

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.74/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Capgemini Technology Services India Ltd.,
(In the matter of erstwhile iGATE Computer
Systems Ltd. formerly known as
Patni Computer Systems Ltd.
and since amalgamated with
iGate Global Solutions Ltd. and now name
changed to Capgemini Technology Services India Ltd.)
Plot No.14, Rajiv Gandhi Infotech Park,
Hinjewadi, Phase-III, MIDC-SEZ,
Village Man, Taluka Mulshi,
Hinjewadi, Pune – 411057

.... अपीलार्थी/Appellant

PAN:AABCP6219N

Vs.

The Dy. Commissioner of Income Tax
Circle 11, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.299/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

The Dy. Commissioner of Income Tax
Circle 11, Pune

.... अपीलार्थी/Appellant

Vs.

M/s iGATE Computer Systems Ltd.
(formerly known as Patni Computer Systems Ltd.)
amalgamated with iGate Global Solutions Ltd.,
Level 2, Tower-III,
Cybercity, Magarpatta City,
Hadapsar, Pune – 411013

.... प्रत्यर्थी / Respondent

PAN:AABCP6219N

Assessee by : Shri C.H. Naniwadekar
Revenue by : Ms. Divya Bajpai

सुनवाई की तारीख / Date of Hearing : 06.02.2019	घोषणा की तारीख / Date of Pronouncement: 18.03.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross appeals filed by assessee and Revenue are against order of DCIT, Circle-11, Pune, dated 31.12.2015 relating to assessment year 2011-12 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by assessee and Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.74/PUN/2016 has raised the following grounds of appeal:-

1. *In respect of deduction u/s 10A/10AA in respect of certain eligible undertakings of the Company:*
 - a. *In not allowing deduction u/s 10A/10AA of Rs.240,14,52,340 in respect of various eligible undertakings established after A.Y. 2005-06, viz. Airoli, Noida SEZ, Hyderabad and Gandhinagar SEZ.*
 - b. *In assuming jurisdiction to disallow the deduction u/s 10A/10AA in respect of such undertakings by observing and holding that the new units/undertakings have been formed by splitting up of a business already in existence since the 1980s, and that the profits and gains of the units/undertakings subsequently setup by the Company are not eligible for deduction u/s 10A/10AA of the Income-tax Act 1961.*
 - c. *In denying the deduction u/s 10A/10AA in respect of such eligible undertakings on the basis of the nature of business etc.*
 - d. *In re-examining the conditions of eligibility of deduction u/s 10A/10AA in respect of various undertakings established in earlier years. The Assessing Officer ought to have appreciated that the eligibility conditions in respect of splitting up of business already in*

existence is required to be complied with in the year of formation of the undertaking.

- e. *In relying on various observations and conclusions recorded in the assessment order for earlier years and thereby not allowing deduction u/s 10A/10AA in respect of such eligible undertakings.*
 - f. *In holding and concluding that new unit at Gandhinagar SEZ is no exception to the stand taken by the Department and is clearly formed by the splitting up and the reconstruction of the existing business as provided in Section 10AA of the Act on the basis that some of the employees have been transferred to this unit and new unit is also carrying on the same business of software development services.*
2. *In not considering the unit at TTC BPO as a separate and independent undertaking for the purpose of section 10A and holding that the unit at TTC BPO is formed by splitting up and reconstruction of the existing BPO business of the assessee which is being carried on at NDA 58 unit and thereby netting the profits of the TTC, BPO business against the loss of the NDA 58 unit for the purpose of allowing deduction u/s 10A.*
 3. *In charging interest u/s 234C at Rs.30,97,009/-*
 4. *In not allowing credit under DTAA for taxes paid in the USA and Japan amounting to Rs.5,12,99,494/- while computing tax liability.*
 5. *In not allowing credit for TDS as per Form 26AS.*
4. The Revenue in ITA No.299/PUN/2016 has raised the following grounds of appeal:-

