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

BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos. and Assessment Year	Appellant	Respondent
2815/Del/2013 2008-09	Assistant Commissioner of Income Tax, Circle – 16(1), New Delhi.	M/s. Tecnotree Convergence Ltd., 16th Floor, DLF Building No.5, Tower – A, DLF Cyber City, Phase – III, Gurgaon – 122 002. **PAN : AAACL 7345 L**
2830/Del/2013 2008-09	M/s. Tecnotree Convergence Ltd., Gurgaon – 122 002. **PAN : AAACL 7345 L**	Income Tax Officer, Ward – 16(2), New Delhi.
2831/Del/2013 2009-10	-do-	-do-

Revenue by	:	Ms. Neera Malhotra, CIT (DR)(ITAT), Bengaluru
Assessee by	:	Shri. K. R. Vasudevan, Advocate

Date of hearing	:	02.03.2020
Date of Pronouncement	:	03.06.2020

O R D E R

Per A. K. Garodia, Accountant Member

Out of these three appeals, there are two cross-appeals of assessee and Revenue for Assessment Year 2008-09 and there is one appeal of the assessee only for Assessment Year 2009-10. These appeals were heard together and

are being disposed of by way of this common order for the sake of convenience.

2. First, we take up the appeal of the Revenue for Assessment Year 2008-09 i.e., ITA No.2815/Del/2013. The grounds raised by the Revenue are as under:

1. *"On the facts and in the circumstances of the case and in law the learned CIT(A) has erred in directing the AO to exclude the expenses incurred in foreign currency outside India, from total turnover of the assessee."*

2. *"The appellant craves for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of appeal".*

2. In the course of hearing, learned DR of the Revenue supported the Assessment Order whereas it is submitted by learned AR of the assessee that this issue is now covered in favour of the assessee by the judgment of Hon'ble Karnataka High Court rendered in the case of Tata Elxsi Ltd. as reported in 349 ITR 98.

3. We have considered the rival submissions. We find that as per the grounds raised by the Revenue as reproduced above, this is the grievance of the Revenue that learned CIT(A) has erred in directing the AO to exclude the expenses incurred in foreign currency outside India from the total turnover of the assessee for computing deduction allowable u/s 10A. On this issue, it was

held by Hon'ble Karnataka High Court that total turnover is sum total of domestic turnover and export turnover. Therefore, if an amount is reduced from export turnover, then total turnover also goes down by the same amount automatically. In view of this, we find that the direction of the learned CIT(A) is in line with this judgment of Hon'ble Karnataka High Court and respectfully following the same, we decline to interfere in the order of CIT(A) on this issue.

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

5. Now we take up the appeal of the assessee for Assessment Year 2008-09, i.e., ITA No.2830/Del/2013. The grounds raised by the assessee are as under:

> *1. That the CIT(A) has erred on facts and in law in upholding the order of the Assessing Officer restricting deduction u/s 10A of the Income Tax Act, 1961 to Rs. 11,18,5g,936/- as against Rs. 19,91,40,406 as claimed by the Appellant .*
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> > *1.1 On facts and in law, the C1T(A) erred in upholding the order of the Assessing Officer reducing Rs. 18,53,87,711/- from export sales on the ground of non-realization for the purposes of computing deduction u/s 10A.*
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> > *1.2 That the CIT(A) has failed to appreciate that it is settled law that if no communication is received to a request made to a statutory authority or its nominee, the request is deemed to be allowed. The CIT(A) has erred in not realizing that even if no explicit approvals were received from the RBII Authorized Dealer, it has to be read as implicit approval since no communication has been forthcoming. In light of the implicit approval, the CIT(A) has erred in upholding the exclusion from export proceeds on the ground of non-realization.*

2. The CIT(A) has erred on facts and in law in upholding the exclusion of Rs. 5,21,84,295/- from export sales on the ground that it was expenditure incurred in foreign currency without taking into consideration that these amounts were not included in export invoices nor did they form a part of export sales.

3. The CIT(A) has erred on facts and in law in upholding the exclusion of Rs. 2,76,86,054/- from eligible business profits for the purposes of computing deduction u/s 10A on the ground that the amount was as profit from trading of third-party software without appreciating the fact that the Appellant had done value addition to the third-party software before supplying it to its customers, thereby making it eligible for deduction u/s 10A.

3.1 The CIT (A) has erred on facts and in law in disallowing the application of the Appellant under Rule 46A of the Income Tax Rules 1962, requesting permission to file additional documents containing information on tax deducted at source, in light of the fact that the Appellant was unable to file the documents before the Assessing Officer as no further documents were requested nor any opportunity given to the Appellant to produce the documents.

3.2 The CIT(A) has erred on facts and in law in upholding the disallowance of Rs.3,52,94,615/- on the ground of non-deduction of tax.

3.3 The CIT(A) has failed to appreciate that the Appellant was not liable to deduct tax on the export commission to the tune of Rs.66,84,504/- as they were not taxable in India.

3.4 The CIT(A) has failed to appreciate that as required by law, the appellant obtained certificates from Chartered Accountant that payments made for procurement of export orders were not chargeable to tax in India hence no tax was required to be deducted before remittance especially in light of the fact that no finding has been given by the CIT(A) that the income of persons

receiving commission for export sales is taxable in India and that when genuineness of the payments and the certificates for non-deduction of tax is not in question, there is no reason to uphold the disallowance.

3.5 The CIT (A) has erred in upholding the order of the Assessing Officer disallowing payments to the tune of Rs.41,21,993/- made for technical services even though the payment was made for liability incurred in the previous years and the services were utilized by the Appellant for projects undertaken outside India and no tax was required to be deducted in view of the exception provided under section 9(1)(vii)(b) of the Act.

3.6 The CIT(A) has erred in upholding the order of the Assessing Officer disallowing payments to the tune of Rs.24,49,755/- even though the payment was made to an Indian company and no tax was required to be deducted at source.

3.7 The CIT(A) has erred in upholding the order of the Assessing Officer disallowing payments to the tune of Rs.2,20,38,363/- for software purchased and services utilized even though expenditure of Rs.31,73,639/- was made for liability incurred in previous years, expenditure of Rs.1,03,51,524/- was capitalized and Rs.4,12,800/- was made to and Indian company and the same were utilized outside India.

4. The CIT(A) has erred on facts and in law in confirming the disallowance of Rs.3,52,94,615/- by relying on his own order for Assessment Year 2009-10 since the facts are different and the heads under which the expenditure disallowed has been incurred were different from those in Assessment Year 2009-10.

5. The CIT(A) has erred in allowing deduction under section 10A on the returned income and not on the assessed income.

6. The CIT(A) has erred on facts and in law in upholding the levy of interest under section 234B of the Act.

6. Regarding Ground No. 1, learned AR of the assessee submitted a copy of the Tribunal order in assessee's own case for Assessment Years 2010-11 and 2011-12 in ITA Nos.1447 and 1448/Bang/2017 dated 03.07.2019 and submitted that this issue is covered in favour of the assessee as per para No.7.5.3 of this Tribunal order. As against this, learned DR of the Revenue supported the orders of authorities below and also placed reliance on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Tyco Electronics Corporation India Pvt. Ltd., as reported in 208 Taxman 141 (Karnataka) and our attention was drawn to para No.9.

7. We have considered the rival submissions. First of all, we reproduce para No.7.5.3 of the order of Tribunal cited by learned AR of the assessee. This para reads as under:

"7.5.3 The facts of the case on hand are also similar to the aforesaid case of Wipro Ltd., (supra). The assessee has made exports and certain foreign remittances on export sales have not been received within the specified time limit of six (6) months and application for extension of time for receiving such foreign remittances have been filed with the authorized bankers and the applications have not been rejected. However, the foreign exchange remittances have been received and credited to the assessee's account. Respectfully following the aforesaid decision of the Hon'ble Karnataka High Court in the case of Wipro Ltd., (supra), we also hold that notwithstanding the fact that there is no express order granting approval by the authorized bankers extending

the time limit of six months for receipt of foreign remittances on account of export sales, the assessee is entitled to the benefit of deduction under section 10A of the Act and consequently direct the AO, that those amounts, though realized belatedly, shall be included in the export turnover while computing the deduction under section 10A of the Act. Consequently, ground No.3.1 of the assessee's appeal is allowed."

8. In this para, the Tribunal has followed the judgment of Hon'ble Karnataka High Court rendered in the case of Wipro Ltd., Vs. DCIT (2016) 382 ITR 179 and by following this judgment, it was held that even if there is no express order granting approval by the authorized bankers extending the time limit of six months for receipt of foreign remittances on account of export sales, the assessee is entitled to the benefit of deduction under section 10A of the Income Tax Act, 1961. We find that in the preset year, as per page 2 of his order, learned CIT(A) has followed the order of CIT(A) in Assessment Year 2009-10. Since the order of CIT(A) in Assessment Year 2009-10 is available on record in ITA No.2831/Del/2013, it was submitted by learned AR of the assessee that para No.3.3 of the order of CIT(A) for Assessment Year 2009-10 is relevant in this regard. We find that this issue was discussed by learned CIT(A) in para Nos. 3.3 to 3.5 and in para 3.5, a specific finding was given by learned CIT(A) that the assessee has himself admitted that it could not realize an amount of Rs.20.23 Crores out of total export sales of Rs.1880.48 Crores. Before us, learned AR of the assessee could not point out any mistake in this categorical finding of CIT (A) on the basis of assessee's own submissions and therefore, the facts of the present case are different because the export proceeds were not brought into India even after lapse of the prescribed time and hence, this tribunal order and in turn the judgment of Hon'ble Karnataka High Court is not applicable in the present case. We,

therefore, decline to interfere in the order of CIT (A) on this issue. Ground No.1 is rejected.

9. Regarding ground No.2 of assessee's appeal, it was submitted by learned AR of the assessee that para No.8.4 of the same Tribunal order in assessee's own case for Assessment Years 2010-11 and 2011-12 is relevant in this regard. In reply, it was submitted by learned DR of the Revenue that as per the same para of the Tribunal order cited by learned AR of the assessee, this issue is decided by the Tribunal against the assessee. Therefore, in the present year also, this issue should be decided against the assessee.

10. We have considered the rival submissions. First of all, we reproduce para No.8.4 from the Tribunal order cited by learned AR of the assessee. This para reads as under:

> *"8.4 We have considered the rival contentions put forth on this issue. While the assessee has given some break-up of details of expenses incurred in foreign currency, the details do not establish that all of these expenses were not incurred for rendering technical services outside India; as claimed by the assessee. In the absence of details, the issue is only academic. Further, we do not consider it necessary to adjudicate on issue which is academic in nature, as the CIT(A) has addressed the assessee's grievance and allowed the alternate claim of the assessee on this issue. Consequently, ground No.4 raised by the assessee is dismissed as academic."*

11. As per above para reproduced from the Tribunal order cited by learned AR of the assessee, we find that in that year, the Tribunal had rejected this claim of the assessee that expenditure incurred in foreign currency should not be reduced from export turnover. Respectfully following the same, in this year also, this issue is decided against the assessee. Ground No.2 is rejected.

12. As per Ground No. 3, the issue involved is regarding upholding the exclusion of Rs. 2,76,86,054/- from eligible business profits for the

purposes of computing deduction u/s 10A on the ground that the amount was profit from trading of third-party software without appreciating the fact that the Appellant had done value addition to the third-party software before supplying it to its customers, thereby making it eligible for deduction u/s 10A.

13. Learned AR of the assessee placed reliance on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Hewlett Packard Global Soft Ltd., as reported in 87 taxmann.com 182, copy available on pages 36-42 of case law compendium. He also submitted that in para 3.5.1. of the Assessment Order, this is noted by the AO that the assessee has included an amount of Rs.20,53,68,620/- in export turnover which is regarding trading export and not manufacturing export and the same was excluded by the AO for computing the deduction allowable to the assessee under section 10A of the Income Tax Act, 1961 and as per para 3.17 of the Assessment Order, the AO has worked out a profit of Rs.800,39,989/- and this much profit was reduced from the eligible profit for computing the deduction allowable to the assessee under section 10A of the Income Tax Act, 1961. He submitted that in this judgment, Hon'ble Karnataka High Court has held that all profit and gains of 100% EOU including the incidental income by way interest on bank deposits or staff loans would be entitled to 100% exemption or deduction under section 10A of the Income Tax Act, 1961. As against this, learned DR of the Revenue supported the order of CIT(A). He pointed out that para No.3.2.3 of the order of CIT(A) for Assessment Year 2009-10 is relevant in this regard.

14. We have considered the rival submissions. Regarding this issue, we find that in this judgment of Hon'ble Karnataka High Court rendered in the

case of CIT Vs. Hewlett Packard Global Soft Ltd. (supra), the assessee was 100% EOU. We do not know whether in the present case also, the assessee is 100% EOU or not. In para No.2 of the Assessment Order, it is noted by the AO that the assessee is engaged in the business of developing Software Products for Billing, Wireless and Internet Space and it renders services to its clients both for maintenance as well as core development. Hence, the relevant facts are not on record as to whether the assessee is 100% EOU or not. Therefore, we restore this matter back to the file of CIT (A) for fresh decision after examining the facts of the present case in the light of this judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Hewlett Packard Global Soft Ltd. (supra) after providing adequate opportunity of being heard to both sides. Accordingly, ground No.3 is allowed for statistical purposes.

15. Now we decide Ground No. 4 as per which, this is the grievance of the assessee that the CIT(A) has erred on facts and in law in confirming the disallowance of Rs.3,52,94,615/- by relying on his own order for Assessment Year 2009-10 since the facts are different and the heads under which the expenditure disallowed has been incurred were different from those in Assessment Year 2009-10. On this issue, learned AR of the assessee submitted that as per para No.10 of the same Tribunal order in assessee's own case for Assessment Years 2010-11 and 2011-12, this issue is covered in favour of the assessee. Learned DR of the revenue supported the order of AO and CIT (A).

16. We have considered the rival submissions. We find that as per this ground No.4, this is the grievance of the assessee that CIT(A) was not justified in deciding this issue by following its own order for Assessment Year

2009-10 because the facts in the present year are different. We find that in the impugned order for Assessment Year 2008-09, learned CIT(A) has simply stated that the discussion in the appellate order for Assessment Year 2009-10 is adopted *mutatis mutandis* as part of this order. But in A. Y. 2009 – 10, this issue about disallowance of export commission due to non deduction of TDS was decided in great detail as per para 3.1 to 3.6 of his order for A. Y. 2009 – 10. Hence, we decide this ground by considering the finding of CIT (A) in A. Y. 2009 – 10 as finding for A. Y. 2008 – 09 also. The main finding is this that the assessee was not able to show that income of the foreign agent was not taxable in India. Now we examine the finding of tribunal in the assessee's own case in Para no. 10.5.10 of the tribunal order for A. Y. 2010 – 11 and 2011 – 12 where this is held by the tribunal that the services are provided outside India and therefore, commission payments made by the assessee to non residents cannot be treated as income deemed to accrue or arise in India and therefore, the provisions of section 195 are not applicable in the case in hand. No difference in facts could be pointed out by the learned DR of the revenue in the present year and therefore, respectfully following this tribunal order in asssessee's own case, this issue is decided in favour of the assessee and Ground No. 4 is allowed.

17. Regarding ground Nos.5 and 6, this was the objection of the learned DR of the Revenue that these two grounds do not arise out of order of CIT(A) and since, these grounds are not raised as additional grounds, these grounds cannot be admitted and decided. Learned AR of the assessee could not show that these grounds are arising out of the order of CIT(A) and hence, we find force in the arguments of the learned DR of the Revenue and accordingly, we dismiss these 2 grounds as not arising out of the order of CIT(A). Accordingly, ground Nos.5 and 6 are rejected.

18. In the result, assessee's appeal for Assessment Year 2008-09 is partly allowed for statistical purposes.

19. Now we take up assessee's appeal for Assessment Year 2009-10. The grounds raised by the assessee are as under:-

1. That the CIT(A) has erred on facts and in law in upholding the order of the Assessing Officer disallowing deduction of Rs. 17,28,83,855/- u/s 10A of the Income Tax Act, 1961.

1.1 On facts and in law, the CIT(A) erred in upholding the order of the Assessing Officer reducing Rs. 26,05,82,985/- from export sales on the ground of non-realization for the purposes of computing deduction u/s 10A.

1.2 That the CIT(A) has failed to appreciate the fact that the Appellant had already filed applications for extension of time for realizing export sales of Rs.20,23,79,275.

1.3 That the CIT(A) has failed to appreciate that export proceeds of Rs.5,82,03,710/- were duly received by the Appellant and it was permitted to receive the same by RBI/Authorized Dealer which should be read as implicit approval of extension of time for collection of export proceeds for the purposes of deduction under section 10A.

1.4 That the CIT(A) has failed to appreciate that it is settled law that if no communication is received to a request made to a statutory authority or its nominee, the request is deemed to be allowed. The CIT(A) has erred in not realizing that even if no explicit approvals were received from the RBI/ Authorized Dealer, it has to be read as implicit approval since no communication has been forthcoming. In light of the implicit approval, the CIT(A) has erred in upholding the exclusion from export proceeds on the ground of non- realization.

2. The CIT(A) has erred on facts and in law in upholding the exclusion of Rs.18,95,56,662/- from export sales on the ground that it was expenditure incurred in foreign currency without taking into consideration that these amounts were not included in export invoices nor did they form a part of export sales.

2.1 Without prejudice to the above, the amount of Rs.2,09,50,230/- should be reduced from the excluded amount as it has already been disallowed under a separate head.

3. The CIT(A) has erred on facts and in law in upholding the exclusion of Rs.8,00,39,989/- from export turnover purposes of computing deduction under section 10A on the ground that the amount was as profit from trading of third-party software without appreciating the fact that the Appellant had done value addition to the third-party software before supplying it to is customers, thereby making it eligible for deduction under section 10A.

4. The CIT(A) has erred on facts and in law in upholding the disallowance of export commission of Rs 2,09,50,230/- on the ground of non-deduction of tax.

4.1 The CIT(A) has failed to appreciate that the Appellant was not liable to deduct tax on the aforementioned payments as they were not taxable in India.

4.2 The CIT(A) has failed to appreciate that as required by law, the appellant obtained certificates from Chartered Accountant that payments made for procurement of export orders were not chargeable to tax in India hence no tax was

required to be deducted before remittance especially in light of the fact that no finding has been given by the CIT (A) that the income of persons receiving commission for export sales is taxable in India and that when genuineness of the payments and the certificates for non-deduction of tax is not in question, there is no reason to uphold the disallowance.

5. *The CIT (A) has erred in law in not adjudicating the ground raised by the Appellant that no credit was allowed for brought forward MAT Credit in spite of furnishing all details.*

6. *The CIT (A) has erred in allowing deduction u/s 10A on the returned income and not on the assessed income.*

7. *The CIT (A) has erred on facts and in law in upholding the levy of interest under section 2348 of the Act.*

20. In the course of hearing, both sides agreed that the issues involved and the facts are similar in Assessment Year 2008-09 and 2009-10 and therefore, the appeal of the assessee for Assessment Year 2009-10 may be decided on similar line as per the decision in assessee's appeal for Assessment Year 2008-09. Accordingly, in Assessment Year 2009-10, all the grounds are decided on similar line as per the decision in Assessment Year 2008-09 as above.

21. In the result, assessee's appeal for Assessment Year 2009-10 is also partly allowed for statistical purposes.

22. In the combined result, appeal of the Revenue for Assessment Year 2008-09 is dismissed and the appeals of the assessee for Assessment Years 2008-09 and 2009-10 are partly allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	**(A.K. GARODIA)**
Judicial Member	**Accountant Member**

Bangalore,

Dated: 3rd June, 2020.

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Copy to:

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

By order

Assistant Registrar,

ITAT, Bangalore.