

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH 'B', BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER  
AND  
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

**IT (TP) A No.162(Bang) 2012  
(Assessment year 2005-06)**

M/s Hewlett Packard Globalsoft Pvt.Ltd  
39/40, Electronic City, Phase-II,  
Hosur Road,  
Bangalore-560 030

**Pan No.AAACD4078L**

Appellant

**Vs**

The Asst. Commissioner of Income Tax Officer,  
Circle-11(4),  
Bangalore

Respondent

**Assessee by: Shri T.Suryanarayana, Advocate  
Revenue by: Mrs Neera Malhotra, CIT-II**

**Date of hearing : 21-06-2016**

**Date of pronouncement: : 24-06-2016**

**O R D E R**

**PER SHRI A.K.GARODIA, AM**

This is assessee's appeal directed against the order of  
CIT(A)-I dated 18-10-2011 for the assessment year 2005-06.

2. The assessee has raised the following grounds:

*"1.The order passed by the learned Commissioner of Income-  
tax (Appeals)-I, Bangalore ["CIT(A)"] under section 250 of the  
Income-tax Act, 1961 ("Act") is bad in law and on facts on  
more than one of the following grounds:*

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1. Assessment order bad in law as due process of law not followed

No fresh assessment framed

1.1 The Assistant Commissioner of Income-tax, Circle-11 (4) ("AO") erred in not framing a fresh assessment under section 143(3) of the Act in accordance with the directions contained in the order under section 263 of the Act, passed by the Commissioner of Income-tax ("CIT"). Wherein the CIT(A) had set aside the original assessment order ("OAO") passed under section 143(3) of the Act and had directed the AO to frame a fresh assessment. .

1.2 The learned CIT(A) erred in upholding the assessment order passed under section 143(3) read with section 263 of the Act ("impugned assessment order" or "IAO"), without taking cognizance of the fact that the AO ought to have carried out a fresh assessment in accordance with the provisions of the Act, as they stood at the time of framing of the assessment, having regard to the fact that the CIT had set aside the original order of assessment passed under section 143(3) of the Act (OAO).

1.3 The learned CIT(A) erred in not upholding the Appellant's contention that the AO has not framed a fresh assessment since, although the IAO contains Transfer pricing ("TP") adjustments, neither a reference was made to the Transfer Pricing Officer ("TPO") nor was a Draft Assessment Order ("DAO") passed as per the provisions of section 144C of the Act, which existed on the statute on the day of passing the IAO and consequently the IAO is in violation of the principles of natural justice and ought to be set aside.

1.4 The learned CIT(A) erred in upholding the IAO which was framed by the AO without application of mind and merely by incorporating adjustments, carried out in the OAO, which itself was set aside by the CIT(A), and in doing so, an opportunity was provided to the Appellant to participate in fresh assessment proceedings and providing objections specifically as indicated as per the provisions of section 144C of the Act.

1.5 Without prejudice, the CIT(A) erred in dismissing the Appellant's grounds of appeal on merits against the IAO, on the basis that the IAO was passed pursuant to the directions issued by the CIT, without appreciating the fact that the directions of the CIT was to frame a fresh assessment after examining the issues on merits and facts.

*I. Incorporating adjustments merely on the basis of a "set aside order" is void-ab-initio and cannot be held to be a 'fresh assessment'*

1.6 The CIT(A) erred in upholding the IAO, containing the TP

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*adjustments forming part of the OAO, which itself did not survive, pursuant to the directions of the CIT under section 263 of the Act.*

*1.7 The learned CIT(A) ought to have held that since the OAO itself was set aside with directions for framing fresh assessment, no TP adjustments could have been carried out, merely on the basis of the OAO.*

*1.8 Without prejudice, the CIT(A) ought to have considered and adjudicated on the ground in relation to not following the procedure under section 144C of the Act, in framing a fresh assessment and in doing so, failed to appreciate that the TP adjustments incorporated on the basis*

*1.9 Without prejudice, even if the IAO passed by the AO is held to be valid in law, the learned CIT(A) ought to have considered the Appellant's ground that no adjustments can be made by the AO*

*The learned CIT(A) erred in not taking cognizance of the fact that the appeal filed against the OAO was held as being infructuous, and in doing so erred in not adjudicating specifically on the TP grounds, which becomes a part of the IAO, albeit by not carrying out a fresh assessment, pursuant to the directions of the CIT under section 263 of the Act. For the convenience of your good self, a copy of the grounds. of appeal filed against the original assessment order showing the transfer pricing grounds raised by the Appellant is enclosed herewith as **Attachment**.*

