IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' : NEW DELHI)

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5622/Del./2010
(ASSESSMENT YEAR : 2005-06)

HCL Technologies BPO Services Ltd., (now stands amalgamated with HCL Technologies Limited), 806, Siddhartha, 96, Nehru Place, New Delhi. **(PAN : AAACH1645P)**	vs.	ACIT, CC – 2, New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Ajay Vohra, Senior Advocate &
Shri Aditya Vohra, Advocate
REVENUE BY : Shri Navin Chandra, CIT DR

Date of Hearing : 31.07.2017
Date of Order : 16.08.2017

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, M/s. HCL Technologies BPO Services Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 28.10.2010, passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2005-06 on the grounds inter alia that :-

"1. That the Assessing Officer erred on facts and in law in completing assessment under Section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ("the Act") at an income of Rs.3,29,10,533 as against the NIL income returned by the appellant.

2. That the Assessing Officer erred on facts and in law in reducing the link charges amounting to Rs.15,89,95,369 from "the export turnover" by the virtue of clause (iv) of Explanation 2 of Section 10A of the Act, without making the similar adjustment from" the total turnover" resulting into absurd and unintended results.

2.1. That the Assessing Officer erred on facts and in law in, making the purported adjustment from "the export turnover, in failing to appreciate the fact that the said issue has already been decided by the Hon'ble ITAT in favor of the appellant for the Assessment Year 2004-05 and even the departmental appeal against the said order of the ITAT has been rejected by the Hon'ble Delhi High Court.

3. That the Assessing Officer erred on facts and in law in disallowing depreciation to the extent of Rs.41,78,200 which the assessee had claimed on certain networking equipments / computer peripherals, covered under the Computers holding that the said items were eligible for depreciation as plant and machinery and not as computer.

3.1. That the assessing officer erred on facts and in law in making disallowance of depreciation claimed by the assessee @ 60% on certain networking equipments and computer peripherals, forming part of the "Computer System" and instead allowing the depreciation on the said items @ 25% holding the same to be in the nature of "Plant & Machinery"

> ***4. That the assessing officer erred on facts and in law in disallowing depreciation to the extent of 2,35,371 on electrical installation holding the same to be eligible for depreciation @ 15% as opposed to 25% applicable to plant and machinery.***
>
> ***5. That the assessing officer erred on facts and in law in concluding that the deduction under section 10A of the Act is to be computed after setting off of brought forward losses and unabsorbed depreciation.***
>
> ***5.1. That the assessing officer erred on facts and in law in not allowing carried forward of brought forward losses of Rs.34,99,523 and unabsorbed depreciation of Rs.2,05,013 for set off in the subsequent assessment years.***
>
> ***5.2. Alternatively, that the learned AO erred in not setting off the unabsorbed depreciation against the interest income to the extent of Rs.2,05,013/-.***
>
> ***6. That the Assessing Officer erred on facts and in law in charging interest under section 234B and 234C of the Income Tax Act, 1961."***

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : assessee has claimed deduction under section 10A of the Act admissible up to Financial Year 2009-10 being engaged in the business of providing Business Process Outsourcing (BPO) services and export of ITES of its three undertakings situated at A-104, Sector 58, Noida, 30, Egmore, Chennai and B-34/3, Sector 59, Noida. Assessee has adopted the

same figure of export turnover for total turnover for computing deduction. However, AO has reduced the link charges amounting to Rs.15,89,95,369/- from the export turnover by invoking clause (iv) of Explanation 2 of section 10A of the Act and recomputed the deduction claimed by the assessee u/s 10A of the Act. AO also disallowed the depreciation to the extent of Rs.41,78,200/- claimed by the assessee on net working / computer peripherals on the ground that the said items were eligible for deduction as plant and machinery but not as computer. AO also disallowed the depreciation claimed by the assessee on electrical installation by observing that the same are eligible for deprecation @ 15% as against 25% applicable to the plant and machinery but AO also proceeded to conclude that the deduction u/s 10A of the Act is to be computed after setting off of brought forward losses and unabsorbed depreciation. AO has also disallowed carry forward of brought forward losses of Rs.34,99,523/- and unabsorbed depreciation of Rs.2,05,013/- for set off in subsequent years and has also not set off the unabsorbed depreciation against the interest income to the extent of Rs.2,05,013/-.

3. Assessee carried the matter before the DRP by filing objections which have been dismissed by the ld. DRP. Feeling

aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

5. Ground No.1 is general in nature and does not require any adjudication.

GROUND NO.2 & 2.1

6. Bare perusal of the assessment order passed by the AO in not reducing the link charges amounting to Rs.15,89,95,369/- from the export turnover by invoking clause (iv) of Explanation 2 of section 10A of the Act shows that this view has been taken by the AO merely on the ground that the decision rendered by ld. CIT (A) in assessee's own case for AY 2004-05 holding the principle of making the similar adjustment from the total turnover in case some adjustment is made from the export turnover has not been accepted by the Department as the appeal before the Tribunal is pending.

