

आयकर अपीलिय अधिकरण, मुंबई "के" खंडपीठ
Income-tax Appellate Tribunal - "K" Bench Mumbai
सर्वश्री राजेन्द्र, लेखा सदस्य एवं अमरजीत सिंह, न्यायिक सदस्य
Before S/Sh.Rajendra, Accountant Member and Amarjit Singh, Judicial Member
आयकर अपील सं./I.T.A./7472/Mum/2010, निर्धारण वर्ष /Assessment Year: 2006-07

M/s. Franklin Templeton International Services (India) Private Limited Level-3, Wockhardt Towers, Bandra Kurla Complex, Bandra (East) Mumbai-400 051. PAN:AAACF 6496 I	Vs.	DCIT-3(1) Room No.607, 6th Floor Aayakar Bhavan, M.K. Marg, Churchgate, Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Shri Jayant Kumar-DR
अपीलार्थी की ओर से / **Assessee by:** S/Shri Porus Kaka / Manish Kanth
सुनवाई की तारीख / **Date of Hearing:** 24/10/2017
घोषणा की तारीख / **Date of Pronouncement:** 10.01.2018

लेखा सदस्य, राजेन्द्र के अनुसार/ PER RAJENDRA, AM-

Challenging the order of the Assessing Officer (AO) passed in pursuance of the directions dated,06/08/2010,of the Dispute Resolution Panel (DRP)-1,Mumbai,the assessee has filed the present appeal.Assessee-company,engaged in the business of providing back-office-support-services and software development services(SDC)to the group entities,filed its return of income on 27/11/2006,declaring income of Rs 1.59 crores.The AO finalised the assessment on,20/09/2010,u/s.143(3)r.w.s.144C(13) of the Act,determining the income of the assessee at Rs.4.36 crores.

2.During the assessment proceedings,the AO found that assessee had entered into International Transactions (IT.s)with its Associated Enterprise (AE).He made a reference to the Transfer Pricing Officer(TPO)to determine the arm's length price (ALP) of the transactions. He issued a draft order to the assessee.After receiving the order of the TPO,it filed objections before the DRP.Considering the available material,the DRP issued directions to the AO. Accordingly,the AO completed the assessment.

2.1.First ground of appeal is about Transfer Pricing (TP) adjustments of Rs. 2.48 crores. During the TP proceedings,the TPO observed that Franklin Templeton Investment Group was one of the largest financial services group,that it offered investment growth and value style equity products as well as several focused sector portfolios, that Franklin Templeton Holding Ltd, Mauritius was 100% subsidiary of Templeton Asset Management Ltd, Singapore,that it was holding company of Franklin Templeton group companies in India,that the assessee had

entered into two IT.s in to with its AE.s.He observed that the assessee was earning a Markup of 10% and 15% (on cost)on back-office-support-services(BOSS)and SDC respectively,that TNMM was selected as the most appropriate method for benchmarking the IT.s,that it had used three years' data to work out a weighted average for computing Profit Level Indicator (operating profit/cost)of the comparable companies,that the assessee had selected eight comparables with PLI of 10.07%. The TPO held that using the data of three years was not as per the provisions of Act,that the companies selected by the assessee could not be treated as valid comparables.He rejected five comparables selected by it and accepted the remaining three,namely Ace Software Exports Ltd.,Allsec Technologies Ltd.(ATL)and Spanco Ltd.

He added 10 new comparables and selected 13 comparables in the final list,namely-Ace Software Exports Ltd.(ASEL),Allsec Technologies Ltd.(ATL),Apex Knowledge Solutions Private Ltd. (AKSPL),Asit Mehta Financial Services Ltd.(AMFSL) Cosmic Global Ltd.-Seg.- (CGL),Datamatics Financial Services Ltd.-seg-(DFSL),Flextronics Software System Ltd. (FSSL),Goldstone Infratech Ltd. (GIL),Maple e-solution Ltd.(Maple),R System International Ltd.(RSIL),Spanco Telesystme and soltion Ltd.(Spanco)and Transworks Information Service Ltd.(TISL).He arrived at the margin of 24% for benchmarking the ALP of the IT.s.He further allowed working capital adjustment of @1.32%.He finally applied net margin of 22.68% to determine the ALP of the IT.s.In pursuance of the order of the TPO,the AO issued the draft order to the assessee.