1. *The DRP has erred in allowing deduction u/s 10A in respect of 6 units including the two units namely Akurti and Millennium Business Park without appreciating the fact that the approving authority i.e. Software Technology Park of India (STPI) had approved the above two units as expansion of existing units on the basis of the assessee's application stating these units to be expansion of the existing units, thereby, not fulfilling the condition laid down u/s 10A(2) of the Act. The dept had filed SLP against the order of Hon'ble High Court in respect of these two units on the issue for the A. Yrs 2002-03 to 2004-05.*
2. *The DRP erred in directing the Assessing Officer to delete the disallowance made u/s 14A r.w. Rule. 8D even though the assessee has earned substantial amount of tax free dividend and has disallowed meager amount u/s 14A on estimated basis.*
3. *The DRP erred in directing the Assessing Officer to delete the ESOP cost on the basis of the special Bench of ITAT Bangalore decision in the case of Biocon Limited even though the issue has not reached finality and being notional.*

4. *The DRP has erred in directing the Assessing Officer to delete disallowance u/s 10A(7) rws 801A(10) when in fact the assessee has earned substantial excessive profits as discussed in Assessment Order.*
5. *The DRP has erred in directing the Assessing Officer to delete disallowance u/s FBT paid in Australia not treating it as income tax.*
6. *The Hon'ble DRP erred in allowing assessee's claim u/s 40a(i) in respect of disallowance made in connection with foreign remittance made towards software and other services where TDS was not deducted.*

5. The learned Authorized Representative for the assessee pointed out that major of the issues raised in cross appeals are covered by the order of Tribunal in assessee's own case relating to assessment year 2010-11.

6. The ground of appeal No.1 raised by assessee and the Revenue are linked and in respect of deduction claimed under section 10A/10AA of the Act in respect of certain eligible undertakings of the company. The assessee had established different undertakings in different assessment years and had claimed them to be independent new units / undertakings. However, the case of Revenue was that the new units / undertakings were formed by splitting of business already in existence since 1980 and hence the profits and gains of the said units / undertakings subsequently set up by the assessee company were not eligible for deduction under section 10A/10AA of the Act. As part of ground of appeal No.1 raised by assessee vide clause (f), the assessee is aggrieved in not allowing the aforesaid claim of deduction in respect of new unit at Gandhi Nagar SEZ, set up during the year under consideration. The grievance of Revenue on the other hand, is against order of DRP in allowing deduction under section 10A of the Act in respect of six units including two units at Akurti and Millennium Business Park. The learned Authorized Representative for the assessee has taken us through the issue decided by Tribunal in assessee's

own case for assessment year 2010-11 in cross appeals vide ITA No.216/PUN/2015 & 360/PUN/2015, order dated 25.01.2018, wherein the decision has been given in respect of several undertakings, wherein one was BPO and deduction claimed was allowed under section 10A of the Act. In respect of balance 11 undertakings, deduction was allowed in respect of 10 units except Hyderabad unit, for which no deduction was allowed as independent unit. The Tribunal vide para 15 has referred to earlier orders of Tribunal and first decided the issue in respect of all the units and the BPO unit except Hyderabad unit and held as under:-