7. However, the appeals filed by the Revenue in assessee's own case for AY 2003-04 and 2004-05 challenging the decision of ld. CIT (A) have already been dismissed and further appeals filed by

the Revenue in the Hon'ble Delhi High Court haves also been dismissed vide order dated 14.11.2001, available at pages 26 to 28 of the paper book.

8. Coordinate Bench of the Tribunal in assessee's own case for AY 2004-05, available at pages 1 to 10 of the paper book, settled the identical issue in favour of the assessee by following the decision rendered by ITAT, Delhi Bench in case of ***DCIT vs. Binary Sematics – 109 TTJ 556*** wherein it is held that, ***"the total turnover in the denominator and export turnover in the numerator have to be read in the same manner and directed the AO to exclude these items from the total turnover also while computing the deduction u/s 10A of the Act."*** Since this issue has already attained finality the link charges amounting to Rs.15,89,95,369/- from the export turnover are to be reduced while making similar adjustment from the total turnover as well as export turnover. So, following the decision rendered by the coordinate Bench in the assessee's own case for AY 2004-05, we determine grounds no.2 & 2.1 in favour of the assessee.

GROUNDS NO.3 & 3.1

9. AO by treating certain networking equipments / computer peripheral part of the computer system allowed the depreciation @ 25% by treating the same as plant and machinery, instead of

depreciation claimed @ 60% by the assessee to the tune of Rs.41,78,200/-. The ld. AR for the assessee relied upon the judgment rendered by Hon'ble Delhi High Court in case cited as ***CIT vs. BSES Rajdhani Powers Ltd. – ITA 1266/2010 dated 31.08.2010*** wherein depreciation @ 60% has been allowed on computer accessories and peripherals and further contended that the SLP filed by the Revenue in this case has also been dismissed.

10. Ld. DR for the Revenue to repel the arguments addressed by ld. AR for the assessee contended that no general item / entry for machinery and plant, and scope of item "computers" has not been expanded, the scope of items "computers" has understood in normal connotation and if any particular is commercially being referred to or sold by a different name, it is not covered under the said item / entry i.e. "computers", and relied upon the decisions rendered by Hon'ble Supreme Court in case of ***Smt. Tarulata Shyam and Ors. vs. CIT – (1977) 108 ITR 345 (SC)***.

11. However, Hon'ble High Court of Delhi in ***CIT vs. BSES Rajdhani Powers Ltd.*** (supra) set the controversy at rest by allowing the depreciation of computer accessories and peripherals, such as, printers, scanners and server etc. forming integral part of the computer system without which computer cannot be used by making following observations :-

> ***"6. We are in agreement with the view of the Tribunal that computer accessories and peripherals such as, printers, scanners and server e form an integral part of the computer system. In fact, the computer accessories and peripherals cannot be used without the computer. Consequently, as they are the part of the computer system, they entitled to depreciation at the higher rate of 60%"***

12. The Revenue has failed to bring on record if the decision rendered by Hon'ble Delhi High Court in case cited as ***CIT vs. BSES Rajdhani Powers Ltd.*** (supra) is under challenge. Case law relied upon by ld. DR cited as ***Smt. Tarulata Shyam and Ors.*** (supra) is not applicable to the facts and circumstances of this case. So, following the decision rendered by Hon'ble jurisdictional High Court in case of ***CIT vs. BSES Rajdhani Powers Ltd.*** (supra), we are of the considered view that the assessee is entitled for depreciation of computer / integral equipments @ 60% as against 25% allowed by the AO. So, grounds no.3 & 3.1 are decided in favour of the assessee.

GROUND NO.4

13. Assessee claimed depreciation on electrical installation @ 25% applicable on the plant and machinery. However, the AO allowed the depreciation @ 15% on the electrical installation used for more than 180 days and @ 7.5% for the installation used less than 180 days.

14. Ld. AR for the assessee by relying upon the decision rendered by Hon'ble High Court of Gujarat in ***CIT vs. Express Resorts & Hotels Ltd. – (2015) 56 taxmann.com 171 (Gujarat)*** contended that electrical installations are plant and as such qualify for depreciation @ 25%. Hon'ble High Court of Gujarat in the judgment in ***CIT vs. Express Resorts & Hotels Ltd.*** (supra) by following the decisions rendered by Hon'ble Supreme Court in case cited as ***CIT vs. Taj Mahal Hotel – (1971) 82 ITR 44 (SC)*** and ***Anand Theatres – (2000) 244 ITR 192*** held that electrical installations are to be regarded as plant and machinery for the purposes of depreciation in the scheme of section 32 of the Act. So, when electrical installations are treated as plant the depreciation has to be allowed @ 25% as per provisions contained u/s 32 of the Act. So, in these circumstances, ground no.4 is decided in favour of the assessee.

GROUNDS NO.5, 5.1 & 5.2

15. AO while computing the deduction u/s 10A of the Act concluded that the same is required to be computed after setting off brought forward losses of Rs.34,99,523/- and unabsorbed depreciation of Rs.2,05,013/-. However, this controversy has already been set at rest by Hon'ble Supreme Court in case cited as ***CIT vs. Yogokawa India Ltd. – 391 ITR 274 (SC) and CIT vs. JP***

Morgan Services India Pvt. Ltd. – 393 ITR 24 (SC). Hon'ble Supreme Court in ***CIT vs. Yogokawa India Ltd.*** (supra) decided the issue in favour of the assessee by observing that in case of 100% export oriented undertaking, deduction is to be granted by computing gross total income of eligible undertaking under Chapter IV and not at stage of computation of total income under Chapter VI of the Act. Operative part of the judgment in ***CIT vs. Yogokawa India Ltd.*** (supra) is as under :-

> ***" Section 10A of the Income-tax Act, 1961as originally introduced, provided that any profits and gains derived by an assessee from an industrial undertaking to which the section applied shall not be included in the total income of the assessee. The amendment of the section by the Finance Act, 2000 with effect from April 1, 2001, specifically uses the words "deduction of profits and gains derived by an eligible unit ... from the total income of the assessee". The retention of section 10A in Chapter III of the Act after the amendment made by the Finance Act, 2000 would be merely suggestive and not determination of what is provided by the section as amended, in contrast to what was provided by the unamended section. The true and correct purport and effect of the amended section will have to be construed from the language used and not merely from the fact that it has been retained in Chapter III. The introduction of the word "deduction" in section 10A by the amendment, in the absence of any contrary material, and in view of the scope of the deductions contemplated by section 10A has to be understood as embodying a clear enunciation of the legislative decision to alter the nature of the section from one providing for exemption to one providing for deductions.***
>
> ***Though the difference between the two expressions "exemption" and "deduction", broadly***

may appear to be the same, i.e., immunity from taxation, the practical effect of it in the light of the specific provisions contained in different parts of the Act would be wholly different. The above implications, would be obvious where loss making eligible units or non-eligible assessees seek the benefit of adjustment of losses against profits made by eligible units.

Sub-section (4) of section 10A which provides for pro rata exemption, necessarily involving deduction of the profits arising out of domestic sales, is one instance off deduction provided by the amendment. Profits of an eligible unit pertaining to domestic sales would have to enter into the computation under the head "Profits and. gains from business" in Chapter IV and be denied the benefit of deduction. The provisions of sub-section (6) of section 10A, as amended by the Finance Act, 2003, granting the benefit of adjustment of losses and unabsorbed depreciation, etc., commencing from the year 2001-02 on completion of the period of tax holiday also virtually work as a deduction which has to be worked out at a future point of time, namely, after the expiry of the period of tax holiday. The absence of any reference in Chapter VI of the Act to deduction under section 10A can be understood by acknowledging that any such reference or mention would have been a repetition of what, has already been provided in section 10A. The provisions of sections 80HHC and 80HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under section 10A were to be made at the stage of operation of Chapter VI of the Act. The retention of the provisions of the Act, i.e., sections 80HHC and 80HHE, despite the amendment of section 10A indicates that some additional benefit to eligible section 10A units, not contemplated by sections 80HHC and 80HHE, was intended by the Legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the deductions under sections 10A and 80HHC and 80RHE are substantially different.

From a reading of the relevant provisions of section 10A, it is more than clear that the deduction contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. Circular No. 794, dated August 9, 2000 states in paragraph 15.6 that the export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100 per cent export oriented undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision. If the specific provisions of the Act (the first proviso to sub-section (1) of section 10A and sub-sections (1A) and (4) of section 10A provide that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous circular of the Department understood the situation, it is logical and natural that the, deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in sections 70, 72 and 74 of the Act would be premature for application. The deduction under section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total, income of the assessee" in section 10A can be reconciled by understanding the expression "total income of the assessee" in section 10A as "total income of the undertaking".

Therefore, though section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act

and not at the stage of computation of the total income under Chapter VI.

Decision of the Karnataka High Court in CIT vs. Yokogawa India Ltd. [2012] 341 ITR 385 (Karn) affirmed on this point."

16. So, following the law laid down by Hon'ble Supreme Court in ***CIT vs. Yogokawa India Ltd.*** (supra), deduction u/s 10A is required to be taken before setting off brought forward losses and unabsorbed depreciation. Accordingly, Grounds No.5, 5.1 & 5.2 are determined in favour of the assessee and the AO is directed to compute the deduction u/s 10A accordingly.

GROUND NO.6

17. Ground No.6 needs no adjudication as the same is consequential in nature.

18. Resultantly, the appeal of the assessee is allowed.

Order pronounced in open court on this 16th day of August, 2017.

Sd/- **(N.K. SAINI)** **ACCOUNTANT MEMBER**	**sd/-** **(KULDIP SINGH)** **JUDICIAL MEMBER**

Dated the 16th day of August, 2017
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Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A).
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.