2.2.The assessee filed objections before the DRP and made detailed submissions about the comparables.The DRP observed that the assessee had objected to seven(7)comparables namely -AKSPL;AMFL;CGL; GIL; TIS; VITL and Maple,that except for VITL remaining six(6)comparables were valid,that in the case of VITL most of the services were outsourced. The DRP held that twelve(12) comparables except VITL should be included in the list of final comparables.It took arithmetic mean @21.99%.After giving working capital adjustment @1.32% the average margin was computed at 20.67% as against 22.68%. Finally,the DRP directed the AO/TPO to apply the net margin of 22.67% to determine the ALP.

2.3.Before us,the AR contended that the TPO had rejected the methodical search process followed by the assessee for identifying the comparables,that he did not give reasons for rejecting the comparables selected by it,that he conducted search for ITES and not for BOSS and SD,that his faulty approach was confirmed by the DRP,that the TPO had added new filters without rejecting the filters applied by the assessee,that he had used the data that was

not available in public domain,that he cherry picked the comparables to determine ALP,that he did not share the information,called for u/s.133(6)of the Act,with the assessee though the same was used against it.

2.3.1.With regard to **AMFSL**,the AR argued that the company was engaged in SD/Portfolio management services/Investment activities, that segmental information in respect of IT.s and SD was not available,that an extraordinary event(amalgamation) had taken place during the year under consideration.He relied upon certain case laws,wherein the Tribunal had rejected **AMSFL** to be a valid comparable.About **Maple**,the AR contended that it was engaged in providing call Centre services, that 99.78% of its total revenue was earned from call centres, that the functions, assets and risks were distinct and different from the functions assets and risks for providing data processing services,that the assessee was providing non-voice based services,that intangible assets consisted 21.93% of the total fixed assets of Maple,that the assessee did not have any intangible asset.He relied upon about a dozen of cases where the Tribunal had held that Maple could not be taken as a valid comparable.With regard to **GTL**,the AR stated that it had export income from exports of goods and not of services,that it failed the export-filter applied by the TPO himself,that he had excluded certain comparable selected by the assessee on the very same ground i.e. export filter,that the information obtained by the TPO u/s. 133 (6) of the Act,for selecting **GSL** as a comparable,was never furnished to the assessee. He relied upon he cases where the Tribunal has rejected **GTL** as a valid comparable.About **TTL**,it was argued that it had 93.58% of its total revenue from translation services, that the **BPO** and medical transcription services earned only 6.42% of the total revenue,that it would outsource most of its translation work to third parties instead of carrying out the work itself, that the assessee would use its own resources and was not outsourcing its work. About a dozen cases were relied upon by the AR in his support,wherein **TTL** was rejected as a valid comparable by the Tribunal.With regard to **DFL**,the AR argued that it was an unlisted company,that no segmental information was available in case of **DFL**,that it failed 25% RPT filter.About **AKSPL**,it was contended that the company was engaged in export of software products,that no segmental data was available in the annual report of the comparable,that the TPO had erred in taking entity level margin,that the TPO did not furnish the information collected by him u/s. 133 (6) of the Act. It was argued about **STSL** that initially it was selected as the valid comparable by the assessee,that post DRP hearing it had requested to excluded from the final list of comparables,that the function

profile of the comparable was totally different,that forex income as percentage of total income was 23.32%,that it was engaged in providing call Centre services,that the merger of domestic call Centre division to Intelenet BPO services Ltd had taken place in the month of January, 2006.It was further argued that in the case of **ATL**, the correct margin was 19.95% as against 28.51% considered by the TPO, that the DRP did not adjudicate the issue in that regard, that it had acquired one company in December 2005. The AR referred to page number 1223 of the paper book.