*1.10 The learned CIT(A) has erred in law and on facts in upholding the IAO which has incorporated all adjustments made in the OAO (including the transfer pricing adjustment) despite the fact that the directions by the CIT under section 263 of the Act was to set aside the OAO and carry out a fresh assessment.*

**2. Other grounds**

*2.1 The learned CIT(A) has erred in law and on facts by not adjudicating on all the grounds raised by the Appellant and by passing an adverse order to the prejudice of the Appellant without considering the submissions filed by the Appellant.*

*2.2 The learned CIT(A) has further erred in not accepting the transfer pricing grounds submitted before him on November 11, 2011 in good faith even before the receipt of the appellate order dated October 18, 2011 (served on the Appellant on December 3,2011) passed by him.*

*2.3 Without prejudice that the CIT's order under section 263 of the Act set aside the DAD with directions to frame a fresh assessment, the learned CIT(A) has erred in law and on facts that in dismissing the Appellant's grounds of appeal (on merits) against the IAO, by holding that "the issues decided in the order passed under section 263 of the Act cannot be decided by CIT(A)*

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under section 246A of the Act", without appreciating that the CIT's directions under section 263 to the AO in the instant case, was not conclusive but was merely a direction to further examine the issues on merit and facts.

3. Computation` of relief u/s 10A f the Act

3.1 The Id. CIT(A) has erred in law and on facts in upholding the AO's computation of relief under section 10A of the Act at Rs.742,562,786 (as against the amount of Rs.,348,027,117 claimed by the appellant in its return of income).

*Inter unit set off of losses*

3.2 The Id. CIT(A) has erred in law and on facts in upholding that relief under section 10A of the Act is o be computed on the basis of consolidated profits of all the eligible undertakings (after setting off inter unit losses of Rs.191,091,286), instead of the same being computed undertaking wise, and in doing so, disregarded the provisions of section 10A(4) of the Act.

*Exclusion of telecommunication charges*

3.3. The Id. CIT(A )has erred in law and on facts in upholding the AO's conclusion that the communication expenses amounting to Rs.164,163,227 incurred by the appellant should be excluded from the amount of 'export turnover' for the purposes of computation of relief under section 10A of the Act. The Id. CIT(A further erred in not reducing the same although, it was submitted that the communication expenses do not form part of the 'export turnover' during the assessment proceedings.

3.4 The Id. CIT(A) has erred in law and on facts in holding that after exclusion of communication expenditure/foreign currency expenditure from the 'export turnover' such amount should not be reduced from the amount of 'total turnover' for the purpose of computation of relief under section 10A of the Act and thereby ignoring the recent ruling of the jurisdictional Karnataka High Court in this regard, in the case of M/s Tata Elxsi Ltd., (ITA No.70 of 2009), which was brought to his notice.

*Provision of technical services*

3.5 The Id. CIT(A) has erred in law and on facts in upholding the AO's conclusion that HPGS is involved in providing 'technical services' outside India and therefore, the expenditure incurred in foreign currency of Rs.2,630,180,361, would have to be reduced from export turnover.

3.6 (a) The Id. CIT(A) has erred in law and on facts by rejecting the explanations offered by the appellant that it is engaged in the export of computer software from its of-shore development centres and only a portion of the software development is sometimes necessitated to be carried on at the clients location outside India as envisaged by Explanation 3 to Sec.10A of the Act, and instead upholding the contention of the AO that the appellants employees visit to its clients

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*locations and provision of software development services by the appellant amounts to provision technical services outside India and therefore, expenditure incurred in foreign currency is to be reduced from export turnover.*

*(b) The Id.CIT(A) has also failed to follow the principles of the jurisdictional Bangalore Tribunal in its order bearing ITA No.333(Bang)/2008 in the appellant's own case on similar facts, which was brought to his notice.*

**4. Software purchases treated as capital expenditure**

*4.1 The learned CIT(A) has erred in law and on facts in not giving any finding on whether the expenditure incurred towards software purchases shall be treated as capital in nature. The learned CIT(A) has also erred in disregarding the Appellant's contention that expenses need to be classified as capital or revenue expenditure before deciding on whether they need to be made part of depreciable block.*

