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

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

IT(IT)A Nos.910 & 911/Bang/2015
Assessment years : 2008-09 and 2009-10

The Income-Tax Officer, Ward-3(1)(4), Bangalore.	Vs.	M/s. Invitrogen Bioservices India Pvt. Ltd., First Technology Place – 3, EPIP, Whitefield, Bangalore – 560 066. **PAN : AABCI 3134 K**
APPELLANT		RESPONDENT

Revenue by	:	Shri. R. N. Siddappaji, Addl. CIT
Assessee by	:	Shri. Sharath Rao, CA

Date of hearing	:	03.01.2019
Date of Pronouncement	:	27.03.2019

O R D E R

Per Jason P Boaz, Accountant Member

These appeals by Revenue are directed against the orders of CIT(A)-3, Bangalore, dated 18.03.2015 for Assessment Year 2008-09 and dated 13.03.2015 for Assessment Year 2009-10. As the main issue involved in both these appeals is common, both these appeals were heard together and we deem it appropriate to dispose them off together by way of this consolidated order.

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

2.1 The assessee is a company engaged in the business of carrying out R & D functional genomics, bioinformatics and chemistry and also trading in biotechnology tools and instruments manufactured by its Associated Enterprises (AE) M/s. Life Technologies Corporation, USA.

2.2 <u>For Assessment Year 2008-09,</u> the assessee filed its return of income on 30.09.2008 declaring a loss of (-) Rs.80,48,771/- under non-EOU undertaking and claimed deduction under section 10B of the Income Tax Act, 1961 (in short 'the Act') for its EOU undertaking amounting to Rs.1,97,61,465/-. The return was processed under section 143(1) of the Act vide order dated 31.12.2010 wherein the assessee's income was determined at Rs.4,02,970/-. Subsequently, based on findings in the course of assessment proceedings in this case for Assessment Year 2009-10, certain information / material was brought on record to indicate that the business activity of assessee was not eligible for deduction under section 10B of the Act. Since the business activity carried out for the year under consideration i.e., Assessment Year 2008-09 was similar to that carried out by the assessee in Assessment Year 2009-10, proceedings were initiated under section 147 of the Act by the Assessing Officer (AO) and after recording reasons in this regard; that income of the assessee exigible to tax had escaped assessment due to the assessee's wrong claim for deduction under section 10B of the Act, notice under section 148 of the Act was issued to the assessee on 25.03.2013 after obtaining the prior approval of the CIT. The assessment was concluded under section 143(3) r.w.s. 147 of the Act vide order dated 31.10.2013 wherein the assessee's income was determined at Rs.1,22,40,540/-. In the assessment order, the assessee's claim for deduction under section 10B of the Act related to the Functional genomics division of the assessee was disallowed and thereby as against the assessee's total claim of deduction under section 10B of the Act amounting to Rs.197,61,465/-, the AO allowed deduction thereunder only to the

extent of Rs.75,20,924/- and thereby disallowed the deduction claimed under section 10B of the Act to the extent of Rs.1,22,40,540/-.

2.3 **For Assessment Year 2009-10,** the assessee filed its return of income on 30.09.2009 declaring total income of Rs.24,45,582/-, after claiming deduction under section 10B of the Act amounting to Rs.2,35,77,611/-. The return was processed under section 143(1) of the Act and the case was then taken up for scrutiny for this Assessment Year. The assessment was concluded under section 143(3) of the Act vide order dated 19.03.2013 wherein the assessee's income was determined at Rs.3,45,94,735/-. In the order of assessment, the assessee's claim of deduction under section 10B of the Act related to the Functional Genomics Division of the assessee company was disallowed and the deduction under section 10B of the Act was allowed only to the extent of Rs.41,52,292/-.

2.4 Aggrieved by the orders of assessment dated 31.10.2013 for Assessment Year 2008-09 and dated 19.03.2013 for Assessment Year 2009-10, the assessee preferred appeals before the CIT(A)-10, Bangalore, who vide the impugned orders dated 18.03.2015 for Assessment Year 2008-09 and dated 13.03.2015 for Assessment Year 2009-10 allowed the entire claim of the assessee for deduction under section 10B of the Act. In doing so, the CIT(A) placed reliance on the decision of the Dispute Resolution Panel (DRP) for Assessment Year 2010-11 dated 26.11.2014 in the case on hand.