The Departmental Representative(DR)argued that the TPO had considered the ITE.s function at functional level,that the back office services included voice call or data processing,that both were similar,that specific products were not to be considered.About Cosmic Global,he stated that the assessee,itself had included it in the list of comparables for the AY.s.2007-08 and 2008-09.About Datamatics,he stated that the TPO had used the Segmentals,that assessee itself used the comparabale in AY.2007-08 and 2008-09.About Apex,he relied upon the order of the TPO and DRP.With regard to Spanco,he stated that TPO had used segmental data only. The DR further argued that the assessee was confronted with the comparable selected on 20/07/2009 and 17/10/17(Pg.353 &355 of the PB),that manufacturing segment was not relevant to decide the BPO issue,that for comparing turnover 1/10th or 10 time of the turn-over could be considered.He referred to cases of PCM Stresscom Overseas Ventures Ltd.(85taxmann 165)and Daikin Air-conditioning India Pvt. Ltd.(67 taxmann.com.119)and stated that in absence of opportunity of being heard not given the matter should be restored back to the file of the AO.Referring to the order of Acusis Software India P.Ltd.(77taxman. com.6),he contended that Maple was considered as a valid comparable,that in the year 2007-08 the assessee itself had considered it as a valid comparable.Relying upon the case of Allscripts India Pvt. Ltd.(37taxmann. com19),he argued that if it was to be excluded then comparables selected by assessee who were in the same business should also be excluded from the list of the comparables.He made a reference to the matter Akami Technologies India P.Ltd.(74 taxmann.com188),wherein the matters were set aside to the file of the AO.

In the rejoinder,the AR stated that initially the AO had selected seventeen (17) companies as a result of search filters.(TPO order Pg.9),that in the final list of comparable those 17 companies were not considered,that different notices were issued to the assessee during the TP proceedings,that the notice proved that there was no application of mind,that by setting aside the AO should not be given more opportunity to improve his stand,that Spanco was

only a call centre (Pg-286i),that no segmental,in the case of Datamatics,were available (Pg. 115).

2.4.We have heard the rival submissions and perused the material before us.We find that the value of the IT.s for the year under appeal was Rs.25.63 crores,that the assessee had used TNMM as MAM,that it had selected eight comparables to determine the ALP of the IT.s,that the TPO rejected 5 comparables,that he added eight more comparables in the final list of comparables,that he applied export filter of 25% for selecting the comparables,that mean arrived by the TPO was 24% as against the mean of 10% shown by the assessee,that the DRP excluded one comparable,namely VIT,and directed the AO to adopt PLI @20.67%,that the assessee was engaged in back office work.

2.4.1.Before proceeding further,we would like to take notice of certain other facts.The TPO,for finding suitable comparables made search,on 29.01.2009,in the field of ITES,that he did not make search in the fields of BOSS or SDS-the activities carried out by the assessee during the year under consideration,that the TPO identified 17 comparables out of the 97 companies resulted by the key word ITES(Pg.9 of the order of the TPO).If the notice issued by the TPO to the assessee(Pg.353 of the PB)is considered it becomes clear that page 9 of his order and the search process mentioned therein not the same as revealed by the notice.The notice talks of 13 comparables.Even if we reject the assertion of the AR that Pg.9 is cut and paste case of other assessee,the fact remains that the search process claimed to be adopted by The TPO(order Pg.9)and the show cause notice issued to the assessee are not based on same data.This proves flawed search process on part of the TPO.A vitiated process would bear invalid results.

2.4.2.Now,we would like to discuss the validity of the individual comparables,objected to by the assessee.First we would take up the matter of AMFL(Formerly known as Nucleus Netsoft & GIS (India) Ltd.).A perusal of the web site and annual report of AMFL (Pages 8,29,37,326,387,408 and 410 of the PB)reveal that it is engaged in software development,portfolio management services and investment activities,that segmental results are not available about the various activities carried out by it.It is also a fact that an extraordinary event,amalgamation,had taken place(Pg.384 and 388 of the PB) during the year under consideration.In the matter of American Express(India)Pvt.Ltd.(64 taxmann. com 280),the Tribunal has held that AMFL cannot be treated a valid comparable for the AY.2006-07. We are reproducing the relevant portion of the order which reads as under:

“7.1 This company was initially included by the assessee in its list of comparables on weighted average basis. Thereafter, when the TPO required the assessee to furnish the profit rates of the companies selected by it with current year data alone, the assessee excluded this company. The TPO included it in the final set of comparables despite the assessee's objection that there was amalgamation of some other company in this company during the year under consideration and the audited financial accounts contain the figures relevant to the amalgamating company as well. The TPO was unconvinced with this reason for exclusion. The DRP affixed its seal of approval on the inclusion of this company.

7.2 We have heard the rival submissions and perused the relevant material on record. The assessee has not disputed the functional dissimilarity of this company. The only reason taken by the assessee in seeking its exclusion is the amalgamation of another company with it during the year. This fact is borne out from the Annual report of this company, a copy of which has been placed on record. The Annual report of this company provides that: The Scheme of Amalgamation ("the Scheme") of erstwhile Nucleus and GIS (India) Ltd., the Transferor Company, with your Company was sanctioned by Hon'ble High Court of Judicature of Bombay on 22nd February, 2006. On complying with the requisite formalities, the Scheme became effective and operative retrospectively from the appointed date of 1 April 2005 as per the Scheme. In the accompanying financial statements, results of the transferor company have been incorporated and the figures given herein and elsewhere in this Annual Report are not strictly comparable with those of previous year. It is clear from the above extraction that the amalgamation took place in the year in question and the financial results of this company include those of the amalgamating company as well. In our considered opinion, the factor of amalgamation or merger or acquisitions, etc., has its own implications on the financial results of a company as these are abnormal financial characteristics which distort the normal profitability. The Mumbai Bench of the Tribunal in Petro Araldite (P.) Ltd. v. Dy. CIT [2013] 144 ITD 625/31 taxmann.com 281, has held that a company cannot be considered as comparable because of exceptional financial results due to mergers/demergers. Similar view has been bolstered by the Delhi Bench of the Tribunal in several cases including Ciena India (P.) Ltd. v. Dy. CIT [2015] 154 ITD 349/57 taxmann.com 329 (Delhi - Trib.) a vide its order dated 23.4.2015. In view of the fact that there was a merger by way of amalgamation during the year itself, we hold that Nucleus Netsoft and GIS (India) Ltd. cannot be considered as comparable due to this extraordinary financial event. Accordingly, we direct to eliminate this company from the final set of comparables.”

Respectfully, following the above order of the Tribunal, we hold that AMFL should be taken out of the final list of the valid comparables.

Maple, as per the pages 863 and 1222 of the PB, is engaged in providing call centre services, that more than 90% of its revenue is arising from call center, that intangible assets constitute more than 20% of the total fixed assets of Maple. If we compare the FAR analysis of both the companies it is clear that the assessee was justified in arguing that Maple should be treated an invalid comparable. In the case of Stream International Services Pvt.Ltd. (31 taxmann.com 227) the Tribunal has held as under:

“17. Third case against is that of Maple eSolutions Limited, whose inclusion has been assailed by the Id. AR. It is observed that the TPO excluded the case of Satyam Computers Services on the ground of "Unreliability of data", although that case satisfied all the relevant criteria chosen by the TPO. The learned Counsel for the assessee contended that the case of Maple eSolutions Limited which was included by the TPO suffered from the same disability. It was argued that the reputation of Rastogi group, owning Maple eSolutions Limited was under

serious indictment. Our attention was drawn towards an order passed by the Delhi Bench of the Tribunal in ITO v. CRM Services India (P.) Ltd. [2011] 48 SOT 41 (URO)/14 taxmann.com 96 for the assessment year 2006-2007 vide which the case of Maple eSolutions Limited has been directed to be excluded for this reason alone. We were also taken through an order passed by the Hyderabad Bench of the Tribunal in the case of Capital IQ Information Systems (India) (P.) Ltd. v. Asstt. CIT [2012] 26 taxmann.com 31 wherein the order passed by the Delhi Bench of the Tribunal in the case of CRM Services India (P.) Ltd. (supra) has been followed and the case of Maple eSolutions Limited excluded from the list of comparables. It was therefore, accentuated that the same case of Maple eSolutions Limited should be excluded from the final list of comparables prepared by the TPO. Per contra, the learned Departmental Representative contended that no such objection was taken by the assessee before DRP/TPO. It was argued that the case of Satyam Computers was excluded by the TPO on the ground of mala fides on the part of the company itself whereas in the case of Maple eSolutions Limited, the entire doubt was over the management and not the company.

18. We are unable to uphold the contention raised by the learned Departmental Representative. It is apparent from two orders passed - one by the Delhi Bench and the other by the Hyderabad Bench of the Tribunal - that the case of Maple eSolutions Limited has been directed to be excluded from the list of comparables. As the assessment year under consideration is 2006-2007 and the Delhi Bench of the Tribunal has also considered the same assessment year while directing the exclusion of the case of Maple eSolutions Limited from the list of comparables, we are unable to accept the contention of the ld. DR in this regard. It is more so because no contrary view has been brought by the ld. DR to our notice. Respectfully following the precedents, we direct the exclusion of this case from the final list of comparables.”

Considering the above, we hold that the DRP should have excluded Maple from the list of comparables.

We find that one of the comparables, **GTL**, fails on the filters applied by the TPO himself. It had earned export income of Rs. 424 lakhs (0.14%) that was a miniscule part of its income for the year under appeal. Thus, it fails the export-filter of 25% applied by the TPO. Pg. 1222f of the PB prove that GTL had three divisions namely (i) Insulator division (ii) Telcom division and (iii) BPO division, that it was manufacturing composite insulators and was also in the process of developing a wide range of insulators, that the Telcom division was providing cable joining kits, that it had earned 42.83% of its total revenue from insulator division, that 44.13% income earned by GTL was arising out of Telcom division. Considering these facts we hold that GTL should not have been included in the list of valid comparable.

As far as **TTL**, as a comparable is concerned, it is found that during the year under consideration 93.58% of its total revenue arose from translation services. Not only this unlike assessee it was outsourcing the translation work. We find that roughly half of its translation work (52.54%) was done by the outsiders. On the other hand the assessee is doing work for its AEs. In the case of Parexel International (India) Pvt. Ltd. (51 taxmann.com 332), for the AY. 2007-08,

the Tribunal has excluded it from the final list of comparables. Considering the peculiar facts about TTL, we hold that it is an invalid comparable for the year.

Now we would take up the issue of exclusion of **DFL**. We find that it was an unlisted entity, that the financials of DFL were not available in the public domain, that it was engaged in carrying on the activity of registrar and share transfer agent services, that the TPO had rejected two of the assessee's comparables which were engaged in the similar business as of DFL, that it failed on touchstone of RPT filter. In our opinion, it has to be considered an invalid comparable.

About **STSL** it is found that the function profile of the assessee is totally different from the profile of the assessee, that it fails the export filter applied by the TPO, that it was engaged in providing call Centre services. We are of the opinion that BOSS cannot be compared with call centre services. Besides, the merger of domestic call Centre division to Intelenet BPO Services Ltd. (January 2006) would also make STSL an invalid comparable.

We find that once above mentioned five comparables are excluded from the final list of valid comparables, the margin shown by the assessee would be within the safe limits of plus/minus 5%. Therefore, we are not commenting upon the other comparables, though the arguments advanced by the AR about the remaining comparables are found to be factually correct. In short, we hold that the assessee had proved that the list of comparables approved by the DRP (12 comparables) contain 8 comparables which should have been excluded. We hold that AMFL, Maple, GTL, TTL, DFL, STSL, AKSPL and ALT are not valid comparables for the purpose of determining the ALP of the IT.s entered in to by the assessee for the year under consideration. We want to emphasise that our conclusion is based on the peculiar facts and circumstances of case and for the year under appeal only.

2.4. We would now take up the issue of remanding the matter to the departmental authorities, as argued by the DR. We find that in the case of PCM Stresscon Overseas (supra) the assessee had objected to the jurisdiction of the TPO, that it was argued that in year under appeal it had not entered into any IT with its AE.s, that the AO did not address the basic jurisdictional issue before making a reference to the TPO. Considering these facts and deciding the writ petition filed by the assessee, the Hon'ble Calcutta High Court had held that there was violation of principle of natural justice. Consequently, the order of the TPO was set aside by the Hon'ble Court and the AO was directed to rehear the basic issue raised by the assessee. In our opinion, the case does not help the cause of Revenue in any manner. Facts of

the case under consideration are totally different from the facts of PCM Stresscon Overseas(supra).In the matter under appeal there is clear cut non application of mind on part of the TPO.

In the matter of Daikin Air Conditioning(supra)the TPO had not provided any opportunity to the assessee for filing its objections.The Tribunal remanded back the matter for fresh adjudication.In the case of Akamai Technologies India(supra),the Tribunal found that the TPO had collected information u/s.133(6)and had not confronted the assessee with it before using against it.So,the issue was sent back.In the case under consideration,we find that the search process adopted by the TPO was faulty,that the assessee was not confronted with the information gathered u/s.133(6)of the Act.Even on merits,we have held that 8 comparables approved by the DRP should not have been included in the final list.

We would like to discuss the matter of All scripts India(P.)Ltd supra).In that matter the issue was remanded back to the file of the departmental officers.We are reproducing the relevant portion of the order and it reads as follow:

“When this case was called out for hearing, learned counsel of the assessee submitted that all that is required to be adjudicated in this appeal is whether or not two comparables, namely Compu U learn Tech India Ltd and FCS Software Ltd can be valid comparable for the purpose of TNMM. It was submitted that the assessee Company is engaged in captive software development services to its associate enterprises i.e. Eclipsys US, and that during the relevant previous year, the assessee has provided software services to the tune of Rs 29,20,12,656. The assessee had adopted TNMM and selected certain comparables. These comparables were rejected by the Transfer Pricing Officer, and the Transfer Pricing Officer selected his set of comparables. Learned counsel submits that barring these two comparables, he has no issues with the comparables adopted by the Transfer Pricing Officer himself. Learned counsel made elaborate submissions on how these two companies are not appropriate comparables for the assessee before us, even though, for the reasons we will set out in a short while, it is not really necessary to deal with these contentions on merits. Suffice to say that the emphasis of the learned counsel has been that these two comparables adopted by the Transfer Pricing Officer cannot be treated as valid comparables for the purposes of this assessee. When asked whether all the comparables selected by the Transfer Pricing Officer have been subjected to the same test of rigorous scrutiny as these two comparables selected by the TPO, learned counsel fairly accepted that the assessee has not done so. He frankly stated that as long as assessee has no grievance with the comparables selected by the TPO there was no need to examine the appropriateness of comparables.

We also asked learned counsel for the assessee to step wise process whereby assessee's comparables were selected, and asked him to take us through the screenshots of various stages in narrowing down the results found in the database to the comparables eventually selected. Learned counsel took us through the transfer pricing study. While learned counsel took us through the transfer pricing study and explained the selection process, he could not show the process of 'qualitative screening' which resulted in selection of 20 comparables out of 463 comparables found in the preceding stage of selection process. When asked as to what was the objective criterion adopted in this narrowing down process, learned counsel did not have much to say. He, however, prayed that the matter be remitted to the file of the Assessing Officer so that assessee has a reasonable opportunity of explaining these issues, which, according to him, were not raised earlier.

Learned Departmental Representative, on the other hand, submitted that there cannot be cherry picking in putting selected comparables to the rigorous test. He pointed out that learned counsel has fairly accepted that they have scrutinized only those comparables which they find to be against their interests. The very foundation of this exercise is not on the legally sustainable basis. The application of any test has to be on uniform and consistent basis. Learned departmental Representative also highlighted the fact that the process of narrowing down to 20 comparables by the assessee is not transparent, nor the assessee is able to show any objective criterion adopted for this process. The selection of comparables thus is also a cherry picking exercise, which is contrary to the scheme of things envisaged in the transfer pricing legislation. Learned Departmental Representative, however, did not oppose the prayer to remit the matter to the file of the Assessing Officer.

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We have noted that at page 259 and 260 of the paper-book the assessee has set out various objective tests employed in narrowing down universe of 18,249 comparables available in the Prowess database to 463 comparables. However, the qualitative analysis based on which, 20 comparables were finally selected from these 463 comparables, is not specified. Similarly, there cannot be cherry picking for selecting unsuitability of comparables either, The assessee should have subjected all the comparables selected by the revenue to the same tests. The income tax proceeding are not adversarial proceedings, as these are the proceedings to reach the correct position. In the process of any analysis, objectivity and consistency is to be maintained. In view of these discussions, as also bearing in mind entirety of the case, we deem it fit and proper to remit the matter back to the assessment stage for fresh adjudication in the light of our above observations, in accordance with the law and by way of a speaking order.”

From the above,it is clear that the matter was remanded back as 'the qualitative analysis based on which 20 comparables were finally selected from these 463 comparables, was not specified'.Fact of the case under appeal are totally different.