*4.2 The learned CIT(A) has hence erred in law by disregarding the recent ruling of the jurisdictional Karnataka High Court in the case of Addl CIT vs Toyota Kirloskar Motors Private Limited (ITA No 174/2009) wherein the nature of expenditure, i.e., capital or revenue, has been held to supersede the insertion made in the depreciation schedule under the Income-tax Rules, 1962.*

*4.3 The learned CIT(A) has therefore erred in law and on facts in impliedly upholding the addition of Rs 6,526,112 to total income after providing depreciation at the rate of 60 percent 1 30 percent (depending on number of days from date of purchase) on the above and thereby ignoring the actual nature of software expenses incurred by the Appellant.*

**5. Interest income**

*5.1 The learned CIT(A) has erred in law and on facts in impliedly upholding the AO's finding that the amount of interest on income tax refunds amounting to Rs 5,561,436 received by the Appellant is taxable as income in the relevant assessment year.*

*5.2 The learned CIT(A) has erred in law and on facts by not accepting the contentions of the Appellant that mere receipt of the said interest does not ensure that the same is irrevocably made available to it, given that the matters on which the adjustments have been made have not yet reached finality and therefore such refund cannot be treated as its income.*

6. Charge of tax and interest

6.1 *The learned CIT(A) has erred in upholding the levy of interest under section 234D of the Act.*

6.2 *The learned CIT(A) has erred in sustaining the above additions & disallowances made by the AO, resulting in a tax demand of Rs 219,900,993, against the Appellant.*

6.3 *The ld. CIT(A) has erred in law and on facts in sustaining the penalty proceedings initiated by the AO under section 271(1)(c) of the Act*

*Each of the above grounds is independent to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble income tax appellate Tribunal to decide this appeal according to law".*

3. At the very outset, it was submitted by the ld. AR of the assessee that in the present case, initial assessment order passed by the AO was set aside by the ld. CIT u/s 263 of the IT Act, 1961 and consequent to that order passé by the ld. CIT, the present assessment was framed by the AO on 24-12-2010 against which the assessee carried the matter in appeal before the ld.CIT(A) but in the impugned order, it is noted by the ld. CIT(A) at para -9 of his order that five issues were raised before him. Thereafter, it was pointed out by him that the ld. CIT(A) has stated in para-10 of his order that the fifth issue regarding the levy of interest u/s 234D is mandatory and is consequential. Therefore, no interference is called for.

4. Regarding initiation of penalty u/s 271(1)(c ) of the IT Act being part of the fifth issue also, he has decided the issue against the assessee and the assessee has no grievance on

these two issues. Thereafter, he pointed out that regarding the issues raised in sl. No.1,2 & 3 as noted by the ld. CIT(A) in para-9 of his order, the ld.CIT(A) has not decided the issue by saying that these issue were decided in the assessment order as per the direction in the order passed by the ld. CIT u/s 263 of the IT Act, 1961. Therefore, these issues cannot be decided by the ld.CIT(A) u/s 246A of the IT Act, 1961. He submitted that as per order of ld. CIT u/s 263 of the Act, these issue were restored to the AO as an open remand as there was no specific direction to the AO. Therefore, these issues can be raised by the assessee before the ld.CIT(A) and he should decide the same and since he has not done so, the matter may be restored back to his file for decision on these aspects.

5. Regarding the issue no.4 noted by the ld. CIT(A) in para-9 of his order he submitted that this issue is covered in favour of the assessee by the judgment of the Hon'ble Karnataka High Court rendered in the case of M/s Tata Elxsi Ltd., 349 ITR 78.

6. The ld. DR of the revenue supported the orders of the authorities below.

7. We have considered the rival submissions. First of all, we reproduce para-9 to 14 from the order of the ld. CIT(A) for ready reference;

“9. In toto this appeal has been preferred against the –

(i)	Reduction of Rs.26,30,180,361/- spent in foreign Currency holding The same attributable to Provide Technical service outside India from the E.T.
(ii)	Addition of Rs.55,61,436/- Being interest received as Income from Other Sources
(iii)	Disallowance and addition of expenditure incurred for Purchase of software amounting Rs.95,66,525/- (Rs.11,54,534/- + Rs.84,11,987 1-) And
(iv)	Wrong computation of 10A deduction at RS.74,25,62,786/- instead of the claim of Rs.134,80,27,117/ -
(v)	Levy of interest u/s.234D of I.T.Act and initiation of penalty u/s.271(1)(c) of I.T.Act.

