IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU

BEFORE SHRI N.V.VASUDEVAN, VICE PRESIDENT
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

IT(TP)A 550/Bang/2016
(Assessment year:2011-12)

M/s.Sasken Technologies Ltd.
139/25, Amarjyothi Layout, Ring Road,
Domlur,
Bengaluru-560071.
PAN:AAECS 6424 R … Appellant

Vs.

Deputy Commissioner of Income-tax,
Circle 6(1)(1),
Bengaluru. … Respondent

AND

IT(TP)A No.627/Bang/2016
(Assessment year:2011-12)
(By Revenue)
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Assessee by : Shri Padamchand Khincha,CA.
Revenue by : Shri C.H.Sundar Rao, CIT(DR)

Date of hearing : 17/10/2018
Date of pronouncement : 16/11/2018

O R D E R

Per INTURI RAMA RAO, AM:

These are cross appeals filed by the assessee as well as the revenue directed against the assessment order dated 29/01/2016 passed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] for the assessment year 2011-12.

2. Briefly, the facts of the case are that the assessee is a company incorporated under the provisions of the Companies Act, 1956. It is rendering software development services. Return of income for the assessment year 2011-12 was filed on 28/11/2011 declaring income of Rs.25,33,10,603/- and this was revised on

20/03/2013 at total income of Rs.23,72,94,572/-. Against the said Return of income, the Assessing Officer (AO) took up the case for scrutiny by issuing notice u/s 143(2) of the Income-tax Act,1961 [hereinafter referred to as 'the Act'] noticing the following international transactions in Form 3CED along with transfer pricing study report:

	Amount	Method
Purchase of fixed assets	Rs. 1,57,776	
Rendering of software development services	Rs. 13,81,00,032	CUP
Rendering of sales & marketing services	Rs. 46,25,129	CPM
Receipt of software & marketing services	Rs. 4,36,27,226	CPM
Receipt of software development services	Rs. 12,30,84,344	CPM, CUP
Interest received on loan	Rs. 46,39,048	CUP
Cross charge of management cost	Rs. 1,86,22,306	NA
Reimbursement of expenses	Rs. 1,53,18,728	NA

3. AO referred the matter to the Transfer Pricing Officer (TPO) for the purpose of bench marking the above international transactions. TPO had chosen to bench mark the international transactions of interest on loans and corporate guarantee. TPO noticed that the assessee-company had advanced loans to its wholly owned subsidiary in USA, Sasken Inc and charged interest on said loan at 3.24% and the same was claimed to be at arm's length as LIBOR rate during the financial year 2010-11 relevant to assessment year 2011-12 was at 0.9%. It was claimed that since interest charged was higher than LIBOR rate of interest, the same was at arm's length and no adjustment was required in respect of interest on loan advanced to Associated Enterprises (AE), USA. As regards transaction of corporate guarantee, it was claimed that corporate guarantee provided to its AE, Sasken, OY was not international transactions at all and reliance was placed on the decision in the case of *Bharti Airtel Ltd*. in ITA No.5861/2011.

3.1 However, TPO declined to accept the contention of the assessee and proceeded to bench mark both the transactions by applying CUP method. TPO was of opinion that interest rate which the assessee would have earned in advancing loan to unrelated third party with similar standing should be adopted. Accordingly, TPO applied yield rate of corporate bonds of similar maturity with that of loan and credit with similar rate with its subsidiary. TPO had obtained information u/s 133(6) of the Act with Crisil Ltd., about rating and prevalent average yield. TPO has given bb rating and applied interest rate of 13.46% as he felt that the tenure is not clear and it is unsecured loan. Accordingly computed upward adjustment interest on loan of outstanding as under:

Balance of loan outstanding	13,49,48,000
Rate of interest as discussed above	13.46%
Interest to be charged at ALP	**Rs.1,81,64,000**
Interest already charged	Rs.46,39,048/-
Adjustment	**Rs.1,35,24,952/-**

3.2 As regards corporate guarantee, TPO has assumed that credit rating of the subsidiary company i.e. Sasken OY as that of junk Bonds whose rating would be less than BBB+ credit rating from CRISIL Ltd. was obtained for this purpose. The difference between corporate yield and corporate bonds applicable to BBB+ and AA+ is computed at 1.84%. TPO opined that the above is to be shared between assessee and its subsidiary in equal ratio. Therefore, corporate guarantee fee at 50% of 1.84% is determined as arm's length price of international transactions. Accordingly, TPO suggested ALP adjustment in corporate guarantee of Rs.97,11,346/- as under:

5.6 Computation of Arm's Length Price of the taxpayer:

Amount of Corporate guarantee on 31.3.2010	Rs. 103,33,98,000/-
Amount of corporate guarantee on 31.3.2011	Rs. 107,77,68,000/-
Average corporate guarantee in the year	Rs. 105,55,83,000/-
Rate of corporate guarantee fee to be paid (ALP rate)	0.92%
Amount of corporate guarantee fee	Rs. 97,11,364/-

The amount of **Rs. 97,11,364/-** is determined as the adjustment u/s92CA of the IT Act in respect of the corporate guarantee given by the taxpayer.

Thus, TPO suggested TP adjustment of Rs.2,32,36,316/- as under vide order dated 30/01/2015 passed u/s 92CA(3) of the Act.

6. Summary of adjustments:

Interest on loan (para 4.4)	Rs. 1,35,24,952/-
Fees on corporate guarantee (para 5.6)	Rs. 97,11,364/-
Total adjustments u/s 92CA	**Rs. 2,32,36,316/-**

4. After receipt of TPO order u/s 92CA(3), AO passed draft assessment order dated 30/03/2015 u/s 143 r.w.s.144C of the Act, proposing addition on account of TP adjustment of Rs.2,32,36,316/- and disallowance u/s 14A of Rs.1,04,91,588/- ; addition on account of reduction of deduction u/s 10A/10AA of Rs.29,11,22,361/- and addition on account of loss on restatement of loans in foreign exchange fluctuation of Rs.47,80,862/-.

5. Being aggrieved by above additions, assessee filed objections before the Hon'ble Dispute Resolution Panel (Hon'ble DRP) contending inter alia that ALP adjustment u/s 92CA on the ground that in respect of interest on loans to foreign subsidiary LIBOR rate adopted by the assessee should be accepted and also submitted that said loans were subsequently i.e. on 31/03/2015 converted into equity. It was further submitted that loans were advanced only for business purpose therefore no bench marking is required. Without prejudice to the above, it is further contended that rate of interest adopted by the TPO was excessive.

6. Hon'ble DRP, after considering the objections of the assessee, had confirmed the reasoning of the TPO after giving broad analysis, factors to be taken into consideration to decide the rate of interest to be applied. In respect of corporate guarantee also, confirmed the findings of the TPO. Hon'ble DRP also confirmed the addition u/s 14A. As regards exclusion of royalty income from eligible profits for deduction u/s 10A/10AA of the Act, the stand of the AO was confirmed. As regards exclusion of expenditure incurred in foreign currency from export turnover for the purpose of computing

deduction u/s 10A, Hon'ble DRP, placing reliance on the decision of the co-ordinate bench of Tribunal in the assessee's own case of for assessment years 2004-05, 2006-07 and 2008-09, directed the AO to reduce it from export turnover as well as total turnover. Objections relating to deduction of expenditure incurred in foreign currency on communication and insurance placing reliance on the decision of the jurisdictional High Court in the case of *CIT vs. Tata Elxsi* (349 ITR 98) directed the AO to exclude both from export turnover as well as total turnover. As regards the loss on account of re-statement of loans in foreign currency to subsidiary companies, Hon'ble DRP had confirmed the addition noticing the fact that assessee itself has offered it as capital item.

7. After receipt of directions from the Hon'ble DRP, AO passed final assessment order dated 29/01/2016 passed u/s 143(3) r.w.s. 144C(13) of the Act.

8. Being aggrieved, the assessee is in appeal before us in ITA No.550/Bang/2016 raising the following grounds appeal:

General Grounds

1. The learned Assistant Commissioner of Income Tax, Circle - 6(1)(1), Bangalore ("AO" for brevity), learned Deputy Commissioner of Income Tax (Transfer Pricing) - 2(2)(1), Bangalore ("TPO" for brevity) and the Dispute Resolution Panel - 11, Bangalore ("DRP") ("AO", "TPO" and "DRP" collectively referred as "lower authorities" for brevity) have erred in passing the orders and giving directions in the manner passed by them. The said orders/directions being bad in law is liable to be quashed.

Grounds on necessity and expediency for making reference to TPO, charge of TP adjustment to income tax and motive of tax evasion

2. The learned AO has erred in making a reference for the determination of the Arm's Length Price of the international transactions to the TPO without demonstrating as to why it was necessary and expedient to do so.

3. The learned AO and DRP have erred in confirming the chargeability of TP adjustment to income tax in the absence of inclusion of TP addition or adjustment in the definition of income under section 2(24) of the Income Tax Act, 1961 ("the Act")

4. The lower authorities have erred in making adjustment under section 92CA without demonstrating that the Appellant had any motive of tax evasion.

Grounds on merit in respect of TP adjustment on interest received from Sasken Inc, USA

5. The lower authorities have erred in determining and making adjustment under section 92CA of the Act amounting to Rs. 1.35,24,952/- in respect of interest earned on loan given to Sasken Inc. USA. The entire basis of making impugned adjustment, inter alia, by considering the annual average yield for BB rated bonds for 5 years or more term at 13.46% instead of LIBOR is contrary to facts, bad in law and consequently the TP adjustment determined amounting to Rs. 1,35,24,952/- is to be deleted in entirety.

Grounds on merit in respect of TP adjustment on Corporate Guarantee

6. The learned TPO has erred in concluding that corporate guarantee given to M/s Sasken OY, Finland amounting to Euro 17 Million [INR 1,033,398.000 as on 01.04.2010 and INR1.077,768.000 as on 31.03.2011; average INR 1.055,583.000] constituted 'international transaction' under section 92B of the Act. On facts and in the circumstances of the case and law applicable, corporate guarantee given was not an international transaction since it had no bearing on profits. income, losses or assets and consequently the addition of Rs. 97,I1,364/- is to be fully deleted.

7. Without prejudice, the entire basis of making impugned adjustment, inter alia, by considering the corporate bond rates is contrary to facts, bad in law and consequently the TP adjustment determined amounting to Rs. 97,11,364/- is to be deleted in entirety.

8. In any case and without prejudice, the TP adjustment, if any, should be computed in respect of loan outstanding payable to Nordea Bank as on 31st March 2011 amounting to Rs.10,30,21,913/- since the risk of default, if any, will be limited to the said outstanding amount.

9. In any case and without prejudice, impugned rate of 0.92% is very very excessive.

Disallowance under section 14A

10. The learned AO and DRP have erred in disallowing an *additional' sum of Rs. 1,04,91,588/- under section 14A of the Act read with Rule 8D without appreciating that the Appellant did not incur any expenditure towards earning the exempt income other than amount disallowed in the return of income.

11. On facts and in the circumstances of the case and law applicable, disallowance made under section 14A of the Act read with rule 8D(2)(iii) amounting to Rs. 1,04,91,588/- should be fully deleted.

12. In any case and without prejudice, mutual funds not yielding dividends during the year and investments made in equity shares of subsidiary companies on account of business/commercial expediency cannot be included while computing disallowance under section 14A of the Act read with rule 8D(2)(iii).

13. In any case and without prejudice, the computation of disallowance made under section 14A of the Act read with rule 8D(2)(iii) is also incorrect.

Grounds relating to exclusion of royalty income from profits eligible for deduction under section 10A and 10AA of the Act

14. The learned AO has erred in excluding royalty income amounting to Rs. 25.63,61,000/- from the profits eligible for deduction under section I 0A/10AA of the Act without appreciating the fact that the royalty income constitutes profits of the business of the STP1 units / SEZ units and consequently the same is eligible for deduction under section 10A and IOAA of the Act.

Grounds relating to reduction of expenses incurred in foreign currency from export turnover while computing deduction under section 10A and 10AA of the Act

15. The learned AO has erred in excluding expenses incurred in foreign currency totally amounting to Rs. 7329.94 lakhs from the export turnover in the process of computation of deduction under section 10A and IOAA of the Act. On facts and circumstances of the case and law applicable, the impugned expenditure should not be reduced from export turnover while computing deduction under section 10A and 10AA of the Act.

Ground relating to excessive reduction of communication expenses and insurance charges from export turnover while computing deduction under section 10A

16. The learned AO has erred in

    a. excluding the communication expenses of Rs. 1,58,11,331/- (comprising off courier charges Rs. 28,04,822/-, Post and Telegraph Rs. 9,37.929/- Telephone charges - office Rs. 96,26,647/- and Telephone charges - mobile Rs. 24.41,934/-) from export turnover of STPI units and SEZ units without

appreciating the fact that the aforesaid expenditure were not at all incurred for the purpose of export / delivery of computer software outside India: and

b. excluding the insurance charges of Rs. 1.73.99.746/- (comprising of Asset insurance charges Rs. 17.16884/- ECGC Insurance charges Rs. 50,37,621/-. Liability insurance charges Rs. 27.57,920/-. Errors and Omission (E&O) insurance charges Rs. 43,29,936/- and Employee Insurance charges Rs. 35,57.384/-) from the export turnover STPI units and SEZ units without appreciating the fact that the aforesaid expenditure were not at all incurred for the purpose of export / delivery of computer software outside India.