3. Revenue, being aggrieved by the orders of CIT(A)-3, Bangalore, dated 18.03.2015 for Assessment Year 2008-09 and dated 13.03.2015 for Assessment Year 2009-10, has filed these appeals before the Tribunal wherein it has raised the following grounds which are extracted hereunder:

3.1 Assessment Year 2008-09

1. The order of the learned CIT(A) is opposed to law and facts of the case.

2. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee by placing reliance on the order of Dispute Resolution Panel in the case of assessee for AY 2010-11 without appreciating the fact that the same has not become final as the appeal against the same is pending before the Hon'ble ITAT.

3. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee without appreciating the fact that the assessee is not engaged in the activity of Research & Development pertaining to Software Development, rather, engaged in the R&D activity in the field of biological sciences by employing highly qualified people in life sciences as opposed to software engineers required for Software Development.

4. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee without giving any cogent finding but only accepting the submissions of the assessee on its face value.

5. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee without appreciating the fact that the AO has elucidated numerous strong reasons for denial of deduction u/s 10B like the nature of functions carried out by the assessee, type of R & D activity carried out by the assessee, what type of plant and machinery is used by the assessee for the so called "R&D in Software Development", and most importantly, the fact that the Board Circular No. 1/2013 is not applicable to the assessee's case, which the assessee has only been able to rebut feebly without any substantial submission made therein.

6. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to exclude reimbursement of specific expenditure both from the export turnover as well as from total turnover for the purpose of computation of deduction u/s 10A & 10AA, without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by Sub-clause (4) of Explanation 2 below Sub-section (8) of Section 10A and the total turnover has not been defined in this Section.

7. On the facts and in the circumstances of the case the learned CIT(A) erred in directing the AO to compute deduction u/s 10A & 10AA in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.

8. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

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

3.2 Assessment Year 2009-10

1. The order of the learned CIT(A) is opposed to law and facts of the case.

2. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee by placing reliance on the order of Dispute Resolution Panel in the case of assessee for AY 2010-11 without appreciating the fact that the same has not become final as the appeal against the same is pending before the Hon'ble ITAT.

3. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee without appreciating the fact that the assessee is not engaged in the activity of Research & Development pertaining to Software Development, rather, engaged in the R&D activity in the field of biological sciences by employing highly qualified people in life sciences as opposed to software engineers required for Software Development.

4. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee without giving any cogent finding but only accepting the submissions of the assessee on its face value.

5. On the facts and in the circumstances of the case the learned CIT(A) erred in law in directing the AO to allow the deduction u/s 10B to the assessee without appreciating the fact that the AO has elucidated numerous strong reasons for denial of deduction u/s 10B like the nature of functions carried out by the assessee, type of R & D activity carried out by the assessee, what type of plant and machinery is used by the assessee for the so called "R&D in Software Development", and most importantly, the fact that the Board Circular No. 1/2013 is not applicable to the assessee's case, which the assessee has only been able to rebut feebly without any substantial submission made therein.

6. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

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

Ground Nos. 2 to 5 (for Assessment Years 2008-09 and 2009-10) – Deduction under section 10B of the Act – Functional Genomics Division

4.1 The basic issue for consideration before us is the eligibility of the assessee's claim for deduction under section 10B of the Act on the revenue of the Functional Genomics Division of the assessee company.

4.2.1 As per the details in the impugned orders of assessment, the assessee company is engaged in the business of carrying out R & D activity on Functional Genomics, Bioinformatics and Chemistry and also trading in biotechnology tools and instruments. The R & D undertaking of the assessee has been approved as a 100% EOU for manufacture and export of "functional genomics, bioinformatics and chemistry". As per the agreement with its AEs, the assessee company has undertaken to provide R & D services.

4.2.2 Based on the details furnished by the assessee and after analysing the agreement with its AEs and the invoices raised in this regard, the AO concluded that the basic activity of the assessee is Research & Development in the field of Functional Genomics and that all other activities of the assessee were ancillary in nature. In that view of the matter, the AO concluded that the R & D activity undertaken by the assessee is in the field of Biology on behalf of the AE in USA for which the assessee is reimbursed at cost plus 10% commission. The AO, therefore, held that there is no activity undertaken by the assessee of manufacturing and export of any article or thing or computer software; that its activity does not come under notified ITES and consequently the assessee is not eligible for deduction under section 10B of the Act in respect of its income / revenue of its Functional Genomics Division. While arriving at this conclusion, the AO observed / took note of the following points:-

(i) The Functional Genomics Division of the assessee company is purely scientific research organisation in the field of Biology and is neither carrying out any manufacturing activity nor providing any ITES. This is borne out from the recitals in the Agreement with the AEs and the invoices raised for the same.

(ii) The Plant and Machinery used, the profile of the employees and the lab expenses debited to the Profit and Loss account corroborate the fact that the assessee is carrying out R & D activity only.

(iii) The assessee is reimbursed for R & D expenses at cost plus Mark up commission and not for communication of end results. Mere delivery of results in R & D in electronic data cannot be considered as “Software Development” and “ITES”.

(iv) Mere approval as a 100% EOU does not automatically entitle the assessee for grant of deduction under section 10B of the Act.

(v) The claim that the case of the assessee is covered by CBDT Circular No.1/2013 dated 17.01.2013 regarding R & D activity is not correct as the clarification in the Circular is restricted to the activity of R & D relating to software development.

4.3.1 The submission of the assessee is that it is registered as a 100% EOU undertaking with the Cochin Special Economic Zone (CSEZ) for manufacture and export of functional genomics and bioinformatics chemistry. The EOU has two divisions, one of which is the Functional Genomics Division. The Functional Genomics Division employs scientists (PHD's)and Junior Scientists for carrying out research activities. As per the assessee, the research activities are carried out in the following areas:-

(a) <u>Discovery Process:</u> The objective of these processes is to find new and improved ways of developing products that are sold by the parent company. If the process of developing a product has certain inherent flaws, then this division explores new ways / methods of developing the same so that the flaws can be eliminated.

(b) <u>Process Improvements:</u> The objective of these projects is to reduce the cost or time involved of existing product development processes carried out by the parent company.

4.3.2 It is submitted that projects entail researching existing processes to see how the product development process can be improved. After the process is completed, the Functional Genomics Division prepares the Proof of Product

(POP) reports which documents the work carried out, the findings as well as the Methodology to be followed to improve the process in question. Further, where a sample product is produced, the samples are couriered through Fedex to whom an export value declaration is filed which mentioned the consignment is samples. Fedex files a shipping bill of export with nominal value. In view of this, the assessee's contention is that the research services rendered by the assessee are sent to the AE in the form of reports, which are in the form of "customized electronic data" and which comes under the scope of "computer software" as mentioned in section 10B of the Act.

4.3.3 The term "computer software" has been specifically defined in terms of Explanation 2 to section 10B of the Act to mean:-

"(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(b) any customized electronic data or any product or service of similar nature as may be notified by the Board,

which is transmitted or exported from India to any place outside India by any means;

A perusal of the above definition provides that the term "computer software" encompasses the following:

(1) Computer programmes;

(2) Any customized electronic data; and

(3) Any product / service notified by the CBDT.

It is argued that the research reports sent by the assessee to the AEs will be covered under the term “computer software” and the assessee is therefore eligible for deduction under section 10B of the Act.

4.3.4 According to the learned AR, the meaning of “computer software” is enlarged to include customized electronic data or such other services as may be notified by the CBDT. In this regard, the following Information Enabled Product or Services were notified in Notification No.SO 890(E), dated 26.09.2000 –

- Back- office operations;
- Call centres;
- Content Development or Animation;
- Data Processing;
- Engineering and Design;
- Geographic Information System Services;
- Human Resource Services
- Insurance Claim Processing;
- Legal Databases;
- Medical Transcription;
- Payroll;
- Remote Maintenance;
- Revenue Accounting;
- Support Centres and
- Website services

The learned AR contended that the activities of Functional Genomics Division involves activities in various fields of Biological Engineering, Biomedical Engineering, Biotechnological Engineering and Genetic Engineering and Designing to come up with desired objectives as specified in the service

requested and it is covered under the meaning of "Engineering and Design" forming part of the Information Technology Enabled Products or Services notified in Notification SO 890(E) dated 26.09.2000.

4.3.5 It was further submitted that in terms of CBDT Circular No.1 of 2013, it has been clarified that Research and Development (R&D) activities pertaining to Software Development would be covered under the definition of "computer software" stipulated under Explanation to section 10A and 10B of the Act.

4.3.6 In view of the above submissions and in support of the proposition that the reports sent by the assessee in the form of "customized electronic data" would constitute "computer software" as envisaged under section 10B of the Act and would render the assessee eligible for deduction under section 10B of the Act, reliance was placed on the following judicial pronouncements:-

(i) DCIT Vs. Syngene International Ltd., (2015) (64 Taxmann.com 222) (Bang. Trib);
(ii) DCIT Vs. RXMD Pharmaceutical Physicians Pvt. Ltd., (ITA Nos. 379 to 381/Mds/2015 dated 30.12.2015);
(iii) Strides Shasun Ltd., Vs. ACIT (ITA No.8614/Mum/2011 dated 08.06.2018).

4.4 Per contra, the learned DR for Revenue vehemently assailed the decision of the CIT(A) in the impugned order and submitted that the CIT(A) has not considered many of the findings rendered by the AO while allowing the assessee's appeal. According to the learned DR, the CIT(A) ignored the R & D activities of the assessee in the Functional Genomics division and erroneously assumed the activities to be that of "Design and Engineering services". The

learned DR also referred to various clauses of the R & D Services Agreement (copy placed at pages 64 to 70 of Paper Book for Assessment Year 2008-09) of the assessee with its AE, as was recorded in the orders of assessment, to submit / contend that there was no export of computer software by the assessee as claimed; that the assessee is only a contractor rendering services and that the assessee is reimbursed for its costs and not for payment of purchases. It was contended that the judicial pronouncements relied upon (supra) are not applicable to the facts of the assessee in the case on hand.

4.5.1 We have heard the rival contentions and perused and carefully considered the submissions made, the judicial pronouncements cited and the other material on record. The assessee is a 100% Export Oriented Undertaking (EOU) duly approved by the Cochin Special Economic Zone (CSEZ) for the manufacture and export of Functional Genomics and Bioinformatics and Chemistry. The letter of Approval issued by CSEZ dated 10.03.2005, placed at pages 140 to 144 of Paper Book for Assessment Year 2008-09 mentions "functional genomics and Bioinformatics Chemistry" as the item of manufacture and also states that the EOU shall export its entire production.

4.5.2 In submissions put forth before the AO dated 28.08.2013, placed at pages 94 to 104 of Paper Book for Assessment Year 2008-09, the assessee has, *inter alia*, submitted as under:

(i) "After the process is completed, the Functional Genomics division prepares proof of Product (PoP) reports which documents the work carried out, the findings as well as the methodology to be followed to improve the process under question. The 'PoP' reports are sent via email. In certain cases, a sample product is produced and exported free of cost. The samples are usually genetically modified

cells or DNA samples". (page 101 of Paper Book for Assessment Year 2008-09).

(ii) At page 102 of Paper Book for Assessment Year 2008-09, the assessee submits

> "Since Functional Genomics Division is engaged in processing data or development of content as required by the parent company with the help of computers and other lab equipment, generation of reports also been delivered through computers and internet, this unit would be eligible for deduction under section 10B of the Act".

From the above, we find a contradiction in the submissions made by the assessee before the AO in the mode of transmitting the research activity reports. In one place, the assessee states that the research activity reports are sent in the form of reports via e-mail and also some products are sent through courier. In another place, the assessee states that the function of the Functional Genomics Division is processing of data or development of content, thereby implying that there is no development of product.

4.5.3 In submissions put forth before the CIT(A) vide letter dated 17.08.2015, placed at pages 113 to 119 of Paper Book for Assessment Year 2008-09, it was submitted that the Functional Genomics division prepares both 'PoP' reports as well as sample products. It is mentioned that when a sample product is produced, which are in the form of cells or DNA samples, the samples are couriered through Fedex to whom a export value declaration is filed which mentions that the consignment is in samples. Fedex files a shipping bill of export with nominal value (only for customs purposes). Whatever these submissions mean, it appears therefrom that there are transmission of reports and also export of products. The sum and substance of the assessee's submissions before the

CIT(A) is based on the premise / principle that 'PoP' reports are in the nature of "customized electronic data"; which is in the nature of "computer software". Therefore, in our view, there appear to be clear contradiction between the facts presented and the arguments advanced by the assessee before the authorities below.

4.5.4 On an examination of the clauses of the Research & Development Services Agreement executed by the assessee with its AE (copy placed at pages 64 to 70 of Paper Book for Assessment Year 2008-09), the following points are noticed:-

(i) The said agreement is titled as Research & Development Services Agreement. Throughout this agreement, the deliverables are called / referred to as services. As rightly pointed out by the AO, nowhere is there any mention of manufacture / production, 'PoP' reports, customized electronic data or computer software. **Therefore, there is clearly an inherent contradiction between the submissions made by the assessee before the authorities below and the recitals in the clauses of the Research and Development Services Agreement.**

(ii) The agreement refers to the assessee as 'contractor'. Nowhere in the agreement is it stated that the assessee is required to perform scientific research and submit 'PoP' reports, as claimed by the assessee.

(iii) The exclusive rights of the work product generated in performances of the services are with the AE. This indicates that, what the

assessee provides is only services and not any product or reports as claimed by the assessee.

(iv) The assessee; i.e., the contractor is reimbursed service – related costs plus a 10% commission. Therefore, the payments to the assessee by the AE is clearly only for expenses incurred. In the agreement, there is not a whisper about payments made for 'PoP' reports or for customized electronic data as claimed by the assessee.

(v) The invoices will contain the details of the costs to be reimbursed. As pointed out by the AO, the invoices mention "R & D Charges". There is no mention of reports, transmission of customized electronic data or computer software.

(vi) As per clause 8 of the Agreement titled "Inventions", all the work products and writings generated as a result of the services are the property of the AE and not of the assessee. Therefore, even if any reports are generated, as claimed by the assessee, the reports belong to the AE and hence, the question of export of such reports does not arise. The payments by AE to the assessee are for reimbursement of costs incurred by the assessee while rendering of services and therefore, the question of export of such reports does not arise. The payments by AE to the assessee is only for services and not for the reports.

4.5.5 Thus, from the above observations, it is amply clear that the Research and Development Services Agreement (supra) refers / speaks only of services to be rendered by the assessee, payment / reimbursement to the assessee for cost of services and does not contain anything to support the assessee's contention / claims that it transmits 'PoP' reports or customized electronic data

or computer software. Therefore, in our view, there is a wide variation seen between the recitals in the clauses of the Research and Development Services Agreement and the claims put forth in the submissions made by the assessee, both before the authorities below and before us. We observe that the CIT(A) has neither examined these aspects, as noticed by us (supra), nor rendered a finding on the functional profile of the Functional Genomics Division and the manner and character of the deliverables. We find that the CIT(A), in allowing the assessee's claims for deduction under section 10B of the Act has, without any application of mind, merely relied on the decision of the DRP in the case on hand for Assessment Year 2010-11, without examining the facts and merits of the case.

4.5.6 We have carefully perused the directions issued by the DRP under section 144C(5) of the Act on 26.11.2014 for Assessment Year 2010-11 (copy placed at pages 39 to 64 of the Case Law Compendium). After tabulating the activities of the assessee and the AE in the entire process, the DRP concluded that the activities of the Functional Genomics Division involving activities in R & D, is Engineering and Design and forms part of ITES. In our considered view, this conclusion of the DRP is far fetched and erroneous. Research and Development activity, Engineering and Design Services and Engineering and Design under ITES are three different things, operating in distinctly different fields. We find that the DRP has concluded that the deliverables as 'PoP' reports, without even examining the reports. It appears that not a single report has brought on record or examined. Even the output from the Functional Genomics Division does not appear to have been examined at all. Further, these transactions qualify as "international transactions" and the assessee was required to benchmark the transaction for TP analysis. In such a benchmarking, it will be useful and relevant to see whether the assessee has classified the transaction as "product deliverables in the form of reports" or as "Design and Engineering Services" or as "ITES" and whether the stand taken by the assessee before the AO for claiming deduction

under section 10B of the Act and before the Transfer Pricing Officer (TPO) are consistent.

4.5.7 The main issue to be examined in the case on hand is the form, content and character of the deliverables arising out of the Functional Genomics Division of the assessee's undertaking. There is no finding rendered in this regard, either by the AO in the order of assessment or by the CIT(A) in the impugned order or even in the DRP order in the case on hand for Assessment Year 2010-11, relied on by the CIT(A) to allow the assessee's claim. There is also no discussion in the aforesaid orders of the AO/CIT(A)/DRP on the contradictions between the assessee's submission before the authorities below and in the recitals in certain clauses of the Research and Development Services Agreement. The AO's findings / observations in this regard have been ignored by the CIT(A). In deciding the issue of the allowability of the assessee's claim for deduction under section 10B of the Act in respect of its Functional Genomics Division, the following points, in our view, are critical:

(i) Whether the deliverable is a product arising out of manufacturing / production / R & D activity? This is particularly relevant in the light of the submissions put forth by the assessee before the AO and CIT(A).

(ii) Whether the deliverable is in the form of 'PoP' reports, as claimed by the assessee? If so, what are the contents of the report? Does it pertain to the R & D services activity of the assessee or is it in the nature of ITES?

(iii) Whether the reports qualify to be characterised as "customised electronic data" as defined for the purposes of eligibility for deduction under section 10B of the Act?

(iv) Whether the consideration paid is for the delivery of the 'PoP' reports or as reimbursement of the costs incurred in generating the reports? In case the payment / consideration is for Reimbursement, as laid out in the Research and Development Services Agreement of the assessee with the AE; will it then qualify for being granted deduction under section 10B of the Act?

(v) If the payments / consideration have no correlation to the deliverables in the form of 'PoP' reports, will they then qualify for the purposes of being allowed deduction u/s 1B of the Act?

4.5.8 To answer the above questions, the basic form and content of the deliverables given by the assessee to the AE requires examination on the facts of the matter in the light of the recitals of the Research and Development Services Agreement entered into between the assessee and its AE and contradictory submissions put forward by the assessee before the authorities below. Such an examination has not been carried out by the authorities below. In this factual matrix of the case, as discussed above, we deem it appropriate to remand the issue back to the file of the AO for a proper, thorough and comprehensive examination of the facts related to the functions and activities of the assessee's Functional Genomics Division and also examine the form, nature and content of the deliverables of this division and to then decide on the allowability of the assessee's claim for deduction under section 10B of the Act. Needless to add, the assessee shall be afforded adequate opportunity of being heard and to file details / submissions required in this regard, which shall be duly considered by the AO, before deciding the issue. Consequently, ground Nos. 2 to 5 of Revenue's appeals for both Assessment Years 2008-09 and 2009-10 are treated as allowed for statistical purposes.

5. Ground Nos.6 & 7 (Assessment Year 2008-09) – Deduction under section 10A and 10AA of the Act

5.1 These grounds (supra) relate to the exclusion of certain expenses both from Export turnover as well as Total Turnover, while computing the deduction under section 10A & 10AA of the Act.

5.2.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement cited. The jurisdictional High Court of Karnataka in the case of CIT v Tata Elxsi Ltd (349ITR98) (Kar) has held that when certain expenses are excluded from the export turnover for the purposes of computing deduction admissible under the Act; like u/s.10Aof the Act, such expenses are also to be excluded from total turnover, as export turnover is a part of total turnover. The decision in the case of Tata Elxsi Ltd(supra) has also been followed by the Hon'ble Court in its order in the case of DCIT v Motor Industries Co. Ltd.,(ITANo.776/2006, 744/2007 and1155/2006 dated13.06.2014),holding that if any expenditure is sought to be removed from export turnover, then it should also be reduced from total turnover for the purposes of computing the eligible deduction u/s.10AoftheAct. This issue is no longer res integra, and has been decided in favour of the assessee and against revenue by the decision of the Hon'ble Apex Court in the case of CIT V.HCL Technologies Ltd. (2018) 93 taxmann.com 33 (SC); wherein at paras19 to 21, it has been held as under:-

> "19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.

> 20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.
>
> 21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover."

5.2.2 In this legal and factual matrix of the case, as discussed above, we find no reason to interfere with or deviate from the finding rendered by the ld. CIT(A) on this issue with respect to the deduction under section 10A and 10AA of the Act, and therefore respectfully following the decision of the Hon'ble Apex Court in the case of CIT Vs. HCL Technologies Ltd. (supra),we uphold the impugned order of the learned CIT (Appeals)'s order allowing the assessee's claim for deduction under Section 10A and 10AA of the Act. Consequently, the grounds raised by revenue are dismissed.

6. <u>Ground Nos. 1, 8 and 9 – Assessment Year 2008-09</u>

<u>Ground Nos. 1, 6 and 7 – Assessment Year 2009-10</u>

6.1 These grounds being general in nature, no adjudication is called for thereon.

7. In the result, Revenue's appeals for Assessment Years 2008-09 and 2009-10 are partly allowed for statistical purposes.

Order pronounced in the open court on this 27.03.2019*.*

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

Bangalore.
Dated: 27.03.2019.
/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.