10. So far issue raised at (v) above is concerned the levy of interest u/s.234D of I.T.Act is mandatory and its quantification being consequential no interference is considered necessary. So far initiation of penalty u/s.271(1)(c) is concerned. I find no legal flaw in the action of A.O. because S.271(IB) introduced by F.A. 2008 w.r.e.f. 01-04-1989 empowers to initiate such proceeding even on a prima facie satisfaction of any addition/disallowance. Hence grounds of appeal are dismissed.

11. So far the issue raised at (i) (ii) & (iii) above is concerned the A.O. has originally not touched upon or had made incorrect computation but now as per the directions of CIT contained in the order u/s.263 of I.T.Act has made proper additions. It may be pointed out that no appeal had been preferred against the order passed u/s. 263 of I.T.Act dated 21-12-2009. Under such circumstances I hold that, even if appeal has been raised on such issues I have no authority to trod upon such matters. In the cases of -

Season Rubber Ltd., Vs. CIT (2003)

263 ITR 385 (Ker)

And

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Dr. A. Naresh Babu Vs. ITO (2009)  
123 TTJ (Hyd.-Trib) 836

the assesses have not preferred any appeal against such direction of the learned CIT to the ITAT. It had been held therein that, therefore it has reached finality. Therefore I have no authority to disturb the same. The ratio of case of -

Sadhuram Patel & Sons Vs. ITO  
(2009) 120 ITD 291 (Mum)

is not applicable here because in that case the direction of the CIT U/s.263 of I.T.Act was not in certain terms. The learned CIT therein had directed the AO to examine whether short term capital gains liable for taxation had been omitted or not? while completing the original assessment and it omitted to add the same in the set aside assessment thus giving a latitude to the AO which is capable of being questioned in an appeal before the CIT(A). In this case it can be inferred, from the learned CIT's order u/s.263 quoted, in the assessment order vide para 2 & 3 that he is not providing any such freedom to the A.O. and also had decided some of the grounds of appeal raised before me herein, against the assessee. In view of the above I hold that I have no authority to adjudicate the issue involved" at (i) (ii) and (iii) above. In toto it is held that the issue decided in a order passed u/s. 263 of I.T.Act cannot be decided by a CIT(A) u/s.246A of IT.Act. Following the same I am only left with the issues.

	whether the A.O. is correct in reducing the telecommunication expenditure from and
	Whether the profits of the 10A unit can be set off against the loss of another 10A unit before computation of deduction U/S.10A of IT.Act of the unit earning

12. So far issue raised at (A) above in Para 11 is concerned, now there is a plethora of decisions of jurisdictional ITAT against the appellant. Some of the cases are -

(a) I Gate Global Solutions Ltd., Vs. ACIT (2008) 24 SOT (Bang) 3

(b) Relq Software (P) Ltd., Vs. ITO (2009) 123 TTJ (Bang) 356

and

(c) M/s. Axa Business Services Pvt. Ltd., in ITA.No.749 & 750/ Bang/2007 (A.Ys. 2003-04 & 2004-05)

13. So far issue raised at (B) of Para 11 above is concerned I follow my decision in the case of -

M/s. Crossdomain Solutions Pvt Ltd

to dismiss this issue against the appellant. The relevant portion is extracted below –

7.3. I find the AR's contention not acceptable because the decision of the Hon'ble High Court is yet to be received and therefore, its nature and context is not known and therefore, it is better to go by one's own wisdom. I find the A.O. has arrived at the destination but through a very clumsy and narrow zig zag path. Therefore, I will take a very straight and simple path. For this, I depend solely on the analysis of provisions of sub-section (1) of Sec 10B of LT. Act quoted below:-

"Subject to the provisions of this section, a deduction of such profit and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive Assessment Years beginning with the Assessment Year relevant to the previous year in which the undertaking begins to manufacture or produce articles of things or computer software, as the case may be, shall be allowed from the total income of the assessee"

Provisions of sub-section (1) of Sec10B presumes that in order to be given deduction u/s.10B -

- (i) There must be an export oriented undertaking
- (ii) Such undertaking must be doing business of export
- (iii) Such business of export must be of articles or things or computers software manufactured or developed.
- (iv) Such benefit of deduction is for 10 consecutive years, etc.
- (v) The deduction shall be allowed from the total income of the assessee (under lined for emphasis.

Thus, the gist is that the deduction u/s. 10B is to be computed undertaking wise only. Probably because of such restriction, the Tribunals had allowed the set off of earlier year's loss to arrive at present year's PBU to compute the eligible deduction and horizontal set off amongst even the eligible STPI undertakings is not accepted. However, the crucial and clinching provision is at (v) above which states that the deduction even if computed u/s. 10B(4), it has to be allowed from the total income only. In other words, the allowance of Sec. 10B claim requires passing through three distinct stages. The first stage is the computation of the 10B deduction applying the formulae prescribed in Sec 10B(4) of the I.T.Act. The second stage is the computation of total income of the assessee. The third stage only comes into play if the

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total income is positive only. If the total income is negative or NIL, the procedure stops here because in such cases the deduction is not allowable. However, if the total income is positive, then the computed deduction gets the eligibility of allowance. The above conclusion is derived from the wordings –

"shall be allowed from the total income of the assessee"

It does not say that the deduction is to be allowed or reduced from the profits of export business of the undertaking but a question may arise whether an assessee can have two total incomes i.e. the one computed as per provisions of the Act and then, if it is positive a total taxable income after reduction there from the eligible IOB claim. Obviously, such proposition would be against the scheme of determination of assessable income and calculation of tax thereon provided in the IT.Act Therefore, the best way or the solution to avoid such absurd situation, it would be better and appropriate, if the total income is positive only, to reduce the eligible deduction from the profits of the business of the undertaking which will spill out the income of the assessee under the Head "Business". However, in this case, the total income as computed by the A.O. reproduced from the assessment order in page 36 of this order is negative and therefore, there is no scope for proceeding further, to third stage of allowance of eligible deduction u/s 10B of IT Act.

14. In view of the above, appeal is decided against the appellants grounds of appeal are dismissed. "

8. From para-9 of the order of ld. CIT(A), it is seen that five issues were raised by the assessee before him. Out of this, for the fifth issue i.e. levy of interest u/s 234D of the Act and initiation of penalty u/s 271(1)(c ) of the Act, no grievance is raised by the assessee before us. For the first three issues as noted by the ld. CIT(A) in para-9 of his order, no decision was rendered by the CIT(A) by stating that since no appeal has been preferred against the order passed u/s 263 of the Act, these issues cannot be decided in an appeal filed u/s 246A of the Act, 1961.

9. We have gone through the order passed by the ld. CIT u/s 263 of the Act and as per the same, he has set aside the original assessment order in respect of two issues i.e. allowability of depreciation on the software expenditure and allowability of deduction u/s 10A and u/s 80HHE of the Act in respect of profit derived from the export of Computer Software. Therefore, in respect of these two issues only, AO can pass fresh assessment order consequent to order passed by the ld. CIT u/s 263 of the IT Act, 1961 and as a consequence, only these two issues can be raised in an appeal before the ld. CIT(A) and before the Tribunal in the proceedings u/s 143(3) of the IT Act, r.w.s.263 of the IT Act, 1961.

10. In the present appeal, the assessee has raised before us some TP issues also which in our considered opinion, cannot be raised before us, in the present proceedings. Hence, these grounds of assessee are rejected.

11. Regarding the issue in respect of allowability of deduction 10A of the IT Act, we feel it proper that this issue should go back to the file of the ld.CIT(A) for a fresh decision in the light of the judgment of the Hon'ble jurisdictional High Court in the case of M/s Tata Elxsi Ltd., (Supra).

12. Regarding the issue no.1,2 & 3 noted by the ld.CIT(A) in para-9 of his order, these were not decided by the ld. CIT(A). We remand the matter back to the file of the ld. CIT(A) for a

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fresh decision on this issue because these issues were set aside by the ld.CIT to the file of the AO for a fresh decision and therefore, these issues had to be decided by the ld. CIT(A) in the present proceedings. We order accordingly.

13. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

**(VIJAYPAL RAO)**  
**JUDICIAL MEMBER**  
**Bangalore:**  
**D a t e d : 06-2016**  
**am**

**Copy to :**

- 1 *Appellant*
- 2 *Respondent*
3. *CIT(A), Bangalore*
4. *CIT, Bangalore*
5. *DR, ITAT, Bangalore*
6. *Guard File*

**(A.K.GARODIA)**  
**ACCOUNTANT MEMBER**

*By order*  
*AR, ITAT, Bangalore*