“15. We have heard the rival contentions and perused the record. The issue raised in ground of appeal No. 2 is against the claim of deduction u/s. 10A/10AA of the Act in respect of various eligible undertakings established by the assessee from assessment year 2005-06 onwards. The case of the Revenue was that new units/undertakings were formed by splitting up of the business already in existence and hence, not eligible for claiming the aforesaid deduction. The assessee is also aggrieved by the order of Assessing Officer in denying the said deduction to such eligible undertaking which have been allowed the deduction by the Tribunal in earlier years. The assessee has claimed that it has 12 eligible undertakings in the current year and there is no dispute in respect of the BPO undertaking. Out of balance 11 undertaking, 2 undertakings established in assessment year 2005-06, and 5 undertakings were established up to assessment year 2004-05; one undertaking established in assessment year 2007-08, one undertaking established in assessment year 2009-10 and TTC (BPO) undertaking established in assessment year 2009-10. The Tribunal in assessee’s own case vide consolidated order dated 06.06.2016, in ITA No. 1338/PN/2010 relating to assessment year 2006-07, ITA No. 1451/PN/2011 relating to assessment year 2007-08, ITA No. 2507/PN/2012 relating to assessment year 2008-09 and ITA No. 282/PN/2014 relating to assessment year 2009-10 had individually considered the various undertakings established by the assessee from year to year and had also relied upon the order of Tribunal in assessment year 2005-06 and directed the Assessing Officer to allow the deduction u/s. 10A of the Act to the said eligible units. The only new undertaking which has been established in the current year is at Hyderabad. Following the parity of reasoning as in the earlier years, we direct the Assessing Officer to allow the deduction u/s. 10A of the Act in respect of various undertakings established by the assessee from year to year, except new undertaking at Hyderabad which we shall decide separately. As per the undertakings claimed as TTC (BPO) the same was established in assessment year 2009-10 and the Tribunal has in ITA No. 282/PN/2014 vide paras 90 and 91 held that since, the assessee satisfies the employee condition as per the CBDT Circular No. 14/2004 dated 08.10.2014 held that there was no justification in denial of deduction u/s. 10A of the Act. The assessee has raised the issue of denial of deduction u/s. 10A in respect of TTC (BPO) by way of ground of appeal No. 3 and hence, the same is allowed.”

7. The facts and issue arising in the present appeal are similar to the facts and issue in earlier years and following the same parity of reasoning, we hold that the assessee is entitled to the claim of deduction under section 10A of the Act in respect of various undertakings which were established by the assessee from year to year except the new undertaking at Hyderabad. Further, the Tribunal also held that BPO unit is entitled to the claim of deduction under section 10A of the Act. So, the assessee is thus, held to be eligible to claim the deduction in respect of BPO undertaking and out of 11 undertakings in respect of 10 undertakings, the said claim is allowed.

8. Now, coming to the claim of deduction in respect of eleventh undertaking i.e. unit at Hyderabad. The Tribunal vide paras 16 and 17 held that the claim of assessee is not correct and the assessee is not entitled to the claim of deduction under section 10A of the Act. However, vide para 18, the alternate plea raised by the assessee on without prejudice was allowed that the undertaking at Hyderabad may be treated as expansion of the existing unit at Pune, from where the employees were transferred. The Tribunal thus, directed the Assessing Officer to allow the said deduction under section 10A of the Act to Hyderabad unit being expansion of Pune unit, for the remaining period as eligible to the Pune unit. We similarly, direct the Assessing Officer to follow the directions of Tribunal in para 18 in this regard.

9. Now, the last undertaking which is to be adjudicated is the new undertaking established in Gandhi Nagar.

10. The learned Authorized Representative for the assessee pointed out that new unit at Gandhi Nagar was established independently and was not formed by splitting of any of the old units. He also pointed out from the list of new assets purchased, were totaling ₹ 4.23 crores, copy of which is placed at page 14 of Paper Book. The learned Authorized Representative for the assessee then referred to pages 19 to 22 of Paper Book and pointed out that only 15% of employees were transferred from old unit, whereas the limit prescribed by CBDT is 50%.

11. The learned Departmental Representative for the Revenue on the other hand, pleaded that substantial number of employees have been transferred, hence it cannot be said to be case of new unit being established.

