IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA No.1419/Bang/2017
Assessment year : 2011-12

M/s. Clear Water Technology Services Pvt. Ltd., No. 39, Srushti, 15th Main, Rose Garden Road, 5th Phase, JP Nagar, Bangalore – 560 078. **PAN : AABCC 8515 A**	Vs.	The Income-tax Officer, Ward – 11(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri. B. S. Balachandran, Advocate
Revenue by	:	Smt. Srinandini Das, Addl. CIT

Date of hearing	:	19.11.2018
Date of Pronouncement	:	13.12.2018

O R D E R

Per Jason P Boaz, Accountant Member

This appeal by the assessee is directed against the order of CIT(A)-2, Bangalore dated 31.03.2017 for Assessment Year 2011-12.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, a company engaged in provision of IT enabled services (call centre), filed its return of income for Assessment Year 2011-12 on 08.11.2011 declaring NIL income. The return was processed u/s 143(1) of the Income Tax Act,

1961 (in short 'the Act') and the case was taken up for scrutiny for this Assessment Year. The assessment was completed u/s 143(3) of the Act vide order dated 30.09.2013, wherein the assessee's income was determined at Rs.1,27,31,000/- in view of (i) disallowance of Rs.55,41,541/- u/s 40(a)(ia) of the Act and (ii) disallowance of the assessee's claims for set off of brought forward business loss and brought forward depreciation. On appeal, the CIT(A)-2, Bangalore dismissed the assessee's appeal vide the impugned order dated 31.03.2017.

3. The assessee, being aggrieved by the order of CIT(A)-2, Bangalore dated 31.03.2017 for Assessment Year 2011-12, has preferred this appeal, wherein it has raised the following grounds:

1. *The order of CIT (A) is bad and unsustainable in the eye of law as the same was passed without proper application of mind and without considering the explanation of the Appellant.*
2. *The CIT(A) grossly erred in confirming the disallowances as made by the AO in utter disregard to the orders of this Hon'ble ITAT in the Appellant's own case for earlier years, on both the issues involved namely deduction under S.10-B and disallowance under S.40(a)(ia) of the Act.*
3. *The CIT(A) ought to have appreciated both disallowances namely deduction under S.10-B as well as one under S.40(a)(ia) of the Act stood covered, copy of orders of the ITAT having been furnished during the course of hearing.*
4. *The CIT(A) further committed serious lapse in not even considering the afore-said judgments of this Court and further committed a grave error in even ignoring judgment of Supreme court in the case of Yokogawa relied on by the Appellant.*
5. *CIT(A) ought to have appreciated that the order relied on by her in the case of Vodafone as regards disallowance under S.40(a)(ia), has already been considered by another coordinate bench, namely Delhi 'A' Bench in the case of Bharti Airtel Ltd. Vs. ITA (TDS) and hence the same was not applicable to the facts, especially when the court had ruled in favour, in the appellant's own case.*
6. *For these and such other grounds that may be urged at the time of hearing, the Appellant prays that the appeal may be allowed by directing the AO to accept deduction under S.10-B as claimed and deleting the disallowance under S.40(a)(ia) of the Act.*

4. **Ground Nos. 1 and 6 (supra)** being general in nature, no adjudication is called for thereon.

5. **Disallowance u/s 40(a)(ia) – Rs.55,41,541/-**

5. In the grounds raised (supra), the assessee has assailed the order of the CIT(A) in upholding the AO's action in disallowing u/s 40(a)(ia) of the Act, the payment of Rs.55,41,541/- by the assessee to M/s. Novatel of USA for non-deduction of tax at source thereon u/s 195 of the Act. According to the learned AR for the assessee, similar issues have been decided in favour of the assessee by Co-ordinate Benches of this Tribunal in the assessee's own case for Assessment Year 2008-09 in ITA No.1297/Bang/2011 dated 28.09.2012; which has been followed by another Co-ordinate Bench in the assessee's own case for Assessment Year 2010-11 in its order in ITA No.1146/Bang/2013 dated 12.09.2014.

5.2 Per contra, the learned DR for Revenue supported the orders of the authorities below.

5.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited (supra). The issue for consideration before us is whether the assessee was liable to deduct tax at source u/s 195 of the Act on payments to M/s. Novatel, USA during this year. We find that this very issue has been considered and held in favour of the assessee and against Revenue by the decision of the Co-ordinate Bench of this Tribunal in its order in ITA No.1146/Bang/2013 dated 12.09.2014 for Assessment Year 2010-11; wherein, following the decision of another Co-ordinate Bench of this Tribunal in the assessee's own case for Assessment Year 2008-09 dated 28.09.2012 (supra), it was held as under at paras 13 and 14 as under:

“13. We have considered the rival submissions. We find that the ITAT in Assessee's own case for the assessment year 2008-09 in ITA No.1297/Bang/2011 order dated 28.9.2012 in respect of an identical payment to M/S. Novatel, USA, the tribunal held that the payment was not fees for technical services rendered by the non-resident but was business income in the hands of the non-resident and since the non-resident did not have a permanent residence in India, the same is not chargeable to tax in the hands of the non-resident in India. The Tribunal therefore held that there was no obligation on the part of the Assessee to deduct tax at source. The following were the relevant observations of the Tribunal.