Ground relating to deduction u/s 10A of the Act in respect of disallowance of loss on foreign exchange fluctuation on restatement of loan amountin2 to Rs. 47,80,862

17. The learned AO has erred in not allowing deduction under section 10A of the Act in respect of disallowance of loss on foreign exchange fluctuation on restatement of loan amounting to Rs.47,80,862/-

Ground relating to Foreign tax credit, TDS credit and credit for advance tax

18. The learned AO has erred in not fully allowing foreign tax credit. TDS credit and credit for advance tax paid. On facts and in the circumstances of the case and law applicable, foreign tax credit. TDS credit and credit for advance tax should be fully allowed.

Levy of interest under section 234B of the Act

19. The learned AO has erred in levying interest under section 234B of the Act. On the facts and in the circumstances of the case, interest under section 234B of the Act is not leviable. The assessee denies its liability to pay interest.

Prayer

20. In view of the above and other grounds to be adduced at the time of hearing, the assessee prays:

(a)that the final assessment order and the Transfer pricing order passed be quashed;

or in the alternative:

(b)Transfer Pricing adjustment totally amounting to Rs. 2,32,36,316/- be deleted

(c) additional disallowance made under section 14A of the Act be deleted or in the alternative, disallowance under section 14A of the Act be restricted to Rs. 8,32,564/- as claimed by the Appellant;

(d) royalty income be not excluded from the profits eligible for deduction under section 10A/10AA of the Act;

(e) foreign currency expenses, telecommunication expenses and insurance charges be not excluded from export turnover in computing deduction under section 10A and 10AA of the Act;

(f)deduction u/s 10A be allowed in respect of disallowance of loss on foreign exchange fluctuation on restatement of loan:

(g) foreign tax credit. TDS credit and credit for advance tax be fully allowed;

(h) interest levied under section 234B of the Act be deleted.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave 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 Income-tax Appellate Tribunal to decide the appeal according to law.

9. Being aggrieved by that part of directions of the Hon'ble DRP which are against revenue, the revenue is also in appeal before us in IT(TP)A No.627/Bang/2016 raising the following grounds of appeal:

1. ñThe directions of the Dispute Resolution Panel are opposed to law and facts of the case.

2. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the Assessing Officer to exclude all items of expenditure from both, the Export Turnover as well as the Total Turnover.

3. For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel, in so far as it relates to the above grounds may be reversed.

4. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.ò

10. First, we shall take up the assessee's appeal i.e. IT(TP)A No.550/Bang/2016. Ground No.1 is general in nature and does not require any adjudication. Grounds No.2 to 4 are dismissed as not pressed during the course of hearing.

11. Ground No.5 challenges addition on account of ALP adjustment in respect of interest on loan given to Sasken Inc.USA. Learned AR of the assessee submitted that the assessee had advanced loans to its subsidiary in USA, Sasken Inc USA for its business purpose i.e. for expansion and working capital requirements and as a result of these arrangement of funds, assessee had benefited by way of improved efficiency etc. Thus it was submitted that the loans were advanced out of business exigency and no ALP adjustment is required to be made. Without prejudice to this, it is argued that the assessee had charged interest at the rate of 3.24% as against LIBOR rate 0.54%. Since interest charged is higher than LIBOR rate, interest charged should be held to be at arm's length. Without prejudice to the above, it was submitted that rating of subsidiary company adopted by the TPO is incorrect. The TPO should have adopted LIBOR rate, for the purpose of bench marking, instead of adopting domestic lending rates. He also placed reliance on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Cotton Naturals (I) (P.) Ltd*. (55 taxman.com 523), in support of his contention.

We heard rival submissions and perused material on record. We also perused TP study report placed at pages 179 to 182 of the paper book. It is undisputed that transactions of advancing loan are international transactions. The dispute is only with regard to rate of interest to be applied for the purpose of bench marking the transaction. The Hon'ble Delhi High Court, in the case of *Cotton Naturals (I) (P.) Ltd*. (supra) has held in para.14 that in order to ascertain ALP in respect of international transactions of advancing money to its foreign subsidiary. The Hon'ble Delhi High Court, in the case of *Cotton Naturals (I) (P.) Ltd*. (supra) held that in

