IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C', NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.4807/Del/2016
Assessment Year: 2009-10
And
ITA No.4808/Del/2016
Assessment year: 2010-11

DCIT, Circle-11(1), New Delhi	**Vs.**	M/s. HCL Comnet System & Services Ltd., 806, Sidharth, 96, Nehru Place, New Delhi
		PAN :AAACH3130M
(Appellant)		**(Respondent)**

Appellant by	Shri Raghunath, Sr. DR
Respondent by	Shri Ajay Vohra, Sr. Adv. & Shri Aditya Vohra, Adv.

Date of hearing	27.08.2019
Date of pronouncement	16.10.2019

ORDER

PER O.P. KANT, AM:

These two appeals by the Revenue are directed against two separate orders, both dated 24.06.2016, passed by learned Commissioner of Income Tax (Appeals) -16, New Delhi [in short 'learned CIT(A)'] for assessment years 2009-10 & 2010-11 respectively. As both the appeals are connected with same assessee and common issues are involved in the same set of circumstances,

both these appeals were heard together and disposed off by way of this consolidated order for sake of convenience.

ITA No.4807/Del/2016 for AY: 2009-10

2. First, we take up the appeal, having ITA No.4807/Del/2016 for assessment year 2009-10. The grounds raised by the Revenue are reproduced as under:

1. *Whether on the facts & the circumstances of the case, learned CIT(A) is right in deleting the disallowance u/14A r.w.r. 8D of Rs.23,44,799/- by ignoring the fact that the CBDT's circular no. 5/2014 dated 11.02.2014 is directly applicable and the disallowance has to be made irrespective of the fact that the exempt income is accrued to the assessee with regard to the investments or not?*
2. *Whether on the facts and the circumstances of the case, learned CIT(A) is right in excluding the expenditure of Rs.54,41,03,568/- on account of telecommunication charges and foreign currency expenditure from export turnover?*
3. *Whether on the facts & the circumstances of the case, learned CIT(A) is right in excluding the expenditure of Rs.54,41,03,568/- on account of telecommunication charges and foreign currency expenditure from export turnover?*
4. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.*

3. Briefly stated facts of the case are that the assessee was engaged in the business of remote infrastructure management services and application services. In the year under consideration, the assessee filed return of income on 30.09.2009, declaring total income of Rs.8,64,57,746/-. The case was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (for short "the

Act") were issued and complied with. In the assessment completed under Section 143(3) of the Act on 28.03.2013, the Assessing Officer made certain additions/disallowances and assessed the total income at Rs.32,26,57,040/- under the normal provisions of the Act and computed book profit at Rs.189,31,76,520/-.

3.1 Aggrieved by the additions/disallowances, the assessee filed an appeal before the learned CIT(A), who allowed the appeal of the assessee. Aggrieved by the findings of the learned CIT(A), the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

4. Ground no. 1 of the appeal relates to disallowance under Section 14A of the Act r.w.r 8D of the Income-tax Rules, 1962 (in short 'the Rules'), amounting to Rs.23,44,799/-. The Assessing Officer observed dividend income of Rs.1,00,158/- and *suo-motu* disallowance of Rs.4,05,200/- u/s 14A of the Act. The Assessing Officer invoking Rule 8D of the Rules, computed the disallowance u/s 14A at Rs.27,49,999/- and after subtracting the *suo motu* disallowance of Rs.4,05,200/- made by the assessee, he made addition of Rs.23,44,799/- in terms of section 14A r.w.r. 8D of the Rules. The learned CIT(A) deleted the additions in view of the decision of the Hon'ble High Court in the case of ***Joint Investment Ltd. vs. CIT, (2015), 372 ITR 694*** that disallowance cannot be more than exempt income.

4.1 We have heard both the parties on the issue in dispute. As the learned CIT(A) has followed the binding precedent of the Jurisdictional High Court, we do not find any error in the order of the learned CIT(A) and accordingly upheld the same. Ground no. 1 of the appeal is dismissed.