"4.16 Also the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd. v. CIT & Anr reported in 327 ITR 456 (SC) has made it implicit that 'The most important expression in s. 195(1) consists of the words 'chargeable under the provisions of the Act'. A person paying interest or any other sum to a non-resident is not liable to deduct tax, if such sum is not chargeable to tax under the I.T.Act.

4.17 Moreover, the Hon'ble earlier Bench of this Tribunal had considered a similar issue in the case of Infosys Technologies Ltd. v. DCIT in ITA.No.1140/BangI2009 dated 21.1.2011. After due consideration of the issue and also in conformity with the ruling of the Hon'ble Supreme Court in the case of GE India Technology Centre P. Ltd. v. DCIT reported in 327 ITR 456(SC), the Hon'ble earlier Bench had decided the issue in favour of the assessee. The relevant portion of the findings of the Hon'ble Bench is reproduced as under:

'4.9 The payments made to service providers such as AT and T or MCI Telecommunications are for the use of bandwidth provided for down linking signals in the United States. The payments made are not in the nature of managerial, consultancy or technical services nor is it for the use of or right to use industrial, commercial or scientific equipment.

The service providers such as MCI Telecommunications or AT and T only ensures that the sufficient bandwidth is available on an ongoing basis to the ultimate users to uplink and downlink the signals.

4.10 The Madras High Court in the case of Sky Cell Communication Services Ltd. v. DCIT Manu/TN/0461/2001 -- 2521 ITR 53 has held that payment for use of mobile phone services would not constitute royalties or fees for technical services. Payments made for bandwidth are akin to the payments for use of mobile phone services.

4.11 The Bangalore Bench of the ITAT in the case of Wipro Ltd. v. ITO 80 TTJ 191 has held that payment for bandwidth would constitute neither royalties nor fees for technical services either under the Act or under the agreement for Avoidance of Double Taxation with USA. This decision was followed by the Tribunal in the

assessee's own case [ITA.No.532 and 533/Bang/2002 and ITA.No.365 and 367/Bang/2003 dated 12.8.2005]. Moreover, the recent decisions of the AAR in the following cases have decided in favour of the assessee.

Dell International Services (P) Ltd. v. CIT Manu/APJ2002/2008 -- 305 ITR 37 ISRO Satellite Centre (ISAC) v. DIT Manu/AP./0010/2008 -- 307 ITR 59; and Cable and Wireless Networks India (P) Ltd. v. DIT Manu/AR/0018/2009 72.' 4.18 In the overall consideration of the facts and circumstances of the issue and also in conformity with judicial views referred supra, we are of the considered view that the assessee had no obligation whatsoever to deduct tax at source when the payments made to Novatel and as such, no disallowance u/s 40(a)(ia) of the Act was called for. It is order ordered accordingly."

14. Respectfully following the decision of the Hon'ble ITAT cited above in the appellant's own case for the assessment year 2008-09, we uphold the order of the CIT(A) deleting the disallowance made by the AO u/s 40(a)(ia) of the Act relating to the payment made to M/s Novatel of the USA is deleted."

5.3.2 Respectfully following the decisions of the Co-ordinate Benches of this Tribunal in the assessee's own case for Assessment Years 2008-09 (supra) and 2010-11 (supra), we reverse the order of the CIT(A) and direct the AO to delete the disallowance made u/s 40(a)(ia) of the Act in respect of the payment of Rs.55,41,541/- made by the assessee to M/s. Novatel of USA. Consequently, the grounds raised by the assessee on this issue are allowed.

6. Set off of brought forward of business loss and depreciation for computing deduction u/s 10A of the Act

6.1 In these grounds (supra), the assessee assails the action of the CIT(A) in upholding the order of the AO, ignoring the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Yokogawa India Ltd., (341 ITR 385) (Kar) in which it was held that the deduction u/s 10B of the Act is to be computed without setting off brought forward business losses of non section 10B units and to consider carry forward of non section 10B units losses as per the provisions of section 72 of the Act separately.

6.2 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement cited (supra). On perusal of para 4.4 of the impugned order, it is seen that the CIT(A) has not adjudicated this issue on the ground that this claim of the assessee pertained to Assessment Year 2010-11 and not the year under consideration i.e., Assessment Year 2011-12. The CIT(A) has also directed the AO to give consequential effect of earlier years as per the latest enforceable order. In these circumstances, it cannot be said that CIT(A) has dismissed the assessee's claim. We, accordingly, direct the AO to follow the order of the CIT(A) to give consequential effect of earlier years as per the latest order and further direct the AO to follow the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Yokogawa (supra) while setting off the carry forward business losses and depreciation in the computation of the assessee's claim for deduction u/s 10B of the Act. We hold and direct accordingly. Consequently, the grounds raised on this issue are allowed for statistical purposes.

7. In the result, the assessee's appeal for assessment year 2011-12 is partly allowed.

Order pronounced in the open court on this 13th day of December, 2018.

Sd/-	Sd/-
(N. V. VASUDEVAN)	**(JASON P BOAZ)**
Judicial Member	**Accountant Member**

Bangalore.
Dated: December, 2018.
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Copy to:

1. Appellants	2. Respondent
3. CIT	4. CIT(A)
5. DR	6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.