order to ascertain ALP return of income international transaction of advancing loan to its subsidiary, interest rate what would have been earned by the assessee by advancing loan to unrelated party in India with a similar financial health as tested party subsidiary cannot be applied. The Hon'ble High Court further held that financial position and credit rating of subsidiary will be broadly same as that of holding company. It further ruled that domestic prime rate lending or yield rate on corporate bonds in India have no applicability and LABOR rate should be taken as bench mark for international transactions. The Hon'ble Bombay High Court in the case of *CIT vs. Tata Auto Comp. System Ltd.* (374 ITR 316) rules that ALP in case of loans advanced to AE would be determined on the basis of rate of interest being charged in the country where loan is received and consumed. In the light of this position of law, we are required to adjudicate the issue of rate of interest to be charged by the assessee from its AE. In the present case, we find from the perusal of TP study report filed before us at pages 179 to 182, we find that assessee as well as TPO had not undertaken the exercise of analyzing the transaction. No material was brought on record indicating the terms of loan i.e. tenure of loan, security offered, terms of repayment of loan, currency in which loan is to be repaid etc. and RBI policy governing advancing of loans by Indian holding company to its foreign subsidiary companies credit rating etc. determination of credit rating of the lender and borrower, identification of comparable, third party loan agreements. Therefore, we remand the matter back to the TPO with a direction that assessee-company shall submit the TP study on the above loans and the TPO shall consider the analysis and bench mark the transaction by adopting legal position as enunciated in the case law cited above. Thus, this ground of appeal is partly allowed for statistical purposes.

12. Next ground of appeal relates to ALP addition on account of corporate guarantee. The assessee had furnished corporate guarantee to Sasken OY, Finland for a sum of Euro 17 million [INR

103,33,98,000] average INR 105,55,83,000/-. The contention of the assessee that it is international transaction, has been overruled by the TPO as well as the Hon'ble DRP.

12.1 It is undisputed fact that the assessee had not charged any commission on such corporate guarantee furnished by them. Without prejudice, it was argued that corporate guarantee should be charged only on outstanding loan amount and rate of commission applied by TPO is excessive and unreasonable. Reliance in this regard was placed on *Micro Ink Ltd. Vs. Addl.CIT* **(**63 taxman.com 353)(Ahd.Trib); *Bharti Airtel Ltd. Vs. Addl.CIT* in I.T.A. No.5816/Del/2012 dated 11/3/2014.

12.2 On the other hand, Learned CIT(DR) placed reliance on the orders of the lower authorities.

12.3 We heard rival submissions and perused material on record. There cannot be any dispute that the transaction of furnishing bank guarantee to subsidiary constitutes international transactions in view of retrospective amendment to the provisions of section 92B of the Act by the Finance Act, 2012 by inserting Explanation (1)(c) to section 92B w.e.f. 1/4/2002. Then the question that comes for consideration is, as to, what is the arm's length rate of commission to be applied to the transaction of securing bank guarantee. The approach of the TPO applying bench marking for ALP for corporate guarantee cannot be upheld. There cannot be universal application of any rate of commission. It depends upon terms and conditions on which loan has been given, risk undertaken and relationship between bank and client, economic and business interest are some of the major factors which are required to be taken into consideration to arrive at appropriate rate of commission. In the present case, neither the assessee nor the TPO analyzed the transactions in terms of the above stated facts. Therefore, we deem it appropriate to remand the matter to the file of the TPO/AO for fresh adjudication after analyzing the transaction in the above stated terms. TPO shall bench mark the transactions of services of

providing bank guarantee to its AE by adopting comparable unrelated transactions. We make it clear that as held by the Hon'ble Bombay High Court in *Tata Auto Comp. System Ltd* (supra), the considerations applied for issuance of corporate guarantee are distinct from that of bank guarantee. Therefore, bank guarantee commission cannot be applied. Accordingly, this ground of appeal is partly allowed for statistical purposes.

14. The next ground of appeal (Nos.10 to 13) relates to disallowance u/s 14A of the Act. During the previous year relevant to assessment year under consideration, assessee earned dividend income of Rs.6,98,25,510/-. The assessee-company itself offered disallowance under the provisions of section 14A offering to tax a sum of Rs.8,32,554/-. However, the AO was of the opinion that the amount of disallowance should be computed having regard to provisions of the rule 8D of Income-tax Rules, 1962. Accordingly, he computed disallowance as under:

i	Amount of expenditure directly relating to income which does not form part of total income	832564
ii	Interest expenses not directly attributable to any particular income or receipt, then A x B/C *	0
Iii	0.5% of average value of investments, income from which does not or shall not form part of the total income (0.5% of 2098317500)	10491588
	Aggregate of above	11324151

Value of investments	In Rupees
Opening Balance as on 01.04.2010	2,666,633,000
Closing Balance as on 31.03.2011	1,530,002,000
Average value of investments	**2,098,317,500**
0.5% of the average value of investments	**10,491,588**

14.1 Applying rule 8D of IT Rules, AO computed disallowance at Rs.1,13,24,151/- after reducing disallowance offered by the assessee a sum of Rs.8,32,564/-. The balance amount of Rs.104,91,588/- was brought to tax by the AO.

14.2 Being aggrieved, objections were filed before the Hon'ble DRP contending that when actual amount of disallowance had been offered to tax and there is no question of application of rules 8D to the facts of the present case. Hon'ble DRP, placing reliance on the decision of the Hon'ble Delhi High Court in the case of *Maxopp Investment Ltd. vs. CIT* (347 ITR 272) held that where addition is warranted, in the absence of separate books of account, amount of disallowance has to be computed in the manner laid down under the provisions of Rule 8D of the IT Rules. Accordingly, Hon'ble DRP confirmed the addition.

14.3 Being aggrieved, assessee is before us contending that for the purpose of computing average value of investments yielding exempt income alone to be considered and investment in overseas subsidiary need to be excluded, since dividend income from shares held in overseas/subsidiaries is not exempt from tax. It was further contended that the debentures and share application money are required to be excluded for the purpose of computing average value of investments under rule 8D of the IT Rules.

14.4. We heard rival submissions and perused material on record. There is no dispute about applicability of rule 14A as the assessee had earned exempt income. The Assessee also not denying applicability of rule 8D of IT Rules. However, only contention advanced is while computing average value of investments for the purpose of computing disallowance under sub-clause (3) of rule 8D, it is contended that investments which yielded exempt income should be taken into consideration and the value of investments in equity of overseas/subsidiaries, debentures, share application money should not be taken into consideration. From the perusal of orders of the lower authorities, it is clear that the assessee had not raised this contention before the lower authorities. We find that the assessee had neither filed any application for admission of this additional ground of appeal nor had the assessee had filed evidence in support of the above contention. Therefore, in the absence of application for admission of additional grounds of

appeal, the contention cannot be admitted as it is a mixed question of fact and law. Thus, grounds of appeal No.10 to 13 are dismissed.

15. Ground No.14 relates to exclusion of royalty income from eligible profits for deduction u/s 10A/10AA of the Act. It is contended that the AO has denied the benefit without appreciating the fact that royalty income was earned from 10A and 10AA eligible units. AO denied benefit on the ground that royalty income was not derived directly from the industrial undertaking and therefore, cannot form part of eligible profits for deduction u/s 10A. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of *Liberty India* v. *CIT* [2009] 317 ITR 218.

15.1 Being aggrieved, objections were filed before the Hon'ble DRP. Hon'ble DRP also confirmed addition.

15.2 Being aggrieved, assessee is in appeal before us in the present grounds of appeal.

15.3 Learned AR of the assessee contended that royalty income was derived from eligible 10A units and there was direct nexus between business undertaking and royalty income and therefore, eligible for deduction u/s 10A. Reliance in this regard was placed on the decision of the jurisdictional High Court in the case of *CIT vs. Wipro* (ITA No.3204 of 2005 dated 28/02/2012) and *CIT vs. Motorola India Electronics P.Ltd.* (46 taxman.com 167).

15.4 On the other hand, Learned CIT(DR) vehemently contended that there was no nexus between royalty income and 100% EOU undertaking and IPR in respect of which royalty income was earned cannot be related to any industrial undertaking. Further it is submitted that royalty income was shown under the head 'income from other sources' by the assessee itself, which goes to prove that it is not income from business of the assessee. It was further shown that royalty was not shown as part of turnover of 100% EOU and therefore, the question of allowing deduction u/s 10A or 10B does not arise.

15.5. We heard rival submissions and perused material on record. The issue in the present appeal is whether royalty income is eligible for deduction u/s 10A of the Act. Admittedly, royalty income was shown as income from other sources in the financial statement of the assessee. In order to claim deduction u/s 10A/10AA of the Act, the following conditions are required to be satisfied cumulatively:

i) Unit should be registered as 100% EOU under the STPI.

ii) Unit is engaged in the activity of manufacture or production o article or thing.

iii) Unit exports goods manufactured or earns convertible foreign exchange in India.

iv) The sale proceeds in convertible foreign exchange are brought in India.

15.6 From the above, it is clear that goods exported have should have direct nexus with industrial undertaking which is a duly registered 100% EOU under STPI scheme. In the present case, there was no material on record establishing that IPR are generated by the industrial undertaking which is duly registered under 10A/10AA. Even before lower authorities, the assessee had not discharged its burden of proving nexus between industrial undertaking and royalty income. In the decisions relied upon by the Learned AR of the assessee, the issue before the Hon'ble High Court was whether interest income earned on EFI etc., forms part of the business income and whether same can be claimed as eligible profits as business income u/s 10A of the Act. In those cases, there does not exist any dispute as regards existence of nexus between income and industrial undertaking. Therefore, the decisions relied upon by the Learned AR of the assessee do not come to the rescue of the assessee. Further, plea of the Learned AR of the assessee for remand of case to examine nexus cannot be allowed as no remand can be ordered to improve the chances of either of party to the case. Reliance can be placed on the following decision of the ITAT:

i. *Asst. CIT vs. Anima Investment Ltd.* (2000) 73 ITD 125(Delhi);

ii. *Asst. CIT vs. Arunodoi Apartments (P) Ltd.* (2002) 123 Taxman 48(Gau.)

The Courts have held that appeals are not to be decided for giving one more innings to the lower authorities in the appellate jurisdiction.

i. *Rajesh Babubhai Damania vs. CIT* (2001) (251 ITR 541)(Guj).

ii. *CIT vs. Harikishan Jethalal Patel* (1987) 168 ITR 472 (Guj) Remand not for the benefit of the party seeking it to fill up gaps.

Even the Hon'ble jurisdiction High Court in the case of *Karnataka Wakf Board vs. State of Karnataka,* reported in AIR 1996 Kar.55 at pages 63 & 64 held as under:

> ñWhere the party had an opportunity of adducing evidence in the case but with open eyes failed to adduce that evidence, the case should not be remanded to give a second chance to the party to adduce that evidence. The policy of the law is that once that matter has been fairly tried between the parties, it should not, except in special circumstances, be reopened and retrieved. In a recent decision their Lordships of the Supreme Court laid down that power to order retrial after remand, where there had already been a trial on evidence before the court of first instance, cannot be exercised merely because the Appellate Court is of the view that the parties who could lead better evidence in the Courts of first instance have failed to do so.ò

The Hon'ble Tribunal, Delhi bench in the case of *Zuari Leasing & Finance Corporation Ltd. vs. ITO* (2008) 112 ITD 205(Delhi)(TM), following the case-laws referred to above held that the Tribunal should not remand back to the file of the AO in order to give a second innings to the litigant. Thus, there is no merit in the ground of appeal raised by the assessee. Accordingly, the ground of appeal is dismissed.

16. Ground No.15 challenges deduction of expenses incurred in foreign currency from export turn over while computing deduction u/s 10A/10AA of the Act. During the course of assessment

proceedings, AO had noticed that assessee had incurred following expenditure to the tune of Rs.7550.60 lakhs in foreign currency on the following items:

(Rs in lakhs)

Tele communication expenses	:	
Travel	:	175.30
Professional, Legal &Consultancy Charges	:	704.85
Software expenses	:	47.97
Expenses at Branch offices	:	6194.47
Others	:	428.01
TOTAL		*7550.60 Lakhs*

Further, it is noticed that the assessee had already reduced a sum of Rs.2,20,66,228/- while computing amount of deduction u/s 10AA of the Act. Therefore, AO reduced balance expenditure of 7329.94 lakhs from export turnover for the purpose of computing deduction u/s 10A of the Act.

16.1 Being aggrieved, objections were filed before the Hon'ble DRP. Hon'ble DRP directed that telecom expenditure, insurance charges incurred in foreign currency incurred in connection with delivery of software, be reduced from the total turnover as well as export turnover following the decision of the jurisdictional High Court in the case of *CIT vs. Tata Elxsi* (supra) and expenditure incurred towards travelling and salary of the employees of the assessee deployed abroad for development, testing, installation and management of software outside India, directed the AO to exclude same from the export turnover following the decision of the co-ordinate bench of Tribunal in the assessee's own case for assessment years 2004-05, 2006-07 and 2008-09.

16.2 Being aggrieved, the assessee is before in the present appeal. It is contended that these expenses should not be reduced from export turnover while computing the amount of deduction u/s 10A as the same was not incurred for the purpose of rendering technical services and software services outside India. In this regard reliance was placed on the decision of the Hon'ble Karnataka High Court in the case of *CIT/ACIT vs. M/s. Mphasis Ltd*.in ITA

No.1075/2008 & ITA No.196/2009 and *CIT/ACIT vs. M/s. Kshema Technologies Ltd*.- in ITA No.703/2009

16.3 We find that the Hon'ble DRP had set aside the issue to the AO to verify exact nature of the expenditure incurred and directed the AO to follow decision of the Tribunal in assessee's own case for assessment years 2004-05,2006-07 and 2008-09 after due verification and therefore, we do not find any grievance in the direction of the Hon'ble DRP. Accordingly, we dismiss this ground of appeal as infructuous.

17. Ground No.16 challenges the amount of reduction of communication and insurance charges from export turnover so that the AO has adopted excessive amount as the amounts were not incurred on export or delivery of software outside India. This requires verification of facts. Accordingly, we remand this issue back to the file of the AO to verify the contention of the assessee. Thus, this ground of appeal is partly allowed for statistical purposes.

18. Ground No.17 challenges disallowance of loss on account of foreign exchange fluctuation on repayment of loan of Rs.4780862/-. During the course of hearing of the appeal, Learned AR of the assessee admitted that the loss was incurred on account of re-statement of loans which are capital in nature. Therefore, learned AR of the assessee had not pressed the ground relating to allowability of this expenditure as revenue expenditure. However, it is alternatively contended that disallowance results in inflation of business expenditure which is eligible for deduction u/s 10A of the Act. Reliance in this regard was placed on CBDT circular No.37/2016 dated 02/11/2016 and the Hon'ble Bombay High Court in the case of *CIT vs. Gem Plus Jewellery India Ltd*(330 ITR 175)(Bom).

18.1 We find merit in the alternative contention of the assessee that disallowance of expenditure results in inflation of business profits which are eligible for deduction u/s 10A. This proposition of

law is clearly enunciated by the Hon'ble Bombay High Court in the case of Gem Jewellery (supra). The relevant para is extracted below:

> "12. By reason of the judgment of the Supreme Court in Commissioner of Income Tax v. Alom Extrusions Ltd., the employer's contribution was liable to be allowed, since it was deposited by the due date for the filing of the return. The peculiar position, however, as it obtains in the present case arises out of the fact that the disallowance which was effected by the Assessing Officer has not, the Court is informed, been challenged by the assessee. As a matter of fact the question of law which is formulated by the Revenue proceeds on the basis that the assessed income was enhanced due to the disallowance of the employer's as well as the employees' contribution towards Provident Fund /ESIC and the only question which is canvassed on behalf of the Revenue is whether on that basis the Tribunal was justified in directing the Assessing Officer to grant the exemption under Section 10A. On this position, in the present case it cannot be disputed that the net consequence of the disallowance of the employer's and the employee's contribution is that the business profits have to that extent been enhanced. There was, as we have already noted, an add back by the Assessing Officer to the income. All profits of the 4 (2009) 319 ITR 306 unit of the assessee have been derived from manufacturing activity.
>
> The salaries paid by the assessee, it has not been disputed, relate to the manufacturing activity. The disallowance of the Provident Fund/ ESIC payments has been made because of the statutory provisions - Section 43B in the case of the employer's contribution and Section 36(v) read with Section 2(24)(x)in the case of the employee's contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the Revenue that in computing the deduction under Section 10A the addition made on account of the disallowance of the Provident Fund / ESIC payments ought to be ignored cannot be accepted.
>
> No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow. The second question shall accordingly stand answered against the Revenue and in favour of the assessee.

Respectfully following the ratio of the decision of the Hon'ble Bombay High Court in the above mentioned case, we allow this ground of appeal of the assessee.

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

Revenue appeal (IT(TP)A No.627/Bang/2016 :

20. The only issue in the revenue appeal relates to computation of deduction u/s 10A of the Act. As regards portion of the expenses incurred in foreign exchange towards insurance, travelling and communication is concerned, in the case of *CIT vs. Tata Elxsi* (349 ITR 98), the Hon'ble Jurisdictional High Court held that the same is required to be reduced from export turnover as well as total turnover. Respectfully following the ratio of the decision of the Hon'ble jurisdictional High Court we direct that expenses incurred in foreign exchange towards insurance, travelling and communication are to be reduced both from export turnover as well as total turnover. Therefore, the grounds of appeal filed by the revenue are dismissed.

21. In the result, the appeal filed by the assessee is partly allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 16th November, 2018

sd/-
(N.V.VASUDEVAN)
VICE PRESIDENT

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Place : Bengaluru.
D a t e d : 16/11/2018
srinivasulu, sps

Copy to :

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore