs. 12 crores without any cogent material to come to the conclusion that this is excessive or unreasonable, but then the TPO whose duty is it to examine whether or not the price paid in intra associate enterprises transaction are at arms length price or not has accepted the transaction without making any arms length price adjustment. There is no material whatsoever to establish or even indicate that the price of Rs. 12 crores paid for the Acquired Business Database is excessive or unreasonable and only the basis of AO's coming to the conclusion about his subjective judgment. When the valuation of Acquired Business Database has been examined by TPO while concluding that the database price adjustment for the said year and no adverse inferences have been recorded in respect of the same, there could be no good reason for the AO to deviate from the stand of the TPO and substitute his own opinion as to what should be the correct price at which Acquired Business Database should have been purchased. In this view of the matter and in the light of*

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> *the judgment of Hon'ble Delhi High Court in the case of Oracle India P. Ltd. (supra), we are of the considered view that the CIT(A) was indeed in error in restricting the value of Acquired Business Database at Rs. 3 crores as against Rs. 12 crores paid by the assessee. To this extent, we vacate the order of the CIT(A). We further find that so far as the question about admissibility of depreciation of Acquired Business Database is concerned, this issue is covered in favour of the assessee by the judgment of Hon'ble Delhi High Court in the case of CIT vs. Hindustan Coca Cola Beverages Pvt. Ltd. (331 ITR 192), wherein, their Lordships, inter-alia, have observed that "It is worth noting, the scope of sec. 32 has been widened by the Finance (No. 2) Act, 1998 whereby depreciation is not allowed on intangible assets acquired on or after 1st April, 1998. As per section 32(1)(ii), depreciation is allowable in respect of know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature." In view of these discussions as also bearing in mind the entirety of the case, we are of the considered opinion that the CIT(A) ought to have allowed the depreciation on the entire payment of Rs. 12 crores towards Acquired Business Database. We, therefore, reject the appeal filed by the AO against partial relief granted by the CIT(A) and uphold the grievance of the assessee in this regard."*

48. We, therefore, restore the matter to the file of AO to decide this ground in terms of the order of Tribunal in assessee's own case noted above.

49. In the result, these grounds are allowed for statistical purposes.

50. Brief facts apropos ground no. 10 are that assessee company had claimed depreciation of Rs. 38,18,949/- on computers. The AO required the assessee to provide details of computer peripherals in the block of the computer and also to justify the claim of depreciation @ 60% on them. The AO, after considering the assessee's submissions, held that the

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peripherals/accessories, which could be used, stand alone, independently or along with computer for some function, could not be termed as computer or computer software to be eligible for depreciation @ 60%. After relying on various decisions, the AO excluded the peripherals included in computer and allowed depreciation @ 15% treating them as plant and machinery. He, therefore, made an addition of Rs. 3,39,849/-. Before ld. DRP it was submitted that UPS forms part of computer system and, therefore, entitled to 60% depreciation. The assessee had relied on the decision of Delhi ITAT in the case of Nestle India Ltd. vs. DCIT, 111 TTJ 498 and Hon'ble Delhi High Court decision in CIT vs. BSTS Rajdhani. Ld. DRP did not accept the assessee's contention observing that UPS was not mentioned in the said judgment.

51. We have considered the submissions of both the parties and have perused the record of the case. We find that this issue is covered by the decision of Hon'ble jurisdictional High Court in the case of CIT vs. Orient Ceramics & Industries Ltd., wherein it has been held as under: -

> *"**13.** The third issue pertaining to depreciation on UPS arises only in the AY 2005-06. The assessee had claimed depreciation on UPS at the rate of 60 per cent whereas the AO had allowed it at the rate of 25 per cent and on this basis, disallowance of Rs. 1,470 was made. The issue now stands covered by the judgment of this Court in the case of CIT vs. BSES Yamuna Powers Ltd. [IT Appeal No. 1267 decided on 31/08/2010], wherein it was held that the depreciation at the rate of 60 per cent on such items shall be allowed."*

52. Respectfully following the decision of Hon'ble jurisdictional High Court, this ground is allowed.

53. Ground no. 11: brief facts apropos this issue are that assessee had written off certain sundry advances aggregating INR 703,224/-. After

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considering the assessee's submissions, the AO disallowed the assessee's claim.

54. Before Ld. DRP it was pointed out that the amount represented advances to employee which could not be recovered. Ld. DRP observed as under: -

> *"18.2 After examining the matter, it is seen that the issue is similar to the one that Delhi High Court in CIT vs.Triveni Engg. And Industries Ltd. 2010-TMI-78089 has adjudicated upon. In so far as deduction of advances given to employees is concerned, which has become unrecoverable, that may not pose much of a problem. Advances were given to the persons who had been employed by the assessee company and if they became unrecoverable, it would clearly be treated as a business loss."*
>
> *18.3 It is gathered that department has not filed a SLP in this case.* ***Therefore, the objection is accepted and the AO is directed to delete this proposed disallowance."***

55. The only grievance of the assessee is that AO has not given relief as per the directions of ld. DRP. In this regard, ld. counsel referred to para 7.2 of the asstt. order and pointed out that AO held that Hon'ble DRP has upheld the addition suggested by the TPO.

56. We have considered the submissions of both the parties and have perused the record of the case.

57. The directions of ld. DRP are very clear and unambiguous and, therefore, the AO clearly misconstrued the same. We, therefore, restore this issue to the file of AO for reconsideration and to give effect to these directions of ld. DRP, as reproduced earlier.

58. In the result, this ground is allowed for statistical purposes.

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59. Ground no. 12 & 13 are consequential and, therefore, do not call for any adjudication.

60. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 24/08/2012

Sd/-
(A.D. JAIN)
JUDICIAL MEMBER

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Dated: 24.8.12
*Kavita

Copy to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

TRUE COPY

By Order

DEPUTY REGISTRAR