5. In ground no. 2, the Revenue has challenged the finding of the learned CIT(A) of treating the licence fee paid to DOT, amounting to Rs.3,85,46,284/- as revenue expenditure.

5.1 Before us, learned counsel for the assessee submitted that the issue in dispute is covered in favour of the assessee by the order of the Tribunal in the case of the assessee passed in ITA No.4546/Del./2013 for assessment year 2007-08, dated 15.01.2015.

5.2 Learned DR also could not controvert the submissions of the assessee.

5.3 We have heard the submission of the parties. We find that the learned CIT(A) has deleted the additions following the order of the Tribunal in the case of the assessee for assessment year 2007-08 (supra) which is a binding precedent. The relevant finding of the learned CIT(A) is reproduced as under:

> *"I have considered all the facts and circumstances of the case and also the history of the case. The appellant has been granted the relief by the Hon. ITAT for assessment year 2007-08 and by the ITAT in AY 2006-07 to 2008-09 under the identical facts and circumstances. Therefore, considering the judicial precedent and the consistency on the issue, I respectfully follow the order of the Hon. ITAT as well as my esteemed colleague and the issue is decided in favour of the appellant. The licence fee paid by the appellant is treated as revenue in nature."*

5.4 In view of above, we do not find any error in the finding of the learned CIT(A) and accordingly, we uphold the same.

6. Ground no. 3 of the appeal relates to whether the telecommunication charges and foreign currency expenditure has

to be reduced from the export turnover for the purpose of computing deduction under Section 10A of the Act.

6.1 Before us, learned counsel for the assessee submitted that the issue in dispute is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of ***CIT Vs. HCL Technologies Ltd., [2018] 404 ITR 719 (SC)***. We find that the learned CIT(A) has followed the decision of the Hon'ble High Court in the case of the HCL Technologies, which has now been upheld by the Hon'ble Supreme Court. The finding of the learned CIT(A) is reproduced as under:

> *"Considering all the facts and circumstances of the case, the legal submission of the appellant, the reliance placed on judgments and also the fact that the Hon. ITAT in the case of HCL Technologies Ltd., being the parent company of the appellant, has held that adjustment, if any made from "export turnover" under Explanation 2 of section 10A of the Act is also liable to be paid on "total turnover" to avoid unintended and absurd results. It is also brought to my notice4 that the Hon. High Court of Delhi, has rejected the appeal filed by the revenue, against the above referred decision of the ITAT, in the case of HCL Technologies Ltd. Further, the Assessing Officer in the asstt. Order for AY 2001-12 has also appreciated and agreed with the above submission of the appellant. Therefore, the expenses incurred in foreign currency outside India, are directed to be excluded from the "total turnover" in the denominator, if the same are excluded from the "export turnover" in the numerator, while computing deduction u/s 10A of the Act.*

6.2 In view of above, we do not find any error in the order of the learned CIT(A) on the issue in dispute and accordingly, we uphold the same. Ground no. 3 of Revenue's appeal is dismissed.

7. Ground no. 4 is general in nature, therefore, the same is dismissed as infructuous.

8. In the result, the appeal of the Revenue is dismissed.

ITA No. 4808/Del/2016 for AY: 2010-11

9. Now, we take up the appeal, bearing ITA No.4808/Del/2016 for assessment year 2010-11. Grounds of appeal are reproduced as under:

1. *Whether on the facts & the circumstances of the Id. CIT(A) is right in deleting the disallowance u/s 14A r.w.r. 8D of Rs.55,82,650/- by ignoring the fact that the CBDT's circular no. 5/2014 dated 11.02.2014 is directly applicable and the disallowance has to be made irrespective of the fact that the exempt income is accrued to the assessee with regard to the investments or not?*

2. *Whether on the facts & the circumstances of the case, Id. CIT(A) is right in treating the License fee paid to DOT as revenue expenditure and deleting the capitalization of license fee of Rs.3,69,25,186/-?*

3. *Whether on the facts & the circumstances of the case, ld. CIT(A) is right in excluding the expenditure of Rs.32,92,61,465/- on account of telecommunication charges and foreign currency expenditure from export turnover ?*

4. *Whether on the facts & the circumstances of the case, Id. CIT(A) is right in deleting the disallowance of unrealized foreign exchange loss on account of reinstatement of assets and liabilities of Rs. 15,97,25,873/- by ignoring the fact that this is a notional loss and not allowable to be set off against the taxable income in view of CBDT's instruction no. 3 of 2010 dated 23.03.2010?*

5. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.*

6. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.*

10. Ground no. 1 relates to disallowance of Rs.55,82,650/- which was made by the Assessing Officer, has been deleted by the learned CIT(A).

10.1 The facts qua the issued in dispute are that the assessee received dividend income of Rs.4,22,021/- and claimed exemption for the same. In the computation of income, assessee disallowed an amount of Rs.10,767/- for disallowance under Section 14A of the Act. Dissatisfied with the claim of the assessee of the expenditure incurred towards earning exempt income, the Assessing Officer invoked Rule 8D of the Rules and computed the disallowance at Rs.55,93,417/- and after subtracting the *suo motu* disallowance of Rs.10,767/- by the assessee he made net addition of Rs.55,82,650/-. Learned CIT(A) after considering the submissions of the assessee, held as under:

> *"The Assessing Officer in his order, although, has observed he was not satisfied with the disallowance made by the appellant. However, he has not specifically pointed out any deficiency or error in the computation of disallowance, by the appellant. The recording of satisfaction is not a ritual. It has to be based on concrete findings. Therefore, the Assessing Officer has not made out a case for invoking the provision of Rule 8D.*
>
> *Further the contention of the Ld AR that the investment was only strategic investment made by the appellant in its fully held subsidiary for commercial exigency.*
>
> *The other contention of the Ld. AR is the Rule 8D cannot be applied because there was no opening and closing investment, income from which does not or shall not form part of the total income.*
>
> *In the light of the judicial principle laid down by the Hon. Jurisdictional High Court, as well as various contentions of the appellant, the addition of Rs.55,82,650/-, by invoking the provision of Rule 8D, by the Assessing Officer was not warranted. The same is, therefore, deleted."*

10.2 Before us, the learned counsel for the assessee submitted that the Assessing Officer has not recorded the dissatisfaction over the disallowances of Rs.10,767/- made by the assessee and, therefore, the disallowance invoking Rule 8D need to be deleted

following the decision of Hon'bole Supreme Court in the case of ***Maxopp Investment Ltd. Vs. CIT, 402 ITR 640 (SC).*** He further submitted that even under the computation of Rule 8D, no disallowance can be worked out under Rule 8D(2)(iii) of the Rules as there was no opening or closing balance of the investment and thus, according to the working under Rule 8D(2)(iii), disallowance ought to be computed at nil. In support of the contention, the learned counsel relied on the following decision:

1. *ACB India Ltd. Vs. ACIT, 374 ITR 108 (Del.)*
2. *Pr. CIT Vs. Caraf Builders & Constructions Pvt. Ltd., ITA No. 1260/2018 (Del.HC)*

10.3 On the other hand, learned DR relied on the order of the Assessing Officer.

10.4 We have heard the rival submissions and perused the relevant material on record. We agree with the contention of the learned counsel that disallowance as per Rule 8D(2)(iii) ought to be computed at nil, however, on perusal of the computation of Rule 8D(2)(iii) by the Assessing Officer, we find that he has worked out investment as on 31.03.2009 at Rs.54,94,39,000/- and investment as on 31.03.2010 at Rs.1,68,79,28,003/- and worked out the average investment of Rs.111,86,83,501/-. In view of above facts, the contention that there was wrong opening and closing investment is not accepted. As far as satisfaction of the Assessing Officer is concerned, firstly the Assessing Officer has rejected the claim of assessee after perusal of the account of the assessee, thereafter, he proceeded to invoke Rule 8D of the Rules. Thus, the contentions of the assessee that no dissatisfaction has been

recorded by the Assessing Officer for invoking Rule 8D is not correct. Secondly, the assessee is not in appeal before us and thus, the assessee cannot raise this issue in the appeal of Revenue. Accordingly, we reject the contentions of the assessee. However, in view of the decision of the Hon'ble High court in the case of Joint Investment P. Ltd. (supra), the disallowance cannot be more than exempt income and accordingly, we restrict the disallowance at Rs.4,22,021/-. Ground no. 1 is accordingly partly allowed.

11. In ground no. 2, the Revenue has challenged the finding of the learned CIT(A) of treating the licence fee paid to DOT, amounting to Rs.3,69,25,186/- as Revenue expenditure. This very issue has already been decided in earlier paras 5 to 5.4 of this order. Accordingly, we do not find any error in the order of the learned CIT(A) and uphold the same. Ground no. 2 of Revenue's appeal is dismissed.

12. Ground no. 3 of the appeal related to whether the telecommunication charges and foreign currency expenditure has to be reduced from the export turnover for the purpose of computing deduction under Section 10A of the Act. This very issue has also been decided in earlier paras 6 to 6.2 of this order. Accordingly, we uphold the order of the learned CIT(A) on this very issue. Ground no. 3 of the Revenue is dismissed.

13. Ground no. 4 relates to disallowance of unrealized foreign exchange loss on account of reinstatement of assets and liabilities, amounting to Rs.15,97,25,873/- holding the same to be notional.

13.1 During the course of assessment, the Assessing Officer observed that unrealized foreign exchange loss on account of reinstatement of assets and liabilities at Rs.15,97,25,873/- is

notional and not allowable. Learned CIT(A) after considering the submission of the Assessing Officer and judicial precedents available on the issue in dispute, decided the issue as under:

> *"I have considered all the facts and circumstances of the case.*
>
> *Where the assessee carrying on the mercantile system of accounting claimed that:*
>
> *(i) The additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes was allowable as deduction u/s 37(1) in the year of fluctuation in the rate of exchange and not in the year of repayment of such loans; and*
>
> *(a) The term "expenditure" in s. 37 covers an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. The "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure u/s 37(1);*
>
> *(b) Profits and gains are required to be computed in accordance with commercial principles and accounting standards (AS-11);*
>
> *(c)Accounts and the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits;*
>
> *(d) The fact that the department taxed the gains on fluctuation on the basis of accrual in appellant's own case for AY 2009-10, while disallowing the loss is important shall / amount to the double standards adopted by the Department;*
>
> *(e) U/s 43A (pre-amendment), the change in the rate of exchange subsequent to the acquisition of asset triggers the adjustment in the actual cost of the assets. Actual payment of the liability as a consequence of the exchange variation is not required. The amendment of s. 43A by the FA 2002 w.e.f. 1.4.2003 is not clarificatory.*
>
> *Note: The judgement of the ITAT Special Bench in ONGC vs. ITO 83 1TD 151 has been approved by the Hon. Supreme Court in the case of C1T vs Woodward Governor India Pvt. Ltd 312 ITR 254.*
>
> *Respectfully, following the order of the Hon. Supreme Court in 312 ITR 254 decided in favour of the appellant. The AO is directed to allow the consequential relief."*

12.2 We have heard the rival submission of the parties on the issue in dispute. We find that the learned CIT(A) has decided the issue following the decision of the Hon'ble Supreme Court in the case of ***CIT vs Woodward Governor India Pvt. Ltd 312 ITR 254***. We do not find any error in the order of the learned CIT(A) on the issue in dispute, accordingly, uphold the same. Ground no. 4 is dismissed. The appeal filed by the Revenue is dismissed.

13. In the result, the appeal for assessment years 2009-10 is dismissed whereas appeal for assessment year 2010-11 is partly allowed.

Order is pronounced in the open court on 16th October, 2019.

Sd/-	***Sd/-***
(SUDHANSHU SRIVASTAVA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 16th October, 2019.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi