In the Income-Tax Appellate Tribunal,
Delhi Bench 'B', New Delhi

Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 3722/Del/2014 & 3723/Del/2014
Assessment Years: 2002-03 & 2005-06

DCIT, Central Circle-2, New Delhi. **(Appellant)**	**vs.**	DSL Software Ltd. (Now amalgamated with HCL Technologies Ltd.), 806, Siddharth, 96, Nehru Place, New Delhi. PAN- AAACH1545P **(Respondent)**

ITA No. 2310/Del/2012
Assessment Year: 2003-04

ACIT, Central Circle-18, New Delhi. **(Appellant)**	**vs.**	DSL Software Ltd. (Now amalgamated with HCL Technologies Ltd.), 806, Siddharth, 96, Nehru Place, New Delhi. PAN- AAACH1545P **(Respondent)**

C.O. No. 258/Del/2012
(in ITA No. 2310/Del/2012)
Assessment Year: 2003-04

DSL Software Ltd. (Now amalgamated with HCL Technologies Ltd.), 806, Siddharth, 96, Nehru Place, New Delhi. **(Appellant)**	**vs.**	ACIT, Central Circle-18, New Delhi. **(Respondent)**

Revenue by	Ms. Nidhi Srivastava, CIT/DR
Respondent by	Sh. Ajay Vohra, Sr. Advocate & Sh. Aditya Vohra, Advocate

Date of Hearing	26.03.2019
Date of Pronouncement	30.04.2019

ORDER

Per L.P. Sahu, A.M.:

The appeals of the Revenue for A. Yrs. 2002-03, 2003-04 and 2005-06 are directed against the orders of CIT(A), New Delhi dated 31.03.2014, 01.03.2012 and 31.03.2014 respectively. The grounds raised by the Revenue in their respective appeals are as under :

A.Y. 2002-03:

1. On the facts and in the circumstance of the case, the CIT(A) has erred in not appreciating the facts that none of the issues taken up in assessment proceedings had been taken up in assessment order u/s 143(3) of the Act, hence, it is not based on 'change of opinion'.

2. On the facts and in the circumstance of the case, the CIT(A) has erred in deleting the disallowance made by the AO on account of deduction/exemption claimed u/s 10B and 80HHE of the Income Tax Act, 1961.

3. On the facts and in the circumstance of the case, the CIT(A) has erred in deleting the disallowance of Rs.2,46,557/- made by AO in view of the provisions of Section 14A of Income Tax Act read with Rule 8D of the Income Tax Rules.

4. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

A.Y. 2003-04:

1. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in quashing the reassessment proceedings u/s 148 by holding that the same is based on 'change of opinion'.

2. On the facts and in the circumstances of the case, the CIT(A) erred in law and on facts in deleting the disallowance made by the AO u/s 80HHE and 10A of the Income Tax Act, 1961 on account of profits derived from overseas branches.

3. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

A.Y. 2005-06:

1. On the facts and in the circumstance of the case, the CIT(A) has erred in deleting the disallowance made by the AO on account of deduction/exemption claimed u/s 10B and 80HHE of the Income Tax Act, 1961.

2. On the facts and in the circumstance of the case, the CIT(A) has erred in deleting the disallowance of Rs.24,75,205/- made by AO on account of excess claim of depreciation claimed by assessee.

3. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

2. The assessee has also filed a cross objection in appeal for A.Y. 2003-04 on the following ground :

Ground of Cross-objection:

1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in not adjudicating the alternative claim made for allowing the allocated head office expenses and the foreign tax credit ("FTC") pursuant

to the provisions of section 90 of the Act to be read with the relevant treaty provisions.

3. For the sake of convenience, we first take up the appeals for assessment years 2002-03 and 2003-04. In both these appeals, one common issue challenged by the Revenue is with regard to the action of the ld CIT(A) for holding the re-assessment orders for these years as legally invalid. A perusal of the impugned orders of these years, we find that the ld. CIT(A) has dealt with this issue in detail in his order for A.Y. 2003-04 and has followed the same in A.Y. 2002-03. We, therefore, take up the appeal of Revenue for A.Y. 2003-04 first on this issue.

4. The ld. DR, reiterating the contents of the assessment order, submitted that the ld. CIT(A) was not at all justified in quashing the re-assessment order on the premise of it having been based on change of opinion. It was submitted that the claim granted in original assessment order u/s. 80HHE amounting to Rs.12,51,01,752/- was rightly reduced by Rs.7,56,11,431/- on the premise that this claim included the profits of such Branches of Leela Galleria, which were situated outside India. It was submitted that this action of the AO would not amount to change of opinion, as observed by the ld. CIT(A) in the impugned order. He, therefore, urged to hold the re-assessment order as legally valid.

5. On the other hand, the ld. Counsel for the assessee, relying on the impugned order, submitted a written synopsis on this score, which reads as under :

The assessee is a public limited company, engaged in the business of software development, maintenance services and business process outsourcing services and had three units in operation:

(a) Software development unit in respect of which deduction u/s 80HHE was claimed ("**Leela Galleria unit**"). The Leela unit has three foreign branches, located in the US, UK & Singapore;
(b) BPO unit in respect of which deduction u/s 10A was claimed ("**BPO unit**") with no branches outside India;
(c) Software development unit in respect of which deduction u/s 10A was claimed ("**GNR unit**") with branches in US & UK.

The assessee stood amalgamated with HCL Technologies Ltd w.e.f. 01.04.2005.

RE: <u>BACKGROUND OF ASSESSMENT PROCEEDINGS U/S 143(3) & CONSEQUENTIAL APPELLATE PROCEEDINGS</u>

For the relevant assessment year, the return of income was filed by the assessee on 01.11.2004 declaring income of Rs.16,75,00,900. The assessee claimed, inter alia, deduction u/s 80HHE & 10A.

The return was selected for scrutiny and assessment order dated 28.02.2006 was passed under section 143(3) of the Income-tax Act, 1961 ("**the Act**") wherein, the assessing officer computed deduction u/s 80HHE and u/s 10A.

The details of deduction claimed vis-à-vis deduction allowed by the assessing officer in assessment are tabulated as under:

Units	Deduction claimed u/s 80HHE/ 10A	Deduction allowed by AO	Remarks
Leela Galleria	12,60,85,082	12,51,01,752	Misc income of Rs. 13,72,907 excluded from profits eligible for computing deduction u/s 80HHE

GNR	27,68,45,650	23,75,56,242	Communication expenses, expenses incurred in foreign exchange for rendering services outside India reduced from export turnover while computing deduction u/s 10A
BPO	50,33,378	35,67,788	

Refer **Assessment order u/s 143(3) @ pg 1-11 of the PB**

In appeal before CIT(A), action of the assessing officer in reducing misc income from profits of Leela Galleria unit while computing deduction u/s 80HHE was upheld. With respect to computation of deduction available u/s 10A to GNR & BPO unit, the CIT(A) directed the assessing officer to recompute the deduction by reducing only 10% of the expenses incurred in foreign currency from the export turnover. **CIT(A) order @ pg 12-25 of the PB**

In further appeal before the ITAT, the aforesaid action of the assessing officer was reversed and the deduction claimed by the assessee u/s 80HHE & u/s 10A was restored. **ITAT order @ pg 26-39 of the PB**

RE: <u>REASSESSMENT PROCEEDINGS U/S 148</u>

Notice u/s 148 of the Act was issued on 11.07.2007 for initiating reassessment proceedings. **@ PB pg 40**

Vide letter dated 09.08.2007 (**@ PB pg 41-42**), the assessee requested for original return to be treated as return pursuant to the re-assessment notice. Assessee also requested for **reasons for initiation of reassessment** which are reproduced **@ pg 1 of the reassessment order/ pg 119 of the PB**). The reasons are briefly discussed as under:

(i) Eligible profits for computing deduction u/s 80HHE of the Act was taken by the assessing officer as Rs.25,10,26,060 whereas the same should have been taken as Rs.17,54,14,629 by reducing Rs.7,56,11,431 in respect of profits of branches outside India

(ii) Eligible profits for computing deduction under section 10A of the Act in respect of the BPO and GNR units of the assessee should only include profits from export of software and not the profits earned by providing technical services outside India

Detailed objections to the initiation of reassessment proceedings along with reply on the merits of the proposed disallowances were filed vide letter dated 08.02.2008, 29.05.2008 & 17.09.2008. (**@ PB pg 47-99**)

Reassessment was completed vide order dated 28.11.2008 at total income of Rs.32,60,00,451 after making following disallowances:

- Excess claim disallowed u/s 80HHE in respect of Leela Galleria unit – Rs.3,76,81,835
- Excess claim disallowed u/s 10A in respect of GNR unit – Rs.11,35,51,884

The assessing officer rejected claim of the assessee qua deduction u/s 80HHE of the Act on the ground that the operations were performed at the customer's location outside India by the foreign branches of the assessee and the same is excluded under Explanation (d) to the said section. **@ Reassessment order para 6-21**

The deduction claimed u/s 10A qua profits derived from onsite software development services was also disallowed on the ground that the assessee had rendered technical services outside India through its foreign branches and profits derived from rendering technical services outside India were to be excluded from the export turnover while computing deduction u/s 10A of the Act. **@ Reassessment order para 6-21**

RE: <u>CIT(A) ORDER DATED 01.03.2012 IN APPEAL AGAINST 148 ORDER</u>

❖ **<u>Reassessment proceedings were illegal and without jurisdiction</u>**
@ pg 4-15 of the CIT(A) order

CIT(A) held that reassessment proceedings were without jurisdiction, being initiated on mere change of opinion, and therefore, notice issued u/s 148 of the Act deserved to be quashed for the following reasons:

- The assessee's claim of deduction u/s 10A & 80HHE was evident by the following documents filed with the return of income:
  - Computation of income reflecting the claim of deduction u/s 10A & 80HHE
  - Computation of deduction supported by CA certificate
  - Details of profit margins from overseas branches

- Deduction claimed u/s 10A and 80HHE was verified by the assessing officer and after due verification, certain adjustments were also made to the computation of deduction

❖ **Deduction u/s 10A & 80HHE of the Act allowed**
@ pg 15-28 of the CIT(A) order

CIT(A) held that activities of the assessee are to be regarded as that of developing and supplying software and the overseas branches of the assessee cannot be construed as being engaged in any activity other than rendering onsite software development services. It was held that the overseas branches merely act as conduit for rendering of onsite software development services in relation to projects undertaken by undertakings of the assessee located in India. Therefore, CIT(A) held that profits of foreign branches were essentially in the nature of profit derived by the assessee from onsite software development services and were, therefore, eligible for deduction under section 10A and 80HHE of the Act.

Reference was made by the CIT(A) to the following decisions:

- Interra Software India Pvt Ltd: ITA No.507/2008 & 160/2009 (Del HC)
- HCL Technologies – AY 2004-05 in ITA No.3199 & 3344/Del/2007
- HCL Technologies – AY 2003-04 in ITA No.1320 & 1446/Del/2008
- HCL Technologies – AY 2004-05 in ITA No.3203 & 3204/Del/2007

OUR SUBMISSIONS

I. **Reassessment proceedings are without jurisdiction, bad in law and illegal**

➢ **No fresh tangible material**

The reasons recorded for reopening assessment **do not disclose the tangible material** on the basis of which assessing officer formed a belief that income of the assessee had escaped assessment. The foundation of 'reasons to believe', basis which reopening of assessment has been initiated have not been recorded in the reasons, which merely state that *"on examination of records"* and *"on perusal of assessment records"*, it is found that income has escaped assessment, without referring to any fresh tangible material which had come in possession of the assessing officer for initiating reassessment. It is respectfully submitted that section 147/ 148 does not confer unrestricted power on the assessing officer to reopen assessment and on failure to pass the aforesaid jurisdictional test, impugned reassessment proceedings are clearly without jurisdiction and liable to be quashed.

The Delhi High Court in the case of **Donaldson India Filters Systems (P) Ltd vs DCIT: 371 ITR 87 (Del)** held as under:

> *"24. It is clear from bare reading of the aforementioned satisfaction note recorded by the assessing authority for* ***reopening the assessment five years after the assessment had been completed*** *under Section 143(3) (on 30.11.2005)* ***that the only indication set out as to the grounds which had triggered such action is through the words "after going through the records"****. The assessing authority would not elaborate as to which records had been adverted to and what was the event which had occurred that*

had impelled such perusal of the records for a fresh view to be taken. ***Noticeably, the Assessing Officer while recording his satisfaction by note dated 19.03.2010 that a case had been made out for the income to be reassessed would not attribute any act of commission or omission on the part of the assessee so as to constitute a failure to discuss fully and truly of the material facts.*** *Indeed, the assessing authority expressed that reasons to believe existed that a part of the income had escaped assessment. But, it would not clarify even remotely as to how the said failure had occurred.*

……

27. The order passed by the assessing authority extracted above unmistakably shows that even at that stage it had ***no fresh material available to it*** *so as to exercise the jurisdiction available under Sections 147/148 of Income Tax Act. It was, thus,* ***taking a fresh call on the subject of assessment of income (i.e. reassessment), drawing conclusions and inferences from the same very material that had been scrutinized in the original assessment proceedings.*** *The case at hand is concededly not covered by other exceptions as indicated by second and third proviso or explanation to Section 147 quoted earlier.*

28. The reopening of the assessment in the case at hand through notice under Section 148 of Income Tax Act issued on 22.03.2010 fails to pass the muster on both the tests. The satisfaction note does not disclose the foundation of "reasons to believe" as it vaguely refers to the perusal of "the records" without specifying the fresh "tangible material" that had come to light giving rise to a need for such action. Since the assessment had earlier been concluded under Section 143(3) by order dated 21.09.2007, the restrictions on the exercise of the power of reassessment as contained in the first proviso to Section 147 would inhibit further action in absence of material showing default by the assessee to fully or truly disclose.

29. In the above facts and circumstances, we concur with the view taken by the CIT(A) that it is a case of impermissible change of opinion. The order whereby the proceedings have been reopened for assessment under Section 147/148 of Income Tax Act, thus, is found to suffer from jurisdictional error. Consequently, the proceedings taken out in its wake cannot sustain."

(emphasis supplied)

In fact, during the course of assessment proceedings u/s 143(3), the assessee had filed various details and information regarding deduction claimed u/s 10A/ 80HHE of the Act, including (i) details of profit margins in respect of overseas branches of the assessee, (ii) certificate issued by Chartered Accountant in prescribed Form No.56F which was annexed to the return of income, etc. (**@ PB pg 477-484**) and the assessing officer has merely referred to the same documents for forming a belief that income of the assessee has escaped assessment.

- **Change of opinion**

Reassessment has been initiated merely on the basis of change of opinion since the assessing officer during the course of assessment proceedings u/s 143(3) of the Act had already examined the claim of deduction u/s 10A of the Act and disallowed the same partly after thorough deliberation and discussion in the assessment order. Also, deduction u/s 80HHE of the Act was duly examined and allowed by the assessing officer after making certain adjustments. The same is explained as under:

Deduction u/s 10A of the Act

It is pertinent to note that the assessing officer in assessment finalized u/s 143(3) of the Act had held that the assessee was providing technical services outside India and had, therefore, excluded expenses incurred in foreign currency from the export turnover while computing eligible deduction u/s 10A of the Act. The said action of the assessing officer was challenged and adjudicated in appeal by the CIT(A) and further, by this Hon'ble Tribunal, which was pleased to delete the disallowance made by the assessing officer qua the said issue, in toto, in order dated 31.03.2009 (**@ pg 26-38 of the PB**). Therefore, re-determination of the same issue by initiating reassessment proceedings is undisputedly, change of opinion on the part of the assessing officer and cannot be sustained.

Deduction u/s 80HHE of the Act

Even the claim of deduction u/s 80HHE was examined threadbare in original assessment proceedings and was allowed subject to exclusion of miscellaneous income from profits eligible for computing deduction u/s 80HHE. The said issue was carried in appeal and was finally decided in favour of the assessee by this Hon'ble Tribunal in order dated 31.03.2009 (**@ pg 26-38 of the PB**).

In view of the aforesaid, the action of the assessing officer in initiating reassessment to reconsider the claim of deduction u/s 10A/ 80HHE of the Act tantamount to review of view earlier taken/ **change of opinion** and deserves to be quashed.

The Supreme Court in the case of **CIT vs Foramer France: 264 ITR 567 (SC)**, affirmed the decision of the Allahabad High Court in the case of **Foramer France vs CIT: 247 ITR 463 (All)**, wherein it was, inter alia, held by the Court in the context of the provisions of section 147/ 148 of the Act, as amended with effect from 1.4.1989, that reassessment cannot be based on a mere change of opinion and that the law that an assessment could not be reopened on a change of opinion was the same before and after the amendment by the Direct Tax Laws (Amendment) Act, 1987.

The Full Bench decision of the Delhi High Court in the case of **CIT vs Kelvinator of India Ltd: 256 ITR 1 (Del)** held that '*section 147 of the Act does not postulate conferment of power upon the assessing officer to initiate reassessment proceedings upon his mere change of opinion*'. The Full Bench of the Delhi High Court also took into account Circular No.549 dated 31.10.1989 issued by CBDT explaining the scope of amended section 147 of the Act.

The aforesaid decision of the Full Bench (supra) was affirmed by the Apex Court in the case of **CIT vs Kelvinator of India Ltd: 320 ITR 561 (SC)**.

Reliance is placed on the decision of the Delhi High Court dated 20.07.2017 in the case of the assessee [WP(C) 8165/2010], wherein the High Court quashed similar notice issued under section 148 of the Act by the assessing officer for assessment year 2004-05, which decision squarely covers the present case.

In the said case, reason for initiation of reassessment, inter alia, was allowance of deduction claimed under section 10A of the Act in respect of profits of foreign branches of eligible undertakings. Noting that the assessee had filed Form 56F in support of its claim of deduction and had also filed details of telecommunication expenses and expenses incurred in foreign currency during the course of assessment proceedings u/s 143(3), amongst other details, the Court was of the firm view that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It was also held that the reassessment was initiated not on the basis of any tangible material but '*on perusal of the record*' (akin to the facts of the present case) and that the said proceedings were essentially invoked on account of change of opinion. For the said reasons, notice issued u/s 148 and consequential proceedings were quashed by the High Court.

Reliance is placed on the decision of the Delhi High Court in the case of **Moser Baer India Ltd vs DCIT: 212 Taxman 139 (Del)(Mag)** wherein the High Court held that where issue relating to deduction under section 10B in respect of assessee's unit was specifically examined during original assessment and allowed with some modifications, Assessing Officer could not re-open such assessment without placing tangible material to disprove such claim.

The Bombay High Court in the case of **Century Textiles and Industries Ltd in ITA No.1367 of 2015 vide order dated 04.04.2018** held that where deduction claimed by the assessee u/s 80IC of the Act was examined during the course of assessment proceedings and certain disallowance was also made after considering audit report in Form 10CCA, it was not open for the assessing officer to turn around and take a different stand qua deduction claimed u/s 80IC by invoking reassessment proceedings.

Similarly, in the case of **Velingkar Brothers: [2017] 85 taxmann.com 8 (Bom)**, the Bombay High Court held that where while disposing of scrutiny proceedings, the assessing officer after examining reply filed by assessee concluded that establishment of assessee was an export oriented unit and, thus, entitled for exemption under section 10B, subsequent notice under section 147 on ground that assessee was not entitled for said deduction was mere change of opinion.

In the case of **Fairfield Atlas vs ACIT [WP(C) 13421 of 20170], the Bombay High Court vide order dated 26.03.2018** held that when assessee placed reliance on Form 56G, which discloses all particulars in support of its claim under section 10B of the Act, notice issued u/s 148 is without jurisdiction.

In the case of **Gujarat Enviro Protection & Infrastructure Ltd vs DCIT: [2018] 91 taxmann.com 436 (Guj)**, it was held that where deduction claimed by assessee, solid waste management company, under section 80-IA of the Act was disallowed by the AO, but on appeal the CIT(A) allowed the same, reassessment could not be initiated by AO on the ground that monitoring expenses, cell utilization expenses, land utilization expenses claimed by the assessee were not allowable.

In the case of **QX KPO Services (P) Ltd vs DCIT: [2018] 94 taxmann.com 467 (Guj)**, it was held similarly. **SLP filed by the Revenue against the said decision has been dismissed by the Hon'ble Supreme Court in [2018] 99 taxmann.com 301 (SC)**.

The Gujarat High Court, in the case of **Hitech Outsourcing Services vs CIT: 409 ITR 609 (Guj)** held that where AO initiated reassessment proceedings on ground that deduction under section 10A was wrongly allowed as assessee's units were situated outside STPI, in view of fact that the assessing officer had allowed assessee's claim for deduction after a detailed scrutiny, initiation of reassessment proceedings merely on basis of change of opinion was not justified.

Reliance in this regard is also placed on the following decisions:

- Usha International Limited: 348 ITR 485 (Del)(FB)
- Manjusha Estate (P) Ltd vs ITO: 314 ITR 263 (Guj) - SLP dismissed by SC
- Satnam Overseas Ltd & Anr vs ACIT: 329 ITR 237 (Del)
- Jal Hotels Co Ltd vs ADIT: 184 Taxman 1 (Del)
- CIT vs Feather Foam Ent (P) Ltd: 296 ITR 342 (Del)
- CIT vs Eicher Ltd: 294 ITR 310 (Del)
- KLM Royal Dutch Airlines vs ACIT: 292 ITR 49 (Del), SLP there against dismissed: CC 13507 of 2008
- CIT vs Goetze Ltd: 321 ITR 431 (Del)
- Carlton Overseas (P) Ltd vs ITO: 318 ITR 295 (Del)
- Jindal Photofilms Ltd vs DCIT: 234 ITR 170 (Del)
- Northern Strips Ltd vs ITO: WP 8265 of 2008 (Del)
- CIT vs Batra Bhatta & Co: 321 ITR 526 (Del)
- Shipra Srivastava vs ACIT: 319 ITR 221 (Del)
- CIT vs Mittal Casting Ltd: 124 Taxman 11 (Del)
- ICICI Prudential Life Insurance Co Ltd vs ACIT and UOI: 325 ITR 471 (Bom)
- Rose Services Apartments (P) Ltd vs DCIT: 348 ITR 452 (Del)
- Maruti Suzuki India Ltd vs DCIT: Writ petition No. 8562/2007 (Del)
- Parveen P Bharucha vs DCIT and UOI: 348 ITR 325 (Bom)
- Ranbaxy Laboratories Ltd vs DCIT: 351 ITR 23 (Del)
- NDT Systems vs ITO: 255 CTR 113 (Bom)
- Rambagh Palace Hotels P Ltd vs Dy CIT: 350 ITR 660 (Del)

- **3rd proviso – Merger of issue with CIT(A) & ITAT order**

The claim of deduction was already disallowed by the assessing officer during the course of original assessment proceedings and thereafter, adjudicated in appeal by the CIT(A) as well as the ITAT. In light of 3rd proviso to section 147, reassessment initiated to adjudicate issues which had already merged in orders passed by the appellate authorities, is invalid and unsustainable. Reliance in this regard is placed on decisions in context of section 263 which also provides that issues which have merged with orders of appellate authorities cannot be subjected to revision:

- Oil India Ltd vs CIT: 138 ITR 836 (Cal HC)
- CIT vs Shashi Theatre (P) Ltd: 248 ITR 126 (Guj HC)
- CIT vs Mehsana District Co-op Mil Producers Union Ltd: 263 ITR 546 (Guj HC)
- CIT vs Nirma Chemicals Works Pvt Ltd: 309 ITR 67 (Guj HC)
- PCIT vs H Nagaraja: 406 ITR 242 (Kar HC)
- CIT vs SRA Systems Ltd: [2019] 410 ITR 392 (Mad HC) – 10A issue

In that view of the matter, reassessment initiated u/s 147/ 148 of the Act has been rightly quashed by the CIT(A) at the outset."

6. We have heard the submissions of both the parties and have gone through the entire material available on record and we do not find any infirmity in the findings reached by the ld. CIT(A) in the impugned order on this score. The ld. CIT(A) while dealing with the legal aspect of the case, as narrated above, has made an elaborate discussion and has reached its conclusions on the basis of various judicial pronouncements. The relevant findings of the ld. CIT(A) read as under :

4.7 ***Finding on Ground of Appeal Nos. 2,3 & 4:-***

I have carefully considered the submissions of the AR and the assessment order passed by the assessing officer. The appellant during the relevant previous year claimed deduction under section 80HHE in respect of the profits of Leela Unit (including the profits from onsite operations accounted as profit of the overseas branches to the extent attributable to the Leela Unit) at Rs. 12,60,85,082, whereas deduction was claimed under section 10A in respect of the profits of GNR and BPO units at Rs.27,68,45,650 and Rs.50,33,378. respectively. The assessing officer in the assessment completed under section 143(3) of the Act, computed deduction under

section 80HHE of the Act in respect of Leela Galleria unit at Rs. 12,51,01,752 (as against Rs. 12,60,85,082 computed by the appellant), considering profit of the undertaking at Rs.25,10,26,060 after reducing therefrom miscellaneous income to Rs. 13,72,907.

The assessing officer has however, in the impugned re-assessment order completed under section 147, allowed deduction under section 80HHE of the Act in respect of Leela Galleria unit at Rs.8,74,19,917 (as against Rs.12,51,01,752 allowed in the original assessment order after excluding from the said profits of Leela Galleria unit the profits of the branches outside India amounting to Rs.7,56,11,431. The assessing officer has now held that in terms of Explanation (d) of section 80HHE of the Act, profits of the business eligible for deduction should be reduced by the profit of the branch, situated outside India and accordingly a sum of Rs.7,56,11,431 was reduced from the total profits for computing deduction under section 80HHE of the Act.

The provisions of section 147 of the Act, as applicable from f day of April, 1989, confer on the assessing officer the powers to reopen the assessment, if the assessing officer has "reason to believe" that income chargeable to tax has escaped assessment. Such power is, however, not unfettered. That the power to reopen an assessment has been conferred by the Legislature not with the intention to enable the Assessing Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position, it would result in placing an unrestricted power in the hands of the assessing authorities.

Thus, where the reasons recorded by the Assessing Officer disclose no more than mere change of opinion, the reassessment proceedings are liable to be quashed. The settled position in this regard has been consistently laid down by the Supreme Court and the various High Courts. Some of the leading decisions in this regard are CIT vs. Kelvinator of India Ltd.: 256 ITR 1 (Del) (FB), Carlton Overseas Pvt. Vs. ITO : 318 ITR 295 (Del) [affirmed by the Supreme Court in Civil Appeal Nos. 2009-201 of 2003, with Civil Appeal Nos. 2520 of 2008], CIT vs. Foramer France: 264 ITR 567 (SC), KLM Royal Dutch Airlines vs. DCIT : 292 ITR 49 (Del), Jindal Photofilms Ltd. vs. DCIT 234 ITR 170 (Del), CIT vs. Mittal Casting Ltd. : 124 Taxman 11 (Del) and Anant Raj Industries Ltd. [ITA No. 342/2009 (Del)]

In the facts of the ease of the appellant the claim of deduction under section 80HHE and section 10A of the Act in respect of various undertakings was evident by the following documents filed with the return of income:

i) Computation of income reflecting the claim of deduction under section 80HHE/1OA of the Act;

ii) Computation of deduction under section 80HHE/10A supported by a certificate by the Chartered Accountant;

iii) Details of profit margin from the overseas branches.

It is also not in dispute that the assessing officer has examined the claim of deduction under section 80HHE / 10A of the Act in the original assessment proceedings. In fact, the assessing officer had made adjustments to the computation of deduction under section 80HHE / 10A of the Act, as claimed by the appellant. Further, clause (d) of Explanation to section 80HHE of the Act providing that profit of branch/office of the assessee situated outside India, is to be excluded from the profit of the business as also Explanation to sub-section (1) of section 80HHE of the Act with regard to the on-site software services, did exist in the statute when the original assessment proceedings were in progress before the assessing officer. Therefore, it cannot be anybody's case that the assessing officer was not aware of the factual and legal position with regard to the claim of such deduction by the appellant under section 80HHE and 10A of the Act in respect of profit of the overseas branches, which were contended to be profit derived from on-site software services. In fact, it is noted from the statement of profitability of the overseas branches filed with the return of income that the fact that profit of such branches was on account of on-site software services rendered by the appellant, was clearly evident to the AO in the course of the original assessment proceedings before him. In the aforesaid view of the matter, I am of the view that the initiation of the impugned reassessment proceedings under section 147 of the Act is on the basis of the re-appraisal of the same facts and information which were available at the time of original assessment proceedings. Relying on the ratio of the decision of the Supreme Court in the case of Kelvinator of India Ltd. (supra) and also various other decisions cited by the appellant it is held that the reassessment proceedings initiated by the assessing officer is based on

"change of opinion" and therefore, is directed to be quashed. Ground of Appeal Nos. 2, 3 & 4 are consequently allowed.

7. The ld. DR could not be able to controvert the findings of the ld. CIT(A) nor could he place before us such authorities which are counter to the catena of decisions relied by the assessee in its written submissions. We, therefore, are not inclined to interfere with the findings of the ld. CIT(A) on the ground of re-assessment having been made on the basis of change of opinion. Accordingly, the ld. CIT(A) has rightly quashed the reassessment made by the AO being bad in law ab initio. As a result, the appeal of the Revenue deserves to be dismissed on this score only. Since, we have supported the quashing of re-assessment proceedings being invalid, we need not to enter into other grounds of Revenue's appeal as well as the ground of assessee's cross objection on merits of additions. Accordingly, the appeal of the Revenue and Cross-objection of assessee are dismissed.

8. Since, the identical issue on similar facts is involved in appeal for A.Y. 2002-03, our decision, as aforesaid, shall apply mutatis mutandis in appeal of the Revenue for this year too. Accordingly, the appeal of the Revenue for A.Y. 2002-03 is also dismissed.

9. Adverting to appeal for A.Y. 2005-06, the ld. DR, relying on the assessment order, submitted that the export turnover has been defined to mean the consideration in respect of export (export sale made by the undertaking) brought into India by the assessee in convertible foreign exchange, but not to

include freight, telecommunication charges or insurance attributable to the delivery of articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India. The assessee has not provided any technical services. Therefore, expenditure incurred in foreign exchange need not to be reduced from the export turnover or from total turnover. The ld. CIT(A) while deleting the addition u/s. 10A and 80HHE, has not properly considered the above aspect of the case. The deletion of depreciation is also not justified for the reason that the items on which the higher depreciation was claimed were in the nature of electric installation not eligible for depreciation more than 15%.

10. On the other hand, the ld. AR, relying on the impugned order, submitted a written synopsis before us, which reads as under :

> The assessee is a public limited company, engaged in the business of software development, maintenance services and business process outsourcing services and had four units in operation:
>
> (a) Software development unit ("Leela Galleria unit") – no deduction claimed as unit suffered losses;
>
> (b) BPO unit in respect of which deduction u/s 10A was claimed ("BPO unit");
>
> (c) Software development unit in respect of which deduction u/s 10A was claimed ("GNR unit");
>
> (d) Software development unit in respect of which deduction u/s 10A was claimed ("Chennai unit");
>
> The assessee stood amalgamated with HCL Technologies Ltd w.e.f. 01.04.2005.
>
> For the relevant assessment year, the return of income was filed by the assessee on 30.10.2005 declaring income of Rs.2,57,02,830. The assessee claimed, inter alia,

deduction u/s 10A of the Act. The assessee filed a revised return declaring an income of Rs.2,57,02,830 on 30.03.2007.

The return was selected for scrutiny and assessment order dated 15.12.2008 was passed under section 143(3) of the Income-tax Act, 1961 ("the Act") wherein, the assessing officer recomputed deduction u/s 10A in respect of the BPO, GNR and Chennai units holding that the assessee had rendered technical services outside India through its foreign branches and, therefore, (i) profits derived from rendering technical services outside India, i.e., from foreign branches, were to be excluded from the export turnover while computing deduction u/s 10A, (Assessment order @ para 17.3, pg 8) and (ii) expenses incurred by the assessee in foreign currency for rendering alleged technical services outside India were to be reduced from export turnover while computing deduction u/s 10A of the Act (Assessment order @ para 18.1, pg 8). - Can also refer tables on page 10 onwards wherein AO has ignored (i) profits of branches and (ii) reduced 60% of expenses incurred in foreign currency for alleged rendering of technical services outside India, while computing allowable deduction u/s 10A in respect of each unit.

The details of deduction claimed vis-à-vis deduction allowed by the assessing officer in assessment are tabulated as under:

Units	Deduction claimed u/s. 10A	Deduction allowed by A.O.	Disallowance made by A.O.	Remarks
GNR	1,13,53,78,335	1,00,05,19,001	13,48,59,334	Communication expenses, expenses incurred in foreign exchange for rendering services outside India reduced from export turnover while computing deduction u/s 10A. Further, deduction u/s 10A not allowed by AO qua profits of branches situated outside India.
BPO	35,46,13,504	32,97,38,669	2,48,74,835	
Chennai	19,22,31,981	19,44,72,378	(22,40,397)	
Total	168,22,23,820	152,47,30,048	15,74,93,772	

The assessing officer also made disallowances, inter alia, on alleged excess depreciation claimed on computer peripherals.

Refer assessment order u/s 143(3) @ para 20, pg 9

Aggrieved by the disallowance made in respect of profits of GNR & BPO units eligible for deduction u/s 10A, the assessee preferred appeal before the CIT(A). In order passed by the CIT(A), it was held that activities of the assessee are to be regarded as that of developing and supplying software and the overseas branches of the assessee cannot be construed as being engaged in any activity other than rendering onsite software development services. It was held that the overseas branches merely act as conduit for rendering onsite software development services in relation to projects undertaken by undertakings of the assessee located in India. Therefore, CIT(A) held that (i) profits of foreign branches were essentially in the nature of profit derived by the assessee from onsite software development services and were, therefore, eligible for deduction under section 10A of the Act, and (ii) since assessee is not engaged in rendering technical services, no adjustment clause (iv) of Explanation 2 to section 10A is warranted – Reference made to ITAT order in own case for AY 2003-04 & 2004-05.

CIT(A) order @ pg 80-81

Reference was made by the CIT(A) to the following decisions:

- Interra Software India Pvt Ltd: ITA No.507/2008 & 160/2009 (Del HC)
- Assessee's own case passed by Delhi Bench of tribunal for AY 2004-05 in ITA Nos. 3203 & 3204/Del/2007
- Assessee's own case passed by Delhi Bench of tribunal for AY 2003-04 in ITA 1320/Del/2008

The assessee, in the course of its business of rendering software development services, enters into software development contracts, which involve off-shore as well as onsite software services. For the relevant year, the assessee has entered into a Master Service Agreement ("MSA") with its only customer, viz., Deutsche Bank AG ("DB"), for rendering software development services. Software development services required to be rendered by the assessee, in terms of the MSA, include off-shore services as well as onsite services.

For undertaking onsite services forming an integral part of the various software development projects executed by the assessee, the employees are deputed to the overseas locations, viz., Singapore, US and UK. In view of the regulatory requirement of obtaining work permits/ visa for such employees deputed on onsite projects, the assessee is required to have a physical presence, inter alia, in the form of branch in these countries. The assessee has accordingly established branches at Singapore, USA and UK. The employees deputed on overseas locations for rendering onsite services are shown as part of the branches in those countries and the profit/ loss from the onsite operations so performed by these overseas branches are accounted for as profit/ loss of the overseas branches.

The assessee, for the limited purpose of complying with Transfer Pricing Regulations and for discharging its statutory obligation of filing return of income in respect of such branches in the respective countries, considered the revenue from such onsite services, as the revenue of the branch and salaries of the employees, deputed on onsite projects, and other related expenses as the expenditure of the respective branches. In the books of accounts maintained in India, however, the revenue in respect of onsite operations relating to each project is identified with the undertaking and profits in relation to such onsite services, is accounted for as a part of overall profits of the undertaking.

The assessing officer, while denying deduction under section 10A in respect of BPO and GNR unit, held that onsite services rendered by the assessee were technical services rendered outside India, profit whereof was not eligible for deduction u/s 10A. It was also held by the assessing officer that expenses incurred by the assessee in foreign currency for rendering alleged technical services outside India were to be reduced from export turnover while computing deduction u/s 10A of the Act.

The findings of the assessing officer in this regard, in the assessment order, are summarized as follows:

(i) since export of computer software and providing technical services in connection with development of software are distinguishable from each other, the profits for providing technical services abroad is to be excluded while computing deduction under section 10A of the Act;

(ii) section 10A of the Act provides for deduction from the total income only in respect of profit from export of computer software and profit from rendering of technical services is not included therein;

(iii) expenses incurred by the assessee in foreign currency for rendering alleged technical services outside India were to be reduced from export turnover while computing deduction u/s 10A of the Act.

In appeal, the CIT(A) held that overseas branches of the assessee merely constitute a liaison office for rendering of onsite software development services in relation to software development projects undertaken by the various undertakings located in India and therefore, it could not be held that the assessee was engaged in rendering technical services outside India. The adjustments made by the assessing officer were accordingly deleted. @ CIT(A) order @ pg 80-81

It is respectfully submitted that the denial of deduction under section 10A of the Act by the assessing officer is incorrect having regard to the scheme of the said section as well as factual matrix of the software development activities undertaken by the assessee and the view taken by the CIT(A) deserves to be upheld.

For detailed legal submissions, please refer chart for assessment year 2002-03.

The assesse claimed depreciation on computer and peripherals @ 60% in the return of income.

The assessing officer, however, allowed depreciation @ 25% only, as available in the case of general plant and machinery, thereby, disallowing Rs.24,75,205 as alleged excess depreciation claimed by the assessee. @ Pg 9 of the assessment order.

The CIT(A) deleted the aforesaid disallowance made by the assessing officer by relying on the decision of CIT vs Birlasoft Ltd: ITA No.1284/2011 (Delhi HC) dated 15.12.2011 wherein the Apex Court held that the depreciation on computer accessories and peripherals would be admissible @ 60%.

The action of the CIT(A) in deleting disallowance of depreciation claimed on computer and its peripherals @ 60% is in accordance with law and deserves to be upheld in view of the following decisions as well:

- SLP preferred by the Revenue in the case of Birla Soft Ltd dismissed in SLP(C) No.20645/2012.
- CIT vs BSES Rajdhani Powers Ltd: ITA No.1266/2010 (Delhi HC) dated 31.08.2010
- CIT vs BSES Yamuna Power Ltd: 358 ITR 47 (Del)
- Expeditors International (India) (P) Ltd vs Addl CIT: 2 ITR(T) 153 (Del Trib.) dated 29.08.2008
- DCIT vs Oriental Ceramics and Industries Ltd: 3 ITR 246 (Del Trib.) dated 20.01.2011
- CIT vs Orient Ceramics and Industries Ltd: 358 ITR 49 (Delhi) dated 20.01.2011
- Steel Authority of India Ltd vs Addl CIT: ITA No. 751/Del/2011 (Delhi) dated 26.10.2012
- ACIT vs HCL Comnet Ltd.: ITA No. 322/Del/2012 (Delhi) dated 24.08.2012
- HCL Technologies BPO Services Ltd vs ACIT: ITA No.5622/Del/2010

In view of the aforesaid, depreciation on computer and peripherals is to be allowed @ 60% thereon. Accordingly, disallowance made by the assessing officer has been rightly deleted by the CIT(A).

11. We have heard the rival submissions and have gone through the entire material available on record. We find that the ld. CIT(A) has given cogent reasons on the issues under consideration, which could not properly controverted on behalf of the Revenue. For ready reference, the findings of the ld. CIT(A) are reproduced as under :

> *" 2.1 I have considered the facts stated by the assessee in his submission and the grounds raised in appeal.*
>
> *2.2 These Grounds of Appeal deal with disallowance of deduction u/s 10A of the Act in respect of profits of overseas branches.*
>
> *The appellant has submitted vide his reply filed during the appellate proceedings that it is engaged in the business of rendering software development services, which involves off shore as well as onsite software services. That the appellant has entered into a Master Service agreement ("MSA") with its only customer, viz., Deutche Bank AG (DB) for rendering software development services. Software development services required to be rendered by the appellant, in terms of the MSA, include off-shore services as well as onsite services. Various software development projects (which are covered under the said MSA with DB) are executed either by GNR units, which is registered with Software Technologies Park of India ("STPI") or Leela Galleria unit. Business process Outsourcing services, however, are undertaken by BPO unit, which is also registered with STPI.*
>
> *2.3 The appellant has branches in the overseas locations at US, UK and Singapore to facilitate onsite operations. For undertaking onsite services in respect of various software development projects by the various units, the employees are deputed to the overseas locations, viz., Singapore, US and UK. In view of the regulatory requirement for obtaining work permits/ VISA for such employees deputed on onsite projects, the appellant is required to have a physical presence, inter alia, in the form of branch in these countries. The appellant has accordingly established branches at Singapore, USA and UK. In view of the regulatory requirements relating to work permits, etc., employees deputed on overseas locations for rendering onsite services are shown as part of the branches in those countries and the profit / loss from*

the onsite operations so performed by these overseas branches are accounted for as profit / loss of the overseas branches.

2.4 It has been submitted that the appellant, for the limited purpose of complying with Transfer Pricing Regulations and for discharging its statutory onus of filing return of income in respect of such branches in the respective countries, considers the revenue from such onsite services, as revenue of the branch and salaries of the employees, deputed on onsite projects, is considered as the expenditure of the respective branch. That in the books of accounts, however, the revenue in respect of onsite operations relating to each project is identified with the respective undertaking and profit in relation to such onsite services, is accounted as part of overall profits of the concerned undertaking.

2.5 That the appellant had during the relevant previous year claimed deduction under Section 10A of the Act in respect of the profits of its STPI Units, namely, BPO Unit and GNR Unit (including the profits from onsite operations Accounted as profit of the overseas branches to the extent attributable to these STPI Units). However, the deduction so claimed by the appellant was rejected by the AO in the impugned assessment order against which the appellant in the appeal.

2.6 Section 10A of the Act allows deduction for profits derived from export of software. The deduction under that section is calculated with reference to profits of the eligible undertaking and not with reference to profits of all businesses carried on by the assessee. The said section provides that provision of onsite services would be deemed to be export of software from India in view of Explanation 3 of Section 10A of the Act. Further, unlike Section 80HHE of the Act, there is no provision in section 10A of the Act for excluding profits of a foreign branch, considering the scheme of that section, where the deduction is allowed, qua profits of the eligible undertaking and not the profits of the total businesses carried on by the assessee.

2.7 Reliance has been placed on the decision of the Delhi Bench of the Tribunal in the case of DCIT vs. Interra Software India (P) Ltd. 112 TTJ 982 in the context of section 10A of the Act, wherein the Tribunal upheld the order of the CIT (A) allowing deduction in respect of profits derived a

foreign branch, which was regarded as an extension of the eligible undertaking in India for rendering onsite services in connection with development and production of computer software.

2.8 That the overseas branches of the appellant, it was submitted, merely constitute conduit for rendering of onsite software development services in relation to software development projects undertaken by the various undertakings located in India. The impugned profits of such branches aggregating to Rs. 5,72,40,384/- (Rs. 18,41,165/- in case of BPO Unit plus Rs. 5,53,99,218/- in case of GNR Unit) being essentially profit derived by the appellant from onsite software development services, is clearly covered by Explanation 3 of Section 10A of the Act and should accordingly qualify for deduction under that section.

2.9 The decision of the Delhi Bench of the Tribunal in the case of Interra Software India Pvt. Ltd., relied upon by the appellant, has recently been adjudicated by the Honhle Delhi High Court vide their order dated 24-12-2010 in ITA Nos. 507 of 2008 and 160 of 2009. The relevant portions of the decision of the Hon'ble Delhi High Court are reproduced as under:

QUOTE
"6. The submission of Mr. Sahni, learned Counsel appearing for the Revenue is that the Tribunal and CIT (A) did not appreciate the document furnished before the AO and relied only on Expln. 3 to Section 10A of the Act which according to the Tribunal 'permits exemption under Section 10A on profits derived by an Assessee from a foreign branch with reference to onsite services or development of computer software provided by the said company". His argument was that the relevant documents would clearly demonstrate that the trading branch at Tokyo is an independent and separate branch office and, therefore, profits incurred (sic—earned) in respect of that branch would not qualify for deduction under Section I0A of the Act. He drew distinction between a branch office and a liaison office submitting that a branch office is one which may meet all commercial requirements. A liaison office is only permitted to do what its name suggests—act as an intermediary between the foreign principal enterprise and the Indian customers and vice versa. It may not engage in any other commercial activity with the objective to earn profit. The Assessee has been carrying on full-fledged marketing operations in Tokyo, Japan, as per the

approval of RBI. It has been incurring all sorts of expenses for maintaining its branch office. The Assessee is thus not entitled to deduction under Section 10A on the revenues of the Tokyo branch office under Section 10A/80HHE of the Act. It is submitted that the nature of the operations of the said branch office can be gathered from various letters filed by the Assessee to Development Commr., Noida Export Processing Zone, the general manager, RBJ, etc. In fact, the submission of the Appellant becomes crystal clear by referring to the letter of the Assessee addressed to the manager, Bank of America which leads, "... in view of the current slide down which has hit the US software market most, Japan is emerging as a critical market in the international software trade. With a view, therefore, to expanding our market in Japan, we have decided to have an effective presence in that country and establish a non-trading branch in Japan...". From this, it is amply clear that the Assessee wanted to enter and capture Japanese market by opening a branch office there and its revenues from the branch office are not covered under Explanation 3 to Section 10A of the Act.

7. Mr. Vohra, learned Counsel appearing for the Assessee, on the other hand, argued that a pure finding off act was arrived at by the two authorities below that the Japan Branch was an onsite office. There was no development of computer software provided by the Assessee Company and, therefore, profits derived from the said unit were entitled to exemption under Section 10A of the Act. He submitted that it was clear from the facts that the Assessee had sought permission from the RBI to open non-trading branch in Tokyo, Japan to facilitate communication between NEPZ unit and the company in Japan, assist in marketing efforts, help procure orders, render assistance to professionals deputed there on offshore assignments, attend to validation and testing of the products, if required and providing other requisite comforts to customers. He also argued that the Revenue was trying to make out a totally new case before this Court and that too on presumptions, namely, the Assessee may have engaged in other activities contrary to permission granted by the RBJ which was not backed by any evidence.

8. In order to appreciate the rival contentions, it is necessary to take note of the provisions contained in Section 10A of the Act. This section carves out special provision in respect of newly established 100 per cent export- oriented undertakings. It, inter alia, stipulates that deduction of

such profits and gains as are derived by an undertaking for export of articles or computer software shall be allowed from the total income of the Assessee for a period of ten consecutive assessment years.

9. The Assessee is dealing with the export of computer software; it is 100 per cent export- oriented unit. There is no dispute that the Assessee is engaged in the business of development or development of software through its unit located in NEPZ. It is also not in dispute that for this reason, the NEFZ is entitled to deduction under Section 10A/10B of the Act in respect of profits derived from the said unit. The question relates to the profits derived by the Assessee's branch in Japan. Answer to that would depend on Expln. 3. of Section 10A which reads as under.

Explanations. —For the removal of doubts, it is here by declared that the profits and gains derived from onsite development of computer software (including services for development of software outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

10. As per this Explanation, even if the profits and gains are derived from onsite development of computer software outside India, they are also treated as profits and gains from the export of computer software outside India. In the backdrop of this provision, what is to be examined is as to whether Japan office of the Assessee would be treated as an onsite development of computer software or it is to be treated as separate branch functioning independently.

11. As noted above, the submission of learned Counsel for the Revenue is that to qualify the "onsite development", it should be only a liaison office acting as an intermediary between the foreign principal enterprise and the Indian customers and vice versa. Wherever, such foreign office is working as a separate branch carrying on full-fledged marketing operations that would not be treated as onsite development.

12. We are in agreement with this interpretation suggested by learned Counsel for the Revenue. However, what we find from the record that matter is not examined in this perspective by the authorities below.

15. Before us an attempt was made by counsel for both the sides to interpret the documents filed by the Assessee including RBI permission in their favour, that is, on the basis of some documents the Assessee claims that Expln. 3 of Section 10A of the Act is satisfied whereas the Revenue feels otherwise. However, since proper exercise is not done by any of the authorities below, we set aside the orders and remit the case back to the AO to decide the issue afresh in the light of documents produced and having regard to the principles laid down in this order."

2.10 In view of the afore said finding of the Hon'ble Delhi High Court, it was required to examine, whether branch offices in Singapore, USA and UK, created by the appellant, operate as liaison offices for rendering on-site services or such branches are engaged in rendering marketing services. During the appellate proceedings, the appellant has submitted the following papers and documents to demonstrate that the overseas branches of the appellant at Singapore, UK and USA are solely engaged in rendering of on-site software development services:-

(v) Master Service Agreement with Deutche Bank, AG.

(vi) Project-wise Details of software development services (offshore and onsite) in respect of GNR Unit.

(iii) SOFTEX Form / return submitted with STPI.

2.11 It, therefore, cannot be disputed that onsite services rendered by the appellant are essentially services for development of software or are onsite services rendered in connection with software development operations performed by the appellant in the software development centers in India.

Moreover from para 2 at page 1 of the impugned assessment order too, it is observed that the assessing officer has not disputed the fact that the appellant is developing and supplying software only. The assessing officer, however, was of the view that there is an element of "technical services" involved in such activity and accordingly held that the appellant was engaged in the business of providing technical services at the customer's location through it's overseas branches.

2.12 Further the Hon'ble Delhi Bench of the Tribunal vide order dated 23-01-2009 in appellant's own case for assessment year 2004-05 (ITA Nos. 3199 & 3344/Del/07) has while reversing the action of the Assessing Officer in holding 60% of the expenditure incurred in foreign currency was for rendering technical services outside India [which was reduced to 10% by the CIT (A)] held as under:

QUOTE
"5. From perusal of this finding, it reveals that CIT (Appeals) has principally agreed with the contentions of the assessee that it was not providing technical services outside India. However, while concluding his finding, somehow he estimated 10% of software development charges towards expenses attributable for providing technical services outside India. The AO has totally misconstrued the activities of the assessee from its website. The assessee was not providing any technical services and there is no material brought on record by the assessing officer which can exhibiting that it was providing technical services. There are no receipt under that head. If the assessee was in the business of providing consultancy services, then assessing officer could have lay his hands on some agreement executed between the assessee and the entity who availed the consultancy charges. The assessing officer could also investigate from the receipts whether these were received by the assessee in lieu of any consultancy agreement or they are related to export of software developed by it. In view of the above, we do not find any justification in allocating a particular percentage of software development charges towards expenses alleged to have been incurred for providing technical services. We allow this ground of appeal raised by the assessee and reject the ground of appeal raised by the revenue. We direct the assessing officer not to exclude any amount from software development charges under the garb of expenses incurred, towards providing consultancy services. He will not exclude these amounts from the export turnover while computing the deduction admissible under section 10A of the Act."

UNQUOTE
To 'similar effect is the finding of the 'Hon'ble' Tribunal' in the case of the appellant for assessment years 2004-05 in ITA Nos. 3203 & 3204/Del/07,wherein relying upon the earlier decision of the Tribunal for

assessment year 2003-04 (in ITA Nos. 1320 & I 448/D/08), the contentions of the assessee were upheld.

2.13 In view of the aforesaid findings by the Hon'ble Tribunal, too, the activities of the appellant are to be regarded as that of developing and supplying software and the overseas branches of the appellant, cannot be deemed to be engaged in any activity other than rendering software development services (on-site services) only.

In view of the aforesaid facts, which are on record, I am of the view that the overseas branches of the appellant merely act as conduit for rendering of the onsite software development services in relation to software development projects undertaken by the various undertakings located in India. The aforesaid profits of the branches do satisfy the test laid down by the Hon'ble Delhi High Court in the case of Interra Software India Pvt. Ltd., in as much as the overseas branches of the appellant are acting merely as conduit for rendering on site services. The profits of such branches aggregating to Rs. 9,79,43,206/- being essentially in the nature of profits derived by the appellant from onsite software development services, is apparently covered by Explanation 3 of Section 10A of the Act and would accordingly qualify for deduction under that Section. Ground No. 2 8s 3 are hereby allowed.

12. There being no contrary material on record to rebut the aforesaid findings of ld. CIT(A), we do not find any merit in the appeal of the Revenue. Accordingly, this appeal of the Revenue also deserves to be dismissed.

13. In the result, all the three appeals of the Revenue and cross objection of the assessee are dismissed.

Order pronounced in the open court on 30.04.2019.

Sd/-	Sd/-
(Amit Shukla)	**(L.P. Sahu)**
Judicial member	**Accountant Member**

Dated: 30.04.2019