We are not inclined to allow premium on carelessness and callousness of the TPO and allow him a second chance to amend his errors.An erring officer does not deserve a new innings to continue unnecessary litigation.TP proceedings,like any other proceedings under the Act,have to be completed in a proper manner and the record should prove that,while making TP adjustment,the TPO had applied his mind to the facts and circumstances of the case.Posts of TPO.s were specifically created to determine the ALP of the IT.s.Considering the seriousness of the job the AO.s are not allowed to decide the value of IT.s.The scheme of the Act casts an added responsibility on the TPO.s to pass a reasoned,valid and proper order.In the case before us,we find that the TPO had committed several mistakes in the search proceedings and sending notices.So,we are of the opinion that it is not a fit case to be remanded.

We again make it clear that our order is limited to present case only.It should not be considered a precedent for remitting/not remitting back the matters to the file of the departmental authorities.First Ground of appeal is decided in favour of the assessee.

3.Ground No.2 is about disallowance of Rs 23 06 lakhs made u/s. 10A of the Act.During the assessment proceedings,the AO held that expenditure incurred by it towards software expenses was capital in nature Though,he allowed depreciation on it.In short,the AO did not allow incremental deduction to the extent of Rs.23.06 lakhs,while calculating the profits eligible for deduction u/s 10A of the Act.The DRP,while dealing with the objections of the assessee,did not adjudicate the issue though it was specifically raised before it.

3.1.Before us, the AR referred to the case of Gem Plus Jewellery India Ltd. (330ITR175) and stated that assessee was entitled to incremental deduction under section 10A of the Act. The DR stated that matter could be decided on merits.

3.2.We have heard the rival submissions.We find that the assessee had filed a specific objection about not allowing incremental deduction,that the DRP did not decide the issue. Therefore, we are of the opinion that the matter should be restored back to the file of AO who would decide the Ground after affording reasonable opportunity to the assessee and after considering the judgment of Gem Plus Jewellery India Ltd.(supra).Ground No.2 is partly allowed.

4.Next ground of appeal is about 14A disallowance.During the assessment proceedings,the AO found that the assessee had claimed exemption of Rs.98.28 lakhs,that it had made no disallowance u/s.14A.He called for an explanation in that regard.After considering the same,he held that the assessee had received exempt income,that expenditure had been incurred on day to day activities.Referring to the order of the Tribunal in the case of Daga Capital Management Ltd.,he held that disallowance had to be made as per the provisions of section 14A r.w.rule 8D of the Income-tax Rules,1962(Rules).He made a disallowance of Rs. 5.64 lakhs[Rs.26,512/- under Rule 8D(2) and Rs.5.37 lakhs under Rule 8D(iii) of the Rules]. The DRP upheld the order of the AO.

4.1.Before us,the AR argued that the assessee had not incurred any expenditure, that the AO had invoked the provisions of Rule 8D in a routine manner, that the provisions of rule 8D were not applicable for the year under consideration.He further stated that a reasonable disallowance could be made.The DR left the issue to the discretion of the Bench.

4.2.We find that the AO had invoked the provisions of section 14A r.w.r.8D of the Rules to make the disallowance.As per the judgment of the Hon'ble jurisdictional High Court provisions of Rule 8 were not applicable for the year under consideration.We direct the AO restrict the disallowance to 1% of the exempt income.Third grounds is partly allowed.

5.Next Ground is about levy of interest u/s 234B of the Act. In our opinion,the Ground is consequential in nature, hence,it needs no separate adjudication.

6.Last ground of appeal deals with initiating penalty proceedings,u/s.271(1)(c)of the Act.As the issue is premature at this s age,so,we dismiss the same.

As a result, appeal filed by the assessee stands partly allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतःमंजूर की जाती है.

Order pronounced in the open court on 10th January,2018.

आदेश की घोषणा खुले न्यायालय में दिनांक 10 जनवरी , 2018 को की गई ।

Sd/-

(अमरजीत सिंह / Amarjit Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 10.01.2018.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

2. Respondent /प्रत्यर्थी

- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5.DR “ K” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खडपीठ,आ.अ.न्याया.मुबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुबई /**ITAT, Mumbai.**

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