12. We have heard the rival contentions and perused the record. In order to avail the deduction under section 10A of the Act, requirement for the assessee was to fulfill the conditions laid down by the CBDT vis-à-vis employees transferred from existing undertaking. However, no such condition is imposed under the Act, but the CBDT had prescribed that where more than 50% employees are transferred, then it is case of splitting up or re-construction of business already in existence. During the year under consideration, the assessee had established new unit at Gandhi Nagar, wherein it made investment in the fixed assets to the tune of ₹ 4.23 crores. Further, the assessee had also filed list of employees, wherein the employees to the extent of 15% were transferred from old unit to Gandhi Nagar unit. Since it had fulfilled the conditions laid down by CBDT, then it cannot be said to be formed by splitting up or re-construction of business already in existence.

Consequently, we hold that the assessee had established new undertaking at Gandhi Nagar, for which the assessee is entitled to claim the deduction under section 10A of the Act independently. Accordingly, we hold so. The ground of appeal No.1 raised by assessee is allowed and ground of appeal No.1 raised by Revenue is dismissed.

13. Now, coming to the next claim of assessee vide ground of appeal No.2 in respect of TTC BPO being separate and independent undertaking, entitled to claim the benefit under section 10A of the Act. The said issue has also been decided by the Tribunal in assessment year 2010-11 and following the same parity of reasoning, we allow the claim of assessee vis-à-vis TTC BPO unit.

14. Further, the assessee has raised grounds of appeal No.3 to 5, which are not pressed as the issue has been rectified vide order passed under section 154 of the Act. Consequently, the said grounds of appeal are dismissed as not pressed.

15. Now, coming to balance grounds of appeal raised by the Revenue, wherein vide ground of appeal No.2 the Revenue is aggrieved by deletion of disallowance made under section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (in short 'the Rules'). The Assessing Officer had made the aforesaid disallowance under section 14A of the Act read with Rule 8D of the Rules. However, the DRP vide para 6 had deleted the said disallowance on the ground of lack of satisfaction.

16. The learned Authorized Representative for the assessee pointed out that similar issue was decided by the Tribunal in assessee's own case for assessment year 2010-11 i.e. for lack of satisfaction recorded by the Assessing Officer, disallowance made was deleted.

17. The perusal of draft assessment order reflects the Assessing Officer to have noted that the assessee had earned tax free dividend income of ₹ 50.41 crores. The assessee in computation of income had disallowed sum of ₹ 50 lakhs under section 14A of the Act. The perusal of assessment order does not reflect the Assessing Officer to have recorded satisfaction as to why *suo motu* disallowance made by the assessee at ₹ 50 lakhs is not sufficient to cover disallowance of expenditure relatable to exempt income, in view of the provisions of section 14A(2) of the Act. The Assessing Officer has noted the fact that similar disallowance was made in earlier year which was though allowed by DRP, but the appeal is pending before the Tribunal and hence, he computed disallowance under section 14A of the Act read with Rule 8D of the Rules at ₹ 6,02,73,236/-. Since the assessee had already disallowed sum of ₹ 50 lakhs, the additional disallowance was worked out at ₹ 5,52,73,236/-. The DRP had allowed the said claim of assessee in turn, relying on its order for earlier year. The Tribunal in assessee's own case relating to assessment year 2010-11 (supra) had decided the issue vide paras 34 and 35 and had held that in the absence of any satisfaction being recorded by the Assessing Officer before making aforesaid disallowance under section 14A of the Act, then there is no merit in the disallowance made by the Assessing Officer. Reliance in this regard was placed upon the ratio laid down by the Hon'ble Supreme Court in *Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT & Anr.* (2017) 394 ITR 449

(SC). The relevant findings of Tribunal are in paras 34 and 35 at pages 18 to 20 of the order of Tribunal, which read as under:-

“34. We have heard the rival contentions and perused the record. The Assessing Officer while passing the assessment order in para 10 had observed that the assessee had earned significant amount of tax free dividends and in the computation of income, the assessee has disallowed sum of Rs.50 lakhs under section 14A of the Act. Then, reference is made to the Note filed by the assessee on expenditure disallowable under section 14A of the Act. The Assessing Officer thereafter, takes note of the contents of said explanation and observed as under:-

“I have gone through the submissions made by the assessee. It is observed that apart from investments in the overseas subsidiaries (where there is no tax-free income since the dividend is also taxable) the investments made by the assessee are in mutual funds. The entire investment in mutual fund is in non-equity scheme. In respect of investment in mutual funds, except for growth funds, the company receives tax free dividend. The amount of dividend received by the company is substantial. This is a clear case for application of Rule 8D. Hence, the contention of the assessee cannot be accepted. The disallowance u/s 14A is required to be made by applying Rule 8D. As per the working of disallowance u/s 14A as per Rule 8D, the amount of disallowance comes to Rs.5,68,32,323/-. The assessee has already disallowed Rs.50,00,000/- in the computation of income.”

35. The requirement of section 14(2) of the Act is that the Assessing Officer is to record as to why the disallowance made by the assessee i.e. Rs.50 lakhs under section 14A of the Act is not correct. The Assessing Officer takes note of the disallowance, considers the explanation of assessee and holds that the contention of assessee cannot be accepted. The preliminary satisfaction to be recorded by Assessing Officer, before making disallowance under section 14A of the Act read with Rule 8D of the Rules, is missing in the case; in the absence of the same, there is no merit in the disallowance made by the Assessing Officer. We find support from the ratio laid down by the Hon'ble Supreme Court in Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT & Anr. (2017) 394 ITR 449 (SC).

“37. We do not see how in the aforesaid fact situation a different view could have been taken for the assessment year 2002-03. Sub-sections (2) and (3) of section 14A of the Act read with rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of section 14A(2) and (3) read with rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.”

(underline provided by us for emphasis)

18. Following the same parity of reasoning and since the issue was also decided by the Assessing Officer on the basis that similar disallowance was made in earlier year, we allow the claim of assessee in entirety and dismiss the ground of appeal No.2 raised by Revenue.

19. The issue in ground of appeal No.3 raised by Revenue is against deletion of disallowance made of ESOP cost. The Assessing Officer had noted the fact that similar disallowance was made in earlier year. Though the DRP had allowed the said claim but since the Department had filed an appeal against the order of DRP, disallowance was made of ₹ 16,78,25,399/-.

20. The learned Authorized Representative for the assessee pointed out that the said issue has also been decided by the Tribunal in assessee's own case and the claim has been allowed in entirety. The Tribunal had remitted the issue back to the file of Assessing Officer to follow the directions of Tribunal in assessment year 2009-10 and decide the issue accordingly. Applying the same, we remit this issue also back to the file of Assessing Officer to decide the same in line with directions of Tribunal in assessment year 2009-10. The ground of appeal No.3 raised by Revenue is thus, dismissed.

21. Now, coming to the next issue i.e. against order of DRP in allowing disallowance made under section 10A(7) r.w.s. 80IA(10) of the Act.

22. The case of assessee before us is that the said issue stands covered by the order of Tribunal from assessment year 2006-07 to 2009-10. The case of Assessing Officer was that as against net profit margins of assessee at 31.34%, the mean margins of comparables selected for benchmarking

international transactions worked out to 12.40%. The Assessing Officer thus, has invoked the provisions of section 10A(7) r.w.s. 80IA(10) of the Act. The case of assessee before us in assessment year 2010-11 was that in the absence of any arrangement between the assessee and other persons and also in the absence of assessee making more than ordinary profits out of such arrangement, the provisions of section 10A(7) r.w.s. 80IA(10) of the Act were not applicable. The Assessing Officer in assessment year 2010-11 had re-computed the profits of BPO business and worked out the disallowance. The Tribunal in turn, relying on the ratio laid down by Pune Bench of Tribunal in M/s. Honeywell Automation India Ltd. Vs. DCIT in ITA No.18/PN/2011, relating to assessment year 2006-07 vide order dated 25.02.2015 had held that in the absence of any arrangement of earning more than ordinary profits pointed out by Assessing Officer and also there being no arrangement between the assessee and comparables, provisions of section 10A(7) of the Act were not attracted. The relevant findings of Tribunal are in paras 24 to 27 at pages 14 to 16 of the order.

23. In the facts of present case also the Assessing Officer noted that net profit margins earned by assessee were 31.77%. However, the profit margins earned by 7 companies were 9.33% (mean margins). The Assessing Officer thus, had invoked provisions of section 10A(7) r.w.s. 80IA(10) of the Act and held the assessee to have earned more than average profits than its comparable companies and where 26% of export of services were provided by the assessee to its group companies, there was close business connection between group companies which enabled the assessee to show more than ordinary profits. The Assessing Officer thus, computed disallowance of BPO business carried out from NDA-58, TTC BPO and also from Noida, SEZ and

disallowance under section 10A(7) of the Act in respect of BPO business was made at ₹ 35,15,727/-. The Assessing Officer re-computed the deduction allowable under section 10A of the Act in respect of other undertakings. The DRP held that in the absence of any arrangement made between the parties, there was no merit in disallowing any part of profits under section 10A(7) r.w.s. 80IA(10) of the Act.

24. The Tribunal had already decided this issue in assessee's own case in assessment year 2010-11 vide paras 24 to 26 and applying the same ratio, we find no merit in ground of appeal No.4 raised by Revenue.

25. Now, coming to next issue which is in respect of disallowance made on account of FBT paid in Australia.

26. Brief facts relating to the issue are that the assessee had claimed sum of ₹ 48,17,580/- as deduction on account of Fringe Benefit Tax (FBT) paid in foreign country. The said amount was added back in the computation of income but note was attached to the computation of income stating that the amount was in the nature of employees cost and the same is to be allowed as deduction at the time of assessment. The assessee also explained the nature of FBT tax in Australia and stressed that FBT was not tax on income. The Assessing Officer rejected the claim of assessee holding that FBT paid in Australia was nothing but income tax.

27. The DRP allowed the claim of assessee holding as under:-

“10.3 Findings

We have considered the facts and the legal position. Clause (ic) of section 40(a) provides that any sum paid on account of fringe benefit tax under Chapter XIIH shall not be allowed as deduction. Further, clause (b) of section 115W defines ‘fringe benefit tax’ to mean the tax chargeable under section 115WA. Thus, FBT paid in Australia is not covered by clause (ic). Further, from the perusal of documents submitted by the assessee, it is observed that the FBT paid in Australia is not a tax on income. Accordingly, we allow the deduction of FBT paid in Australia.”

28. The Revenue is in appeal against the order of DRP.

29. The learned Departmental Representative for the Revenue pointed out that FBT paid in Australia is against remuneration paid to employees deputed in India.

30. The learned Authorized Representative for the assessee pointed out that FBT paid under Chapter XIIH is paid in India and is covered by provisions of section 40(a)(ic) of the Act. However, there is no provision under the Act to disallow foreign FBT tax paid and it is *simile* drawn from the provisions of section 40(a)(i) of the Act and pointed out that since the assessee was entitled to Double Taxation Relief, so foreign tax paid was not to be disallowed in the hands of assessee.

31. We have heard the rival contentions and perused the record. Under clause (ic) of section 40(a) of the Act, it is provided that fringe benefit tax paid under Chapter XIIH is not to be allowed as deduction while computing income under the head ‘Profits & gains or profession’. In other words, FBT paid in India under the provisions of the Act is not to be allowed as deduction but there is no such embargo in respect of FBT paid in Australia. We uphold the findings of

DRP in this regard that FBT paid in Australia is not covered by clause (ic) of section 40(a) of the Act.

32. Similar is the proposition laid down by Mumbai Bench of Tribunal in ACIT Vs. Shipping Corporation of India in ITA No.5556/Mum/2007, along with CO No.294/Mum/2007, relating to assessment year 2003-04, order dated 23.12.2010. Accordingly, the ground of appeal No.5 raised by Revenue is dismissed.

33. Now, coming to last issue raised by Revenue i.e. deletion of disallowance made under section 40(a)(ia) of the Act in respect of overseas payments. The issue raised by Revenue is in respect of non deduction of tax at source out of certain payments made by the assessee to its associated enterprises. The assessee had not deducted tax at source out of following payments:-

a)	<i>AMC Charges</i>	<i>Rs. 16,76,325</i>
b)	<i>Consultancy Fees</i>	<i>Rs. 81,54,754</i>
c)	<i>Purchase of software licenses</i>	<i>Rs.1,51,00,945</i>
d)	<i>Data link charges</i>	<i>Rs.8,75,36,820</i>
e)	<i>Other payments</i>	<i>Rs. 7,14,007</i>

34. The Assessing Officer relying on the orders of earlier years had held the assessee liable to deduct tax at source out of aforesaid payments and for such non deduction, had disallowed the expenditure in the hands of assessee.

35. The DRP in turn, relying on the order of Tribunal in ITA Nos.1636 & 1637/PN/2014, relating to assessment years 2011-12 and 2012-13, order dated 29.04.2015 in respect of data link charges had held that the assessee was not required to deduct tax at source on payment of data link charges and hence, the assessee had not defaulted in not deducting tax at source on the payments

made. In view of the issue being settled in respect of data link charges by the Tribunal in assessee's own case, we find no merit in the submissions of Revenue in this regard.

36. Now, coming to balance payments which have been allowed by the DRP. Reliance was placed on the order of Tribunal for assessment years 2008-09 to 2010-11 in ITA Nos.1172 to 1174/PN/2013, dated 10.04.2015. The Tribunal had held that no liability to deduct tax could be fastened on the assessee to deduct tax at source on the basis of subsequent amendments made in the Act in relation to payments made to non residents, this was the view of Tribunal while deciding the appeals against order passed under section 201(1) / 201(1A) of the Act.

37. Further, the Tribunal in the case of John Deere India Pvt. Ltd. Vs DDIT (International Taxation) in ITA Nos.905 to 908/PUN/2015, relating to assessment years 2007-08 and 2008-09, order dated 23.01.2019 have also elaborately discussed the issue in paras 45 to 89 and the Tribunal in final analysis has held as under:-

"90. In conclusion, we hold that purchase of software by the assessee being copyrighted article is not covered by the term 'royalty' under section 9(1)(vi) of the Act. Where the assessee did not acquire any copyright in the software, is not covered under Explanation 2 to section 9(1)(vi) of the Act. We further hold that amended definition of 'royalty' under the domestic law cannot be extended to the definition of 'royalty' under DTAA, where the term 'royalty' originally defined has not been amended. As per definition of 'royalty' under DTAA, it is payment received in consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to deduct tax for payments made for purchase of software. In such scenario, the assessee cannot be held to be in default and the demand created under section 201(1) and interest charged under section 201(1A) of the Act is thus, cancelled."

38. In view of the issue being settled, we find no merit in the ground of appeal No.6 raised by the Revenue. The assessee was not obliged to deduct tax out of aforesaid payments made to associated enterprises and hence, has not defaulted in not deducting tax at source. Consequently, the assessee is entitled to the said claim and no disallowance is to be made under section 40(a)(ia) of the Act. The grounds of appeal raised by Revenue are thus, dismissed.

39. In the result, the appeal of assessee is partly allowed and appeal of Revenue is dismissed.

Order pronounced on this 18th day of March, 2019.

Sd/-
(D.KARUNAKARA RAO)
लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 18th March, 2019.

GCVSR

आदेश की प्रतिलिपि अद्योपित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP-3, Mumbai;
4. The PCIT-1, Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलिय अधिकरण ,पुणे / ITAT, Pune